IN THE SUPREME COURT OF THE DEMOCRATIC SOCIALIST REPUBLIC OF SRI LANKA

SC Appeal No. 67/2013
SC (SPL) LA Application No. 24/2013
CA (Writ) Application No. 411/2012

In the matter of an application for Special Leave to Appeal against the Judgment of the Court of Appeal under and in terms of Article 128(2) of the Constitution of the Democratic Socialist Republic of Sri Lanka.

Hon. Attorney General,
Attorney General's Department,
Colombo 12.

PETITIONER - APPELLANT

-Vs-

Dr. Upathissa Atapattu Bandaranayke Wasala Mudiyanse Ralahamilage Shirani Anshumala Bandaranayake,
Residence of the Chief Justice of Sri Lanka
No. 129, Wijerema Mawatha,
Colombo 07.

Presently at: No. 170, Lake Drive,
Colombo 08.

PETITIONER - RESPONDENT

1. Chamal Rajapakse,
   Speaker of Parliament,
   Parliament of Sri Lanka,
   Sri Jayawardenepura, Kotte.

2. Anura Priyadarshana Yapa,
   Eeriyagolla,
   Yakawita.

3. Nimal Siripala de Silva,
   No. 93/20, Elvitigala Mawatha,
   Colombo 08.

4. A. D. Susil Premajayantha,
   No. 123/1, Station Road,
   Gangodawila, Nugegoda.

5. Rajitha Senaratne,
   CD 85, Gregory's Road,
   Colombo 07.

6. Wimal Weerawansa,
No. 18, Rodney Place,
Cotta Road, Colombo 08.

7. Dilan Perera,
No. 30, Bandaranayake Mawatha,
Badulla.

8. Neomal Perera,
No. 3/3, Rockwood Place,
Colombo 07.

9. Lakshman Kiriella,
No. 121/1, Pahalawela Road,
Palawatta, Battaramulla.

10. John Amaratunga,
No. 88, Negambo Road,
Kandana.

11. Rajavarothiam Sampathan,
No. 2D, Summit Flats,
Keppitipola Road,
Colombo 05.

12. Vijitha Herath,
No. 44/3, Medawaththa Road,
Mudungoda, Miriswaththa,
Gampaha.

Also of
Parliament of Sri Lanka,
Sri Jayawardenepura, Kotte.

13. W.B.D. Dassanayake,
Secretary General of Parliament,
Parliament Secretariat,
Parliament of Sri Lanka,
Sri Jayawardenapura, Kotte.

RESPONDENT - RESPONDENTS

Before **:** Hon. Saleem Marsoof, PC., J,
Hon. Chandra Ekanayake, J,
Hon. Sathyaa Hettige, PC., J,
Hon. Eva Wanasundera, PC., J and
Hon. Rohini Marasinghe, J.

Counsel	**:**	Palitha Fernando, PC, Attorney General with Shavindra Fernando, DSG., Sanjay Rajaratnam DSG., Dilip Nawaz, DSG., Janak De Silva, DSG., Nerin Pulle, SSC., and Manohara Jayasinghe, SC, for the Petitioner-Appellant. Petitioner-Respondent is absent and unrepresented. M.A. Sumanthiran with Viran Corea and Niran Ankatell for the 11th Respondent-Respondent. J.C. Weliamuna with Sunil Watagala, Pulasthi Hewamanne and Mevan Bandara for the 12th Respondent - Respondent.
Argued on	**:**	28.11.2013
Written Submissions:		12.12.2013 (Petitioner-Appellant) 12.12.2013 (12th Respondent-Respondent) 17.12.2013 (11th Respondent-Respondent)
Decided on	**:**	21.02.2014

SALEEM MARSOOF J.

By its orders dated 30th April 2013 and 28th June 2013, this Court has granted special leave to appeal against the judgment of the Court of Appeal dated 7th January 2013 on two questions of "public or general importance" within the meaning of the proviso to Article 128 (2) of the Constitution of the Democratic Socialist Republic of Sri Lanka (hereinafter referred to as "the Constitution of Sri Lanka" or "the Constitution").

These questions concern the ambit of the writ jurisdiction of the Court of Appeal, in particular, whether the Court of Appeal had the power to issue a writ of *certiorari* in terms of Article 140 of the Constitution with respect to proceedings and actions of Parliament or of a Parliamentary Select Committee within the process of impeachment of a Chief Justice of Sri Lanka under Article 107 of the Constitution. Before considering these questions in greater detail, it will be useful to outline the material facts and circumstances from which they arise for determination.

Impeachment Motion and the Report of the Select Committee

On or about 1st November 2012, a notice of a resolution for the removal of the Petitioner-Respondent, the 43rd Chief Justice of Sri Lanka, prepared in terms of the proviso to Article 107(2) of the Constitution, signed by 117 Members of Parliament, setting out therein, 14 charges pertaining to alleged misbehavior on the part of the Petitioner-Respondent, was presented to the 1st Respondent-

Respondent, who is the Speaker of the House of Parliament. The 1st Respondent-Respondent entertained the said motion, placed it on the Order Paper of Parliament on 6th November 2012, and acting in terms of Order 78A(2) of the Standing Orders of Parliament, made by Parliament pursuant to powers conferred by Articles 74(1)(ii) and 107(3) of the Constitution, proceeded to appoint on 14th November 2012, a Parliamentary Select Committee consisting of the 2nd to 12th Respondent-Respondents, to consider the same.

The said Select Committee, investigated 5 of the 14 charges contained in the motion, and by its undated report, allegedly prepared on 8th December 2012, a copy of which was produced by the Petitioner-Respondent marked 'P17' with her petition filed in the Court of Appeal dated 19th December 2012, found the Petitioner-Respondent guilty, by majority decision, of charges 1,4, and 5, which were considered by the Select Committee to be "of such a degree of sufficiency and seriousness as to remove" the Petitioner-Respondent from the office of Chief Justice of Sri Lanka. The said report was signed by only the 2nd to 8th Respondent-Respondents, since the 9th to 12th Respondent-Respondents had staged a walk out from the Select Committee on 7th December 2012, after the Petitioner-Respondent herself walked out midway through the proceedings before the Select Committee on 6th December 2012, but the Committee had nonetheless proceeded with its business without their participation.

On 19th December 2012, the Petitioner-Respondent filed an application for orders in the nature of writs of *certiorari* and prohibition in the Court of Appeal, citing the Speaker of the House of Parliament, the Chairman and members of the aforesaid Parliamentary Select Committee, and the Secretary General of Parliament as respondents, but except for the 11th and 12th Respondent-Respondents, none of the other respondents had responded to the notice issued by the Court of Appeal. However, the 11th and 12th Respondent-Respondents appeared in the Court of Appeal and through their Counsel informed court that they are instructed to accede to the jurisdiction of court and inform court that they do not intend to file any objections in the case, but would assist court.

While the said writ application was pending before the Court of Appeal, the Speaker of the House reported the findings of the Select Committee contained in the report marked "P17" to Parliament, which debated the resolution to impeach the Petitioner-Respondent on 11th January 2013, and passed the same with 155 Members of Parliament voting for it, and 49 voting against it. This paved the way for an address of Parliament for the removal of the Chief Justice to be presented to the President of Sri Lanka as required by Article 107(2) of the Constitution and Order 78A(9) of the Standing Orders of Parliament, and thereupon, on or about 12th January 2013, the President made order in terms of Article 107(2) of the Constitution removing the Petitioner-Respondent from the office of Chief Justice of Sri Lanka.

The Decision of the Court of Appeal

By the application filed by her in the Court of Appeal dated 19th December 2012, the Petitioner-Respondent sought the following substantive relief:-

(a) a mandate in the nature of writ of *certiorari* quashing the findings and / or the decision of the report of the 2nd to 8th Respondent-Respondents marked 'P17' and or quashing the said report marked 'P17';

(b) a mandate in the nature of writ of prohibition, prohibiting the 1st and / or 2nd to 13th Respondent-Respondents from acting on or and / or taking any further steps based on the said purported report marked 'P17';

The aforesaid relief were prayed for on the basis of the alleged procedural irregularities in the manner in which the Select Committee was constituted and / or conducted its affairs. It was also contended that the exercise of judicial power by the Select Committee was unconstitutional, and alternatively, that the functioning of the 2nd to 8th Respondent-Respondents as the Select Committee even after the withdrawal of the 9th to 12th Respondent-Respondents was wrongful, unlawful and *ultra vires* the Standing Orders of Parliament, and that the Petitioner-Respondent was deprived of a fair hearing. It was further contended that in the aforesaid circumstances, the 2nd to 8th Respondent-Respondents failed to adhere to the rule of law, breached the rules of natural justice, acted unreasonably, and / or capriciously and / or arbitrarily, and had prejudged matters.

It is significant that neither the 1st Respondent-Respondent, who is the Speaker of the House of Parliament, nor the 2nd to 8th Respondent-Respondents, who were the members of the Parliamentary Select Committee, responded to the summons issued by the Court of Appeal. Only the 11th and 12th Respondent-Respondents appeared in the Court of Appeal, and acceded to the jurisdiction of court and further informed court that they do not intend to file any objections in the case. The Court of Appeal, first disposed of the applications made by two persons, namely, Don Chandrasena and Sumudu Kantha Hewage, to intervene into the case. By its order dated 3rd January 2013, the Court of Appeal refused the applications for intervention, and by the same order it decided to invite the Petitioner-Appellant, who is the Attorney-General of Sri Lanka, to assist court as *amicus curiae*.

At the hearing of the Court of Appeal into the substantive application held on 7th January 2013, learned Counsel for the Petitioner-Respondent and the 11th and 12th Respondent-Respondents made submissions, and the learned Attorney-General also assisted Court as *amicus curiae*. It is noteworthy that the learned Attorney-General, in the course of his submissions, stressed that the Court of Appeal is devoid of jurisdiction to hear and determine the application as the jurisdiction of that court conferred by Article 140 of the Constitution, is "subject to the provisions of the Constitution", which excluded judicial review of the process of impeachment of Judges of the Supreme Court and the Court of Appeal.

By its judgment dated 7th January 2013, the Court of Appeal held that since its power to exercise judicial review on findings or orders of persons "exercising authority to determine questions affecting the rights of subjects" is wide, and has been conferred by the Constitution of the Democratic Socialist Republic of Sri Lanka, it cannot be "abridged by the other arms of the government, namely the Legislature or the Executive." In arriving at this conclusion, the Court of

Appeal sought to follow the principle enunciated by this Court in *Atapattu and others v People Bank and others* [1997] 1 Sri LR 208 at pages 221 to 223. The Court of Appeal reasoned as follows:-

> "The Constitution in Article 80(3), 81 and 124 expressly ousts the jurisdiction of courts. If the legislature had intended that the jurisdiction of the court should be ousted under Article 107 of the Constitution to impeach judges, it ought to have specifically provided for such an eventuality. As such, in my opinion the Legislature has clearly placed no such obstacle either directly or by necessary implication in the way of entertaining the present application."

Having thus taken a considered decision to exercise jurisdiction in the case, the Court of Appeal purported to apply the determination of this Court in SC Reference No. 3/2012, which was made in terms of Article 125 of the Constitution on a question of constitutionality that was considered to have arisen in CA (Writ) Application No. 358/2012. In SC Reference No. 3/2012, a Bench consisting of 3 judges of the Supreme Court, had determined that-

> ".....it is *mandatory under Article 107(3) of the Constitution for the Parliament to provide by law* the matters relating to the forum before which the allegations are to be proved, mode of proof, burden of proof and the standard of proof of any alleged misbehaviour or incapacity and the Judge's right to appear and to be heard in person or by representative in addition to matters relating to the investigation of the alleged misbehaviour or incapacity". (*Emphasis added*)

The Court of Appeal considered itself bound by the said determination, and upheld the submission of the learned President's Counsel for the Petitioner-Respondent that by reason of the aforesaid determination, "a Select Committee appointed under and in terms of Standing Order 78A has no power or authority to make a finding *adversely affecting the legal rights of the judge* against whom the allegation made in the resolution moved under the proviso to Article 107(2) is the subject matter of its investigation." The Court of Appeal accordingly concluded that the power "to make a valid finding, after the investigation contemplated in Article 107(3), can be conferred on a court, tribunal or body, *only by law and by law alone*", and went on to hold that the finding and / or the decision or the report of the 2nd to 8th Respondent-Respondents marked as 'P17', "has no legal validity, and as such this court has no alternative but to issue a writ of *certiorari* to quash 'P17', thus giving effect to the determination of the Supreme Court referred to above."

It is significant to note that the Court of Appeal did not make any findings on any of the other allegations, including those of impropriety and non-conformity with rules of natural justice, made by the Petitioner-Respondent in her petition, and it also declined to grant a mandate in the nature of writ of prohibition as prayed for by the Petitioner-Respondent. The Court of Appeal expressly stated in the impugned judgment that insofar as the Petitioner-Respondent had failed to cite as party respondent to her writ petition, the 117 Members of Parliament who had signed and presented to the 1st Respondent-Respondent the impeachment motion under consideration, "the quashing of the impugned decision will not affect the members who subscribed to the impeachment motion, as it does not prevent the Parliament from proceeding with the said motion to impeach the petitioner [the present Petitioner-Respondent]".

The Application for Special Leave to Appeal

The Petitioner-Appellant, in his capacity as the Attorney-General of Sri Lanka, applied to this Court on 15th February 2013 seeking special leave to appeal against the decision of the Court of Appeal dated 7th January 2013 on the basis of several substantive questions of law. The Petitioner-Respondent responded to the notice issued on her by the Registrar of this Court by way of motion dated 16th March 2013, in which the said Respondent has stated as follows:

> "The Court of Appeal gave its Order on 7th January 2013. The Court of Appeal Order was not followed and / or was not adhered to by most of the Respondent-Respondents.
>
> The Petitioner-Respondent has at all times maintained that her impeachment is null and void and is of no force or effect in law and will continue to be so. Consistent with the Petitioner-Respondent's position, the Petitioner-Respondent will not participate in these proceedings.
>
> Thus the Petitioner-Respondent's view is that her purported removal as Chief Justice is of no force or effect in Law. In any event, the Petitioner-Respondent fails to see how a party invited to assist Court could appeal against the said order."

This Court, after hearing submissions of the learned Attorney-General who appeared in support of the application for special leave to appeal, made order on 30th April 2013, granting special leave to appeal against the impugned judgment of the Court of Appeal in terms of the proviso to Article 128(2) of the Constitution on two substantive questions of law. Court also fixed the appeal for hearing on 29th May 2013 after the filing of written submissions.

The 11th and 12th Respondent-Respondents thereafter filed motions dated respectively 21st May 2013 and 22nd May 2013, informing the Court that they could not file *caveat* or appear in this Court on 30th April 2013 for the purpose of objecting to the grant of special leave to appeal against the judgment of the Court of Appeal as they had not received any notice from this Court requiring them to do so. After examining the contents of the aforesaid motions, the supporting affidavit affirmed to by the 12th Respondent-Respondent, and all other relevant material, this Court made order on 29th May 2013 that the Attorney-General had duly taken out notice on all parties cited as respondents, and that there has been substantial compliance by the Petitioner-Appellant of the Supreme Court Rules, 1990.

However, in view of the position taken up by the 11th and 12th Respondent-Respondents that they had not in fact received the notices sent out through the Registry of this Court, it was considered necessary to permit the 11th and 12th Respondent-Respondents, in the interests of Justice, "an opportunity to participate in the proceedings for the grant of special leave to appeal." Accordingly, Court set aside its own order granting special leave to appeal with respect to the 11th and 12th Respondent-Respondents, to enable them to file *caveat* within one week, and fixed the case for consideration of special leave to appeal against these respondents for 10th June 2013, on which date the Court also considered certain preliminary objections that had been taken up by the 11th and 12th Respondent-Respondents against the maintainability of the application for special leave to appeal.

In view of certain submissions made by learned Counsel in the course of the hearing of this appeal, it may be opportune to mention that one of the preliminary objections raised by the 11th and 12th Respondent-Respondents was that the Attorney-General, who had not been a party to the writ application before the Court of Appeal, and was invited by that court to assist court as *amicus curiae*, was not entitled to appeal against the decision of the said Court. This Court dealt with this and the other objections raised by the said respondents in its unanimous order dated 28th June 2013, by which all of the objections of the 11th and 12th Respondent-Respondents were overruled. In particular, this Court followed its decision in *Bandaranaike v Jagathsena* (1984) 2 Sri LR 397, and held that the Supreme Court has a wide discretion under Article 128(2) of the Constitution to entertain an application for special leave to appeal *from a person who was not a party to the proceedings before the Court of Appeal*, where it is of the opinion that the question or matter in issue is "fit for review by the Supreme Court". This Court further held that where, as in this case, the Court is satisfied that "the question to be decided is of public or general importance", the *Court has no power to refuse leave to appeal* in view of the proviso to Article 128(2) of the Constitution.

Accordingly, this Court granted leave to appeal against the 11th and 12th Respondent-Respondents on the same two substantive questions of law on the basis of which special leave to appeal was previously granted on 30th April 2013 against all respondents. The two substantive questions of Law on which special leave to appeal was granted by this Court, are as follows:-

1) Did the Court of Appeal err in holding that the writ jurisdiction of that Court embodied in Article 140 of the Constitution extends to proceedings of Parliament or a Committee of Parliament?

2) Did the Court of Appeal err in holding that the words "any Court of first instance or tribunal or other institution or any other person" in Article 140 of the Constitution extends to the Parliament or a Committee of Parliament?

In my view, it is convenient to consider these questions in converse order, and hence I would prefer to consider Question 2) ahead of Question 1). In any event, though formulated as two separate questions, in the context of the factual settings of this case, the essence of the substantive questions of law on which this Court has granted leave to appeal is whether the Court of Appeal was possessed of jurisdiction to issue an order in the nature of a writ of *certiorari* in terms of Article 140 of the Constitution with respect to proceedings and actions of Parliament or of a Parliamentary Select Committee, within the process of impeachment of a Chief Justice of Sri Lanka under Article 107 of the Constitution, and I would prefer to adopt a general approach towards these questions.

The Submissions of Counsel

As already noted, the two questions on which this Court has granted special leave to appeal relate to the ambit of the writ jurisdiction of the Court of Appeal. We have heard extensive submissions of learned Counsel on the substantial questions of law on which special leave to appeal has been granted, and have considered these as well as the additional written submissions filed by the learned Counsel as directed by this Court on 28th November 2013. It will be useful to begin with a

summary of the submissions of learned Counsel. The learned Attorney General has submitted that the Court of Appeal exceeded the jurisdiction vested on it by Article 140 of the Constitution in entertaining the application filed by the Petitioner-Respondent and making its several orders including the judgment dated 7th January 2013 which sought to quash the report of the Parliamentary Select Committee. He has premised these submissions primarily on the *sui generis* nature of the power of impeachment conferred on the President and Parliament by Articles 4 and 107 of the Constitution based on a system of checks and balances inspired by the doctrine of separation of powers.

He has submitted that historically, the power of removal of superior court judges has been vested in the legislative and executive branches of the State, and the courts had no role to play in the process, which position is also reflected in the present Constitution. He has highlighted the limitations placed on the jurisdiction and powers of the Court of Appeal by reference to various provisions of the Constitution of Sri Lanka including Article 140 itself, and stressed that the Court of Appeal has not only overlooked other relevant provisions of the Constitution but also has paid scant respect to the exclusive jurisdiction of Parliament in regard to its own proceedings and decisions. In particular, he relied on what he described as a "constitutional ouster" of the jurisdiction of Court which arises from the incorporation by reference of Section 3 and other provisions of the Parliamentary (Powers and Privileges) Act into Article 67 of the Constitution.

It was the submission of the learned Counsel for the 11th Respondent-Respondent that the Court of Appeal had acted within its jurisdiction in entertaining the application of the Petitioner-Respondent and making the several orders it did, and in doing so, it had acted objectively and with due difference to the legislative arm of government. He argued that the contention of the Attorney General that Article 67 of the Constitution had the effect of elevating the provisions of the Parliamentary (Powers and Privileges) Act into a "constitutional ouster" of the jurisdiction of the Court of Appeal is not supported by the text of that article, by decided authority, or by the principles of constitutional theory. He emphasised that the express provisions of the Constitution conferring on the Court of Appeal its jurisdiction to issue orders in the mature of writs, and the presumption in favour of jurisdiction entail that in the absence of contrary provisions in the Constitution, the jurisdiction of that court would be preserved. Relying on the decision of *Stockdale v Hansard* [1839] EWHC QB J21, 112 ER 1112 (1839), he stressed that while Parliament could regulate its own affairs, where the rights of a third party was concerned, the Courts would not be denuded of jurisdiction, and that in any event, the scope of the ouster did not affect the material subject matter of this case.

Learned Counsel for the 12th Respondent-Respondent has submitted that the impugned judgment of the Court of Appeal is well conceived in law and is an affirmation of the independence and dignity of that court and a manifestation of the willingness of that court to defend the Rule of Law and the independence of the judiciary, whereas the very grounds of appeal relied on by the Attorney General are an attack on these fundamental concepts. He submitted that in terms of Article 3 of the Constitution, sovereignty is in the hands of the People, and that in Sri Lanka, unlike in the United Kingdom, Parliament is not supreme and it is only the Constitution that is supreme. Referring to certain observations of this Court in *Heather Therese Mundy v Central Environmental Authority*, SC 58-60/2003 (SC Minutes of 20th January 2004), he submitted that the scope and ambit of writs have

been extended from time to time through judicial activism, and that "orders in the nature of writs" issued in terms of Article 140 of the Constitution constitute one of the principal safeguards against excess and abuse of executive powers. He submitted citing *Kesavananda Bharathi v State of Kerala and Anr* (1973) that the safeguarding of the basic structure of the constitution is the task of the courts, but the validation of the removal of the Chief Justice is not a function that falls within the jurisdiction of the Supreme Court of Sri Lanka.

I take this opportunity, to thank all the learned Counsel, for the assistance rendered to this Court in the hearing of this appeal, particularly for all their efforts in making available to this Court in a timely manner, the relevant authorities, some of which were hard to find, and I do so, on my own behalf as well as on behalf of the other members of this Bench.

The Writ Jurisdiction of the Court of Appeal

It is convenient to first consider Question 2), on which special leave to appeal has been granted by this Court, which is whether the Court of Appeal erred in holding that the words "any Court of first instance or tribunal or other institution or any other person" in Article 140 of the Constitution extends to the Parliament or a Committee of Parliament. In answering this question, it is necessary to examine Article 140 of the Constitution, which provides as follows:-

> "Subject to the provisions of the Constitution, the Court of Appeal shall have full power and authority to inspect and examine the records of any Court of First Instance or tribunal or other institution, and grant and issue, according to law, orders in the nature of writs of *certiorari,* prohibition, *procedendo, mandamus* and *quo warranto* against the judge of any Court of First Instance or tribunal or other institution or any other person:
>
> Provided that Parliament may by law provide that in any such category of cases as may be specified in such law, the jurisdiction conferred on the Court of Appeal by the preceding provisions of this Article shall be exercised by the Supreme Court and not by the Court of Appeal."

It is noteworthy that there have been some instances in which the jurisdiction of the Court of Appeal to grant and issue "orders in the nature of writs" in terms of Article 140 of the Constitution has been vested in the Supreme Court by legislation, and that the jurisdiction of the Court of Appeal to issue the specific writs enumerated in Article 140 as well as orders in the nature of *habeus corpus* under Article 141 are concurrently vested in the High Court of the Provinces by virtue of Article 154P(4) of the Constitution. These provisions do not concern us in this appeal.

The learned Attorney General has submitted that the words "or any other institution" occurring in Article 140 of the Constitution have to be read *ejusdem generis*, and has invited our attention to two early decisions of this Court, namely, *In the Matter of an Application for a Writ of Habeas Corpus on the Body of Thomas Perera alias Banda* 29 NLR 52 (SC) and *In re Goonesinha* 43 NLR 337 (SC), which show that this Court has, following the common law of England, held that the phrase "other institution" does not include a superior court. He has argued that though in terms of Article 4(c) of

the Constitution, the judicial power of the People may be directly exercised by Parliament in regard to matters relating to the privileges, immunities and powers of Parliament, neither Parliament nor a Select Committee thereof appointed as contemplated by Article 107(3) of the Constitution read with Order 78A(2) of its Standing Orders, is a court of first instance or inferior court within the meaning of Article 140 of the Constitution.

Learned Counsel for the 11th Respondent-Respondent has, on the other hand, relied on the presumption in favor of jurisdiction adverted to by this Court in *Atapattu v People's Bank* (1997) 1 Sri LR 208 at page 222, and contended that since the 2nd to 8th Respondents-Respondents, who signed the impugned report of the relevant Select Committee of Parliament, fall within the words "or other person" used in Article 140 of the Constitution even if they may not be a "judge of the any Court of First Instance or tribunal or other institution" within the meaning of that article, they were amenable to the writ jurisdiction of the Court of Appeal.

Learned Counsel for the 12th Respondent-Respondent has invited our attention to the decision of this Court in *Mundy v Central Environmental Authority and Others* SC Appeal 58/2003 (SC Minutes dated 20.1.2004), where this Court has noted that orders granted and issued by the Court of Appeal under Article 140 of the Constitution "constitute one of the principal safeguards against excess and abuse of executive power, mandating the judiciary to defend the Sovereignty of the People enshrined in Article 3 against infringement or encroachment by the Executive, with no trace of any deference due to the Crown and its agents." He has also submitted, citing recent decisions of our courts such as *Harjani and Another v Indian Overseas Bank and Another* (2005) 1 Sri LR 167, that the dynamism of law has driven the traditional remedy of *certiorar*i away from its "familiar moorings by the impetus of expanding judicial review".

The six mandates in the nature of writs mentioned in Article 140 of the Constitution of Sri Lanka had their origins in the common law of England which recognized the prerogative power of the Crown to grant and issue writs initially through the Star Chamber, and after its abolition in 1642, through the Court of King's Bench to ensure that inferior courts and authorities acted within their jurisdiction. After Sri Lanka came under British rule, the prerogative powers of the British Crown were recognized by the local courts as a consequence of annexation, which applied the English common law in issuing mandates in the nature of writs, and Section 42 of the Courts Ordinance, No. 1 of 1889, which may safely be regarded as the predecessor to Article 140 of the present Constitution, provided that-

> "The Supreme Court or any Judge thereof, at Colombo or elsewhere shall have full power and authority to inspect and examine the records of any Court, and to grant and issue, according to law, mandates in the nature of writs of mandamus, *quo warranto*, *certiorari,* procedendo and prohibition, against any District Judge, Commissioner, Magistrate or other person or tribunal".

The learned Attorney General has submitted that the writ jurisdiction of the Court of Appeal is confined in its purview to courts of first instance and tribunals and other institutions exercising judicial or *quasi-judicial* powers, and do not extend to the Parliament or a Select Committee of Parliament, which are part of the legislative arm of State. In interpreting Article 140 of the Constitution, this Court has to give impetus to the words "subject to the provisions of the

Constitution", which in the present context would take us to Articles 3 and 4 of the Constitution, the implications of which will be considered later on in this judgment, and before doing so, it is desirable to deal with the learned Attorney General's submissions on the applicability of the *ejusdem generis* rule.

The learned Attorney General has argued that the words "or any other institution" must be read *ejusdem generis*. These Latin words literally mean "of the same kind", and it is generally accepted that the *ejusdem generis* rule is applicable when particular words pertaining to a class, category or genus are followed by general words, and that unless there is something in the context that suggests otherwise, the general words are construed as limited to things of the same kind as those specified. The rule reflects an attempt to reconcile incompatibility between the specific and general words in view of the other rules of interpretation, which require that all words in a statute are given effect to, that a statute be construed as a whole, and that no words in a statute are presumed to be superfluous.

As Lord Wright observed in National *Association of Local Government Officers v. Bolton Corp.* (1943) AC 166, "the *ejusdem generis* rule is often useful or convenient, but it is merely a rule of construction, not a rule of law". Craies on *Statute Law* 7th Edition, has stressed at page 181 that-

> "…….to invoke the application of the *ejusdem generis* rule, there must be a *distinct genus or category*. The specific words must apply not to different objects of a widely differing character but to something which can be called a class or kind of objects. Where this is lacking, the rule cannot apply."(*Emphasis added*)

Farwell L.J., has explained in *Tillmanns and Co. v. SS. Knutsford* 1908 2 KB 385 at pages 402 to 403 that "there is no room for the application of the *ejusdem generis* doctrine unless there is a genus or class or category – perhaps category is the better word….", and as Lord Thankerton put it in *United Towns Electric Co. Ltd. v. Attorney General for Newfoundland* 1939 1 All ER 423 at page 428, the "mention of a single species – for example, water rates, does not constitute a genus". Hence the question that arises here is whether we can identify a genus or category within the words that are used in Article 140 in setting out or identifying the bodies that were sought to be conferred "full power and authority" to inspect and examine records and grant and issue orders in the nature of writs. The key words in Article 140 are "*any Court of first instance or tribunal or other institution*" which are used in relation to the power to examine records, and "*the judge of any court of first instance, or tribunal, or other institution or any other person*" when it comes to the power to grant and issue orders in the nature of writs. We are here concerned with the second set of words in the context of the power of the Court of Appeal to grant and issue orders in the nature of writs, but should also be mindful of the first set of words in order not to lose sight of the objectives of that article.

In interpreting these words, it is important to consider how our courts exercised writ jurisdiction prior to the present Constitution. I note that the language of the first paragraph of Article 140 of the present Constitution seems to follow the words of section 42 of the Courts Ordinance No. 1 of 1889, which vested the jurisdiction in the Supreme Court. It is noteworthy that while the phrase "court of first instance" is not found in section 42 of the Courts Ordinance, this Court has examined the ambit of that section in several celebrated decisions. However, before adverting to the Sri Lankan decisions interpreting these provisions, I would like to commence my examination of the ambit of the writ

jurisdiction of our courts with an analysis of the English common law, which is the source from which the six mandates in the nature of writs mentioned in section 42 of the Courts Ordinance originated.

One of the oldest cases that explored the writ jurisdiction of the old English courts was that of *Ex parte Jose Luis Fernandez* (1861) 142 ER 349, in which the Court of Common Pleas (Earl CJ., Willes J., and Byles.J) concluded, after careful examination of early authorities on the point, that it had no jurisdiction to issue a writ of *habeus corpus* for the release of a witness who had been convicted by the Court of Assize for contempt of court for his refusal to answer questions put. In separate judgments, Earl C.J., observed that "the jurisdiction to try in the country all the civil cases that ought otherwise to have been tried in the Superior Courts of Westminster" was devolved upon the justices of assize by the Statute of Westminster enacted in 1285, and that "there are direct authorities for affirming that the court of assize is entitled to the authority of a court of *a superior degree*."

It is noteworthy in the context of this appeal that Willis J., in his concurring judgment, noted that Judges of Assize "belonged to that *superior class* to which credit is given by other Courts for acting within their jurisdiction, and to whose proceedings the presumption *omnia rite esse acta* applies *equally as to those of the Supreme Court of Parliament itself.*"

In later decisions such as *Queen v. The Judges and Justices of the Central Criminal Court* 11 QBD 479 (writ of mandamus refused) and *Regina v. Boaler* 67 L.T.354 (writ of *certiorari* refused) a similar reasoning was followed, and in the latter case, Lord Coleridge C.J. stressed that-

> "…….there is no authority for saying that this writ can go at all to the Central Criminal Court, which is a Superior Court. It is a court at least as high as the assizes, as the criminal court on the circuit; and it has been held, expressly with regard to those courts, that no *certiorari* will go *to bring up a conviction obtained at the Assizes,* for the purpose of being quashed here." (*Emphasis added*)

The rationale behind these decisions may be discerned from the following *dictum* of Justice Willis in *R. v. Parke* [1903] 2 K.B. 442 –

> "This Court exercises a vigilant watch over the proceedings of *inferior Courts*, and successfully prevents them from usurping powers which they do not possess, or otherwise acting contrary to law."(*Emphasis added*)

Similarly, in *Rex v. Woodhouse* (1906) 2 KB 501, Fletcher Moulton L.J. observed that the writ of *certiorari* –

> "is a very ancient remedy, and is the ordinary process by which the High Court brings up for examination the acts of bodies of *inferior jurisdiction*. In certain cases the writ of certiorari is given by statute, but in a large number of cases it rests on the common law." (*Emphasis added*)

The learned Attorney General has relied on two decisions of this Court which have followed the wisdom of the English common law in regard to the ambit of the writ remedy. The first of these was the decision of the Supreme Court in *In the Matter of an Application for a Writ of Habeas Corpus on the Body of Thomas Perera alias Banda* 29 NLR 52 (SC), in which dealing with the question whether *habeus corpus* would lie to review a warrant of commitment issued by a Commissioner of Assize remanding a prisoner to custody, Schneider A.C.J observed at page 56 of his judgment that –

> "The *writ of certiorari* is *a writ issued out of a superior Court and directed to the Judge or other officer of an inferior Court of record*, requiring the record of the proceedings in some cause or

matter depending before such inferior Court to be transmitted into the superior court to be there dealt with."(*Emphasis added*)

Similarly, when considering the question whether a writ of *certiorari* would lie against a judge of the Supreme Court who is nominated by the Chief Justice under Article 75(1) of the Ceylon (State Council Elections) Order in Council, 1931, for the purpose of trying an election petition, Howard C.J. in the case of *In re Goonesinha* 43 NLR 337, examined section 42 of the Courts Ordinance, and observed at page 342 that-

"The Supreme Court does not require a special provision of law for authority to inspect and examine its own records. Moreover, if "any Court" included the Supreme Court, the words "Judge of the Supreme Court" would be included in the latter half of the paragraph. In my opinion therefore, "any Court" in this paragraph does not include the Supreme Court. From the fact that a Judge of the Supreme Court is not specifically mentioned in the paragraph, the inference is of necessity drawn that *the writs mentioned can only be issued to inferior Courts*. The words "other person or tribunal" in this context cannot, in accordance with the *ejusdem generis* rule, be understood to include a Judge of the Supreme Court". (*Emphasis added*)

The correctness of this decision was confirmed on appeal by the Privy Council in *Goonesinha v The Honourable O.L.De Kretser* 46 NLR 107, in which Lord Goddard, after examining a large number of authorities observed at page 109 that their Lordships are of opinion that the true view is that cognisance of the election petitions "is an extension of, or addition to, the ordinary jurisdiction of the Supreme Court, and consequently *certiorari* cannot be granted to bring up an up any order made in the exercise of that jurisdiction."

These decisions no doubt are relevant in interpreting Article 140 of the Constitution, which only confers on the Court of Appeal the power and authority to grant and issue orders in the nature of the specified writs "according to law". This Court will also take into account the judicial hierarchy in existence in Sri Lanka and be guided by the provisions of the Judicature Act No 2 of 1978, which specifically declares in its preamble that it has been enacted *inter alia* "to provide for the establishment and constitution of a system of Courts of First Instance in terms of Article 105(1) of the Constitution". Section 2 of the Judicature Act identifies as "the Courts of First Instance", the High Court of the Republic of Sri Lanka, the District Courts, the Family Courts, the Magistrates' Courts and the Primary Courts. It is easy to see that these are all *inferior* courts, just as much as the District Judge, Commissioner and Magistrate's Court mentioned in section 42 of the Judicature Act were. It is therefore clear from the forgoing analysis that the courts mentioned in Article 140 of the Constitution belong to one genus or category, namely that of *inferior courts*. Hence, when construed *ejusdem generis*, not only the words "or tribunal" but also the words "or other institution or other person" refer to tribunals, institutions and persons *which are inferior* to the court that are possessed of jurisdiction to issue the writs, which in the context of this case, is the Court of Appeal which purported to issue the writ of *certiorari*.

In view of certain submissions made by all the learned Counsel who appeared in this appeal, it may be material to mention that following the famous *dictum* of Lord Atkin in *R v Electricity Commissioner, ex parte London Electricity Joint Committee Co. Ltd.,* [1924] 1 KB 171, which made amenability to the writ of *certiorari* dependent on the existence of "a duty to act judicially", in decisions such *Dankoluwa Estates Co. Ltd., v The Tea Controller* 42 NLR 197 and *Nakkuda Ali v Jayaratne* 51 NLR 457, our courts had refused relief where the decision or order challenged by the writ was purely administrative.

However, the celebrated decision of the House of Lords in *Ridge v Baldwin* [1964] AC 40 exploded the restrictive reasoning adopted in earlier decisions, and simply laid down that the mere fact that the exercise of power affects the rights or interests of any person would make it "judicial" and requires compliance with natural justice. As Lord Reid observed at page 114 of his judgment -

> "No one, I think, disputes that three features of natural justice stand out, (*i*) the right to be heard by an unbiased tribunal, (*ii*) the right to have notice of charges of misconduct, and (*iii*) the right to be heard in answer to these charges."

The reasoning in the decision in *Ridge v Baldwin* was adopted by our Courts, which have progressively expanded the scope of judicial review of administrative action, expanding its benevolent protection to various authorities and bodies of persons which are not courts, on the basis that they too exercised judicial or quasi judicial power. These developments triggered further horizontal expansion of the parameters of the writ jurisdiction in Sri Lanka as elsewhere, and it has been held in decisions such as *Harjani and Another v Indian Overseas Bank and Another* (2005) 1 Sri LR 167 that even private bodies exercising public functions are amenable to the writ of *certiorari*. Learned Counsel for the 11th and 12th Respondent-Respondents, have not been able to cite any local or foreign authority in support of the proposition that there has been a similar expansion of the writ jurisdiction on a vertical plain on an upward direction, to enable review of decisions and actions of superior or even equal ranking courts and bodies.

Having thus concluded that on an application of the *ejusdem generis* rule, not only the words "or tribunal" but also the words "or other institution or other person" found in Article 140 of the Constitution can only refer to tribunals, institutions and persons *which are inferior* in status to the court that issues the order in the nature of a writ in any case, the question whether the Court of Appeal in fact was possessed of the jurisdiction to grant or issue an order in the nature of the writ of *certiorari* to Parliament or a Select Committee of Parliament needs to be considered. It is in this context that I wish to examine in turn (a) whether Parliament, and in particular, a Select Committee thereof, is in the constitutional setting of Sri Lanka, inferior to the Court of Appeal, and (b) in any event, whether the powers, privileges, and immunities of Parliament would preclude the grant of such a remedy.

The Court of Appeal and Parliament in Sri Lanka's Constitutional Setting

The learned Attorney General as well as the learned Counsel for the 11th and 12th Respondent-Respondents highlighted the words "subject to the provisions of the Constitution" found at the very commencement of Article 140 of the Constitution. They have all referred to Articles 3 and 4 of the Constitution, in the light of which they sought to interpret Article 107(2) and (3) of the Constitution which established a process for impeachment of Superior Court Judges in terms of which the Petitioner-Respondent was sought to be removed from the office of Chief Justice.

Learned Counsel for the 11th and 12th Respondent-Respondents have emphasized that in Sri Lanka Parliament is not supreme but the Constitution is, and have cited before us certain *dicta* from the several judgments in the celebrated decision in *Stockdale v Hansard* [1839] EWHC QB J21, 112 ER 1112, and the learned Attorney General has done likewise. However, while the *dicta* quoted by the learned Counsel dealt with questions relevant for the considering of issues relating to the parliamentary privilege, which I shall advert to later on in this judgment, what I found helpful in regard to the question of relative superiority now being considered was from the judgment of Coleridge J. at page 1196, where his Lordship observed as follows:-

"*Vastly inferior as this court is to the House of Commons, considered as a body in the state, and amenable as its members may be for ill conduct in their office to its animadversions, and certainly are to its impeachment before the Lords,* yet, as a Court of law, we know no superior but those courts which may revise our judgments for error; and in this respect there is no common term of comparison between this Court and the House. In truth, the House is not a court of law at all, in the sense in which that term can alone be properly applied here; neither originally, nor by appeal, can it decide a matter in litigation between two parties: it has no means of doing so; it claims no such power: *powers of inquiry and of accusation it has, but it decides nothing judicially, except where it is itself a party, in the case of contempts*."(*Emphasis added*)

It is important to remember that the English common law which regulates the relationship between the Crown, the legislature and the judiciary is the product of centuries of struggle between these organs of State, details of which it is unnecessary to recount for the purposes of this appeal. Suffice it would be to refer to Erskine May, who in his monumental work *Parliamentary Practice* (21st Edition) at page 145 observes that "after some three and a half centuries, the boundary between the competence of the law courts and the jurisdiction of either House *in matters of privileges* is still not resolved." Hence, when dealing with the comparative superiority or otherwise of Parliament *vis-à-vis* Parliament within the constitutional hierarchy of Sri Lanka, judicial decisions emanating from other jurisdictions can only be of persuasive authority, and it is more important to examine our own constitutional structure and consider local decisions.

It is important, in this context, to remember that the present Constitution of Sri Lanka, which was enacted in 1978, derives its validity from, and was enacted in conformity with, the provisions of the Republican Constitution of Sri Lanka, proclaimed in 1972, which in every sense was an "autochthonous" constitution having decisively broken away from the constitutional regime of the Ceylon (Constitution) Order-in-Council, 1946 and other enactments together collectively known as the "Soulbury Constitution", and derived its authority entirely from the will of the People of Sri Lanka. It is therefore significant that Chapter I of the Constitution of the Democratic Socialist Republic of Sri Lanka, 1978, headed "the People, the State and Sovereignty" commences with Article 1 which declares that Sri Lanka is "a Free, Sovereign, Independent and Democratic Socialist Republic". Article 2 states that Sri Lanka is a Unitary State, and Article 3 enacts that-

"In the Republic of Sri Lanka sovereignty is in the People and inalienable. Sovereignty includes the powers of government, fundamental rights and the franchise".

Article 4 of the Constitution outlines the manner in which the Sovereignty of the People shall be exercised and enjoyed, and expressly provides that –

"(a)the legislative power of the People shall be exercised by Parliament, consisting of elected representatives of the People and by the People at a Referendum;

(b) the executive power of the People, including the defence of Sri Lanka, shall be exercised by the President of the Republic elected by the People;

(c) the judicial power of the People shall be exercised by Parliament through courts, tribunals and institutions created and established, or recognized, by the Constitution, or created and established by law, except in regard to matters relating to the privileges, immunities and powers of Parliament and of its Members, wherein the judicial power of the People may be exercised directly by Parliament according to law……."

A Bench of Seven Judges of this Court, in the course of its determination in *Re the Nineteenth Amendment to the Constitution* [2002] 3 Sri LR 85, had no hesitation in characterizing Article 4, when read with Article 3, as enshrining the doctrine of separation of powers, and at pages 96 to 97 went on to elaborate that-

> "The powers of government are separated as in most Constitutions, but unique to our Constitution is the elaboration in Articles 4 (a), (b) and (c) which specifies that each organ of government shall exercise the power of the People attributed to that organ. To make this point clearer, it should be noted that sub-paragraphs (a), (b) and (c) not only state that the legislative power is exercised by Parliament; executive power is exercised by the President and judicial power by Parliament through Courts, but also specifically state in each sub-paragraph that the legislative power "of the People" shall be exercised by Parliament; the executive power "of the People" shall be exercised by the President and the judicial power "of the People" shall be exercised by Parliament through the Courts. This specific reference to the power of the People in each sub-paragraph which relates to the three organs of government demonstrates that the power remains and continues to be reposed in the People who are sovereign, and its exercise by the particular organ of government being its custodian for the time being, is for the People."

Further clarifying our constitutional provisions, this Court also observed at page 98 of its determination that-

> "This balance of power between the three organs of government, as in the case of other Constitutions based on a separation of powers is sustained by certain checks whereby power is attributed to one organ of government in relation to another."

It will also be seen that the legislative power and judicial power of the People is vested in Parliament, subject to certain qualifications, which are worthy of elaboration. Article 4(a) is carefully worded to vest in Parliament, consisting of elected representatives of the People, the legislative power of the people which it can directly exercise, that is to say, to the exclusion of the legislative power of the People that has to be exercised by the People at a Referendum in terms of the Constitution. Similarly, according to Article 4(c) of the Constitution, the judicial power of the People is vested in Parliament to be exercised through the courts, tribunals and institutions as specified therein, except in regard to matters relating to the privileges immunities and powers of Parliament and of its Members, which may be exercised directly by Parliament according to law. Article 4(b) vests the executive power of the People directly on the President, who too is elected by the People.

It is significant that the legislative, executive and judicial power of the People is vested either on Parliament or the President, both being elected by the People, so as to maintain accountability and transparency, and the courts and other like tribunals and institutions which are not elected by the People, are accountable and responsible to the People through Parliament, which does exercise the kind of superintendence and accountability envisaged by Coleridge J. in the above quoted *dictum* from *Stockdale v Hansard, supra.* All this is no different from the constitutional structure that exists in England, and as Lord Mustill observed in the *Fire Brigades Union* case [1995] 2 AC 513 at 567-

> "It is a feature of the peculiarly British conception of the separation of powers that Parliament, the executive and the courts have each their distinct and largely exclusive domain. Parliament has a legally unchallengeable right to make whatever laws it thinks fit. The executive carries on

the administration of the country in accordance with the powers conferred on it by law. The courts interpret the laws, and see that they are obeyed"

I conclude that, in the light of the constitutional arrangements contained in Article 4 and other provisions of our Constitution, there is no room for doubt that Parliament including its select committees cannot be regarded as *inferior to our Court of Appeal* when it exercises its writ jurisdiction conferred by Article 140 of the Constitution, and would therefore not be amenable to such jurisdiction. Accordingly, I would answer Question 2) on which special leave to appeal has been granted in this case in the affirmative, and hold that the Court of Appeal erred in concluding that the words "any Court of first instance or tribunal or other institution or any other person" in Article 140 of the Constitution extends to Parliament or a Committee of Parliament.

The Impeachment Process

It may now be appropriate to consider Question 1), on which special leave to appeal was granted by this Court, namely, the question whether the Court of Appeal erred in holding that the writ jurisdiction of that Court embodied in Article 140 of the Constitution extends to proceedings of Parliament or a Committee of Parliament when it performs its constitutional function under Article 107(2) and (3) of the Constitution and Order 87A of the Standing Orders of Parliament. For this purpose, it would be necessary to examine in depth the provisions of Article 107(2) and (3) of the Constitution, which set up a mechanism for the removal of a Chief Justice, Judge of the Supreme Court, President of the Court of Appeal and Judge of the Court of Appeal.

Before looking at the provisions of the relevant provisions of the Constitution in greater detail, it may be useful to mention that Section 52(2) of the Ceylon (Constitution) Order in Council, 1946 provided that-

"Every Judge of the Supreme Court shall hold office during good behaviour and shall not be removable except by the Governor General on an address of the Senate and the House of Representatives."

Similar provisions were found in Section 122 of the Republican Constitution of 1972, which provided as follows:

"(1) The Judges of the Court of Appeal, of the Supreme Court or of the Courts that may be created by the National State Assembly to exercise and perform powers and functions corresponding to or substantially similar to the powers and functions exercised and performed by the aforesaid courts, shall be appointed by the President.

(2) Every such Judge shall hold office during good behaviour and shall not be removed except by the President upon an address of the National State Assembly"

It is significant that the Constitution of the Democratic Socialist Republic of Sri Lanka, 1978, went beyond the simple system of removal of Superior Court Judges upon an address made by the Head of State to the legislature, and introduced a more elaborate mechanism for the impeachment of Superior Court Judges in Article 107 as follows:-

"(1) The Chief Justice, the President of the Court of Appeal and every other Judge of the Supreme Court and Court of Appeal shall be appointed by the President by Warrant under his hand.

(2) Every such Judge shall hold office during good behaviour and shall not be removed except by an order of the President made after an address of Parliament supported by a majority of the total number of Members of Parliament (including those not present) has been presented to the President for such removal on the ground of proved misbehaviour or incapacity:

Provided that no resolution for the presentation of such an address shall be entertained by the Speaker or placed on the Order Paper of Parliament, unless notice of such resolution is signed by not less than one-third of the total number of Members of Parliament and sets out full particulars of the alleged misbehaviour or incapacity.

(3) Parliament shall *by law or by Standing Orders* provide for all matters relating to the presentation of such an address, including the procedure for the passing of such resolution, the investigation and proof of the alleged misbehaviour or incapacity and the right of such Judge to appear and to be heard in person or by representative." (*Emphasis added*)

As noted by Wansundera J. in *Visuvalingam and others v. Liyanage and Others No. (1),* (1983) 1 Sri LR 203 at pages 248 to 249 and Wadugodapitiya J. in *Victor Ivan and Others v. Hon. Sarath N. Silva and Others* (2001) 1 Sri LR 309 at page 331, the process outlined in Article 107(2) and (3) is the "only method of removal" of a superior court judge found in the Constitution, and is not vested exclusively in Parliament or the President, and requires Parliament and the President, to act in concurrence. In other words, neither the President of Sri Lanka, nor Parliament, can by himself or itself remove the Chief Justice, a Judge of the Supreme Court or the President of the Court of Appeal or a Judge of the Court of Appeal, and the Constitution requires *two organs of State*, *both elected by the People*, *to act together* in the important process of impeaching a superior court judge.

The learned Attorney General as well as the learned Counsel for the 11th and 12th Respondent Respondents have, in the course of their submissions before this Court, highlighted the words "subject to the provisions of the Constitution" found at the very commencement of Article 140 of the Constitution, and they have all invited our attention to Articles 3 and 4 of the Constitution in the light of which they sought to interpret Article 107(2) and (3) of the Constitution in terms of which the Petitioner-Respondent was sought to be impeached.

Learned Counsel for the 11th and 12th Respondents have stressed that there is no reference to Article 107 in Article 4(c) of the Constitution, and submitted that if it was intended to include within the purview of the "judicial power of the People" that can be exercised directly by Parliament the impeachment power contained in Article 107(2) and (3), it would have been easy to include expressly in Article 4(c), some provision to that effect in the same way as "matters relating to the privileges, immunities and powers of Parliament and of its Members" have been therein expressly adverted to. They have contended that since the process of impeachment outlined in Article 107(2) and (3) is not expressly excluded from Article 4(c), the necessary inference is that the power can be exercised by Parliament only "through the courts, tribunals, and institutions created and established, or recognized, by the Constitution, or created and established by law."

The learned Attorney-General has attempted to meet this submission by arguing that powers of Parliament include not only such powers that are legislative and judicial in nature, but other powers in a general sense, and he has sought to illustrate his argument by adverting to respectively Articles 38(2) dealing with the removal of the President, Article 104E(7)(e) read with Article 104E(8) dealing with the removal of the Commissioner-General of Elections and Article 107(2) and (3) dealing with the removal of a Judge of the Superior Courts including the Chief Justice. In my view none of these

powers are exclusively powers of Parliament or the exclusive province of any other governmental organ, as all those provisions adverted to by the learned Attorney General seek to create mechanisms which are unique and are *sui generis* in the sense that they are the only mode of removal of the incumbents of those offices known to the Constitution. The power of removal of the President of Sri Lanka, the Chief Justice and other Judges of the Supreme Court, the President and other Judges of the Court of Appeal and the Commissioner General of Elections in terms of the aforesaid provisions of the Constitution, have to be exercised by one organ of State in concurrence with one or more governmental organ or organs, and *this feature constitutes a system of checks and balances which is essential for the preservation of the Rule of Law*.

The power of removal of the President of Sri Lanka, for instance, consists of a meticulous procedure which could be initiated by a Member of Parliament with specified number of Members required to sign the relevant notice of resolution, with the Speaker of the House of Parliament, the Supreme Court and the Parliament itself play important roles. It is noteworthy that Article 38(2)(c),(d) and (e) provide that after a resolution to impeach the President is passed in Parliament with the specified majority, the Speaker shall refer the allegations contained in the resolution to the Supreme Court for inquiry and report. If and when the Supreme Court reports to Parliament that in its opinion the President is permanently incapable of discharging the functions of his office, or has been guilty of any of the other allegations contained in such resolution, Parliament may, by a resolution passed by a specified number of Members voting in its favour, remove the President from office.

Likewise, the power of removal of the Commissioner General of Elections consists of a mechanism in which Members of Parliament, the Speaker, the Election Commission constituted under Chapter XIVA of the Constitution and Parliament itself, play important roles, just as much as the procedure for the removal of a Judge of the Supreme Court including the Chief Justice or a Judge of the Court of Appeal envisages initiation by specified number of Members of Parliament, with the Speaker of the House and the Parliament itself and the President of Sri Lanka discharging important functions. None of these powers are vested *exclusively* in one single organ of government, and *one or more organs of government are required to act in concurrence*, providing a system of checks and balances as envisaged by Charles de Montesquieu and William Blackstone, who gave the doctrine of Separation of Powers its initial momentum. Here lies the explanation as to why there is no mention of the process of impeachment of the President, the Commissioner of Elections or the Chief Justice and the Judges of the Superior Courts of Sri Lanka in Article 4(a),(b) or (c), all of which seek to vest the legislative, executive or judicial power of the People *exclusively* in one elected entity or the other.

In the context of the appeal at hand, it is also significant that the procedure for the removal of the President of Sri Lanka outlined in Articles 38(2) of the Constitution, contemplates certain findings in regard to the capacity of the President to hold office or of his guilt in regard to allegations set out in the impeachment resolution to be made by the Supreme Court as a pre-condition for the passing of the resolution to remove the President from office. This may be contrasted with the procedure for the removal of the Commissioner General of Elections, which does not envisage any role to be played by the Supreme Court in regard to the proof of the alleged misbehavior or incapacity of the Commissioner-General of Elections, and Article 104E(8)(b) of the Constitution provides that-

> "Parliament shall *by law or by Standing Orders*, provide for all matters relating to the presentation of such an address, including the procedure for the passing of such resolution, the investigation and proof of the alleged misbehaviour or incapacity and the right of the Commissioner-General of Elections to appear and to be heard in person or by representatives."(*Emphasis added*)

It is significant that a similar system has been prescribed by the Constitution with respect to the impeachment of a Judge of the Supreme Court including the Chief Justice and of a Judge of the Court of Appeal including its President. Article 107(3) of the Constitution, as already noted, provides that-

> "Parliament shall *by law or by Standing Orders* provide for all matters relating to the presentation of such an address, including the procedure for the passing of such resolution, the investigation and proof of the alleged misbehaviour or incapacity and the right of such Judge to appear and to be heard in person or by representative." (*Emphasis added*)

The provisions of Article 104E (8)(b) and Article 107(3) of the Constitution may perhaps be contrasted with Article 40(3) of the Constitution which provides for the procedure for electing a new President from amongst Members of Parliament who are qualified to be elected to the office of President, in the eventuality of a vacancy arising in the office of President prior to the expiration of the term of office of a President who was elected at a Presidential Election. It is significant that Article 40(3) provides that:-

> "Parliament shall *by law* provide for all matters relating to the procedure for the election of the President by Parliament and all other matters necessary or incidental thereto its Members who is qualified to be elected to the office of President."(*Emphasis added*)

Here, Parliament has no option but to provide for all required matters by law, and law only, unlike in the situations contemplated in Article 104E (8)(b) and Article 107(3) of the Constitution, *where Parliament has been expressly conferred a discretion whether to provide the required matters by law or Standing Orders of Parliament*.

It is also obvious that the makers of the Constitution had considered whether the procedure of reference to the Supreme Court of the task of examining the justifiability of the resolution for the removal of the Chief Justice and other Judges of the Supreme Court in the lines of Article 38(2) of the Constitution, and decided against it perhaps in view of the very same reasons that moved Rehnquist CJ., to observe in *Nixon v. United States* 506 U.S. 224(1993) at page 234 that-

> "….judicial review would be inconsistent with the [Constitution] Framers' insistence that *our system be one of checks and balances. In our constitutional system, impeachment was designed to be the only check on the Judicial Branch by the Legislature*…..Judicial involvement in impeachment proceedings, even if only for purposes of judicial review, is counterintuitive because it would eviscerate the "important constitutional check" placed on the Judiciary by the Framers. See id., No. 81, p. 545. Nixon's argument would place final reviewing authority with respect to impeachments *in the hands of the same body that the impeachment process is meant to regulate*." (*Emphasis added*)

Furthermore, there can be little doubt that any arrangement which enables the Supreme Court to play any role in the impeachment of the Chief Justice or a Judge of the very same Court, would go against the maxim *nemo judex in causa sua,* which was explained succinctly by Browne-Wilkinson, L.J. in *In Re Pinochet* (1999) UKHL 52, in the following words:-

> "The fundamental principle is that a man may not be a judge in his own cause. This principle, as developed by the courts, has two very similar but not identical implications. First it may be applied literally: if a judge is in fact a party to the litigation or has a financial or proprietary interest in its outcome then he is indeed sitting as a judge in his own cause. In that case, the mere fact that he is a party to the action or has a financial or proprietary interest in its outcome is sufficient to cause his automatic disqualification. The second application of the

principle is where a judge is not a party to the suit and does not have a financial interest in its outcome, but in some other way his conduct or behavior may give rise to a suspicion that he is not impartial, *for example because of his friendship with a party*. This second type of case is not strictly speaking an application of the principle that a man must not be judge in his own cause, since the judge will not normally be himself benefiting, but providing a benefit for another by failing to be impartial."(*Emphasis added*)

These are pointers as to the thinking of the framers of our Constitution, who have in Article 107(3) of the Constitution, left it to the good sense of Parliament to decide whether all matters relating to the presentation of the address relating to the removal of the Chief Justice and other Judges of the Superior Courts, including the procedure for the passing of such resolution, the investigation and proof of the alleged misbehaviour or incapacity and the right of such Judge to appear and to be heard in person or by representative, should be provided for "by law or by Standing Orders" in the lines of Article 104E (8)(b) of the Constitution, and in both situations, Parliament has decided to do so by Standing Orders.

It is the *constitutionality of this decision made by Parliament* that came in for consideration on references that had been made in terms of Article 125(1) of the Constitution to this Court in the wake of the proceedings before the Court of Appeal that gave rise to the impugned judgment. No reference was made by the Court of Appeal in CA (Writ) Application No. 411/2012 from which this appeal arises, but the Court of Appeal in its impugned judgment dated 7th January 2013 considered itself bound by the determination of this Court in SC Reference No. 3/2012 in which the question referred to this Court in the course of CA (Writ) Application No. 358/2012, was formulated as follows:-

"Is it mandatory under Article 107(3) of the Constitution for the Parliament to provide for [by law] matter (sic) relating to the forum before which the allegations are to be proved, the mode of proof, burden of proof, standard of proof etc., of any alleged misbehavior (sic) or incapacity in addition to matters relating to the investigation of the alleged misbehavior (sic) or incapacity?" (*Words within Square Brackets added by me to make the question meaningful*)

A Bench consisting of three judges of this Court, in its determination dated 1st January 2013, observed that –

"In a State ruled by a Constitution based on the rule of Law, *no court,* tribunal or other body (by whatever name it is called) has authority to make a finding or a decision *affecting the rights of a person unless such court, tribunal or body has the power conferred on it by law to make such finding or decision.* Such legal power can be conferred on such court, tribunal, or body by an Act of Parliament which is "law" and not by Standing Orders which are not law but are rules made for the regulation of the orderly conduct and the affairs of the Parliament. The Standing Orders are not law within the meaning of Article 170 of the Constitution which defines what is meant by "law".

A Parliamentary Select Committee appointed in terms of Standing Order 78A derives its power and authority solely from the said Standing Order which is not law. Therefore a Select Committee appointed under and in terms of Standing Order 78A has no legal power or authority to make a finding adversely affecting the legal rights of a Judge against whom the allegations made in the resolution moved under proviso to Article 107(2), is the subject matter of its investigation. *The power to make a valid finding, after the investigation contemplated in Article 107(3), can be conferred on a court, tribunal, or a body, only by law and by law only."*(*Emphasis added*)

With the very greatest of respect to the honorable Judges of this Court constituting the said Bench, the above quoted observation has the effect of deleting or rendering nugatory the words "*or by Standing Orders*" found in Article 107(3) of the Constitution, purportedly for the preservation of the rule of Law. It is unfortunate that the Divisional Bench of this Court failed to realize that when Article 107(3) was formulated, the makers of the Constitution were fully conscious that they were providing a mechanism for the removal of the Chief Justice and other Judges of the Superior Courts by an order of the President made pursuant to an address of Parliament supported by a specified majority which is presented to the President for such removal on the ground of proved misbehavior or incapacity, and *chose to delegate to Parliament the function of providing for by law or Standing Orders*, "all matters relating to the presentation of such an address, including the procedure for the passing of such resolution, the investigation and proof of the alleged misbehaviour or incapacity and the right of such Judge to appear and to be heard in person or by representative". The words "by law *or by Standing Orders*" clearly conferred the discretion for Parliament to decide whether the matters required to be provided for by that article should be provided for by law or by Standing Orders.

By so deleting or rendering nugatory clear words of the Constitution, the Divisional Bench has flouted the concept of Sovereignty of the People enshrined in Article 3 of the Constitution and the basic rule reflected in Article 4(a) of the Constitution that the legislative power of the People may be "exercised by Parliament, consisting of elected representatives of the People and by the People at a Referendum". The determination of this Court in SC Reference No. 3/2012 does not offer any acceptable reasons for ignoring basic provisions of the Constitution, except for the observation that "no court, tribunal or other body (by whatever name it is called) has authority to make a finding or a decision *affecting the rights of a* person unless such court, tribunal or body has the power conferred on it *by law* to make such finding or decision". The "person" envisaged by the Court of Appeal in the above quoted observation in its factual setting was the Petitioner-Respondent, who had to face impeachment proceedings contemplated by Article 107(2) and (3) of the Constitution read with Standing Order 78A, for which the makers of the Constitution had expressly provided in Article 107(3) that the necessary procedures may be formulated by Parliament "*by law or by Standing Orders*".

It is significant that Article 107(3) of the Constitution does not contain any words indicating that *only certain matters* contemplated by that provision may be provided for by Standing Orders *and certain other matters* must be provided for by law. If that was the intention of the makers of the Constitution, they would probably have adopted language sufficient to convey such a meaning, and used, for instance, the formula "by law *and* Standing Orders". They would also have indicated clearly *what matters should necessarily be provided for by law.* Thus, in my view, the determination of this Court in SC Reference No. 3/2012 is not only erroneous but also goes beyond the mandate of this Court to interpret the Constitution, and intrudes into the legislative power of the People.

In my opinion, to conclude, as this Court did, in SC Reference No. 3/2012, that it is mandatory for Parliament to provide for the matters in question by law, and law only, not only does violence to the clear language of Article 107(3), but also takes away from Parliament, a discretion expressly conferred on it by the Constitution itself. In my opinion, this Court has no authority, whether express or implied, to do so. As this Court observed in *Attorney General v Sumathipala* (2006) 2 Sri LR 126, at page 143,

> "A judge cannot under a thin guise of interpretation usurp the function of the legislature to achieve a result that the judge thinks is desirable in the interests of justice. Therefore the role of

the judge is to give effect to the expressed intention of Parliament as it is the bounden duty of any court and the function of every Judge to do justice within the stipulated parameters."

It is my considered opinion that the determination of this Court in SC Reference No. 3/2012 manifestly exceeded the mandate conferred on this Court by Article 125(1) of the Constitution to interpret the Constitution, and was made in disregard of the clear language of Article 107(3) and other basic provisions of the Constitution. The determination is a blatant distortion of the law, and is altogether erroneous, and must not be allowed to stand. This Court hereby overrules the said determination of this Court in SC Reference No. 3/2012.

As already noted, the power to remove the Chief Justice, Judges of the Supreme Court, the President of the Court of Appeal and Judges of the Court of Appeal through the process outlined in Article 107 of the Constitution and Standing Orders made thereunder, is not a power exclusively vested in either the President or the Parliament, but is a power that is unique and is *sui generis* in the sense that it is vested jointly in the Parliament and the President. These are both governmental organs that are elected by the People, and when they act in concurrence, they act in the name of the People of Sri Lanka. It is unthinkable that a court such as the Court of Appeal, which derives its jurisdiction from Article 140 of the Constitution, which is expressly made subject to other provisions of the Constitution such as Article 107, and whose jurisdiction is further limited, as we have seen, by the requirement to grant and issue orders in the nature of writs "according to law", by which is meant the common law of England as developed by our own courts, which confines the ambit of these writs to inferior courts and tribunals, would seek to impeach a decision taken with the walls of Parliament by a Parliamentary Select Committee, or to quash the same by *certiorari.*

It may now be appropriate for me consider, in some detail, the writ jurisdiction of the Court of Appeal, in the context of the privileges, immunities and powers of Parliament.

Parliamentary Powers and Privileges

The learned Attorney-General has relied on Section 3 of the Parliament (Powers and Privileges) Act No 21 of 1953, as subsequently amended, which he submitted, ousted the jurisdiction of the Court of Appeal to grant any order in the nature of writ against Parliament or a Select Committee of Parliament. Section 3 of the Parliament (Powers and Privileges) Act proclaims that –

"There shall be freedom of speech, debate and proceedings in Parliament and such freedom of speech, debate or proceedings shall not be liable to be impeached or questioned in any court or place out of Parliament."

It is noteworthy that although the said Act which was enacted in 1953 and has since been amended several times, section 3 of the Act, which is relied upon by the learned Attorney General, has not been amended after its original enactment, and in fact echoes section 1 art. 9 of the English Bill of Rights, 1689, which provided that –

"……the freedom of speech, and debates or proceedings in parliament, ought not to be impeached or questioned in any court or place out of parliament."

In view of the citation before this Court of several decisions and authorities from England and other common law jurisdictions, it is necessary to mention at the outset that as Erskine May, in *Parliamentary Practice*, (22nd Edition) at page 65 observes, the privileges of Parliament are "the sum of the peculiar rights enjoyed by each House collectively as a constituent part of the High Court of

Parliament, and by Members of each House individually, without which they could not discharge their functions, and which exceed those possessed by other bodies or individuals." However, as Dr. D.M. Karunaratna has pointed out in his valuable work, *A Survey of the Law of Parliamentary Privileges in Sri Lanka* (2nd Revised Edition), page 8-

> "The privileges of Parliament are also considered part of the common law of England. They are part of the common law not in the sense that they are judge-made, but in the sense that the courts recognize their existence and claim jurisdiction to keep the House within the limits of the recognized privileges. *On the other hand, some of the privileges have been enacted (for example, article 9 of the Bill of Rights) and hence*, *the entire law of parliamentary privileges cannot be regarded as part of the common law*". (*Emphasis added*)

The present appeal involves the nature and ambit of the privilege relating to the impeachment outside Parliament of parliamentary proceedings, particularly those that transpired before a Select Committee of Parliament constituted for the purpose of considering a resolution for the removal of a Judge of the Supreme Court or the Court of Appeal in terms of Article 107(2) and (3) of the Constitution read with Order 87A(2) of the Standing Orders of Parliament, in the context of the writ jurisdiction of the Court of Appeal under Article 140 of the Constitution.

At the hearing of this appeal, the learned Attorney General has stressed that the word "Parliament", as used in Section 3 of the Parliament (Powers and Privileges) Act, included a Select Committee of Parliament, and has invited our attention to Section 2 of the Act, which defined "Parliament" to mean "the Parliament of Sri Lanka, and includes a committee", and further defined a "committee" to mean "any standing, select or other committee of Parliament". This is in line with the decisions of English courts in cases such as *Dingle v Associated Newspapers Ltd., and Others* [1960] 2 QB 405, *Rost v Edwards* [1990] 2 QB 460 and *Neil Hamilton v Mohammed Al Fayed* [2001] 1 AC 395, and there can be no doubt that proceedings of any standing, select, or other committee of Parliament is as sacrosanct as proceedings of Parliament itself.

While there is no definition of the term "proceedings in Parliament" used in Section 3 of our Act or the term "proceedings in parliament" found in section 1 art. 9 of the English Bill of Rights, there seems to be some ambiguity in the language used in both statutes, and the courts have been concerned with the question whether the words were intended to mean that *the freedom* of debates or proceedings in Parliament ought not to be impeached or questioned, or whether they meant, in a wider sense, that *debates or proceedings in Parliament* ought not to be impeached or questioned. William Blackstone, adopted the wider approach when he observed in his *Commentaries on the Laws of England, (*17th Edition, 1830), vol. I, page 163, that "whatever matter arises concerning either House of Parliament, ought to be examined, discussed, and adjudged in that House to which it relates, and not elsewhere".

Much has been said in the course of argument about the celebrated decision in *Stockdale v Hansard,* [1839] EWHC QB J21, 112 ER 1112, and much of its *dicta* quoted by learned Counsel, but it must be noted, as the learned Attorney General has stressed, that *Stockdale v Hansard* was not a case in which whatever was said or done in the House of Commons was being sought to be impeached. That case involved an action for defamatory libel instituted by one Stockdale against James Hansard and three other members of his family, who were responsible for publishing the contents of a prison inspector's report ordered to be printed and published by the House. It is noteworthy that in deciding this case, the court adopted the wider interpretation of the Bill of Rights, as when Lord Denman observed at page 1156 that "whatever is done within the walls of either assembly must

pass without question in any other place", and Patterson J. said at page 1191 that "whatever is done in either House should not be liable to examination elsewhere". In the same case, Coleridge J observed at page 1199 that –

> In point of reasoning, it needed not the authoritative declaration of the Bill of Rights to protect the freedom of speech, the debates or proceedings in parliament, from impeachment or question in any place out of parliament; and *that the House should have exclusive jurisdiction to regulate the course of its own proceedings, and animadvert upon any conduct there in violation of its rules, or derogation from its dignity, stands upon the clearest grounds of necessity*. (*Emphasis added*)

Learned Counsel for the 11th and 12th Respondent-Respondents have invited our attention to the following passage that appears at page 1192 of the judgment of Patterson J:-

> Where then is the necessity for this power? Privileges, that is, immunities and safeguards, are necessary for the protection of the House of Commons, in the exercise of its high functions. All the subjects of this realm have derived, are deriving, and I trust and believe will continue to derive, the greatest benefits from the exercise of those functions. All persons ought to be very tender in preserving to the House all privileges which may be necessary for their exercise, and to place the most implicit confidence in their representatives as to the due exercise of those privileges. *But power, and especially the power of invading the rights of others, is a very different thing: it is to be regarded, not with tenderness, but with jealousy; and, unless the legality of it be most clearly established, those who act under it must be answerable for the consequences.* (*Emphasis added*)

It was the contention of learned Counsel that insofar as in the case at hand the rights of the Petitioner-Respondent, who is not only a citizen of this country but also at the relevant time, its Chief Justice, have been seriously affected by what transpired before the Parliamentary Select Committee, the powers, privileges and immunities of Parliament must give way.

I have several difficulties in agreeing with this contention of leaned Counsel for the 11th and 12th Respondent-Respondents. Firstly, the appeal before us does not relate to all what transpired before the Parliamentary Select Committee. In fact, the Court of Appeal in its impugned judgment, refrained from going into the allegations of procedural irregularities and bias that had been made by the Petitioner-Respondent in the proceedings that had taken place before the Select Committee, and was content to hold that the appointment by the Speaker of the House of Parliament of the said committee, purportedly in terms of Article 107(3) read with Order 87 A (2) of the Standing Orders of Parliament, was invalid, and that in consequence, the Select committee was not properly constituted. That was the only justification offered by the Court of Appeal for quashing the report of the said committee, and from that perspective, the challenge, was not to what transpired before the committee, but was to what was done by the Speaker of the House within the walls of Parliament to constitute the committee in terms of the Constitution and applicable Standing Orders.

Secondly, unlike in *Stockdale v Hansard*, *supra,* what was sought to be impeached in this case was not a publication of the contents of a report of some public official such as the prison inspector, but the proceedings of the Select Committee of Parliament, which took place within the walls of Parliament, and the report of the said Select Committee. Thirdly, the provisions of Article 107(2) and (3) are, as already noted by me, unique to our Constitution, and to which there was no parallel in the common law of England as it stood at the time *Stockdale v Hansard* came to be decided. Furthermore, the process outlined in Article 107(2) and (3) read with the relevant Standing Orders of Parliament, constitute the only mechanism found in our Constitution for removing a Chief Justice

and other Judges of the Superior Courts of Sri Lanka, and envisage Parliament, which is an elected body vested with legislative power, to act in co-ordination with the President, being the elected Head of the Executive. As I have already observed, the power of judicial review, which applies to courts of first instance and like tribunals, institutions and persons, cannot extend to Parliament, in which the judicial power of the People is theoretically vested.

Coming back to the analysis of judicial decisions emanating from England relating to parliamentary privileges, I note that almost forty-five years later, in *Bradlaugh v Gossett* (1884) 12 QBD 271, Lord Coleridge CJ endorsed the views expressed by the judges in *Stockdale v Hansard, supra*, and reiterated at page 275 of his judgment in that case, that what "is said or done within the walls of Parliament cannot be inquired into in a court of law". After another seventy-four years, In 1958, the wider view of privilege once again found favor with Viscount Simonds, who when deciding *In re Parliamentary Privilege Act 1770* [1958] AC 331, at page 350 noted that "there was no right at any time to impeach or question in a court or place out of Parliament a speech, debate or proceeding in Parliament".

I would like to pause for a moment in time, at *Dingle v Associated Newspapers Ltd. and Others* [1960] 2 QBD 405, in which in the course of an action for damages for libel, it was sought to impugn the validity of a report of a select committee of the House of Commons on the ground that the procedure of the committee was defective. In refusing permission for any party to mount such an attack on the validity of the report, Pearson J. explained the reasons for his decision at page 410 of his judgment in the following manner:-

> ".....in my view, it is quite clear that to impugn the validity of the report of a select committee of the House of Commons, specially one which has been accepted as such by the House of Commons by being printed in the House of Commons Journal, would be contrary to section 1 (art. 9) of the Bill of Rights. No such attempts can properly be made outside Parliament.
>
> The next point was that the Solicitor-General and Mr. Cumming-Bruce made a submission or a request that no comment on the report should be permitted in the course of the trial. That, as a matter of construction of the relevant provision in the Bill of Rights might have raised a more debatable question, but it seemed quite clear at the time, and still is clear, to my mind, that it was easy to give effect to that request because, *once the question of the validity of the report had been excluded as outside the scope of the court's inquiries, any comment on the report, or how it was obtained, and the proceedings leading up to it, would have little or no materiality:* indeed, to a large extent, any such comment would not be relevant at all."(*Emphasis added*)

Twelve years later, in *Church of Scientology of California v Johnson Smith* [1972] 1 QB 522 at page 529 Browne J acknowledged the correctness of the broader view of parliamentary privilege, and stated that "what is said or done in the House in the course of proceedings there cannot be examined outside Parliament for the purpose of supporting a cause of action even though the cause of action itself arises out of something done outside the House". In the same vein, in *British Railways Board the Pickin* [1974] AC 765 at page 799 Lord Simon of Glaisdale observed as follows:-

> "I have no doubt that the respondent . . . is seeking to impeach proceedings in Parliament, and that the issues raised . . . cannot be tried without questioning proceedings in Parliament".

In *R v Secretary of State for Trade, ex p Anderson Strathclyde Plc* [1983] 2 All ER 233 at page 239, Dunn LJ noted that it could not examine an extract from *Hansard* in order to determine what were the proper inferences to be drawn from them, since this-

"……..would be contrary to [section 1] art 9 of the Bill of Rights. It would be doing what Blackstone said was not to be done, namely to examine, discuss and adjudge on a matter which was being considered in Parliament. Moreover, it would be an invasion by the court of the right of every member of Parliament to free speech in the House with the possible adverse effects referred to by Browne J."

In short, judicial authority up to the decision of the House of Lords in *Pepper (Inspector of Taxes) v Hart* [1993] AC 593 clearly reflected the wider meaning of the words used in Article 9 of the Bill of Rights. However, it is noteworthy that the House of Lords in Pepper *(Inspector of Taxes) v Hart* overruled more than two centuries of precedent when it decided that courts could refer to and rely on *Hansard* to aid in construing enacted laws. Since then, there have been many decisions that took a more liberal view in regard to the use of legislative history for the interpretation of legislation, which is an aspect of the law that is not relevant to the question arising on this appeal, and on which I shall not make any further comment. The decision in this case did not in any way impinge on the traditional position that had prevailed for centuries, that the proceedings of Parliament are sacrosanct, as would become clear from the following observation of Lord Browne Wilkinson in *Prebble v. Television New Zealand Ltd.* [1995] 1 A.C. 321 at page 332:-

"In addition to article 9 itself, there is a long line of authority which supports a wider principle, of which article 9 is merely one manifestation, viz. that the courts and Parliament are both astute to recognise their respective constitutional roles*. So far as the courts are concerned they will not allow any challenge to be made to what is said or done within the walls of Parliament in performance of its legislative functions and protection of its established privileges*: *Burdett v. Abbott* (1811) 14 East 1; *Stockdale v. Hansard* (1839) 9 Ad. & E.C. 1; *Bradlaugh v. Gossett* (1884) 12 Q.B.D. 271; *Pickin v. British Railways Board* [1974] A.C. 765; *Pepper v. Hart* [1993] A.C. 593. As Blackstone said in his *Commentaries on the Laws of England,* 17th ed. (1830), vol. 1, p. 163: 'the whole of the law and custom of Parliament has its origin from this one maxim, "that whatever matter arises concerning either House of Parliament, ought to be examined, discussed and adjudged in that House to which it relates, and not elsewhere."

In *Neil Hamilton v Mohammed Al Fayed* [2001] 1 AC 395, the House of Lords followed the aforesaid line of authorities, and dismissed an application for judicial review of a decision of the Parliamentary Commissioner on the grounds that such matters were properly within the exclusive cognizance of Parliament. In the course of his opinion in this case Lord Browne Wilkinson referred to his above quoted *dictum* in *Prebble v. Television New Zealand Ltd., supra,* and observed at page 407 that--

"The normal impact of parliamentary privilege is to prevent the court from entertaining any evidence, cross-examination or submission which challenge the veracity or propriety of anything done in the course of parliamentary proceedings. *Thus it is not permissible to challenge by cross-examination in a later action the veracity of evidence given to a parliamentary committee*." (*Emphasis added*)

In the more recent decision in *Jackson v. Attorney-General* [2005] UKHL 56 [2006] 1 A.C. 262, the House of Lords had the opportunity of reviewing the validity of certain English Acts of Parliament. The decision involved a challenge to the validity of the Hunting Act of 2004, which had been passed in the House of Commons but not in the House of Lords. The challenge was on the ground that the Parliament Act of 1949, which permits a Bill which has not been passed in the House of Lords to become an Act under certain conditions, was itself not validly enacted. A unanimous nine-member House of Lords Appellate Committee agreed with a unanimous Court of Appeal (and before that, the

Divisional Court) that the 1949 Act was not invalid, and on that basis, upheld the validity of the Hunting Act 2004.

What is of some significance in the context of what is in issue before this Court in this appeal is that the Attorney-General did not oppose in *Jackson's* case the courts entering into judicial review, and the lower courts and the House of loads justified their decisions, by holding that they were not considering the mode of passing Bills but engaging simply in a matter of statutory interpretation, namely, whether the 1949 Act was permitted by the terms of the 1911 Act. The decision of the House of Lords contains interesting but inconclusive *obiter dicta* impinging on the concept of Supremacy of Parliament, and on one end of the spectrum was Lord Bingham, who at paragraph 9 of the opinion, described the supremacy of the Crown in Parliament as the "bedrock" of the British constitution, observing that then as now "the Crown in Parliament was unconstrained by any entrenched or codified constitution", and at the other end of the spectrum was Lord Steyn, who at paragraph 102 of the opinion, noted that the "classic account given by Dicey of the doctrine of the supremacy of Parliament, pure and absolute as it was, can now be seen to be out of place in the modern United Kingdom". It is noteworthy that the following comment of Lord Steyn in the same paragraph has generated much speculation as to what the future holds for the United Kingdom:

> *"*Nevertheless, the supremacy of Parliament is still the general principle of our constitution. It is a construct of the common law. The judges created this principle. If that is so, it is not unthinkable that circumstances could arise where the courts may have to qualify a principle established on a different hypothesis of constitutionalism. In exceptional circumstances involving an attempt to abolish judicial review or the ordinary role of the courts, the Appellate Committee of the House of Lords or a new Supreme Court may have to consider whether this is a constitutional fundamental which even a sovereign Parliament acting at the behest of a complaisant House of Commons cannot abolish. It is not necessary to explore the ramifications of this question in this opinion. No such issues arise on the present appeal."

Nor is it necessary for the purpose of this appeal to go into these concepts, as we are here interpreting and applying the principles of our own Constitution, which differs in many ways from the British constitution. As far as Sri Lanka is concerned, under the Republican Constitution of 1972 as well as the Constitution of the Democratic Socialist Republic of Sri Lanka 1978, Sovereignty is expressly, and manifestly vested in the People, and Article 4 of the Constitution outlines very clearly the manner in which the "Sovereignty of the People" is to be exercised and enjoyed, particularly by the legislative, executive and judicial organs of government.

Let me at this stage turn to the only local decision in point, which has been referred to by the learned Attorney General in the course of his submissions before us. In *The Attorney General v. Samarakkody and Dahanayake* 57 NLR 412 two members of the House of Representatives were noticed by this Court, on an application by the Attorney General, to show cause as to why they should not be punished for offences of breach of privilege of Parliament. On a question of conflict of jurisdiction between this Court and the House of Representatives having being raised by learned Counsel for the respondents, this Court had no hesitation in holding that, even if the conduct complained of was disrespectful, it was not justiciable by the Supreme Court, as the conduct in question fell within the scope of sections 3 and 4 of the Parliament (Powers and Privileges) Act and could not therefore be questioned or impeached in proceedings taken in the Supreme Court under section 23 of the Act. After examining the English authorities and relevant Standing Orders of the House, H.N.G. Fernando J. observed as follows at page 427 of his judgment:-

"The jurisdiction to take cognisance of such conduct was exclusively vested in the House of Representatives. The respondents are accordingly discharged from the notices served on them."

It remains for me to consider the submissions made by learned Counsel on the question as to whether Section 3 of the Parliament (Powers and Privileges) Act amounts to a constitutional ouster of the writ jurisdiction of the Court of Appeal conferred by Article 140 by reason of its embodiment in Article 67 of the Constitution. Article 67 enacts as follows:-

"The privileges, immunities and powers of Parliament and of its Members may be determined and regulated by Parliament by law and until so determined and regulated, the provisions of the Parliament (Powers and Privileges) Act, shall, *mutatis mutandis,* apply."

While the learned Attorney General has forcefully contended that Article 67 brought about a constitutional ouster of the writ jurisdiction of the Court of Appeal, learned Counsel for the 11th and 12th Respondent-Respondents have argued with equal force that the mere reference to the Parliament (Powers and Privileges) Act in Article 67 of the Constitution does not elevate section 3 of the said Act into a constitutional ouster of jurisdiction, and that a jurisdiction conferred by the Constitution cannot be denuded by an ordinary "law" which has not been enacted in the manner set out in Chapter XII of the Constitution. For this proposition, they have relied on the decision of this Court in *Attapattu and Others v People's Bank and Others* (1987) 1 Sri LR 208, in which this Court dealt with an apparent conflict between the ouster clause found in section 22 of the Interpretation Ordinance, as amended by Act No. 18 of 1972, and the power of judicial review conferred principally on the Court of Appeal by Article 140 of the Constitution, and expressed the view at pages 222 to 223 that-

"Apart from any other consideration, if it became necessary to decide which was to prevail - an ouster clause in an ordinary law or a Constitutional provision conferring writ jurisdiction on a Superior Court, "subject to the provisions of the Constitution" - I would unhesitatingly hold that the latter prevails, because the presumption must always be in favour of a jurisdiction which enhances the protection of the Rule of Law, and against an ouster clause which tends to undermine it (see also *Jailabdeen v. Danina Umma* 64 NLR. 419, 422). But no such presumption is needed, because it is clear that the phrase "subject to the provisions of the Constitution" was necessary to avoid conflicts between Article 140 and other Constitutional provisions - such as Article 80(3), 120, 124, 125, and 126(3). That phrase refers only to contrary provisions in the Constitution itself, *and does not extend to provisions of other written laws, which are kept alive by Article 168(1)*." (*Emphasis added*)

The learned Attorney-General has submitted that at best the above passage is an *obiter dictum* having no binding effect on this Court, as the case was decided on the basis that upon the death of an applicant for relief in proceedings for the redemption of land under section 71 of the Finance Act, No. 11 of 1963, as subsequently amended, a "specified heir" or a testate heir may be substituted, and whether the application was duly constituted, or whether the Bank ought to exercise its discretion, to vest the premises, in favor of the substitute, should not be considered at the stage of substitution, but only after a substitute has stepped into the shoes of the deceased and has acquired the necessary status to present his case.

However, I do not have to go into this question as Article 67 of the Constitution incorporates into that article *mutatis mutandis* all the provisions of the Parliament (Powers and Privileges) Act that were in force at the time of the enactment of the Constitution in 1978, and the effect of such incorporation by reference is to write into that article the provisions of the aforesaid Act as if they

were part of the Constitution. As Lord Esher M.R. observed in *In Re Woods Estate* (1886) 31 Ch.D 607 at 615 –

> "If a subsequent Act bring into itself by reference some of the clauses of a former Act, the legal effect of that, as has often been held, is to write those sections into the new Act just as if they had been actually written in it with the pen, or printed in it, and the moment you have those clauses in the later Act, you have no occasion to refer to the former Act at all. For all practical purposes therefore, those section of the Act of 1840 are to be dealt with as if they were actually in the Act of 1855".

Learned Counsel for the 11th and 12th Respondent-Respondents have stressed that Article 67 itself has empowered Parliament to determine and regulate "by law" its privileges, immunities and powers, and that since the word "law" as used in that article envisages an ordinary Act of Parliament that may be enacted with a simple majority in Parliament, the provisions of the Parliament (Powers and Privileges) Act including section 3 thereof cannot be regarded as constitutional provisions. However, I find that there are several provisions in our Constitution such as Article 12(4), the proviso to Article 13(5), Articles 15, 74(2), 101(2), 154A (3) and 154G (3)(a) that are expressly permitted to be varied or amended by an ordinary majority, and in my view, the simple fact that variation is permitted by an ordinary majority in Parliament, would not deprive the provision of its constitutional status.

It is in this context important to note that Article 67 does not stand alone and must be read with Article 4(c) of the Constitution which makes express reference to "the privileges, immunities and powers of Parliament and of its Members, wherein the judicial power of the People may be exercised by Parliament according to law". The direct vesting of the judicial power of the People with respect to the privileges, immunities, and powers of Parliament and its Members in Parliament, by Article 4(c) of the Constitution means, as has been explained in the judgments of this Court in decisions such as *Stockdale v Hansard,* [1839] EWHC QB J21, 112 ER 1112, *Bradlaugh v Gossett* (1884) 12 QBD 271, *The Attorney General v. Samarakkody and Dahanayake* 57 NLR 412, *Dingle v Associated Newspapers Ltd. and Others* [1960] 2 QBD 405, *Prebble v. Television New Zealand Ltd.* [1995] 1 A.C. 321 and *Neil Hamilton v Mohammed Al Fayed* [2001] 1 AC 395, that no Court can exercise any supervision of that power. I therefore hold that section 3 of the Parliament (Powers and Privileges) Act No. 21 of 1953 read with Articles 4(c) and 67 of the Constitution would have the effect of ousting the writ jurisdiction of the Court of Appeal in all the circumstances of this case.

I accordingly answer Question 1) on which special leave to appeal had been granted by this Court in the affirmative, and hold that the Court of Appeal erred in holding that the writ jurisdiction of that Court embodied in Article 140 of the Constitution extends to proceedings of Parliament or a Committee of Parliament which performs its constitutional function in terms of Article 107(2) and (3) of the Constitution read with Order 87A of the Standing Orders of Parliament.

Conclusions

For the foregoing reasons, I would conclude that the Court of Appeal possessed no jurisdiction in terms of Article 140 of the Constitution to review a report of a Select Committee of Parliament, which was constituted in terms of Article 107(3) of the Constitution read with Order 87A(2) of the Standing Orders of Parliament, or to grant and issue an order in the nature of a writ of *certiorari*

purporting to quash the report and findings of the Parliamentary Select Committee on the basis that it was not properly constituted.

I would accordingly, allow the appeal and set aside the impugned judgment of the Court of Appeal dated 7th January 2013. The application filed by the Petitioner-Respondent in the Court of Appeal shall stand dismissed due to lack of jurisdiction.

In all the circumstances of this case, I do not make any order for costs.

JUDGE OF THE SUPREME COURT

Chandra Ekanayake, J,

I agree.

JUDGE OF THE SUPREME COURT

Sathyaa Hettige, PC., J,

I agree.

JUDGE OF THE SUPREME COURT

Eva Wanasundera, PC., J,

I agree.

JUDGE OF THE SUPREME COURT

Rohini Marasinghe, J.

I agree.

JUDGE OF THE SUPREME COURT