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

In the matter of an Application under and in terms of Articles 17 and 126 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

S.C. APPLICATION No: 665/2012(FR)

S.C. APPLICATION No: 666/2012(FR)

S.C. APPLICATION No: 667/2012(FR)

S.C. APPLICATION No: 672/2012(FR)

1. Athula Chandraguptha Thenuwara,
   60/3A, 9th Lane,
   EthulKotte.
   (Petitioner in SC Application 665/12 [FR])

2. Janaka Adikari
   Palugaswewa, Perimiyankulama,
   Anuradhapaura.
   (Petitioner in SC Application 666/12 [FR])

3. Mahinda Jayasinghe,
   12/2, Weera Mawatha,
   Subhuthipura, Battaramulla.
   (Petitioner in SC Application 667/12 [FR])

4. Wijedasa Rajapakshe,
   Presidents' Counsel,
   The President of the Bar Association
   of Sri Lanka.
   (1st Petitioner in SC Application 672/12 [FR])

5. Sanjaya Gamage,
   Attorney-at-Law
   The Secretary of the Bar Association
   of Sri Lanka.
   (2nd Petitioner in SC Application 672/12 [FR])

6. Rasika Dissanayake,
   Attorney-at-Law
   The Treasurer of the Bar Association
   of Sri Lanka.
   (3rd Petitioner in SC Application 672/12 [FR])

7. Charith Galhena,
   Attorney-at-Law
   Assistant-Secretary of the Bar Association
   of Sri Lanka.
   (4th Petitioner in SC Application 672/12 [FR])

Petitioners

Vs.

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.

2nd – 12th Respondents Hon. Members of Parliament;
Members of the Select Committee of Parliament appointed with regard to the Charges against the Chief Justice.

13. The Attorney General,
Attorney General's Department,
Hulftsdorp, Colombo 12.

Respondents

1. Koggala Wellala Bandula,
No. 67A, Kandy Road,
Dalugala, Kelaniya.
(Intervenient-Petitioner-Respondent in SC Application 665/12 [FR],666/12 [FR], 667/12[FR] and 672/12 [FR])

2. Jayasooriya Alankarage Peter Nelson Perera,
No. 22/51, Chamikara Cannel Road, Chilaw.
(Intervenient-Petitioner-Respondent in SC Application 666/12 (FR) and 667/12 [FR])

3. Arumapperuma Arachchige Sudima Chandani,
No. 300/3, Kandy Road, Kirillawala, Webada.
(Intervenient-Petitioner-Respondent in SC Application 672/12 [FR])

Intervenient – Petitioners – 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 : Suren Fernando for the Petitioner in SC Application 665/12 (FR).

Viran Corea and Ms. Sarita de Fonseka for the Petitioner in SC Application 666/12 (FR).

M.A. Sumanthiran for the Petitioner in SC Application 667/12 (FR).

Dr. Sunil Cooray for the Petitioners in SC Application 672/12 (FR).

Nigel Hatch, PC. with S. Galappatti and Ms. S. Illangage for the Intervenient-Petitioner-Respondent in SC Application 665/12 (FR), 666/12 (FR), 667/12 (FR) and 672/12 (FR), Koggala Wellala Bandula.

Prof. H.M. Zafrullah with B. Manawadu for the Intervenient – Petitioner-Respondent in SC Application 666/12 (FR) and 667/12 (FR), Jayasooriya Alankarage Peter Nelson Perera.

Razik Zarook, PC. with B. Manawadu for the Intervenient – Petitioner-Respondent in SC Application 672/12 (FR), Arumapperuma Arachchige Sudima Chandani.

Palitha Fernando, PC. Attorney-General, with Shavindra Fernando, DSG., Sanjay Rajaratnam, DSG., Ms. Indika Demuni de Silva, DSG., Nerin Pulle, SSC. and Manohara Jayasinghe, SC. for the 13th Respondent.

Argued On	**:**	23.10.2013
Written Submissions On	**:**	11.11.2013 and 13.11.2013
Decided On	**:**	24.3.2014

SALEEM MARSOOF, PC., J.

These fundamental rights applications were filed in terms of Article 17 read with Article 126 of the Constitution in the wake of the presentation to the 1st Respondent, who is the Hon. Speaker of the House of Parliament, of a notice of resolution for the removal of the 43rd Chief Justice of Sri Lanka, Hon. (Dr.) Upathissa Atapattu Bandaranayke Wasala Mudiyanse Ralahamilage Shirani Anshumala Bandaranayake, in terms of Article 107(2) and (3) of the Constitution of Sri Lanka read with Order 78A of the Standing Orders of Parliament.

The Petitioner in SC Application 665/12 (FR), who is an artist by profession, sought redress for the alleged violation of his fundamental rights enshrined in Articles 12(1), 12(2), 14(1)(a) and (b) of the Constitution. Similar applications were also filed by the Petitioner in SC Application 666/12 (FR), who is an Attorney-at-Law and holds the post of General Secretary of the Inter Company Employee's Union, the Petitioner in SC Application 667/12 (FR), who is the General Secretary of the Ceylon Teacher's Service Union, and the Petitioners in SC Application 672/12 (FR), who are respectively the President, the Secretary, the Treasurer, and the Assistant Secretary of the Bar Association of Sri Lanka, which is, a representative body consisting of approximately eleven thousand Attorneys-at-Law of the Supreme Court of Sri Lanka.

When the aforesaid applications, filed by the respective Petitioners allegedly in their own right and in the public interest, were supported before this Court, leave to proceed was granted for the alleged violation of their fundamental right to equality enshrined in Article 12(1) of the Constitution. In so granting leave to proceed, by its order dated 23rd November 2012 made in the first three of these cases, this Court restricted the scope of the hearing to prayer (i) of the petitions filed by the Petitioners in those cases, by which they sought a declaration to the effect that Standing Order 78A is *ultra vires* the Constitution of Sri Lanka and is null and void and of no force or avail in Law. Similarly, when on 3rd December 2012, this Court granted leave to proceed to the Petitioners in SC Application 672/12 (FR), who were at the relevant time the key office bearers of the Bar Association of Sri Lanka, this Court similarly restricted the scope of the hearing to the corresponding prayer (f) of the petition in that case.

Several persons also applied to this Court to intervene into these cases in the public interest. This Court, by its orders dated 16th July 2013 and 25th July 2013, permitted Koggala Wellala Bandula, who is also known as Bandula Wellalage, a lawyer by profession who had also held office in the past as the Chairman of the Sri Lanka Foundation Institute, to intervene into all the applications. Similarly, Jayasooriya Alankarage Peter Nelson Perera, who is the Chairman of the Sri Lanka Pragathasili Peramuna, a registered political party, was permitted to intervene into SC Application Nos. 666/12 (FR) and 667/12 (FR), and Arumapperuma Arachchige Sudeema Chandani, a member of the Mahara Pradeshiya Sabha, who was permitted to intervene into SC Application No. 672/12 (FR).

When granting leave to proceed in these cases, Court also fixed dates for the filing of objections and counter-affidavits. However, the learned Attorney-General, who was the only Respondent to make an appearance in Court, informed Court that he has not filed any objections in view of the fact that the question is purely one of law. This obviated any need for the Petitioners in these cases to file any counter-affidavits. Similarly, learned Counsel for the Intervenient-Petitioners-Respondents, who were allowed by this Court to intervene into some or all of these cases, also indicated that they would not file any objections, and moved Court to treat the averments of their applications for intervention as their objections. The Petitioners have not filed any counter-affidavits in response to the averments in the applications for intervention.

Preliminary Objections

At the hearing into these applications on 23rd October 2013, Mr. Nigel Hatch P.C, who appeared for Koggala Wellala Bandula, moved to raise certain preliminary objections to the maintainability of the said applications, with which the learned President's Counsel for the other Intervenient-Petitioner-Respondents, associated themselves. The said preliminary objections were as follows:-

a) Proceedings under Article 126(1) of the Constitution are confined to any infringement or imminent infringement by "executive or administrative action" of any fundamental right or language right declared and recognised by Chapters III and IV of the Constitution, and do not extend to the present proceedings;

b) The Petitioners have no *locus standi*;

c) The Petition does not disclose on the face of it any violation of the fundamental rights of the Petitioners;

d) The matters sough to be determined are not justiciable having regard to the provisions of the Constitution.

This Court has heard oral submissions and also perused all the written submissions filed by learned Counsel who appeared in the case. I shall deal with the said preliminary objections in turn, to the extent necessary in the context of the circumstances of these cases.

(a) Executive or administrative action

The phraseology of "executive or administrative action", based on which the preliminary objection (a) appears to have been formulated, occurs in Article 17 and Article 126 of the Constitution. While Article 17 of the Constitution empowers every person "to apply to the Supreme Court, as provided by Article 126, in respect of the infringement or imminent infringement, *by executive or administrative action,* of a fundamental right to which such person is entitled under the provisions of this Chapter (Chapter III)", Article 126 of the Constitution confers on this Court, the exclusive jurisdiction to entertain and dispose of all fundamental rights applications. The said Article consists of several sub-articles, but for the purpose of considering this preliminary objection, it would suffice to reproduce the first sub-articles of that article:-

> "(1) The Supreme Court shall have sole and exclusive jurisdiction to hear and determine any question relating to *the infringement or imminent infringement by executive or administrative action* of any fundamental right or language right declared and recognized by Chapter III or Chapter IV." (*Emphasis added*)

Mr. Nigel Hatch P.C, addressed Court in support of preliminary objection (a), and submitted that this Court has jurisdiction to hear and determine any application filed in terms of Articles 17 and 126 of the Constitution, only if the alleged infringement or imminent infringement resulted from *executive or administrative action.* He argued that what is done by the Speaker of the House of Parliament or a Parliamentary Select Committee in the process of impeachment of a Judge of the Superior Courts does not fall within the purview of "executive or administrative action" within the meaning of the said articles. He submitted that Article 107, which is the first article under the sub-heading "Independence of the Judiciary", which occurs in Chapter XV under the heading "Judiciary", provides for *inter alia* the appointment of Judges of the Supreme Court and Court of Appeal by the President, and the removal by the President of any such Judge after an address of Parliament is presented to him as provided in Article 107(2) of the Constitution. He further submitted that this procedure was *sui generis*, and was intended to satisfy two fundamental objectives, namely the independence of the apex Judiciary and Judicial accountability, both equally important in the constitutional scheme.

Prof. H.M. Zafrullah, who appeared for Jayasooriya Alankarage Peter Nelson Perera, the Intervenient-Petitioner-Respondent in SC Application 666/12 and 667/12(FR), submitted that Standing Orders of Parliament are *sui generis* in nature since they were made by Parliament for the purposes of Article 107(3) of the Constitution. He additionally invited the attention of Court to

Order 78B of the Standing Orders of Parliament, which dealt with the procedure for the impeachment of certain key public officials including the Secretary-General of Parliament. All the other learned Counsel for the Intervenient-Petitioners-Respondents associated themselves with the submissions of Mr. Nigel Hatch PC.

The learned Attorney General, in the course of his submissions before Court, pointed out that Parliament possesses powers other than legislative, and submitted that this becomes apparent from the reference in Article 4(a) of the Constitution to "legislative power", which may be contrasted with the words "privileges, immunities and powers of Parliament" as used in Article 4(c) of the Constitution. He further submitted that these "powers" of Parliament are also distinct from judicial power dealt with under Article 4(c) of the Constitution. He submitted that the powers conferred by Articles 38, 104H(8)(a) and 107 of the Constitution, which dealt with respectively the impeachment of the President, the Commissioner General of Elections and Judges of the Supreme Court and Court of Appeal including the Chief Justice, are not judicial, executive or judicial in character, and stand on their own. He submitted that while in the process of impeachment of the President, the Supreme Court had an important role to play, the Constitution did not provide for the Supreme Court or any other court to be involved in the process of impeachment of the Commissioner General of Elections or Superior Court Judges. He referred to *dicta* of Wadugodapitiya J. in *Victor Ivan and Others v. Hon. Sarath N. Silva and Others* (2001) 1 Sri L.R. 309 at 331 and 332 in support of these propositions.

Responding to these submissions, Mr. Suren Fernando, who appeared for the Petitioner in SC Application 665/2012 (FR), submitted that the Parliamentary Select Committee was appointed by the Speaker of Parliament purportedly in terms of Order 78A(2) of the Standing Orders of Parliament, which he submitted was not a legislative act, as it did not purport to legislate, nor was it a judicial act, and was thus clearly an administrative act, akin to that of appointing a public officer to a public office. He relied on the decisions of this Court in *Faiz v The Attorney General and Others* (1995) 1 SLR 372 and *Weerawansa v The Attorney General and Others* (2000) 1 Sri LR 387 to argue that the question whether or not a particular act or omission constitutes executive or administrative action must be determined on the basis of the nature of the power that is exercised or sought to be exercised, rather than on the basis of the office or position of the person who is alleged to have exercised the said power or performed the said function.

While the other learned Counsel who appeared for the Petitioners in these cases associated themselves with these submissions of Mr. Fernando, Mr. M.A. Sumanthiran, who appeared for the Petitioner in SC Application 667/2012 (FR), additionally invited the attention of Court to the distinction between judicial or legislative acts on the one hand and ministerial or administrative acts on the other. He submitted that the appointment of the Parliamentary Select Committee was a ministerial act, which attracts the fundamental rights remedy under Article 126 of the Constitution. He contended that the distinction between legislation and Standing Orders of Parliament has been recognised by the Constitution, which deals with legislation in Article 75 and deals with the power of Parliament to make Standing Orders in Article 74.

It is manifest that the legislative powers of Parliament are dealt with in Article 75 of the Constitution, which along with certain other procedural and ancillary provisions are contained in Chapter XI of the

Constitution which is headed "The Legislature". I find no reference in that entire Chapter to any "Select Committee", nor is there any reference in Article 107(2) and (3) to any Parliamentary Select Committee. It is Order 78A of the Standing Orders of Parliament that were purportedly made under powers conferred on Parliament by Article 74(1)(ii) for giving effect to the provisions of Article 107(2) and (3) of the Constitution dealing with the removal of Superior Court Judges, that mentions a Select Committee of Parliament which has to be constituted for the purpose. In any event, Article 107 occurs outside Chapter XI, in Chapter XV of the Constitution, which deals with "The Judiciary".

In considering the question that arises in this case, namely whether Parliament is amenable to Article 126 of the Constitution, when it, or its officials, perform an act which is "executive or administrative" in nature essential to carry out the powers and functions of Parliament, I take note of the fact that this question has not directly arisen before in any Sri Lankan case. In *Dayananda v. Weeratunga, S.I. Police, et al.* Fundamental Rights Decisions, Vol. 2 page 291*, Kumarasinghe v. A. G. et al.* SC Application No. 54/82 – SC Minutes of 6.9. 1982 and *Leo Fernando v. Attorney-General* (1985) 2 Sri LR 341, when the related question as to whether a judge would be amenable to the fundamental rights remedy enshrined in Article 126 of the Constitution arose, this Court answered the question in the negative. In *Leo Fernando's* case, where the matter was examined by a Bench consisting of 5 Judges of this Court, Colin Thome J, stated at page 357 that –

> "A judicial order does not become converted into an administrative or executive act merely because it is unlawful."

In *Victor Ivan and Others v. Hon. Sarath N. Silva and Others* (2001) 1 Sri LR 309, the Petitioners sought to challenge an appointment made by the President to the office of Chief Justice by invoking the jurisdiction of this Court in terms of Articles 17 and 126(1) of the Constitution. This Court upheld a preliminary objection taken by the Attorney General that by holding office and functioning as the Chief Justice, the person so appointed had not violated any fundamental right of the Petitioners by what may be termed as "executive or administrative action". The Court took the view that the holding of judicial office, cannot be construed as "executive or administrative action" but the act of the President of appointing the Chief Justice or a Judge of the Supreme Court or Court of Appeal would attract the immunity conferred by Article 35(1) of the Constitution. This Court went on to hold that the Chief Justice cannot be made indirectly liable for the act of the President in appointing him into office, as he cannot be expected to be in a position to justify his suitability for the post.

That decision is obviously distinguishable from the decision of this Court in *Faiz v Attorney General,* (1995) 1 Sri LR 372, where it was alleged that two Members of Parliament and one Member of a Provincial Council had, acting purely in their personal capacities, instigated certain public officers to infringe the fundamental rights of the petitioners in that case, who were also public officers. This Court had no hesitation in holding that the responders, including the Members of Parliament and the Member of the Provincial Council, liable for the violation of the fundamental rights of the petitioners. In arriving at this conclusion, M.D.H Fernando J, at pages 381 to 382 of his judgment, adverting to the phrase "executive or administrative" as used in Article 126, observed that-

"That phrase does not seek to draw a distinction between the acts of "high" officials (as being "executive"), and other officials (as being "administrative")."Executive" is appropriate in a Constitution, and sufficient, to include the (official) acts of all public officers, high and low, *and to exclude acts which are plainly legislative or judicial (and of course purely private acts not done under colour of office)*. The need for including "administrative" is because there are residual acts which do not fit neatly into this three-fold classification. Thus it may be uncertain whether delegated legislation is "legislative" and therefore outside the scope of Article 126. However, *delegated legislation is appropriately termed administrative, although it has both legislative and executive features* (*Cf. Ramupillai v. Perera* (1991) 1 Sri LR 11 at pages 74 – 75 and *Jayathevan v. AG*· S.C. Application No. 192/91- SCM of 17.09.92). Thus "administrative" is intended to enlarge the category of acts within the scope of Article 126; *it serves to emphasise that what is excluded from Article 126 are only acts which are legislative or judicial, either intrinsically or upon the application of a historical test* (as in *R v. Liyanage* 64 NLR 313); *it may well be that the act of a court or a legislative body in denying a language right guaranteed by Article 20 or 24 is "administrative" for the purpose of Article 126 even though it is done in the course of a judicial or legislative proceeding*." (*Emphasis added*)

Though much relied upon by learned Counsel for the Petitioners, *Faiz v Attorney General, supra,* was not a case where the Members of Parliament concerned had been involved with the legitimate functions of Parliament. On the other hand, in the instant cases, the 1st Respondent Speaker of the House of Parliament, performed a function that was essential to proceed with an impeachment resolution placed on the Order Paper of Parliament, and in doing so, he was bound to act in accordance with Order 78A of the Standing Orders of Parliament, which had been adopted by Parliament with effect from 4th April 1984, except for Order 78A(4) which came into effect on 8th January 1985, in terms of Article 74(1)(ii) read with Article 107(3) of the Constitution. In so appointing the Parliamentary Select Committee, the 1st Respondent performed an important power of Parliament, which was required by Order 78A(2) of the Standing Orders of Parliament for the purpose of the investigation and proof of the allegations made against the Chief Justice by 117 Members of Parliament who had moved the impeachment resolution.

This was an integral part of a *sui generis* function of Parliament which did not fit easily into the legislative, executive or judicial spheres of government and bore a unique complexion in that, while being more disciplinary in nature, it could not be exercised by Parliament alone and had to be performed in concurrence with the President of Sri Lanka, as contemplated by Article 107(2) and (3) of the Constitution. It is for this reason that the power of impeachment does not find express reference in Article 4(a) of the Constitution that deals with the legislative power of the People vested *exclusively* in Parliament and the People at a Referendum, or in either Article 4(b) that vests the executive power of the People *exclusively* on the President or Article 4(c) that vests the judicial power of the People in Parliament to be carried out by the courts and other tribunals or institutions administering justice, "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."

In this context, all organs of government including the courts and other tribunals or institutions administering justice must always bear in mind Article 4(d) of the Constitution, which expressly provides that "the fundamental rights which are by the Constitution declared and recognized shall be respected, secured and advanced by all the organs of government and shall not be abridged, restricted or denied, save in the manner and to the extent hereinafter provided." It is the solemn duty of this Court to honour the trust placed on it to respect, secure and advance the fundamental rights enshrined in the Constitution, and in doing so, I have examined very carefully all the provisions of the Constitution and principles of law referred to by learned Counsel in the course of submissions. Having done so, I am inclined to the view that the impugned act of the Speaker of the House of Parliament to appoint a Parliamentary Select Committee was indeed "executive or administrative action" within the meaning of Article 126 of the Constitution.

For these reasons, preliminary objection (a) is overruled.

(b) The locus standi of the Petitioners

The next preliminary objection raised by Mr. Nigel Hatch PC., is whether the Petitioners have the *locus standi* or standing to invoke the jurisdiction of this Court in terms of Articles 17 and 126 of the Constitution. Mr. Hatch PC., contends that none of the Petitioners are possessed of *locus standi* to invoke the fundamental rights jurisdiction of this Court. He relies on the language of Article Section 17, which provides that every person shall be entitled to apply to the Supreme Court, as provided by Article 126, in respect of the infringement or imminent infringement, "of a fundamental right to which *such person* is entitled", and submitted that in terms of this provision, as well as Article 126(2) of the Constitution, the applications of the Petitioners cannot be maintained by reason of the lack of *locus standi,* as they are seeking to indirectly challenge the impeachment of the Hon. (Dr.) Shirani Bandaranayake, and not any violation or imminent violation of their own fundamental rights. Learned Counsel for the Petitioners have submitted that the Petitioners do have *locus standi* in their own right and on behalf of the members of the public, to agitate a fundamental question relating to the removal of Superior Court Judges for any misbehaviour or incapacity, when the integrity of the judiciary is of great importance to the maintenance of the Rule of Law and the wellbeing of society.

For effectively dealing with the objection taken up by Mr. Nigel Hatch P.C, it is necessary to examine the averments of the petitions filed by the Petitioners in these cases to ascertain their alleged grievances for the redress of which they seek to invoke the jurisdiction of this Court in terms of Articles 17 and 126 of the Constitution. The Petitioners have stated in their petitions that they seek relief from this Court in their own right and in the public interest with the objective of safeguarding the rights and interests of the general public and securing due respect, regard for and adherence to the Rule of Law and the Constitution, which is the supreme law of the land. In their petitions, they have refereed to Article 3 and Article 4(c) of the Constitution, and assert that to the extent that "Standing Order 78A seeks to permit judicial or quasi judicial powers to be exercised by Parliament, in contravention of Article 4(c) of the Constitution, the said Standing Order is null and void, and of no effect or force in law."

The whole thrust of the case of the Petitioners is that the Parliamentary Select Committee appointed by the Speaker to consider the allegations contained in the impeachment resolution was not properly constituted insofar as the appointment of the Committee was made purportedly in terms of Order 78A(2) of the Standing Orders of Parliament, which the Petitioners allege was *ultra vires* the Constitution, particularly, Article 4(c) and Article 107(3) thereof. They state that the impeachment process in place in Sri Lanka is not conducive to the protection and fostering of the independence of the judiciary, which is so essential for the wellbeing of the People of Sri Lanka.

It is universally recognised that it is only through fair and transparent procedures for the recruitment of competent, independent and impartial judges and equally fair and transparent procedures for the removal of judges that the independence of the judiciary could be protected and fostered and the Rule of Law established or maintained. No such procedures existed in Sri Lanka even after the enactment of the Constitution of 1978 in regard to the appointment of the Chief Justice and Judges of the Supreme Court and the Court of Appeal, and in *Edward F William Silva and Others v Shirani Bandaranayake and Others* (1997) 1 Sri LR 92, M.D.H Fernando J noted at page 94 that-

> "Article 107 confers on the President the power of making appointments to the Supreme Court, and does not expressly specify any qualifications or restrictions. However, considerations of comity require that, in the exercise of that power, there should be cooperation between the Executive and the Judiciary, in order to fulfil the object of Article 107."

The position was remedied by the Seventeenth Amendment to the Constitution, which introduced a Constitutional Council, that was replaced by a Parliamentary Council under the Eighteenth Amendment to the Constitution, to perform the function of screening the suitability of persons to be appointed to the office of Chief Justice and as Judges of the Supreme Court and the Court of Appeal. However, Article 107 (3) of the present Constitution sought to introduce a fairer and more transparent procedure for the removal of such Judges than what existed in the past, and by the said provision the Parliament was empowered to provide for all matters relating to the presentation of an address for the removal of the Chief Justice or a Judge of the Supreme Court or Court of Appeal including the investigation and proof of the alleged misbehaviour or incapacity "by law or by Standing Orders". The Petitioners contend that Order 78A of the Standing Orders that purports to deal with the aforesaid matters is *ultra vires* the Constitution and null and void.

The question is whether the Petitioners have *locus standi* to invoke the jurisdiction of this Court in all the circumstances of this case. In this connection, it is relevant to note that this Court has granted leave to proceed only with respect to the alleged violation of Article 12(1) of the Constitution, and when a similar question arose in the context of the appointment of a Chief Justice in *Edward F William Silva and Others v Shirani Bandaranayake and Others, supra,* P.R.P Perera J. expressed the following view at pages 99 to 100 of his judgment:-

> "The violation of Article 12(1) involves two or more persons who are similarly placed or circumstanced. The grievance of the petitioner in relation to the respondent must be directly related to the impugned act. A petitioner will not have *locus standi* if he is not one who could have claimed a right in relation to this particular respondent. In this case, the petitioners do not

allege discrimination in relation to the 1st respondent and therefore he is not entitled to any relief under Article 12(1)."

The first respondent in that case happened to be, by an irony of fate, the 43rd Chief Justice of Sri Lanka, whose impending impeachment occasioned the institution of these proceedings by the respective Petitioners, but the reasoning of P.R.P Perera J quoted above cannot have application in respect to the 1st Respondent to these proceedings, who is the Speaker of the House of Parliament, who entertained the notice of resolution to remove the Chief Justice and appointed the Parliamentary Select Committee to investigate into the allegations made against her.

True, as pointed out by Mr. Hatch PC., Article 126(2) is of significance, and would have a limiting effect on *locus sandi* since it restricts the category of persons eligible to invoke the jurisdiction of this Court under that article to any person whose fundamental rights are alleged to be infringed or about to be infringed, who may "himself or by an attorney-at-law on his behalf" invoke the jurisdiction of this Court. Though our courts have applied this provision strictly, as in decisions such as *Somawathie v Weerasinghe* **(**1990) 2 Sri LR 121, where Amerasinghe J. (with Bandaranayake J. concurring, and Kulatunga J dissenting), observed at page 124 that "Article 126 confers a recognized position only upon the person whose fundamental rights are alleged to have been violated, and upon an Attorney-at-Law acting on behalf of such a person" and added that "no other person has a right to apply to the Supreme Court for relief or redress in respect of the alleged infringement of fundamental rights."

However, with the turn of the millennium, our courts have become more liberal with the rules of *locus standi*, and have sought to expand the horizons of standing, and this Court has permitted not only persons directly aggrieved but also others to challenge violations of fundamental rights. Cases such as *Mediwake and Others v Dayananda Dissanayake, Commissioner of Elections and Others* [2000] 1 Sri LR 177, *Sunila Abeysekera v. Ariya Rubasinghe* [2001] Sri LR 315, *Leader Publications v Ariya Rubasinghe* [2001] Sri LR and *Lilanthi De Silva v. Attorney General* [2003] Sri LR 155 are landmark decisions of this Court which reflect this liberal approach. As Amerasinghe J observed in *Bulankulama and others v. Secretary, Ministry of Industrial Development and others* [2000] 3 Sri LR 243 (better known as the *Eppawala* case) –

> "On the question of standing, in my view, the petitioners, as individual citizens, have a Constitutional right given by Article 17 read with Articles 12 and 14 and Article 126 to be before this Court. They are not disqualified because it so happens that their rights are linked to the collective rights of the citizenry of Sri Lanka - rights they share with the people of Sri Lanka. Moreover, in the circumstances of the instant case, such collective rights provide the context in which the alleged infringement or imminent infringement of the petitioners' fundamental rights ought to be considered. It is in that connection that the confident expectation (trust) that the Executive will act in accordance with the law and accountably, in the best interests of the people of Sri Lanka, including the petitioners, and future generations of Sri Lankans, becomes relevant."

The Petitioners have succeeded in obtaining leave to proceed with respect to the alleged violation of their fundamental right to equality before the law and equal protection of the law enshrined in Article 12(1) of the Constitution, and although they had sought from this Court various declarations and orders, this Court has declined any interim orders and restricted the purview of the hearing to one of the relief sought by the Petitioners, namely, "a declaration that Standing Order 78A is *ultra vires* the Constitution and null and void and of no force or effect in law".

Learned Counsel for the Petitioners have submitted that such a declaration from this Court was necessary to protect and foster the independence of the judiciary and safeguarding the rights and interests of the general public and securing due respect, regard for and adherence to, the Rule of Law and the Constitution. There can be no doubt that all responsible citizen of this country, will have a collective interest in protecting and fostering the independence of the judiciary and safeguarding the rights and interests of the general public and securing due respect, regard for and adherence to, the Rule of Law and the Constitution, as much as the Petitioners.

However, I fail to see how the invocation of the fundamental rights jurisdiction of this Court *at the time the Petitioners sought to do so,* could have furthered those very interests. As already noted, the Petitioners invoked the fundamental rights jurisdiction of this Court in the wake of a notice of a resolution to remove the incumbent Chief Justice of Sri Lanka from office. SC Applications 665 to 667/12 (FR) were filed on 21st November 2012, just seven days after the Speaker of the House of Parliament appointed a Parliamentary Select Committee to consider the allegations made in the notice of resolution against the Chief Justice by 117 Members of Parliament, and two days before the said committee commenced its sittings. SC Application 672/12(FR) was filed when the Committee was in session, and before it arrived at any findings or made its report.

It is common ground that the incumbent Chief Justice herself did not challenge the constitutionality of the appointment of the Select Committee or its constitution in any court till 19th December 2012, on which date, she filed CA (Writ) Application No. 411/2012 in the Court of Appeal seeking mandates in the nature of *certiorari* to quash the report of the Parliamentary Select Committee finding her guilty of certain charges which were considered to be "of such a degree of sufficiency and seriousness as to remove" her from the office of Chief Justice, and for prohibition on the Parliament and its Select Committee. In this factual backdrop, I am of the view that the Petitioners possessed no *locus standi* to challenge the constitutionality of the appointment of the Parliamentary Select Committee *at the time they filed their respective applications, particularly in the context that the incumbent Chief Justice herself was in the process of defending herself before the Committee*.

I am of the opinion that in all these circumstances and for all these reasons, preliminary objection (b) would succeed.

(c) *Failure of the petitions to disclose on the face of it any violation of the fundamental rights of the Petitioners*

Since preliminary objection (b) has been upheld by this Court, there is technically no necessity to deal with the question as to whether the petitions filed in these cases by the Petitioners disclose any

violation of their fundamental rights. However, I propose to do so in view of the fact that elaborate submissions have been made by learned Counsel on this question as well.

Mr. Nigel Hatch P.C, has submitted that the Petitioners have failed to disclose on the face of their petitions any violation or imminent violation of their fundamental rights. In particular, he has submitted that though the essence of the Petitioners' case is that their fundamental right to equality enshrined in Article 12(1) of the Constitution has been violated or was about to be violated by the 1st Respondent's act of appointing the Parliamentary Select Committee contrary to Article 107(3) and Article 4(c) of the Constitution, and was thus invalid, the said appointment was in fact made by the Speaker in terms of Order 78A(2) of the Standing Orders of Parliament, which was made by Parliament in terms of powers conferred on it by Articles 74(1)(ii) and 107(3) of the Constitution, and not being subordinate in nature, is immune from judicial review. Prof. H.M. Zafrullah, stressed that Standing Orders of Parliament are not subsidiary legislation, and associated himself with the other submissions made by Mr. Hatch, P.C. The learned Attorney General also associated himself with the submissions of Mr. Hatch P.C and Prof Zaffrullah, and emphasized that being *sui generis* in nature, all steps taken in pursuance of Article 107(2) and (3) of the Constitution fell within the exclusive domain of Parliament and could neither be challenged in terms of Articles 17 and 126 of the Constitution, nor are they justiciable.

Responding to these submissions, Mr. Suren Fernando, who appeared for the Petitioner in SC Application 665/2012 (FR), submitted that the Parliamentary Select Committee was appointed by the Speaker of Parliament purportedly in terms of Order 78A(2) of the Standing Orders of Parliament, which he submitted was is in essence subordinate legislation, and that such appointment was neither a legislative act nor a judicial act, and was thus clearly an administrative act, similar to that of appointing a public officer to a public office. He submitted that any appointment made purportedly under any Standing Orders of Parliament which are *ultra vires* the Constitution, are unconstitutional and therefore invalid. He further submitted that Article 107 read with Article 4(c) of the Constitution necessarily requires that the judicial aspect of impeachment can only be carried out by courts, tribunals and institutions created and established, or recognized, by the Constitution, or created and established by law. He contended that the distinction between legislation and Standing Orders of Parliament has been recognised by the Constitution, which deals with legislation in Article 75 and deals with the power of Parliament to make Standing Orders in Article 74. While the other learned Counsel who appeared for the Petitioners in these cases associated themselves with these submissions of Mr. Fernando, Mr. M.A. Sumanthiran, who appeared for the Petitioner in SC Application 667/2012 (FR), submitted that the appointment of the Parliamentary Select Committee was a ministerial act, and since the Standing Orders of Parliament in terms of which the purported appointment was made were subordinate in nature, such appointment may be quashed by Court if they are found to be *ultra vires.*

A summary of the averments contained in the petitions filed by the respective Petitioners were set out in the previous section in relation to objection (b), and I do not see in these any basis on which this Court could have come to a *prima facie* finding that any fundamental rights of the Petitioners had been violated or is about to be violated. In granting leave to proceed for the alleged violation of Article 12(1) of the Constitution, this Court had assumed that laying down the procedure necessary

for the investigation and proof of any allegation against any Chief Justice, Judge of the Supreme Court, President of the Court of Appeal or Judge of the Court of Appeal by Standing Orders of Parliament without enacting an Act of Parliament for this purpose, was inconsistent with the provisions of Articles 107(3) and 4(c) of this Constitution. However, this is an erroneous interpretation of the said provisions of the Constitution, as explained by this Court in its decision in *The Attorney General v Hon. (Dr.) Shirani Bandaranayke and Others* SC Appeal No. 67/2013 (SC Minutes dated 21.2.2014). This being so, it is manifest that the petitions filed by the Petitioners do not *ex facie* disclose any violation of the fundamental rights of the Petitioners.

In this context it might be useful to recount that after the Petitioners in this case filed their respective petitions in this Court on various dates in November 2012, the Parliamentary Select Committee which had been appointed to consider the resolution to remove the then incumbent Chief Justice concluded its investigation, and on 8th December 2012 reported to Parliament that it had, by majority decision, found her guilty of charges 1, 4, and 5, which were "of such a degree of sufficiency and seriousness as to remove" her from the office of Chief Justice of Sri Lanka. CA (Writ) Application No. 411/2012 was filed by the incumbent Chief Justice in the Court of Appeal challenging the findings of the Parliamentary Select Committee on 19th December 2012, *inter alia* on the basis that the said Select Committee was not properly constituted for the same reasons that were advanced by the Petitioners of the present fundamental rights applications in their respective petitions. The Court of Appeal referred the question of constitutionality to this Court in terms of Article 125(1), and in SC Determination No. 3/2012, a Divisional Bench of this Court consisting of 3 Judges ruled 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". The Court of Appeal purported to follow the said determination, and by its Judgment dated 7th January 2013 granted relief to the incumbent Chief Justice by way of a mandate in the nature of *certiorari* quashing the report and findings of the Parliamentary Select Committee.

However, the Court of Appeal declined to grant the prohibition sought by the incumbent Chief Justice on the Speaker of the House of Parliament and the Members of the Parliamentary Select Committee to restrain them from proceeding with the impeachment resolution. 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 Parliamentary Select Committee "has no legal validity" and proceeded to issue a writ of *certiorari* to quash the said report, purportedly for the purpose of giving effect to the determination of the Supreme Court referred to above.

It is significant that the decision of the Court of Appeal dated 7th January 2013 was set aside by a 5 Judge Bench of this Court in *The Attorney General v Hon. (Dr.) Shirani Bandaranayke and Others* SC Appeal No. 67/2013 (SC Minutes dated 21.2.2014), which also carefully examined the determination of this Court in SC Determination No. 3/2012, which was purportedly followed by the Court of

Appeal, and overruled the same. In so overruling the determination of this Court in SC Determination No. 3/2012, this Court observed as follows:-

> "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. Hence, 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."

For these reasons, I hold that the petitions did not *ex facie* disclose any violation or even imminent violations of the fundamental rights of the Petitioners. Preliminary objection (c) is accordingly upheld.

(d) Justiciability of the matters sought to be determined

In view of the decision of this Court to uphold preliminary objections (b) and (c), it is strictly unnecessary to consider preliminary objection (c). However, since Mr. Nigel Hatch P.C who took up this objection, and Prof H.M. Zaffrullah, Mr. Razik Zarook P.C and the learned Attorney General, who have all associated themselves with Mr. Hatch PC, as much as Mr. Suren Fernando, Mr. Viran Corea, and Mr. M.A. Sumanthiran, who have chosen to differ from Mr. Hatch, have all made extensive submissions on this preliminary objection, I would like to express my opinion on this aspect of the case as well.

The question of justiciability was considered in great depth in the judgment of this Court in *The Attorney General v Hon. (Dr.) Shirani Bandaranayke and Others* SC Appeal No. 67/2013 (SC Minutes dated 21.2.2014), which of course, was in the context of the writ jurisdiction of the Court of Appeal under Article 140 of the Constitution. The question now arises in the context of the fundamental

rights jurisdiction of the Supreme Court under Article 126 of the Constitution, and the focus has necessarily to be on whether that makes any material difference in the legal position.

Section 3 of the Parliament (Powers and Privileges) Act No. 21 of 1953, which 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" 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."

It is necessary to stress that while the above quoted provision from the English Bill of Rights is not part of our law, Section 3 of the Parliament (Powers and Privileges) Act of 1953 is an integral part of Sri Lankan law, more so because it has expressly been referred to and read into Article 67 of the Constitution, which provides 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."

The legal effect of the incorporation by reference of the provisions of the Parliament (Powers and Privileges) Act into the Constitution was considered by this Court in great detail in *The Attorney General v Hon. (Dr.) Shirani Bandaranayke and Others, supra,* and as this Court observed in its unanimous judgment in that case,

> "……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 .....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." (*Emphasis added*)

In arriving at this conclusion, this Court examined a large number of decisions of the English courts that traversed a few centuries which interpreted the ambit and legal effect of section 1 art. 9 of the English Bill of Rights, 1689, which no doubt inspired section 3 of the Parliament (Powers and Privileges) Act No. 21 of 1953. It is therefore unnecessary for this Court to repeat the analysis of the English authorities on this question, except to refer to the decision of this Court in *The Attorney General v. Samarakkody and Dahanayake* 57 NLR 412 in which 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 been 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.

The question that arises in this case is whether this Court would exercise its jurisdiction and powers conferred by Article 126 of this Constitution so as to invade the exclusive domain of Parliament, the limits of which have been carefully delineated by Articles 4(c) and 67 of the Constitution. They seem to put to rest the centuries old conflict between the jurisdiction of courts and the legislature that added some colour and drama to the constitutional history of the United Kingdom, and lay down in very clear terms where the jurisdiction of the Courts begin and where the jurisdiction of Parliament would come to an end. The question under our Constitution would be, on which side of the two exclusive zones of jurisdiction would the particular question for determination fall, and the answer would depend on the nature and complexion of the particular question.

The question in this case is whether this Court would review the validity of Order 78A of the Standing Orders of Parliament on the basis that it was unconstitutional or went beyond the power of Parliament to make subordinate legislation. That was the only question raised by the Petitioners in their petition, there being no occasion to complain of what may have transpired after the date of the petitions in these cases, which were respectively 21st November 2012 (in SC Applications 665 to 667/12 (FR), that is 2 days prior to the commencement of the sittings of the Parliamentary Select Committee) and 26th November 2012 (in SC Application 672/12(FR) which was 3 days after the said Committee commenced sittings).

In all the circumstances of this case, particularly in the light of the fact that the Petitioners sought to invoke the jurisdiction of this Court in terms of Article 17 and 126 of the Constitution solely on the basis that Order 78A of the Standing Orders of Parliament is *ultra vires* the Constitution, which they contended made the appointment of the Parliamentary Select Committee for the purposes of Article 107(2) and (3) invalid, and therefore the said Committee could not lawfully consider the allegations contained in the impeachment resolution against the then incumbent Chief Justice, the correctness of all of which have been examined earlier in this judgment and held to be unfounded, preliminary objection (d) has necessarily to be upheld.

Conclusions

For the reason that preliminary objections (b),(c) and (d) raised by learned President's Counsel for Intervenient-Petitioner-Respondent Koggala Wellala Bandula, with which learned Counsel for the other Intervenient-Petitioners-Respondents associated themselves with, have been upheld, the petitions filed by the Petitioners in all these cases are hereby dismissed.

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