

Constitutional interpretations & expeditious judicial procedure ?

When the President of the Republic refers in terms of Article 129 of the Constitution, **a question of law** or fact for the consideration of the Supreme Court, the said matter concerning **a law is to be determined upon after consideration by at least 5 Judges of the Supreme Court**. The Constitution being the **supreme law** of the Republic, hence should not the interpretation thereof have required the consideration by **at least 5 Judges** of the Supreme Court ? *Article 129 of the Constitution is cited:*

- “129. (1) If at any time it appears to the President of the Republic that a question of law or fact has arisen or is likely to arise which is of such nature and of such public importance that it is expedient to obtain the opinion of the Supreme Court upon it, he may refer that question to that Court for consideration and the Court may, after such hearing as it thinks fit, within the period specified in such reference or within such time as may be extended by the President, report to the President its opinion thereon.
- (2) Where the Speaker refers to the Supreme Court for inquiry and report all or any of the allegation or allegations, as the case may be, contained in any such resolution as is referred to in Article 38 (2) (a), the Supreme Court shall in accordance with Article 38 (2) (d) inquire into such allegation or allegations and shall report its determination to the Speaker within two months of the date of reference.
- (3) Such opinion, determination and report shall be expressed **after consideration by at least five Judges of the Supreme Court**, of whom, unless he otherwise directs, the Chief Justice shall be one. (*Emphasis added*)
- (4) Every proceeding under paragraph (1) of this Article shall be held in private unless the Court for special reasons otherwise directs. “

Furthermore, when the Chief Justice requires a **question of general and public importance** to be considered in terms of Article 132 of the Constitution by the Supreme Court, **such matter is to be heard by a Bench comprising 5 or more Judges of the Supreme Court**. The matter determined upon being the interpretation of Article 107(3) of the Constitution, would not such a matter be of **general and public importance**, and **have been heard by a Bench comprising 5 or more Judges of the Supreme Court** ? *Article 132 of the Constitution is cited:*

- “132. (1) The several jurisdictions of the Supreme Court shall be ordinarily exercised at Colombo unless the Chief Justice otherwise directs.
- (2) The jurisdiction of the Supreme Court may be exercised in different matters at the same time by the several Judges of that Court sitting apart:
- Provided that its jurisdiction shall, subject to the provisions of the Constitution, be ordinarily exercised at all times by not less than three Judges of the Court sitting together as the Supreme Court.
- (3) The Chief Justice may –
- (i) of his own motion ; or
 - (ii) at the request of two or more Judges hearing any matter; or
 - (iii) on the application of a party to any appeal,
- proceeding or matter if the question involved is in the opinion of the Chief Justice **one of general and public importance**, direct that such appeal, proceeding or **matter be heard by a Bench comprising five or more Judges of the Supreme Court**. (*Emphasis added*)
- (4) The judgment of the Supreme Court shall, when it is not an unanimous decision, be the decision of the majority. “

Nevertheless, regardless of the foregoing, the matter of interpretation of Article 107(3) of the Constitution, regarding the impeachment of the Chief Justice, herself, **the Chief Justice had constituted a Bench of only 3 Judges of the Supreme Court** to interpret the said Article 107(3) of the Constitution, referred by the Court of Appeal on 20th November 2012 to the Supreme Court, under Article 125 of the Constitution, on a question arising in 7 Writ Applications considered by the Court of Appeal on that day i.e. 20th November 2012. The 7 Writ Applications filed by several Petitioners had been mainly sought Writs of Prohibition, prohibiting the Members of the Parliamentary Select Committee **from investigating into the allegations of misbehaviour or incapacity alleged against the Chief Justice**. However, the Parliamentary Select Committee had already completed its task on 8th December 2012.

The aforesaid question had arisen in Applications directly concerning the impeachment of the Chief Justice, who had proceeded to constitute a **Bench of 3 Judges of the Supreme Court comprising Justices N.G. Amaratunga, K. Sripavan and Priyasath Dep, P.C.**, to interpret Article 107(3) of the Constitution, **which had directly concerned the Chief Justice, herself**. Furthermore, would not such constitution of a **3 Judge Bench** be in contravention of what is stipulated in the aforesaid Articles 129 and 132 of the Constitution, that such a matter be considered by a **Bench of 5 or more Judges of the Supreme Court** ?

In the given circumstance it is of relevance to note that the Petition filed in the Supreme Court on 18th October 2012 by me in SC (SD) No. 2/2011 and the Minutes made thereon had been called for by the Parliamentary Select Committee on 4th December 2012, as recorded in Column 1 on page 1437 of the Report of the Parliamentary Select Committee, *prior* to the Chief Justice and her Lawyers having left the proceedings of the Committee in the afternoon of 6th December 2012, as recorded in Column 2 on page 1505 of the said Report.

In the aforesaid Petition, I had put in issue *perceived judicial bias and misconduct on the part of the Chief Justice* and two other Justices. I was not heard, but my Petition filed under Article 132 of the Constitution, *warranting to be considered exclusively by the Chief Justice*, had been *minuted* as follows :

“Hon. K. Sripavan, J

AAL for the Petitioner files Motion dated 18.10.2012 with :

1. Petition and Schedules “X”, “Y” & “Z”
2. Documents
3. Affidavit
4. Special Affidavit in support of the facts contained in “X”

AAL further moves Your Lordship’s Court be pleased that this Application be taken for Hearing on 16th, 19th & 20th November 2012, for a review and re-examination of Determination made on 24.10.2011. Submitted for Your Lordship’s directions please.

DRSC
19.10.2012

Hon. Chief Justice

The Petitioner by Motion dated 18.10.2012 seeks to review and re-examine the Special Determination dated 24.10.2011. In terms of paragraph 9(h) of the Petition, Hon. Speaker has certified the Bill on 11.11.2011. Upon certification being endorsed, the Bill becomes law and in terms of Article 80(3), the validity of such Act shall not be called in question thereafter upon any ground whatsoever.

This Article (Art 80 (3)) must be interpreted according to its true purpose and intent as disclosed by the phraseology in its natural signification.

If a party perceives “judicial bias & disqualification” against a member of the Bench, such party should have raised objections at the time the Bill was taken up for hearing. If no Objection is taken at the former stage, that party cannot thereafter complain of the matter disclose, as giving rise to a real danger of bias. Any **frivolous** objection taken **after a long period of time without a firm foundation** would not only impede the due administration of justice, but also undermines the work of Court. (*Emphasis added*)

In view of the foregoing, I do not see any legal basis to entertain the Motion dated 18.10.2012. The Motion may be rejected in limine.

Sgd. Sripavan, J
22.10.2012

Hon. Amaratunga, J, Hon. Ratnayake, PC, J, Hon. Ekanayake, J.

I agree with the Observations of Hon. Sripavan, J. The Bill in question was considered by this Court on 24.10.2011 and the certificate by the Hon. Speaker had taken place on 11.11.2011. In terms of Article 80(3) of the Constitution the validity of such an Act shall not be questioned on any ground whatsoever.

No Objection was raised on any one of the three Judges who heard the matter on 24.10.2011. For the aforementioned reasons the Motion dated 18.10.2012 should be rejected in limine.

Pls. consider the said Motion and tender your observations/concurrence.

Sgd. Chief Justice
23.10.2012

Hon. The Chief Justice

I agree with the observation of Your Ladyship and Hon. Sripavan J, set out above. Since there is no legal basis to entertain the Motion dated 18.10.2012, it should be rejected in limine. The Registrar of the Supreme Court should be directed not to entertain any further Motions/ Applications / Petitions in respect of this matter.

Sgd. Amaratunga, J
24.10.2012.

Hon. The Chief Justice

I agree with the observations and recommendations of Your Ladyship, Hon. Amaratunga J, and Hon. Sripavan, J.

Sgd. P.A. Ratnayake, J
25.10.2012

Hon. The Chief Justice

I agree with the observations and directions embodied in Your Ladyship’s Order 23/10/2012, Hon. Justice Amaratunga’s Order dated 24/10/2012, Hon. Justice Sripavan’s Order dated 22/10/2012 and Hon. Justice P.A. Ratnayake’s Order dated 25/10/2012.

Sgd. Ekanayake, J
7.11.2012 ”

Two of the Justices, namely, K. Sripavan and N.G. Amaratunga of the aforesaid 3 Judge Bench had respectively minuted on 22nd and 24th October 2012, that the said averments made by me against the Chief Justice had been *frivolous* and *belatedly made*, which was incorrect, in that, to the knowledge of Justice N.G. Amaratunga, I had put the said matter in issue, as far back as 9th February 2012. The same said allegations were contained in the Charges in the Impeachment Motion against the Chief Justice, which the aforesaid 7 Petitioners had sought Writs of Prohibition to prevent the Members of the Parliamentary Select Committee proceeding to investigate.

In the foregoing circumstances, the said two Justices, K. Sripavan and N.G. Amaratunga having already *pre-judged* as '*frivolous*' the aforesaid allegations made against the Chief Justice, thus and thereby would they not have been disqualified from being Members of the 3 Judge Supreme Court Bench constituted to interpret Article 107(3) of the Constitution, concerning investigations into the *misbehaviour* or *incapacity* of the Chief Justice, **involving the same allegations** ?

The Supreme Court interpretation Order consequently made on 1st January 2013, arising out of 7 Writ Applications concerning the investigation by a Parliamentary Select Committee on the *misbehaviour* or *incapacity* of the Chief Justice, *which had not been determined upon by a 5 Judge Bench of the Supreme Court in conformity with the stipulations in Articles 129 and 132 of the Constitution*, but had been interpreted only by a 3 Judge Bench of the Supreme Court, constituted by the Chief Justice, herself.

Furthermore, of the said 3 Justices, the disqualification of **two of the Justices N.G. Amaratunga and K. Sripavan having been in issue**, to have heard the said matter, would not the said Supreme Court interpretation Order of 1st January 2013 have *lacked* constitutional jurisdiction *warranting to be disregarded* ?

Furthermore, one of the Charges in the impeachment Motion was concerning the conduct and actions of the Judicial Service Commission, of which Justice N.G. Amaratunga was a Member. Thereby was he not acting, *as a Judge in his own cause*, further disqualifying him from making an erroneous interpretation of Article 107 (3) of the Constitution pertaining to the said impeachment Motion, itself ?

In making the said interpretation Order of 1st January 2013, the Supreme Court had heard the matter on 13th and 14th December 2012, and had entertained Written Submissions on 18th December 2012. The Chief Justice, herself, had filed a Writ Application in the Court of Appeal on 19th December 2012, seeking a Writ of Certiorari to *quash* the findings of the Parliamentary Select Committee Report, presented to Parliament on 8th December 2012.

The Court of Appeal had taken up the Application of the Chief Justice *expeditiously* on the very next day, i.e. 20th December 2012, and had issued Notices on the Members of the Parliamentary Select Committee for 7th January 2013. The aforesaid Order dated 1st January 2013 made by the aforesaid 3 Judge Bench of the Supreme Court, interpreting Article 107(3) of the Constitution had been delivered by the Court of Appeal on 3rd January 2013.

The aforesaid Supreme Court Order interpreting Article 107(3) of the Constitution was in relation to the question arising in 7 other Writ Applications made by the other Petitioners in November 2012, and not on a '*question*' arising from the Writ Application made by the Chief Justice. Nevertheless, the Court of Appeal on 7th January 2013 issued a Writ of Certiorari to *quash* the findings of the Parliamentary Select Committee Report based on the aforesaid Supreme Court interpretation Order made by the aforesaid 3 Judge Bench of the Supreme Court, which was in relation to a question arising in 7 other Writ Applications.

Furthermore, the said Supreme Court interpretation Order made by a 3 Judge Bench of the Supreme Court, with the **disqualification of two of whom having been in issue, would it not raise the question of the constitutional validity of such Supreme Court interpretation Order** ?

It is significant that both the Supreme Court and the Court of Appeal had worked *expeditiously*, sitting during the Court vacation, in the matter concerning the Chief Justice, *whilst other litigants are not ordinarily given such special treatment*. Is such *hasty procedure*, giving the *perception* of *acting in concert*, the normal practice of an independent judiciary ? On the other hand, complaint is made that the Parliamentary Select Committee, who had been given a time frame of one month, had *expeditiously* completed its task in terms of the Constitution !

The Supreme Court interpretation Order of 1st January 2013 made by the 3 Judge Bench of the Supreme Court had interpreted Articles 4(c), read with 107(3) of the Constitution, in the context of the interpretation in Article 170 of the Constitution defining ‘**law**’ to mean any Act of Parliament. *The said Articles of the Constitution are cited below:*

“4. The Sovereignty of the People shall be exercised and enjoyed in the following manner :-

- (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;” *(Emphasis added)*

“107. (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 misbehavior or incapacity and the right of such Judge to appear and to be heard in person or by representative.” *(Emphasis added)*

“170. In the Constitution –

"law" means any Act of Parliament and any law enacted by any legislature at any time prior to the commencement of the Constitution and includes an Order in Council; *(Emphasis added)*

By the said Supreme Court interpretation Order made by the said 3 Judge Bench of the Supreme Court, the words ‘**or by Standing Orders**’ in Article 107(3) of the Constitution had been *expunged* and/or *suspended* from the Constitution. The question arises, **as to whether the Supreme Court had a constitutional mandate to do**, when the Parliament, itself, is **debarred** from doing so in terms of the prohibition stipulated in Article 75 of the Constitution, as had been determined in the Special Determination made in October 2002 by a 7 Judge Bench of the Supreme Court on the *aborted* 19th Amendment to the Constitution, which Supreme Court Bench had also included the impeached Chief Justice. *Article 75 of the Constitution is cited below;*

“75. Parliament shall have power to make, laws, including laws having retrospective effect and repealing or amending any provision of the Constitution, or adding any provision to the Constitution :

Provided that Parliament shall not make any law

- (a) **suspending the operation of the Constitution or any part thereof, or**
(b) repealing the Constitution as a whole unless such law also enacts a new Constitution to replace it” *(Emphasis added)*

As to how it is ‘**mandatory**’ under Article 107(3) of the Constitution for the Parliament to provide by ‘**law**’, as interpreted by the said 3 Judge Bench of the Supreme Court, is in issue with the independence of the Legislature, which cannot be **mandated** except by the Constitution or by the People at a Referendum, whereas the Constitution has specifically stipulated the words by law ‘**or by Standing Orders**’. Such interpretation had been made stipulating as ‘**mandatory**’ one limb of the Constitution, whilst disregarding / suspending the other **optional** limb.

In the context of the interpretation of the word ‘**law**’ to mean an Act of Parliament as per Article 170 of the Constitution, attention is drawn to Article 140 of the Constitution, which *empowers* the Court of Appeal to issue Writs.

“140. Subject to the provisions of the Constitution, the Court of Appeal shall have full power and authority to inspect 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: *(Emphasis added)*

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 ”

In the context of the aforesaid interpretation by the said 3 Judge Bench of the Supreme Court, on a reference on a ‘*question*’ arising out of Writ Applications made against Members of a Parliamentary Select Committee, attention is drawn to the words ‘**according to law**’ in Article 140 of the Constitution. As defined in Article 170 of the Constitution **there is no Act of Parliament enacted empowering the Court of Appeal to issue Writs**, which the said 3 Judge Bench of the Supreme Court **had apparently failed to take cognisance of**.

In such circumstances, **the Court of Appeal over the years had adopted the application of the Common Law in UK** for the *issuance* of Writs in Sri Lanka. Could such Court of Appeal ‘adopted practice’ be deemed to be ‘superior’, than even the Standing Orders made by Parliament in conformity with the Constitution. Under the Common Law of UK, no Writs or Orders, whatsoever are issued against the House of Commons or Lords, its Committees or the Speaker. **Hence, would not the same be applicable in Sri Lanka in the circumstances of adopting the Common Law of UK ?**

In the Writ Application filed by the Chief Justice, Notices had been issued by the Court of Appeal, citing the case of *Mark Antony Lyster Bracegirdle 39 NLR 193 @ 205*, which is on an issuance of a Writ against the then Governor, **who was exercising executive power**, and not against the Parliament i.e. the House of Commons of UK. Had not the Court of Appeal failed to recognise the difference between the **executive** and the **legislature** ?

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