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As I write this, the Commonwealth Heads of Government Meeting (CHOGM) 2013 has just come to a close in Sri Lanka. The sense which seems to emerge from reading the news reports is that this summit may be remembered more for divisions over Sri Lanka’s human rights record than for what CHOGM has managed to achieve. This is unfortunate.

I will make no comment here on the country’s human rights record. However, there is a further reason for which reservations have been expressed concerning the holding of CHOGM 2013 in Sri Lanka – the ongoing challenge to the independence of the judiciary in that country.

Earlier this year, the Commonwealth Magistrates’ and Judges’ Association (CMJA), together with the Commonwealth Lawyers Association (CLA) and the Commonwealth Legal Education Association (CLEA), adopted a resolution on the “Rule of Law and Judicial Independence in Sri Lanka.” This resolution noted with grave concern the flawed impeachment process by which Chief Justice Bandaranayake was removed from the office of Chief Justice in defiance of the judgements of the highest courts in Sri Lanka.

In particular, this resolution placed emphasis on three systematic failures by the Executive of Sri Lanka, namely: (1) the continued erosion of the independence of the judiciary through the impeachment of the Chief Justice and the subsequent relocation of magistrates and judges in Sri Lanka; (2) the Executive’s failure to abide by court orders; and (3) the gross and persistent harassment of members of the legal profession and others who are seeking to defend these values in Sri Lanka.

In light of these failures, the resolution exhorted Members of the Commonwealth to reconsider the holding of the CHOGM 2013 in Sri Lanka. However, with some notable exceptions, this exhortation fell largely on deaf ears. One of the main arguments for those pressing ahead with holding the CHOGM in Sri Lanka was that engagement on these issues with the country was the best strategy.

The argument from engagement has its merits. However, it also has its limits. While one must remain hopeful, only time will tell whether the Executive of this country will be persuaded to rectify the failings detailed in the resolution and thereby truly earn the “badge of respectability” which membership of the Commonwealth has, to date, been seen to bestow.

Onto a separate matter. As stated in the June 2013 issue of the Commonwealth Judicial Journal (CJJ), this year we celebrate the fortieth anniversary of this Journal. I would like to thank our committed readership throughout these years and to renew our invitation for articles and book reviews for publication to be sent to the Editor at email: info@cmja.org

In this issue, we open with an article by First Deemster David Doyle, who looks at providing objectively independent courts in small jurisdictions. The article identifies seven factors which have to be taken into consideration in this regard. This is followed by an article by Justice Charles Mkandawire, who examines the role and challenges facing regional economic communities in Africa. Professor David McClean provides a historical and rare overview of the consistory courts in England. And finally, on the occasion of the 10th anniversary of the adoption of the Latimer House Principles, Dr Peter E. Slinn makes the case that the time has come for some stocktaking of the implementation of these principles over the last decade.

The CJJ has once again collaborated with the Law Reports of the Commonwealth (LRC) to publish two judgments, both related to the impeachment process of Chief Justice Bandaranayake in Sri Lanka, namely (i) Jayarathe v Yapa And Others and (ii) Bandaranayake And Others v Rajapakse And Others. In this respect, I wish to renew our thanks to Dr Peter E. Slinn both in his capacity as chairperson of the Editorial Board of this Journal and as general editor, together with Prof. James S. Read, of the LRC, for allowing us to publish these law reports. I would also like to express my appreciation to the President of the CMJA, the Hon. Justice John Vertes and to Dr Karen Brewer, Secretary General, for their ongoing support of the Journal.
PROVIDING OBJECTIVELY INDEPENDENT COURTS IN SMALL JURISDICTIONS

David Doyle, First Deemster and Clerk of the Rolls, Isle of Man.
This article is based on a paper presented at the Commonwealth Magistrates’ and Judges’ Association Conference, Jersey, September 2013.

Abstract: When arriving at decisions or evaluating issues, judges and magistrates need to be aware of their own personal influences and life experiences. They have to strive to castaway any inappropriate personal baggage and to act and be seen to act objectively and independently. This article addresses the issue of providing objectively independent courts in small jurisdictions. It identifies seven factors which have to be taken into consideration, namely, providing (1) an open and transparent appointments process; (2) a Judicial Code of Conduct and a transparent complaints procedure; (3) an effective appeal system; (4) a robust law on recusal; (5) adherence to the fundamental principle of open justice; (6) a free, responsible and enthusiastic media; and (7) the separation of powers and the promotion of the rule of law and democratic values.

Keywords: objectivity – independence – small jurisdictions – judicial appointments process – Code of Conduct – appeals system – recusal – open justice – role of the media – separation of powers

Introduction

Objectivity in a human context calls for special consideration. Judges are human beings who like everyone else are the products of their upbringing, their education and their experiences of life. We all carry with us on a daily basis in our own minds the subjective baggage of our experiences of life and our personal views.

When arriving at decisions or evaluating issues judges need to be aware of their own personal influences and life experiences. Judges need to be conscious that their decisions may be influenced not just by the evidence, the law and the arguments presented to them but also by their life experiences. In South African terms, as powerfully put forward by Justice Leona Theron: “judges should interrogate their own prejudices and blind-spots.”

Benjamin Cardozo in The Nature of the Judicial Process (1921) stated: "We may try to see things as objectively as we please. Nonetheless, we can never see them with eyes except our own."

We must all strive to castaway any inappropriate personal baggage we possess and to act and be seen to act objectively and independently. We must all keep minds that are open to persuasion.

When dealing with public confidence in the courts perception is, on occasions, just as important as the reality. Perhaps matters of perception are more pronounced in small, compact jurisdictions. How do small, compact jurisdictions convince the public, the politicians, court users, the media and others that we provide objectively independent courts?

How do you provide objectively independent courts in small jurisdictions?

Attention should be given, I respectively suggest, to seven factors.

1. The judicial appointments process

Firstly, the judicial appointments process.

The starting point would be to appoint the right people to the appropriate judicial positions and pay them a decent and competitive wage, provide them with adequate training and education to ensure, in the words quoted by Bridget Shaw, that we all go to bed each evening a little less stupid, provide them with sufficient administrative support and security of tenure.

In respect of security of tenure Lord Phillips in Hearing on the Report of the Chief Justice of Gibraltar [2009] UKPC 43 stated at paragraph 1:

“The independence of the judiciary requires that a judge should never be removed without good cause and that the
The appointments should be by open advertised competition and on merit taking into account the need for diversity and transformation. The appointment process should be transparent. The positions to be occupied should be described, as should the person specification dealing with essential attributes, qualifications, experience, knowledge and skills and personal qualities such as integrity and independence, fairness and impartiality. The need for a diversified and flexible judiciary in a small jurisdiction should also be taken into account.

In the Isle of Man we have open competitions for all our judicial positions including the Deemsters, Bailiffs and Deputy High Bailiffs, judicial officers and lay magistrates.

In addition to the full time judiciary we also have a panel of about 30 part-time Deemsters made up of leading lawyers from the local community and also leading lawyers from off island who are frequently deputy judges from England who can assist us where necessary. There is an ability to grant temporary advocate's licences to lawyers in the British Isles subject to the relevant statutory criteria being met.

There should also be the ability within the judiciary of small jurisdictions, as indeed there is in the Isle of Man, to bring in “outsiders” if necessary remembering always however the wise words of Beverley McLachlin (now the Chief Justice of Canada) in “The Role of Judges in Modern Commonwealth Society” Vol 110 LQR 260 April 1994 “[Judges] must be in touch with the society in which they work, understanding its values and its tensions.” Detachment in judicial decision making is useful but so is knowledge of local values, local tensions and sensitivity to local concerns.

2. A Judicial Code of Conduct and a transparent complaints process

Secondly, a Judicial Code of Conduct and a procedure which effectively and fairly deals with complaints against judicial officers including senior judges. Such Codes of Conduct and procedures should be publicly available and accessible free of charge including via the internet.

In the Isle of Man we have a Judicial Code of Conduct based on the Bangalore Principles of Judicial Conduct and we have a procedure whereby complaints can be made against members of the judiciary and dealt with openly and transparently. Our Judicial Code of Conduct is based on the six Bangalore Principles of Judicial Conduct which are well recognised internationally and which are concerned with (1) judicial independence, (2) impartiality, (3) integrity, (4) propriety, (5) equality of treatment and (6) competence and diligence.

Our Judicial Code of Conduct expressly requires members of the judiciary to uphold the integrity and independence of the judiciary and to perform their duties with competence, diligence and dedication. The Code requires members of the judiciary to carry out their duties according to their oaths, their terms and conditions of service and the dictates of their conscience objectively and without fear, favour or partiality and in keeping with the laws and customs of the island. Judges are required to decide cases objectively and solely on their legal and factual merits.

3. An effective appeal system

Thirdly, an effective appeal system.

In the Isle of Man we have an Appeal Division which as its name suggests does exactly what it says on the tin. It deals with appeals. From the Appeal Division an appeal lies with leave to the Judicial Committee of the Privy Council which provides additional objectivity and independence. We are grateful to them for the services they provide to the Island.

4. A robust law on recusal

Fourthly, it is also important to have a robust law on judicial recusals. This is of particular importance in small jurisdictions where judges are perhaps closer to the local community than might otherwise be the case in larger jurisdictions.

Our Judicial Code of Conduct, reflecting the position at common law, provides that members of the judiciary shall not sit in a case
where they have a financial interest or where the circumstances are such that a fair minded observer, having considered the facts, would conclude that there was a real possibility that the judge was biased: in all other cases they are bound not to abstain from their duty to sit.

The Judicial Committee of the Privy Council in Grant v The Teachers Appeal Tribunal (7th December 2006) and Belize Bank Limited v AG [2011] UKPC 36 were mindful of the problems which face judges in small jurisdictions when dealing with recusal applications. Care, of course, should be taken to discourage “judge shopping” whereby a party presents a recusal application not founded on strong grounds but merely in an attempt to persuade a judge, who he perceives to be against him, to recuse and thereafter shops around for a judge the party perceives is more likely to decide the case in that party’s favour. Small jurisdictions need robust law on recusals which takes into account local circumstances.

It is worth looking at the judgments in Grant and Belize Bank Limited in some more detail. They provide useful assistance to judges in small, compact jurisdictions. In Grant (an appeal from Jamaica) Lord Carswell delivered the judgment of the Lords of the Judicial Committee of the Privy Council (which also included Lord Bingham, Lord Rodger, Baroness Hale and Lord Mance):

“36. The final issue is that of the allegation of bias on the part of Cooke J in the Supreme Court. It may be said at once that no question has been raised of actual bias or of any pecuniary or proprietary interest on the part of the judge. The complaint was rather of what one might term apparent or perceived bias. This was based upon the proposition that because of his friendship with the family of the Chairman of the Board there was a real possibility that the fair-minded and informed observer would conclude that the judge was biased: see the discussion by Lord Hope of Craighead of the applicable principles in Porter v Magill [2001] UKHL 67, [2002] 2 AC 357, paras 99-103.

37. The Court of Appeal in the earlier case of Locabail (UK) Ltd v Bayfield Properties Ltd [2000] QB 451 gave consideration to the circumstances in which a judge should recuse himself on the ground that bias of this type might be thought by the fair-minded and informed observer to exist. In paragraph 25 of his judgment Lord Bingham of Cornhill CJ pointed out that it would be dangerous and futile to attempt to define or list the factors which may or may not give rise to a real danger of bias, as everything will depend on the facts, which will include the nature of the issue to be decided. He did, however, go on to point to some factors which were unlikely and others which were likely to give rise to a soundly based objection. Among the latter he enumerated personal friendship between the judge and any member of the public involved in the case, or if the judge were closely acquainted with any member of the public involved in the case.

38. It is necessary to bear in mind that these remarks of Lord Bingham were intended as guidelines for judges in other cases and not as a comprehensive definition of the circumstances in which bias might properly be thought to exist. The facts of each case are of prime importance, as he pointed out. Their Lordships are mindful of the problems which may face judges in a community of the size and type of Jamaica and other comparable common law jurisdictions. In such communities it is commonly found that many of the parties and witnesses who are concerned in cases in the courts are known, and not infrequently well known, to the judge assigned to sit. It is incumbent on the judge to apply a careful and sensitive judgment to the question whether he is a close enough friend of the person concerned to make it undesirable for him to sit on the case. If he errs on the side of caution by too much, he may make it impracticable for him to carry out his judicial duties as effectively as he should. If, on the other hand, he is not ready enough to recuse himself, however unbiased and impartial his approach may in fact be, he will leave himself open to the suggestion of bias and damage the reputation of the judiciary for independence and impartiality. In this connection it is relevant to take into account the issues in the proceedings. As Lord Bingham pointed out in the Locabail case, if the credibility of the judge’s friend
or acquaintance is an issue to be decided by him, he should be readier to recuse himself.

39. If the judge and the Chairman of the Board had been close family friends who saw each other frequently, or if they had been regular golfing partners, it would no doubt be much more likely that the real possibility of bias could be thought to exist. As it is, the judge has stated to the Court of Appeal that there was no special relationship between the Chairman and his family and that he “may have encountered him no more than ten times over the last twenty years”. The issues in the appeal did not involve any assessment of the veracity or credibility of the Chairman’s evidence and the issues to be decided did not affect his personal position as distinct from that of the Board which he chaired. Their Lordships do not consider that such a degree of acquaintance in these circumstances would have caused the fair-minded and informed observer in Jamaica to conclude that there was a real possibility or danger of bias.”

In Locabail, Lord Bingham stated the following in the context of a jurisdiction the size of England and Wales:

“25. It would be dangerous and futile to attempt to define or list the factors which may or may not give rise to a real danger [now possibility] of bias. Everything will depend on the facts, which may include the nature of the issue to be decided. We cannot, however, conceive of circumstances in which an objection could be soundly based on the religion, ethnic or national origin, gender, age, class, means or sexual orientation of the judge. Nor, at any rate ordinarily, could an objection be soundly based on the judge’s social or educational or service or employment background or history, nor that of any member of the judge’s family; or previous political associations; or membership of social or sporting or charitable bodies; or Masonic associations; or previous judicial decisions; or extra-curricular utterances (whether in textbooks, lectures, speeches, articles, interviews, reports or responses to consultation papers); or previous receipt of instructions to act for or against any party, solicitor or advocate engaged in a case before him; or membership of the same Inn, circuit, local Law Society or chambers (see K.F.T.C.I.C. v Icori Estero S.p.A (Court of Appeal of Paris, 28 June 1991, International Arbitration Report, vol. 6, 8/91)). By contrast, a real danger [now possibility] of bias might well be thought to arise if there were personal friendship or animosity between the judge and any member of the public involved in the case; or if the judge were closely acquainted with any member of the public involved in the case, particularly if the credibility of that individual could be significant in the decision of the case; or if, in a case where the credibility of any individual were an issue to be decided by the judge, he had in a previous case rejected the evidence of that person in such outspoken terms as to throw doubt on his ability to approach such person’s evidence with an open mind on any later occasion; or if on any question at issue in the proceedings before him the judge had expressed views, particularly in the course of the hearing, in such extreme and unbalanced terms as to throw doubt on his ability to try the issue with an objective judicial mind (see Vakauta v Kelly (1989) 167 C.L.R. 568); or if, for any other reason, there were real ground for doubting the ability of the judge to ignore extraneous considerations, prejudices and predilections and bring an objective judgment to bear on the issues before him. The mere fact that a judge, earlier in the same case or in a previous case, had commented adversely on a party or witness, or found the evidence of a party of witness to be unreliable, would not, without more, found a sustainable objection. In most cases, we think, the answer, one way or the other, will be obvious. But if in any case there is real ground for doubt, that doubt should be resolved in favour of recusal. We repeat: every application must be decided on the facts and circumstances of the individual case. The greater the passage of time between the event relied on as showing a danger [now possibility] of bias and the case in which the objection is raised, the weaker (other things being equal) the objection will be.”
In the Belize Bank case (an appeal from the Court of Appeal of Belize) Lord Kerr delivered the judgment of the Judicial Committee of the Privy Council (which on this occasion included Lord Phillips, Lord Brown, Lord Dyson and Sir Patrick Coghlin). Lord Kerr stated:

“34. The leading authority on the issue of apparent bias in this jurisdiction is still Porter v Magill [2001] UKHL 67, [2002] 2 AC 357. The essential principle is best expressed by Lord Hope of Craighead in para 103 of his opinion where he said:

“The question is whether the fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased.”

35. This formulation has been followed by the Judicial Committee of the Privy Council in, for instance, Attorney General of the Cayman Islands v Tibbetts [2010] UKPC 8 [2010] 3 A11 ER 95, at para 3 and Prince Jefri and others v The State of Brunei [2007] UKPC 62 at para 15.

36. The notional observer must be presumed to have two characteristics: full knowledge of the material facts and fair-mindedness. Applying these qualities to his consideration of the issue, he must ask himself whether there was a real possibility that the decision-maker would be biased. In considering how the notional observer would approach this task, one should recall Lord Steyn’s approval in Lawal v Northern Spirit Ltd [2003] UKHL 35, [2004] 1 A11 ER 187 of Kirby J’s comment in Johnson v Johnson (2000) 201 CLR 488 at 509 that “a reasonable member of the public is neither complacent nor unduly sensitive or suspicious.”

37. On the question of the state of knowledge that the fair-minded observer should be presumed to have, Lord Hope said in Gillies v Secretary of State for Work and Pensions (Scotland) [2006] UKHL 2, [2006] 1 WLR 781 at para 17:

“The fair-minded and informed observer can be assumed to have access to all the facts that are capable of being known by members of the public generally, bearing in mind that it is the appearance that these facts give rise to that matters, not what

is in the mind of the particular judge or tribunal member who is under scrutiny.”

38. Of course, one needs to be alert to the danger of transforming the observer from his essential condition of disinterested yet informed neutrality to that of someone who, by dint of his engagement in the system that has generated the challenge, has acquired something of an insider’s status. This theme was taken up by Baroness Hale of Richmond in Gillies when she said at para 39:

“The ‘fair-minded and informed observer’ is probably not an insider (i.e. another member of the same tribunal system). Otherwise she would run the risk of having the insider’s blindness to the faults that outsiders can so easily see. But she is informed. She knows the relevant facts. And she is fair-minded. She is, as Kirby J put it in Johnson v Johnson 201 CLR 488, para 53, ‘neither complacent nor unduly sensitive or suspicious’.”

39. It might be supposed that if the observer is provided with a surfeit of information, his or her detached status would be affected and the essential component of public confidence in the lack of bias in the decision-making progress would be imperilled. One can understand that it is necessary that the objectivity of the notional observer should not be compromised by being drawn too deeply into a familiarity with the procedures, if that would make him or her too ready to overlook an appearance of bias, but I do not consider that either Lord Hope or Lady Hale was suggesting that the amount of information available to the observer should necessarily be restricted to that which was instantly available to a member of the public. The phrase “capable of being known” from Lord Hope’s formulation holds the key, in my opinion. This does not signify a need to restrict the material to that which is immediately in the public domain. It acknowledges that the observer must have such information as may be necessary for an informed member of the public without any particular, specialised knowledge or experience to make a dispassionate judgment. As
Lord Bingham put it in the Prince Jefri case at para 16:

“The requirement that the observer be informed means that he does not come to the matter as a stranger or complete outsider; he must be taken to have a reasonable working grasp of how things are usually done.”

Lord Dyson at paragraph 65 of his judgment in the Belize Bank case stated that:

“... The unspoken assumption is that there is a single universal answer to this question [of apparent bias], whether it is being determined in an English court or any other court and regardless of where that other court might be and regardless of the traditions and culture of the country in which the court operates. I do not think this is a correct assumption to make...”

At paragraph 72 he added:

“Ultimately, it is a matter of impression and assessment whether the test of apparent bias is satisfied on the facts of any particular case... These are not easy cases.”

At paragraph 73 he stressed that:

“... the application of the test for apparent bias is intensely fact-sensitive...”

At paragraph 74 he added:

“I would accept that the question whether there has been apparent bias raises a point of law which is a matter for the court to decide: see per Lord Mance in Helow at para 39. It is an aspect of procedural fairness which is always a matter for the court to decide. But it is a fact-sensitive issue of law and one on which (as evidenced by the fact that the Board is divided as to how this appeal should be decided) different judges within the same jurisdiction and (of particular importance in the present case) courts in different jurisdictions can hold different views.”

At paragraphs 75 and 76 Lord Dyson continued:

“75. Lord Brown has quoted from the lecture given by Lord Rodger (the Sultan Azlan Shah Law Lecture 2010) entitled Bias and Conflicts of Interests – Challenges for Today’s Decision-makers. Lord Rodger says at p 21 in relation to apparent bias that the court should “adopt a course that can be expected to command the assent and respect of the general public”. A little later, he continues:

“Similarly, while decisions from other (foreign) jurisdictions may provide useful guidance, especially as to the test which is to be applied, a court has to apply that test against the background of the traditions, history and culture of its own society, which may affect the way that the public view such matters. In addition, what may be acceptable, or at least tolerable, in a small jurisdiction where substitute judges cannot readily be found, may be unacceptable in a larger jurisdiction where that problem does not arise.”

76. I agree with Lord Rodger’s salutary words. They are apposite in the present appeal. The issue is whether the fair-minded and informed Belizean would conclude that there was a real possibility that the Appeal Board would be biased. In determining this question, the Board should recognise that the judges of Belize are better equipped than we are to assess how the fair-minded and informed Belizean would view matters, also bearing in mind that Belize is a small country with a small pool of persons who would be likely to satisfy the statutory criteria for appointment as lay members of the Appeal Board.”

Lord Brown at paragraph 113 of his dissenting judgment in the Belize Bank case stated:

“113. Lord Dyson suggests (at para 76) that “the Board should recognise that the judges of Belize are better equipped than we are to assess how the fair-minded and informed Belizean would view matters.” With the best will in the world, that seems to me to come close to urging an abnegation of this Board’s proper role in so politically fraught a case as this (ironically the very last Belizean appeal to come before us). I had always understood that role to carry with it the responsibility for ensuring, to the benefit of Belizeans themselves and of their standing in the wider international community, that the highest international standards of justice
are maintained in that country. On the issue of apparent bias there can certainly be no stronger case for deference to the Belizean judges than the Strasbourg Court would afford our judges on a complaint originating in the UK. I do not believe that the Strasbourg Court would reject a challenge to the UK in a comparable case.”

At paragraph 98 Lord Brown referred to Lord Steyn’s comment in Lawal v Northern Spirit Ltd [2003] UKHL 35 at para 14:

“Public perception of the possibility of unconscious bias is the key.”

In a recent and interesting judgment delivered by the Jersey Court of Appeal in Pitman v Jersey Evening Post Limited [2013] JCA 149, Justice Beloff stated:

“8. As to (iii) i.e. the merits of the grounds of Appeal I recognize how important it is that justice not only be done but be seen to be done; and that the appearance is nowadays as vital as the actuality of justice. Hence the fact by itself that a member of a court has by some appropriate formula sworn to administer justice impartially or is subject to a Code of Conduct indicating the circumstances for recusal (see in Jersey the Code of Conduct paragraph 15) or indeed has been appointed – as are Jurats – by an electoral college on the basis of his or her integrity and ability cannot be dispositive. The modern test is that set out by Lord Hope in Porter v Magill [2002] 2 AC 357 at (103) “whether a fair minded and informed observer having considered the facts would conclude that there was a real possibility that the tribunal was biased.” It was applied in this jurisdiction in Syvret v Chief Minister [2011] JLR 343 and I shall follow it.

9. In the Bailiwick the chances that persons (Jurat, jurors or judges) may have encountered someone involved in proceedings before them will be greater than in other larger territories; see Drew v Attorney-General [1994] JLR 1 at para 33 cf, Barette v AG [2006] JCA 128 at paras 53-61. This reality may require, if not disapplication, at any rate adaptation in application of the general principle, but in any event I do not consider that the single fact that someone has served as a Jurat at the same time as someone involved in proceedings before him or her can by itself be a basis for recusal; otherwise it might on occasion be impossible to find anyone eligible to sit on a case where a Jurat was involved as a party or key witness, see Fordham Judicial Review 6th ed para 6.1.37 (apparent bias and function/necessity/reality) and the cases there cited. Nor indeed do the Applicants appear to rely merely upon the fact that both Jurat Le Breton and Jurat Le Brocq held that important office for overlapping periods, Jurat Le Brocq retiring in 2010. In a helpful letter addressed to me on 25th July 2013 the Applicants explained that objection made to the sitting of particular Jurats in advance of the hearing was based on matters other than, indeed over and above, their tenure of that office, and noted that other Jurats were putatively eligible to sit.”

5. Adherence to the fundamental principle of open justice

Fifthly, adherence to the fundamental principle of open justice.

Confidence in the objectivity and independence of the judiciary will be increased if we conduct our work openly and give publicly available reasons for our decisions.

Derogations from open justice can only properly be made when, and to the extent that, they are strictly necessary in order to secure the proper administration of justice.

Lord Atkinson in Scott v Scott [1913] AC 417 stated at page 463:

“... in public trial is to be found, on the whole, the best security for the pure, impartial, and efficient administration of justice, the best means for winning for it public confidence and respect.”

In Taylor and Neale in a judgment delivered on the 21st March 2012 the Manx Appeal Division referred at paragraph 97 to the

“overriding requirement for open justice and transparency.”

Bayley J in Daubney v Cooper [1829] 109 ER 438 stated:
“... it is one of the essential qualities of a Court of Justice that its proceedings should be in public and that all parties who may be desirous of hearing what is going on, if there be room in the place for that purpose, - provided they do not interrupt the proceedings and provided there is no specific reason why they should be removed – [they] have the right to be present for the purpose of hearing what is going on.”

Lord Judge C J in R (Binyam Mohamed) v Secretary of State for Foreign and Commonwealth Affairs [2010] EWCA Civ 65 stated:

“38. Justice must be done between the parties. The public must be able to enter any court to see that justice is being done in that court, by a tribunal conscientiously doing its best to do justice according to law. For that reason, every judge sitting in judgment is on trial. So it should be, and any exception to the principle must be closely limited. In reality very few citizens can scrutinise the judicial process: that scrutiny is performed by the media, whether newspaper or television, acting on behalf of the body of citizens. Without the commitment of an independent media the operation of the principle of open justice would be irremediably diminished.”

Lord Neuberger at paragraph 176 stated:

“... the central point [is] that the court should administer justice in public, which means that all parts of a judgment should be publicly available, unless there is a very powerful reason to the contrary. This principle is so important not merely because it helps to ensure that judges do not, and do not appear to, abuse their positions, but also because it enables information to become available to the public.”

The importance of the fundamental principle of open justice was recently reiterated by the Supreme Court of the United Kingdom in Bank Mellat v Her Majesty’s Treasury (No. 1) [2013] UKSC 38.

Another aspect of open justice which needs focusing upon is easily understood judgments, written insofar as is possible in plain and simple language. Judgments should generally be public documents easily accessible and easily understandable and kept as short as possible. They should generally be freely available on the internet as indeed the vast majority of Manx judgments are. With some of the more complicated judgments, we also provide short judgment summaries for ease of reference.

6. A free, responsible and enthusiastic media

Sixthly, and this is connected with open justice, a free, responsible and enthusiastic media which understands the need to fairly and accurately report court proceedings and legal affairs.

As Jeremy Bentham put it all those years ago now:

“Publicity is the very soul of justice. It is the keenest spur to exertion and the surest of all guards against improbity”.

The media has a very important part to play in a modern democracy which respects the rule of law. The judiciary and court administration should do everything they legitimately can to assist the media in fulfilling their important role. Members of court administration should be specifically charged with liaising with representatives of the media to assist them in the provision of information which should properly be in the public domain and the accuracy of that information. Anything that can legitimately be done to assist the media in their difficult role and to ensure fair and accurate reporting of court proceedings and to maintain and enhance confidence in the administration of justice should be done. There should be constructive engagement between the judiciary and the media together with mutual respect for their separate roles in a modern democracy.

The media must also continue to recognise the need for responsible reporting and the very real damage that can be done if they act irresponsibly. Fortunately on the Isle of Man we have a generally responsible media and I am not aware of any personalised attacks on individual judges in the recent past. There should, of course, be healthy, open and constructive debate on the legal issues of the day but the media should play the ball rather than the individual.
The media in the Isle of Man provide prominent coverage of the criminal cases before the courts but do not seem to have the appetite or the resources to cover the significant civil litigation before the Manx courts. Perhaps they think that such matters are not of sufficient interest to their readers, listeners, viewers or advertisers.

The media have an important role to play and have a significant influence on the perception of their audience and the local community. The media’s coverage of the courts is of relevance to the perception of objectively independent courts in small jurisdictions. They need to continue to appreciate the responsible role they have to play in small compact jurisdictions where their impact can be significant.

7. The separation of powers and the promotion of the rule of law and democratic values

Seventhly, understanding and respect for the separation of powers between the legislature, the executive and the judiciary and the promotion of the rule of law and democratic values. Judges have a real role to play in educating and informing others in respect of the importance of the separation of powers and judicial independence not for the personal benefit of individual judges but for the benefit of the society of which the judges are servants.

In Hinds v The Queen [1977] AC 195 the Judicial Committee of the Privy Council at pages 225-226 recognised that implicit in the constitution was “the basic principle of separation of legislative, executive and judicial powers.” This basic principle of the separation of powers and judicial independence could be reinforced in small jurisdictions by express legislative or constitutional provisions. For an example, see in England, section 3 of the Constitutional Reform Act 2005 (Act of Parliament) which places an express obligation on all Government Ministers and all those with responsibility for matters relating to the judiciary or otherwise to the administration of justice to uphold the continued independence of the judiciary. See also the Judiciary and Courts (Scotland) Act 2008.

The relationship between the judiciary and the legislative and executive branches of government should be one of mutual respect, each recognising the proper role of the others.

Members of the judiciary should not normally enter the political arena. Members of the judiciary should always take care that their comments and conduct do not undermine or appear to undermine their institutional or individual independence. Except in areas which may have an adverse impact upon the rule of law including fundamental human rights, the separation of powers, the independence of the judiciary, access to justice and the adequate resourcing of the legal system and the jurisdiction’s international obligations and reputation, members of the judiciary should always be reluctant to get involved in matters of political controversy or matters which may lead to political controversy.

But as Lord Neuberger has succinctly said:

“7. Mutual respect also requires that the three branches should not intrude onto one another’s patch. This does not mean that the Judiciary should have no policy role... And the Judiciary has a limited right, indeed an obligation, to speak out on matters concerning the rule of law.” (Judges and Policy: A Delicate Balance 18th June 2013).

It is of particular importance in a small, compact jurisdiction that judicial independence and impartiality and the perception of the same is carefully safeguarded. Having said that, on occasion, it is appropriate for there to be a constructive dialogue between the various branches of government respecting always the different role of each branch. The Chief Justice should, especially in a small jurisdiction, take great care in his comments and should not, of course, be seen as a source of legal advice. Moreover he should not put himself in a position where he may be perceived as too close to the “political establishment”. We all need to appreciate the importance of the separation of powers not only to the rule of law but also to the economic health of a jurisdiction, especially a jurisdiction whose economy has a vibrant international business sector.

Max Beloff in An Historian in the Twentieth Century at pages 35-36 stated:

“The separation of the judicial from the executive role of the monarch, which came early in medieval England, has been equally essential to the country’s ability to prosper. Only when the boundaries of the
permitted are clear and no arbitrary act of the executive can alter them can people safely invest in agriculture, industry or commerce. As long as there exists the possibility of an arbitrary invasion of their rights and an absence of any court to which they can safely appeal for redress, no one is going to undertake the risks inherent in all enterprises... Until one has a legal system enabling property to be defined and protected and contracts to be made and honoured, whether between persons or between persons and the state, economic progress whether based on internal or external investment is not possible.”

Lord Neuberger on the 20th January 2012 in a paper delivered to the Chancery Bar Association conference in London entitled Developing equity – a view from the Court of Appeal stated at paragraph 5:

“A successful capitalist economy, as Adam Smith pointed out, depends on a trusted and effective legal system. This is particularly true of an economy with an emphasis on financial and associated services... The threat to the British economy if we cease to be pre-eminent in the commercial legal world is self-evident.”

Michael Todd QC, Chairman of the Bar Council of England and Wales in a presentation delivered in Grand Court No. 1 Cayman Islands March 2012 (reported in the Commonwealth Judicial Journal Vol. 20 No. 1 June 2012) referred to essential investments in the justice system, court accommodation and judicial services. He added:

“If we want justice systems which are the envy of the world, which attract inward investment and instil confidence in those looking to do business in our respective jurisdictions, and which command respect, we must make that investment in access to justice, in the Rule of Law. A jurisdiction which does not exude its support for the Rule of Law, its investment in the equality and integrity of its judicial system, of its Judiciary, and of its legal practitioners, cannot, and will not, prosper.”

I concur.

Conclusion
So in short summary I suggest that we provide objectively independent courts in small jurisdictions by focusing on seven factors:

(1) an open and transparent appointments process on merit taking into account the need for diversity and flexibility in small and compact jurisdictions together with a competent and well educated, adequately resourced judiciary with security of tenure, and judges being conscious of the fact that they are all the products of their life experiences;

(2) a Judicial Code of Conduct and a transparent complaints procedure;

(3) an effective appeal system;

(4) a robust law on recusal;

(5) adherence to the fundamental principle of open justice;

(6) a free, responsible and enthusiastic media; and

(7) the separation of powers and the promotion of the rule of law and democratic values.

These are, I respectfully suggest, the seven main factors which underpin objectively independent courts in small jurisdictions. Above all we must stay loyal to our judicial oaths and keep our integrity.
AU AND UN HUMAN RIGHTS SYSTEMS: “DO REC COURTS HAVE A ROLE?”

Charles Mkandawire, Registrar, Southern African Development Community Tribunal. This article is based on a presentation delivered at the Workshop on Building the Knowledge and Capacity of Bar Associations in East Africa to Utilise UN and AU Rights Promotion and Protection Mechanisms, Ethiopia, June 2013.

Abstract: This article examines the role and challenges facing regional economic communities (RECs) in Africa. It argues that all RECs are clearly aware that human rights and good governance are inseparable. These two play a pivotal role in economic development. The article also submits that REC Courts are crucial institutions in protecting human rights and the rule of law. They act as building blocks of continental integration. Although the principal goal of RECs is closer economic convergence, financial cooperation, policy harmonization and political federation, the protection of human rights and the rule of law has become integral to their goals. They however continue to face importance challenges in their work.

Keywords: regional economic communities in Africa – regional and sub-regional courts – human rights – integration – economic development – right of individual access

Introduction

Integration is a political goal and not a legal principle. Where the fundamentals of politics and legal principles converge, there is usually some problem as the two regularly engage in a tightrope walk. It is therefore not surprising that as of today, very few countries have entered Declarations allowing individuals to access the African Court, and in the Southern African Development Community (SADC), there is a move to turn the SADC Tribunal into an inter-State court, thereby limiting access by individuals and legal persons. It is further not surprising why the Human Rights Protocol in the East African Community (EAC) is taking time to be operationalised.

The dawn of regional economic communities (RECs) in Africa can be traced back to the 1960s, when the United Nations Economic Commission for Africa (UNECA) encouraged African States to incorporate single economies into sub regional systems with the ultimate objective of creating a single economic union on the African continent. In order to achieve this objective, the Organisation of African Unity (OAU), the predecessor of the African Union (AU), identified the need to enhance regional integration within the organisation, recognizing that each country on its own would have little chance of, inter alia, attracting adequate financial transfers and the technology needed for increased economic development.

Africa has since the 1960s taken various steps towards enhancing economic and political integration on the continent. The road map has been paved by several decisions and declarations relating to regional economic and political integration, especially:

- The 1977 Kinshasa Declaration, which provides for successive establishment of the African Economic Community (AEC)
- The Monrovia Declaration, providing for guidelines relating to economic and social development
- The 1980 Lagos Plan of Action, and
- The Abuja Treaty, realizing the establishment of the AEC, the African Unions Economic and Umbrella Institution for RECs.

The Abuja Treaty was adopted on 4th June 1991 and came into force in 1994. Meanwhile, several RECs have been established on the continent. At the seventh ordinary session of the AU’s Assembly of Heads of State and Government in Banjul, the Gambia in July 2006, the AU officially recognized eight such communities. Alphabetically listed these are as follows:

- The Arab, Maghreb Union (AMU)
- The Community of Sahel – Saharan States (CEN – SAD)
• The Common Market for Eastern and Southern Africa (COMESA)
• The East African Community (EAC)
• The Economic Community of Central African States (ECCAS)
• The Economic Community of West African States (ECOWAS)
• The Intergovernmental Authority on Development (IGAD) and
• The Southern African Development Community (SADC)

My paper will focus on RECs in East, Southern and Western Africa and how each such community incorporates human rights related issues into its respective legal setting. It is however imperative at this point to make a few general observations on the relevance of human rights to regional integration.

**RECs Regional Integration and Human Rights**

The first question here would be: What role do human rights play in RECs and the regional integration process in general? In general terms, regional integration is a path towards gradually liberalizing trade of developing countries and integrating them into the global economy. At first glance therefore, it appears that the promotion and protection of human rights is not within the RECs’ focal range. But as this paper will show, human rights related matters play a vital role within the RECs legal framework as well as in their daily practice, as many have implemented certain provisions in their mandate that have an impact on human rights and good governance.

All the RECs that I shall be referring to here have incorporated human rights in their Treaties. In most cases, a general tribute to recognizing and protecting human rights can be found in the basic legal concepts underpinning RECs. Some even cover specific human rights issues such as HIV and AIDS, equality and gender issues, humanitarian assistance and democracy and rule of law just to name a few. Human Rights have also been integrated through RECs by recognizing specific human rights Treaties, Conventions or Declarations on the international, regional and sub-regional level. Thus most RECs have incorporated United Nations Human Rights Instruments and the African Charter on Human and Peoples’ Rights.

All RECs now are clearly aware that human rights and good governance are inseparable. These two play a pivotal role in economic development. Therefore, the promotion of human rights plays an important role in the process of regional integration. Most RECs have also established regional courts to enforce their integration agenda which is sustained by a common legal framework which all Member States agree to apply uniformly.

### 1. The Common Market For Eastern And Southern Africa (COMESA)

The Common Market For Eastern And Southern Africa (COMESA) was formally established in 1994 as a successor organization to the Preferential Trade Area for Eastern and Southern Africa (PTA) which had been in existence since 1981. COMESA focuses on trade, customs and monetary affairs, transport, communication and information, technology, industry and energy, gender, agriculture, the environment and natural resources.

**Human Rights Protection in COMESA**

Human Right Protection is part of the COMESA Treaty; although it might not be at the core of COMESA activities. The Treaty deals with human-right sensitive provisions at various stages. Article 6(e) of the Treaty describes the recognition, promotion, and protection of human and peoples’ rights in accordance with the provisions of the African Charter on Human and Peoples’ Rights. The recognition and observance of the rule of law as well as the promotion and sustenance of a democratic system of governance, both undoubtedly intertwined with the status of human rights protection are similarly laid down as fundamental principles of COMESA. The Treaty also deals with third generation rights such as health, environment and natural resources. Gender issues are also covered in the Treaty.

**Enforcement Mechanism**

COMESA established a court of Justice in 1994 to ensure adherence to law in the interpretation and application of the COMESA Treaty. The COMESA Court of Justice has the potential to contribute to the protection and promotion of human rights, as individual
actions are subject to the courts’ jurisdiction. Currently, there is no real jurisprudence by the COMESA Court of Justice on this area.

2. The East African Community (EAC)

The history of the EAC goes back to 1967, the year in which it was originally founded. In 1977, the EAC was dissolved; and was defunct until 2000, when it was revived. The EAC is established through a Treaty. The Treaty was signed in 1999 and came into force in 2000, allowing the EAC to be officially launched in January 2001. The EAC focuses on and aims at widening and deepening cooperation amongst its Partner States in political, economic, social and cultural fields and in research and technology, defence, security, and legal and judicial affairs, for their mutual benefit.

Human Rights Protection within the EAC

Although the EAC Treaty has primarily been on economic integration, good governance and human rights issues are coming to the fore as the EAC moves deeper into integration. Amongst the fundamental principles of the EAC are many which relate to the protection of human rights. The most relevant provision is Article 6(d), which reads as follows, and governs the achievement of EAC objectives by its Partner States:

“...good governance including adherence to the principles of democracy, the rule of law, accountability, transparency, social justice, equal opportunities, gender equality, as well as the recognition, promotion and protection of human and peoples’ rights in accordance with the provisions of the African charter on Human and Peoples’ Rights.”

The governing principles for the practical achievement of the objectives of the EAC referred to as operational principles – also contain provisions relevant to human rights. This can be found in Article 7(2) of the EAC Treaty. Furthermore, human -rights related provisions have been included in the EAC Treaty with regard to the free movement of persons, labour services, the right of establishment and residence, agriculture and food security, health, cultural and social activities and management of the environment and natural resources.

Enforcement Mechanism

The East African Court of Justice (EACJ) was established in 1999. It became operational in 2001. The court has jurisdiction over the interpretation and application of the EAC Treaty. Therefore it plays an important role in embodying the fundamental principles of the EAC, such as adherence to the rule of law and good governance. Reference to the court may be by legal and natural persons, Partner States and the EAC Secretary-General. Its decisions are binding. The Court has first instance and appellate Chambers.

Although the EAC Treaty provides for broad protection with regard to human rights, notably the EACJ has to date had no jurisdiction in human rights cases. This is because Article 27(2) of the EAC Treaty provides that human rights jurisdiction on human rights-related matters is subject to a respective Protocol, which has not yet been concluded. This therefore is an indication that the court may not rule on issues relating to human rights. However, the court itself has stated that it does not abdicate from exercising its jurisdiction of interpretation of the Treaty-

... merely because the Reference includes allegation of human rights violation.

In the Katabazi case, it was contended that Uganda violated the EAC Treaty when it arrested fourteen accused persons after they had been granted bail. Finding that it lacks jurisdiction to adjudicate on disputes ‘concerning violations of human rights per se’, the court held that it ‘will not abdicate’ its general jurisdiction to interpret the Treaty merely because a case ‘includes allegations of human rights violation’. The court found that Uganda had violated the independence of the Judiciary, which is a cornerstone of the doctrine of the rule of law, as enshrined among the fundamental principles governing the EAC.

Since the Katabazi decision, the EACJ has entertained several other references involving issues of human rights. The recent case of Samuel Mukira Mohochi v The Attorney General of the Republic of Uganda, has further demonstrated how the EACJ has enriched the African jurisprudence.
3. The Economic Community of West African States (ECOWAS)

The Economic Community of West African States (ECOWAS) was founded through the Treaty establishing the Economic Community of West African States in 1975 in Lagos, Nigeria. ECOWAS was originally established with an economic focus. The aims, objectives and fundamental principles of ECOWAS are clearly spelt out in Articles 3 and 4 of the revised Treaty. Several Protocols were subsequently drafted in the following years and were annexed to the original Treaty. From a human rights perspective the most important one remains the ECOWAS Protocol on free movement. The revised 1993 ECOWAS Treaty then included a new Article 4(g) listing the ‘recognition, promotion and protection of human and peoples’ rights’ and a new article 4(j) ensuring the ‘promotion and consolidation of a democratic system of governance in each member state’ as one of the fundamental principles of ECOWAS.

Enforcement Mechanism

The Community Court of Justice, ECOWAS was established pursuant to Articles 6 and 15 of the ECOWAS Treaty. The Court of Justice of ECOWAS was initially established as an Inter-State Court. Individuals and corporate bodies did not have direct access to the court. The issue of access to the court by natural and legal persons was the point of main consideration in the judgment of the court in Olajide Afolabi v Federal Republic of Nigeria. (2004-2009) CCJELR1. The decision of the Court in this case made it imperative to amend the Protocol in order to grant direct access to the Court to individuals and corporate bodies. Supplementary Protocol A/SP. 1/01/05 that amended the initial Protocol on the Court, substituted Article 9 of the Protocol with a new Article 9 on jurisdiction, and thereby expanded the jurisdiction of the Court.

Following this amendment in 2005, there was a paradigm shift in the mandate of the Court because the Supplementary Protocol expanded the jurisdiction and invariably the mandate of the Court. The Community Court of Justice of ECOWAS has got express jurisdiction over human rights issues. Since then, the Court has entertained several human rights cases and has cultivated rich jurisprudence in this field. The Court has given many decisions establishing the extent, scope and legal boundaries of its human rights mandate. The Court also applies the African Charter on Human and Peoples’ Rights. The Court will also apply against any member state any International Human Rights instrument adopted or ratified by the member State. One key characteristic of this court is that there is no requirement to exhaust local remedies before one can access it. Thus this Court is more readily accessible than any other regional or sub-regional mechanism on the African continent.

4. The Southern African Development Community (SADC)

The Southern African Development Community was established in Windhoek Namibia in 1992 as a successor organization to the Southern African Development Coordinating Conference SADCC), which was founded in 1980. SADC was established through the SADC Treaty. The objectives of SADC include the achievement of development and economic growth; the alleviation of poverty; the enhancement of the standard and quality of life; support of the socially disadvantaged through regional integration; the evolution of common political values, systems and institutions; the promotion and defence of peace and security; and achieving the sustainable utilisation of natural resources and effective promotion of the environment.

At first glance, it might appear as if human rights promotion and protection is not one of the priority of SADC as an organisation that furthers socio-economic cooperation and integration as well as political and security cooperation. Nonetheless, many human rights-related provisions can be found within SADC legal framework. The starting point here is the SADC Treaty itself. It refers to regional integration and to human rights directly or indirectly at several stages. In its Preamble, the Treaty determines, inter alia, to ensure, through common action, the progress and well-being of the people of southern Africa, and recognises the need to involve the people of the SADC region centrally in the process of development and integration, particularly through guaranteeing democratic rights, and observing human rights and the rule of law. The Preamble’s contents are given effect within the subsequent provisions of the SADC Treaty. For example, Chapter 3 which deals with the
principles, objectives, the common agenda and general undertakings, provides that SADC and its member states are to act in accordance with the principles of human rights, democracy and the rule of law. Moreover, the objectives of SADC relate to human rights issues in one way or another. For instance the objective of alleviating and eradicating poverty contributes towards ensuring, inter alia, a decent standard of living, adequate nutrition, health care and education - all being human rights. Other SADC objectives such as maintenance of democracy, peace, security and stability refer to human rights, as do the sustainable utilisation of natural resources and effective protection of the environment - known as third-generation rights.

Besides the aforementioned provisions and objectives, the SADC legal system offers human rights protection in many legal instruments other than the SADC Treaty. One such legal regime are the SADC Protocols. For example, the Protocol on Gender and Development which was signed during the 28th SADC Summit in August 2008. This Protocol in its 25 articles addresses issues of affirmative action, access to justice, marriage and family rights, gender-based violence, health, HIV and AIDS. SADC has also a Charter of Fundamental and Social Rights which deals with the right to freedom of association, the right to equality, the right to a safe and healthy environment, the right to remuneration and the right to protection of certain groups such as children.

**Enforcement Mechanism**

The Tribunal was established in 1992 by Article 9 of the SADC Treaty as one of the institutions of SADC. The Tribunal is constituted to ensure adherence to and proper interpretation of the provisions of the SADC Treaty and subsidiary instruments and to adjudicate upon such disputes as may be referred to it. The operationalization of the Protocol on Tribunal within the wider context of SADC integration has brought about an expectation by litigants as well as lawyers in the SADC region who view it as a solution to domestic hurdles that may not be overcome in their domestic courts in particular, with regard to SADC Community law. The Tribunal has jurisdiction over disputes between member states, and between natural and legal persons and member states and it also acts as a labour court for the staff of institutions of SADC. For natural or legal persons to bring cases against member states, there is a requirement to first exhaust domestic remedies. Decisions of the Tribunal are final and binding.

Pursuant to Article 21 of the SADC Treaty, the Tribunal is mandated to develop its own jurisprudence and also to apply any treaty and public international law. This ‘applicable law clause’, has enabled the Tribunal to apply the African Charter on Human and Peoples’ Rights as well as other international conventions.

The Tribunal became operational in 2005 through the appointment of the first ten Members or Judges. It received the first case in 2007. As can be seen from the decision of the Tribunal in the Mike Campbell case, it impressively demonstrates that the Tribunal can also be called upon to consider human rights implications of economic policies and programmes. In that case, the tribunal held that the Republic of Zimbabwe was in breach of its obligations under Articles 4(c) and 6(2) of the SADC Treaty, and that-

- the applicant had been denied access to the courts in Zimbabwe,
- the applicants had been discriminated against on the grounds of race, and
- fair compensation was payable to the applicants for their lands compulsorily acquired by the Republic of Zimbabwe.

Since the decision in the Mike Campbell case, the Tribunal has delivered several judgments which relate to enforcement of human rights in the region. The SADC Tribunal has also gone through very challenging moments since its decision in the Campbell case. Its decision in that case could not be enforced by the Republic of Zimbabwe and eventually, the Summit of Heads of State and Government decided to review its terms of reference. This was followed by a directive by the Summit to the Tribunal not to entertain any new cases but just to complete the pending cases. The Summit later on decided that the Tribunal should not even hear and complete the old cases and further decided not to re-appoint and replace the Members/Judges whose terms of office had expired. Recently, the Summit directed that a new Protocol should be negotiated amongst the Member States and that the
Tribunal should only have jurisdiction over inter-states disputes. The entire SADC region is therefore anxiously waiting to see the redefinition of this regional block in so far as natural and legal persons are concerned in the SADC integration agenda. It is worth mentioning here that the decisions of the Summit on the Tribunal are subject of challenge and litigation before the African Commission on Human and Peoples’ Rights and the African Court on Human and Peoples’ Rights.

Human Rights Strategy For Africa
Between 2010-2012, the Department of Political Affairs of the African Union Commission coordinated a process of formulation of the Human Rights Strategy For Africa. Involved in this process were all Organs of the AU which have Human Rights mandate, the Regional Economic Community Courts, Civil Society, the Office of the High Commissioner for Human Rights, the academia, and some selected International Cooperating Partners.

The Human Rights Strategy for Africa is a guiding framework for collective action by AU, RECs and Member States aimed at strengthening the African human rights system. The strategy seeks to address the current challenges of the African human rights system in order to ensure effective promotion and protection of human rights on the continent. These challenges include:

- Inadequate coordination and collaboration amongst AU and RECs organs and institutions;
- Limited capacity of human rights institutions;
- Insufficient implementation and enforcement of human rights norms and decisions; and
- Limited awareness and access to the African human rights mechanisms.

The Strategy is part of the a broader process to establish greater coordination amongst AU organs and institutions within the framework of the African Governance Architecture (AGA), the African Peace and Security Architecture (APSA), the Humanitarian Policy Framework, the Africa Fit for Children and the African Women’s Decade 2010-2020.

Conclusion
It is now accepted as a fact that REC Courts are crucial institutions in protecting human rights and the rule of law. They act as building blocks of continental integration. Although the principal goal of RECs is closer economic convergence, financial cooperation, policy harmonization and political federation, human rights and the rule of law has become integral to the goals of these RECs.

Sub-regional Courts/Tribunals contribute towards the realization of human rights. It is therefore imperative that there should be individual access to these sub-regional courts/Tribunals as a prerequisite for addressing human rights violations.

The African Charter has become a basis of a common human rights standard in these REC Courts/Tribunals through express Treaty provision or through the generous judicial interpretation of the REC Courts/Tribunals. REC Courts have also applied UN instruments in their decisions.

In order to sustain this momentum, there is need for closer collaboration amongst these Courts/Tribunals. Although it is generally accepted that REC Courts/Tribunals operate independent of the AU mechanisms, there is need to harmonise these systems to avoid inconsistence and forum shopping.
Abstract: This article provides a historical overview of a niche, but intriguing, jurisdiction – the consistory courts in England, which date back to the 11th century. It discusses their evolving functions and provides a rare overview into their early formal procedures. Finally, the article discusses some of the modern cases and issues with which come before these courts today.

Keywords: church courts – canon law – procedure

I sometimes ask groups of lay people if they know which is the oldest court in the English legal system. A surprising number think it must be the Crown Court, which has an ancient-sounding name and is the court most often mentioned in news reports; but it was only introduced in 1971. The High Court? Better, but that only dates back to 1875. Magistrates think they know the answer and will tell you proudly, and of course correctly, that justices of the peace go back to 1361.

But even they must give way to two sets of courts which go back to the 11th century and to William the Conqueror. One is the coroner’s court, dealing with sudden deaths and treasure trove, and the other the consistory court of each diocese in the Church of England. The canon law and the more general ecclesiastical law of the Church of England has always been part of the law of the land. The Reformation emphasised, but did not change, that; but it does mean that Roman Catholic canon law and the internal rules of the Methodist, Baptist and other churches are in the eyes of English law merely the rules of private associations. Anglican law remained part of the law of the land in many of the English colonies in the Caribbean until about 1870 (until 1969 in Barbados) and until 1975 in Bermuda. It is still part of the law of the three Crown Dependencies, Guernsey, Jersey and the Isle of Man.

So what are these consistory courts? What do they do? The answer lies in history, but the consistory courts continue to have a real, if reduced, function.

The Church was for many centuries the best-developed of all instruments of local government in England; long before local authorities there was the Church. And there were some matters, like the marriage of the living and the wills of the departed, which the Church felt it could properly look after. So the Church came to have a system of courts and those courts dealt with wills, nullity of marriage and legal separation (but not divorce, which did not exist), as well as some more internal church matters.

Until 1857 these were thriving, but increasingly old-fashioned, courts. There were courts meeting on a regular basis in London. The best known was the Court of Arches, presided over by the Dean; the name of the court derived from the church of St Mary le Bow (or St Mary Arches) where it met. It remains in existence, now serving as the appellate court for the Southern province; and it still meets in part of St Mary le Bow (see Re St Mary-le-Bow, London [2001] 1 WLR 1507, a decision of the Consistory Court of London ensuring the continued availability of space within the church for sittings of the Court of Arches). Its documented history goes back to the reign of Henry II (1133-1189) when Pope Alexander III sent a letter to the Dean of the Arches.

I have in my possession a copy of James Law’s Forms of Ecclesiastical Law which is actually a translation of part of a 1712 work Oughton’s Ordo Judiciorum. It contains a magnificent purple passage, not I suspect equalled in accounts of modern-day courts, however eminent:

On entering the court, the judge and advocates advance to their seats with gravity and decorum. Let us reverently enter on one of the court days into the sanctuary of this august tribunal with them, and there enjoy without restraint the full delight of the spectacle. On the first view we are constrained to pause. Behold! how solemn, how awakening the aspect of justice! How beautiful her form, how graceful her proportions, how dignified
her carriage; how illustrious her descent! At the first glance who is not penetrated with emotions of affection and veneration! Splendid indeed is the assemblage before us! Here is seen the official principal, the Dean of the Arches; to him is assigned the most elevated seat. On either side are the advocates on curved benches, whose shape resembles a bent bow. ... During the sitting of the court the doctors of canon and imperial Roman law (i.e. the judge and advocates) appear distinguished by the habit which belongs to the station and degree of doctors of law. But most of all distinguished by their learning, their integrity, and their other excellent qualities. ... Long may this useful, this illustrious, this splendid court continue to shine effulgent, and may its glory extend far and wide to distant ages.

Beside the Court of Arches there was once a rival Court of Audience, which faded away; a Court of Peculiars, dealing with certain specific parts of London; the Prerogative Court of Canterbury with a jurisdiction in probate and intestacy, and the Consistory Court of the Diocese of London. In fact they met in turn, on a rota allocating half a day to each court, and to the admiralty court, commonly with the same judges and advocates involved in each jurisdiction. There were corresponding courts in York for the Northern Province of the Church of England. In each diocese, the bishop had his court, the consistory court, presided over by his Chancellor (but in Canterbury the Commissary Court, presided over by the Commissary General). Each archdeacon had a court, with its Official, and there were a range of anomalous ‘peculiar’ jurisdictions, exempt from that of the bishop and so having their own courts. Some of the diocesan courts would in practice send their cases to London by a ‘letter of request’ for trial in the courts there.

The barristers who practised in the other courts studied law mainly in the Inns of Court in London, for English law was not taught at the ancient universities. The church courts, and also the admiralty courts dealing with shipping matters and trade with distant parts of the globe, were drawn from a different profession. They were not barristers but advocates; they studied Roman Law and its procedures at Oxford (or for the less fortunate at Cambridge) and had to have doctorates from one of those universities. They formed themselves into the Fraternity of Association of Doctors of the Archbishop of Canterbury's Court of Arches, and soon became known, from their dining together at a common table in their hall by Paul's Wharf in London, as ‘Doctor's Commons’. (See G D Squibb, Doctors' Commons. A history of the College of advocates and doctors of law (1977)).

The procedures in many of the courts were, to a modern eye, extraordinarily dilatory and formal, with prescribed language to be used at each of the many stages of the case in court. So after initial citation of a defendant a day was fixed for the plaintiff to 'libel', to state his claim. His proctor (the equivalent of a solicitor) would say 'I give in my libel, which I request may be admitted, and I pray an answer to the same from the proctor of the adverse party'. The proctor for the defendant would then 'request a term to be assigned him, to answer the same, on the next court day', and it would be so ordered. On that day the plaintiff's proctor would pray an answer to the libel. The defendant's proctor might then say, 'Protesting the libel, for its too great generality, inapplicability, obscurity, nullity, and erroneous representations, I answer that the statements, as contained in the said libel are not true, and, therefore, that the prayer of the said libel be not granted. And thereupon I contest suit negatively’. The plaintiff’s proctor would then say that he ‘repeated the libel in force of positions and articles’ and ask that it be ‘so repeated and admitted by the court’. After further prescribed exchanges, the court would cite the plaintiff to appear and would assign three court days for the plaintiff to prove his case. Case-management, it will be noticed, was in its infancy.

Almost all was swept away in England in 1857, when most of the business was transferred to the ordinary courts, and the consistory courts were left with specifically church business. A Court for Divorce and Matrimonial Causes took over the marriage jurisdiction and a Court of Probate that work. In 1875, the High Court of Admiralty was abolished and the three courts became the new Probate, Divorce and Admiralty Division of the High Court. The last meeting of Doctors’ Commons was held in 1865 when the buildings were sold; the last fellow of the Society, Dr Tristram, died in 1912. Archdeacons’ courts have disappeared
as have the various courts exercising ‘peculiar’ jurisdiction.

In Guernsey, the Ecclesiastical Court of the Bailiwick, presided over by the Dean, retains a non-contentious probate jurisdiction, whether or not the deceased was a member of the church. Its counterpart in Jersey has lost that jurisdiction but continues to exist, with a General Division exercising the faculty jurisdiction described below and a Clergy Discipline Division. The Isle of Man forms a diocese in its own right and has the usual Consistory Court.

In England the consistory courts continue. The Chancellor, the judge of the court, is also the bishop’s Vicar-General with a remnant of the church jurisdiction over marriage. If for any reason a couple cannot have banns called, they can apply for a ‘common licence’ and the vicar-general oversees that operation (see sections 15 and 16 of the Marriage Act 1949). It has become rather important in recent years because of immigration. There is a growing number of sham marriages, often of Nigerian men and East European women with no common language, as a means of getting round immigration rules. Any case that looks at all suspicious now goes for personal decision by the Chancellor in his role as vicar-general. This common licence system is recognised in a few Commonwealth jurisdictions even though the Anglican Church is no longer the Established Church. So in Gibraltar, the Marriage Act 1948 provides that the formalities to be completed before the celebration of a religious marriage may include the publication of banns, or the grant of a bishop’s licence, or the grant of a special licence by the Roman Catholic or Anglican bishop. The last corresponds to the grant of a ‘special licence’ by the Archbishop of Canterbury, a possibility in England since 1533.

Today’s consistory courts operate under the Ecclesiastical Jurisdiction Measure 1963 and the Care of Churches and Ecclesiastical Churches Measure 1991, both as amended. A Measure is a piece of legislation by the General Synod of the Church of England which after an affirmative resolution of each House of Parliament receives the Royal Assent and has the same force and effect as an Act of Parliament. At one time, the Consistory Court had a criminal jurisdiction which involved charges against members of the clergy being heard in public under a procedure akin to that in an assize court. Such cases are now handled by a tribunal operating much as the disciplinary body of any other profession.

The remaining work is essentially the faculty jurisdiction; new Faculty Jurisdiction Rules come into effect on 1 January 2014. Any work to a church or a churchyard (except certain minor items) requires a faculty, permission from the consistory court. This requirement applies to repairs and other works to the fabric of the church building, its contents (the introduction of new items, the removal or disposal of existing items, and re-ordering), and the monuments, paths and walls of the churchyard. Unlike the pre-1857 ecclesiastical courts, many cases are dealt with on paper and by post, even in urgent matters by e-mail exchanges. The jurisdiction serves two purposes, one I might term internal the other external.

Internally it seeks to ensure that wise decisions are taken about the churches which are not only of religious significance but form such an important part of the heritage (and landscape) of England. The congregation using a parish church may wish to change it to reflect their perceived needs. It is important that they spend their money wisely (the upkeep of churches is not supported from public funds) and in a way that honours the inheritance from the past and does not impose a financial burden on future generations. There is a presumption against any change to a building listed as of historic, architectural or archaeological importance, and most Church of England buildings are so listed. The Chancellor needs to weigh the case for change, respecting heritage considerations but also the needs of the church as a place of worship and mission. Before a faculty can be granted, the parish must consult a Diocesan Advisory Committee which includes in its membership architects as well as senior clergy and which has specialist advisors on such things as bells, stained glass, and organs. The Committee can also advise on the archaeological implications of projects. For major changes, especially in churches dating from Norman or even Saxon times, there have to be further consultations with bodies like English Heritage, the national Church Building Council or the Society for the Protection of Ancient Buildings.
Externally, the existence of the faculty jurisdiction enables the Church of England to continue to enjoy exemption from the requirement of listed buildings consent from the local planning authority under the Ecclesiastical Exemption (Listed Buildings and Conservation Areas) (England) Order 2010. This exemption has been continued after a number of reviews by the Government, which led to other churches being required to introduce procedures comparable to those in the faculty jurisdiction. Local authority officers are accustomed to balancing modern needs and the conservation of the heritage, but the religious nature of a church building, especially one of great antiquity, gives an added dimension. Chancellors will broadly follow the same guidelines as local authority officers but can bring a particular awareness of churches that avoids the risk of decisions insensitive to their special character.

The Church of England system is unique in having a court as the final arbiter. The consistory courts are part, albeit an obscure part, of the national legal system and share with other courts the power to issue witness summonses, and injunctions and restoration orders. The court process includes the posting of public notices inviting any person in the parish, or having a legitimate interest, to object and to be heard in open court.

A rather extreme example of this system in operation is provided by a case I had twice in front of me as chancellor of Newcastle, Re Holy Cross, Newcastle. In September 2006 I granted a faculty for the installation of a set of Stations of the Cross in the parish church of Holy Cross, Fenham, a suburb of Newcastle. There was a full hearing, occasioned by the objection of one parishioner, Mr Glyn Brain. He objected principally on the ground, which I judged misconceived, that the grant of a faculty for ‘graven images’ would contravene the Ten Commandments. The Stations were duly purchased and installed. On Sunday morning, 11 March 2007, shortly before the principal Eucharist, Mr Brain removed one Station from the wall and smashed it underfoot. The police were informed and eventually cautioned Mr Brain in respect of this act of criminal damage; there was no prosecution. I issued an interim injunction and, after hearing Mr Brain, a permanent injunction restraining him from causing any further damage to any part of the fabric of the Church of the Holy Cross Fenham or to the Stations of the Cross or any other artefacts therein and from causing any disturbance or disruption therein. As with any other injunction, it contained a penal notice as to the consequences of any breach. No further damage has taken place.

Two further examples happen to involve the same parish in the Sheffield diocese, that of All Hallows, Harthill. An attempt to break into that church seriously damaged a Victorian stained glass window. The parish architect said that it could be restored but a cheaper option might be a new window in a bright modern design. In due course he heard from the parish that the Ecclesiastical Insurance Group (EIG) had given the go-ahead, and one Sunday morning some time later the congregation was surprised to find a bright modern window in place of the Victorian glass. It turned out that the architect had assumed that the EIG, being a mean insurance company, had approved the cheaper option; the parish knew, but had not made this clear, that the EIG, being a sensitive and sympathetic company, had approved the more expensive restoration of the old glass. How on earth had such a misunderstanding happened? Answer: no-one had applied for a faculty, and the faculty process would of course have made clear what was proposed, and would have given the parish free advice about which course to take. I eventually allowed the new window to stay, under a confirmatory faculty, after a court hearing which I suspect those involved found uncomfortable.

Every Chancellor dreads the sort of case that makes the headlines. I nearly had one at the same church a few years later. A perfectly sensible petition for a new screen at the West end of the church was recommended by the diocesan advisory committee, and seemed an excellent design. I received some two dozen objections. It turned out that the screen was largely of glass, and the choir ladies objected to having to change their clothes in full view of the congregation. I never discovered (a) just how much undressing is required to don the choir robes at Harthill; or (b) whether this was a plot to increase the number of men drawn into the congregation. The screen was redesigned and all was well. The Consistory Court has its uses: the parish officials and the diocesan committee had all approved
the design and the modesty of the ladies of Harthill was only saved by the Chancellor.

When the Ecclesiastical Judges Association (the chancellors’ society) meets, the conversation is as often about churchyards as about churches. Cases about memorial stones in churchyards are often fraught affairs. The family may want a design quite out of keeping in colour or size with everything else in the churchyard. There can be disputes between two women each claiming to be the wife or chosen companion of the deceased. I recently had to have a hearing to deal with a case of a family feud going back 40 years which now centred on the wrongful replacement by one part of the family of a memorial stone, with new language which deleted any reference to their estranged family members.

There is a growing demand for the exhumation of human remains from churchyards (or the consecrated parts of local authority cemeteries, to which the same rules apply). Typically, Mr A dies and is buried in the local churchyard or cemetery; years later his widow goes to live near a married daughter; either Mrs A wants her husband’s remains to be near her new place of residence, so that she can visit the new grave, or after the death of Mrs A the family want to ‘re-unite’ them in a single grave in the place in which Mrs A died. A less common case was a petition for the relocation of one person’s remains from their original resting-place as it was now under the flight-path of Newcastle Airport and not the peaceful spot it had been when the original burial had taken place. Chancellors do their best to discourage such cases which usually lead to the faculty being refused.

There has been a lot of recent case-law, but really most of what needs be said comes from a judgment of Chancellor Quentin Edwards of Chichester in 1988. He had a petition for the exhumation of cremated remains which had been buried in a churchyard in his diocese some 12 years before; it was proposed to move them to a municipal cemetery in Twickenham. The judgment is an interesting mixture of legal precedent and theology. Of course permission will be given when mistakes are made (as happens all too often, e.g. burial in the wrong grave, or in a space reserved for another family) and prompt application is made. But the Chancellor said that the courts should resist any trend towards regarding the remains of loved ones as portable, to be taken from place to place so that the grave or place of interment of ashes may be more easily visited.

So there have to be special reasons. The theology relates, of course, to the Church’s understanding of burial. The phrase of commit his body to the ground implies that we deliver it into safe custody; we carefully lay it in the ground, as having the seed of eternity and, in the words of the Book of Common Prayer, ‘in sure and certain hope of the resurrection to eternal life’.

Of course then there are road-widening schemes, and the learned Chancellor has to qualify his theology a bit.

In the nature of things this cannot, and has never been held to, mean that the Church will ensure that the remains will be for ever undisturbed. The changes and chances of this mortal world may make some disturbance necessary or expedient.

It used to be said of the News of the World, a rather sensational English newspaper fond of exposing the sexual and other sins of the famous, that ‘all human life is here’. I go one better, for a Chancellor has human death to deal with as well.
IS YOUR LATIMER HOUSE IN ORDER? THE ROLE OF THE LATIMER HOUSE WORKING GROUP

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This article is based on a paper presented at the Commonwealth Magistrates’ and Judges’ Association Conference, Jersey, September 2013.

Abstract: On the 10th anniversary of the adoption of the Latimer House Principles (LHP), this article makes the case that the time has come for some stocktaking of the implementation of these principles over the last decade. This exercise is particularly pressing in the light of the circumstances of the removal of the Chief Justice and other threats to the rule of law manifest in Sri Lanka. The article acknowledges the rather lacklustre attitude from official circles towards the taking up and implementation of important measures in this area, such as the proposal for a Commissioner for the Rule of Law, proposed by the Commonwealth Eminent Persons Group. In the face of official obstruction, the article emphasises three steps which may nevertheless be taken to continue to strengthen the LHP.

Keywords: Latimer House Principles – Resolution on the Rule of Law and Judicial Independence in Sri Lanka – independence of the judiciary – monitoring – training

2013 marks the 15th anniversary of the original Latimer House colloquium and the 10th anniversary of the adoption of the Latimer House Principles (LHP) at the Abuja Commonwealth Heads of Government Meeting (CHOGM). As the theme of the 2013 Commonwealth Magistrates’ and Judges’ Association Conference implies, the time has come for some stocktaking and a frank examination of the progress or lack of it in the implementation of the principles over the last decade.

I must first deal with a situation which many consider marks a crisis in the existence of the modern Commonwealth and which goes to the heart of the Latimer House principles in the attempt which they represent to regulate proper relations between the three branches of government. As you will all be aware, the CHOGM is scheduled to take place in November 2013 in Sri Lanka. You will also be aware of the controversial removal from office of the Chief Justice of Sri Lanka, Dr Shirani Bandaranayake.

In the light of the circumstances of the removal of the Chief Justice and other threats to the rule of law manifest in Sri Lanka, the Commonwealth Lawyers Association (CLA), Commonwealth Magistrates’ and Judges’ Association (CMJA) and Commonwealth Legal Education Association (CLEA) adopted a Resolution on the Rule of Law and Judicial Independence in Sri Lanka, at the Commonwealth Law Conference in Cape Town, in April 2013. The Resolution called for a reconsideration of the location of the CHOGM in Sri Lanka. The Canadian Prime Minister has declined to attend, but most Commonwealth Governments appear to share the stance of the UK government that it is better to attend, make clear to the host government concern on rule of law issues and urge the Sri Lanka government to uphold Commonwealth values. You may feel that this has now become a political issue from which as judges you should stand aloof.

However, the conduct of the government of Sri Lanka, as one of the founding members of the modern Commonwealth as a subscriber to the Declaration of London in 1949, threatens one of the fundamental principles of Latimer House, the independence of the judiciary. The importance of this bedrock of the rule of law has been affirmed in a number of declarations to which all Commonwealth governments have subscribed and which is the subject of frequent affirmation in the judgments of superior courts without the Commonwealth.

Judicial pronouncements are legion. Just to quote two recent examples: Dormah J observed recently in the Seychelles Court of Appeal (Ponoo v AG 2012):
The most important aspect of the separation of powers is the absolute independence of the judiciary.

Again Moseneke DCJ in the Constitutional Court of South Africa (the Justice Alliance Case):

The principles of the rule of law, the separation of powers and judicial independence, underscored by international law, are indispensable cornerstones of our constitutional democracy.

It was reassuring that the importance of the LHP in this context was emphasized by Justice Rohini Marasinghe in her address on her elevation to the Supreme Court Bench of Sri Lanka on 15 May 2013 in the presence of the person purportedly appointed to succeed Chief Justice Bandaranayake. Taking her theme as judicial independence, she noted that the LHP were vital to the maintenance of the rule of law and went on to emphasise the importance of judicial review of executive action. She criticized the appointment to the Supreme Court of officers of the Attorney General’s Department over career judges who had worked their way up the judicial ladder. She went on to cite the LHP on the relationship between the judiciary and the executive and the need to evoke a sense of respect on the part of the executive for the judiciary.

The Sri Lanka government claims that the removal of Dr Bandaranayake was done in accordance with the Constitution, which leaves the removal process in the hands of Parliament. However, the opinion of the late, lamented Pius Langa, the former Chief Justice of South Africa, presents a different picture. In what I believe to be the accurate text of an opinion delivered at the request of the Secretary General of the Commonwealth, he concluded:

I view the decision of the Government to ignore the rulings of the Supreme Court as unconstitutional and sowing the seeds of anarchy. This conduct is a direct violation of the Rule of Law and contravenes the Commonwealth Values and Principles as agreed by member states. It is also a serious violation of the doctrine of separation of powers enshrined in the constitution of Sri Lanka.

It follows that all subsequent actions by Parliament and the President – the impeachment of the Chief Justice and her removal were unconstitutional and unlawful. It follows that the purported appointment of a new Chief Justice was also unconstitutional and unlawful since the incumbent Chief Justice had not been validly removed.

I am of course aware that the issue is still subject to appellate proceedings in Sri Lanka, but the government appears to maintain the view that the question of the removal and replacement is not a matter for the courts. In the course of his opinion, Judge Langa referred expressly to the LHP as requiring member states to uphold the rule of law by protecting judicial independence and maintaining mutual respect and co-operation between the legislature and the judiciary.

Sadly, the example of Sri Lanka is not alone. In recent years, there have been too many examples of the harassment of judges or their removal and replacement by processes of questionable legality. So the question arises, how are we to put our Latimer Houses to be put in Order? What is to be done to procure respect for the Principles and in particular the safeguarding of the independence of the judiciary?

At the political and institutional level of the Commonwealth, it is hard to be optimistic. The proposal for an independent oversight body, the Commissioner for the Rule of Law, proposed by the Eminent Persons Group appointed by Heads of Government, has been kicked into very long grass. The much vaunted Commonwealth Charter, signed with due ceremony by Queen Elizabeth as Head of the Commonwealth, is essentially an aspirational document. It restates the fundamental principles but provides for no mechanisms for ensuring compliance. The Commonwealth Ministerial Action Group (CMAG) continues to interpret its remit narrowly. Significant indeed was the reaction of Senior Officials of Commonwealth Law Ministers (SOLM) to a report laid before them by Latimer House Working Group (LHWG) which drew attention to specific concerns regarding particular Commonwealth countries. SOLM declined to forward the report to ministers but instead referred it for ‘correction’ by governments. The reception accorded to the CMJA Secretary General when she presented the report reflected the nervousness of governments when exposed to the concerns voiced by members of
the partner organizations. Officials took the strongest exception to what they interpreted as criticisms of governments by civil society. The conclusion must be that the ‘club of governments’ seems to cherish their sovereign right to disregard the principles of Commonwealth membership when their interests dictate.

In my address to the Cape Town Conference in 2008, I referred to the Edinburgh Plan of Action (EPoA) for the implementation of the LHP, which had been adopted recently. Subsequently senior officials of law ministers declined to endorse the EPoA for consideration by Law Ministers so ownership of this document remains exclusively with the partner organizations (CLA, CLEA, CMJA and Commonwealth Parliamentary Association (CPA)). This means that the mandate of the partner organizations contained in the EPoA to establish a standing committee to gather reports on the implementation of LHP for CMAG was not endorsed, nor the idea that governments should report on implementation to CHOGM; a similar fate befell the proposed mandate of the Commonwealth Secretariat to provide regular reports to law ministers and senior officials.

So, in the face of official obstruction, what can we, the lawyers of the Commonwealth, whether practitioners, judges or academicians, do to keep our Latimer Houses in order? I wish to emphasize three steps that we can take:

(1) Our Associations through the LHWG can continue to monitor examples of good and bad practice and to report them to senior officials, law ministers, the Secretary General, CMAG and other appropriate quarters. We can give appropriate publicity to examples of failure of compliance through our own independent channels as we have done in the case of Sri Lanka. In this sense, the LHWG performs the function of the Standing Committee referred to in the EPoA. In this context, it is particularly important that good practice as well as poor practice is acknowledged. One may have some sympathy for governments who feel that their attempts to respect the rule of law are not always sufficiently acknowledged.

(2) We can promote legislative and other measures to enshrine the principles securely in the domestic law of Commonwealth states. A good example of this is the ‘model clause’ drafted by a joint committee of CLA, CLEA and CMJA on judicial appointments commissions. This seeks to plug a number of loopholes in the appointment process, e.g. by requiring the JAC to meet to fill vacancies within a specified time frame. The model clause also provides for the membership of the JAC: a controversial issue particularly regarding the balance between judicial and lay members: our model provides for 5 judiciary including magistrate, 2 practising lawyers, a teacher of law and 5 lay members. You will note that we exclude express provision for politicians. The ambitious goal might be to draft a series of model clauses dealing with all aspects of the functioning of the judiciary in conformity with LHP, in particular to deal with discipline and removal from office – you will recall the government argument in the Sri Lanka case that the constitution leaves the removal of judges to a political process.

(3) We can provide the adequate training of the judiciary and other members of the other institutions of government on the principles. The Latimer House Toolkit which we are designing on behalf of the Commonwealth Secretariat provides a framework for training programmes for all the relevant stakeholders. The Toolkit provides a step by step analysis of each of the Principles and exercises to illustrate their application. Mutual understanding of the problems of other branches of government is important. It is no good for judges, for example, to demand large increases in remuneration if the government’s treasury is empty.

In conclusion, I must emphasize that lawyers of every description must take personal responsibility for upholding the LHP. In his address to the Hong Kong Commonwealth Law Conference 30 years ago, Sir Shridath Ramphal stated that we must be more than ‘keeper of the seals’. Despite the frustrations of dealing with governments’ reluctance to put their Latimer Houses in order, it is comforting that as is shown by numerous references by our judges, speaking both judicially and extra-judicially, to the LHP that they have become enshrined in the jurisprudence of the Commonwealth. In that we are entitled to take some pride.
The petitioners applied to the Court of Appeal seeking orders prohibiting members of a Parliamentary Select Committee from investigating allegations of misbehaviour or incapacity alleged against the Chief Justice in a resolution presented to the Speaker in terms of art 107(2) of the Constitution and published on the Order Paper of Parliament for 6 November 2012. The Court of Appeal referred to the Supreme Court the following question: ‘Is it mandatory under art 107(3) of the Constitution for Parliament to provide for matters 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 misbehaviour or incapacity in addition to matters relating to the investigation of the alleged misbehaviour or incapacity?’ The Attorney General contended that there had been no proper reference by the Court of Appeal, as there were no adversary proceedings between parties at the time of the reference. Article 125(1) provided that the Supreme Court had sole and exclusive jurisdiction to hear and determine any question relating to the interpretation of the Constitution.

HELD: Question answered in the affirmative.

(i) The writ jurisdiction of the Court of Appeal was invoked by an application (petition supported by affidavit and documents, if any). Proceedings in an application commenced when it was taken up in court for support. The application by which the jurisdiction of the court was invoked then became a part of the proceedings. Article 125 referred to legal proceedings and not to adversary proceedings: a question relating to the interpretation of the Constitution could arise in the absence of a dispute regarding such interpretation and could be referred to the Supreme Court. There was nothing in art 125 to limit references to inter partes proceedings. Therefore the instant reference was valid.

(ii) The preamble to the Constitution ratified the principle of the independence of the judiciary as one attribute of the intangible heritage that guaranteed the dignity and well being of the people of Sri Lanka. The question referred to the Supreme Court related to the interpretation of art 107(3) of the Constitution, which provided for the appointment and removal of the judges. The process for the removal of a judge commenced when a resolution for an address of Parliament to be presented to the President for the removal of a judge on the ground of proved misbehaviour or incapacity was entertained by the Speaker or placed on the Order Paper of Parliament. Article 107 did not specify the body or the authority which should investigate or inquire into the allegations of misconduct or incapacity set out in the resolution. Although art 107(3) provided that Parliament would by law or by Standing Orders provide for all matters relating to: (i) the presentation of an address, (ii) the procedure for passing of such resolution, (iii) the procedure for the investigation and proof of the alleged misbehaviour or incapacity and (iv) the right of such judge to appear and to be heard in person or by representative, Parliament had not enacted any law to provide for any or all of the matters set out in art 107(3). However, Parliament had passed Standing Order 78A, which provided, inter alia, that where a resolution for the presentation of an address to the President for the removal of a judge from office was given to the Speaker and was placed on the Order Paper of Parliament, the Speaker would appoint a Select Committee of Parliament and report to Parliament on the allegations of misbehaviour or incapacity set out in such resolution. Without a definite finding that the allegations had been proved, no address of
Parliament could be made for the removal of a judge. Thus the ‘investigation’ referred to in art 107(3) was an indispensable step in the process for the removal of a judge. The investigation led to a finding on the allegations. The finding that the charges had been proved, a finding that adversely affected the constitutional right of a judge to hold and continue in office during good behaviour, was the indispensable legal basis for the address. In a state ruled by a Constitution based on the rule of law, no court, tribunal or other body had authority to make a finding or a decision affecting the rights of a person unless it had power conferred on it by law to make such finding or decision. Such power could be conferred only by an Act of Parliament, which was ‘law’, and not by Standing Orders, which were not law but rules made for the regulation of the orderly conduct and the affairs of Parliament. A Select Committee appointed under Standing Ord 78A had 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 were the subject matter of its investigation. The power to make a valid finding could be conferred on a court, tribunal or a body, only by law and by law alone. Therefore it was mandatory for Parliament to provide by law the body competent to conduct the investigation contemplated in art 107(3) and to give a legally valid and binding finding with regard to the allegations of misbehaviour or incapacity investigated. In addition, Parliament had to provide by law for the mode of proof, burden 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.

(iii) Although members of Parliament had a constitutional right to move a resolution containing the allegations of misbehaviour or incapacity against a judge of the Supreme Court and the Court of Appeal and the right to make an address of Parliament to be presented to the President for the removal of such judge for proved misbehaviour or incapacity, the power of removal of such judge was a power of the President and not of Parliament.

History

Amaratunga, Sripavan and Dep JJ

The Court of Appeal on 20 November 2012, in the course of considering several writ applications that came up before it, has referred to this court, in terms of art 125 of the Constitution, the following question relating to the interpretation of art 107(3) of the Constitution:

‘Is it mandatory under art 107(3) of the Constitution for Parliament to provide for matters 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 misbehaviour or incapacity in addition to matters relating to the investigation of the alleged misbehaviour or incapacity?’

This question was referred in respect of all seven writ applications considered by the Court of Appeal on that day. In all seven writ applications the petitioners have mainly sought writs of prohibition prohibiting the eleven members of the Parliamentary Select Committee from investigating the allegations of misbehaviour or incapacity alleged against the Chief Justice, Hon (Dr) Shirani A Bandaranayake in the resolution presented to the Speaker in terms of art 107(2) of the Constitution and published on the Order Paper of Parliament for 6 November 2012.

When the seven references (SC Reference Nos 3–9/2012) made by the Court of Appeal came up before this court on 22 November 2012, it was observed that the Court of Appeal had not complied with r 64(1)(b) of the Supreme Court Rules 1978. Accordingly, this court directed the Court of Appeal to issue notice in terms of the aforesaid rule and also directed notice to be issued on the Attorney General—who immediately appeared in court when the court resumed sittings at 1.30 pm on the same day. The Court of Appeal through its registrar thereafter reported to this court that notices have been issued to the parties in terms of r 64(1)(b) as per the direction given by this court.

The respondents did not appear in this court and also did not file their written submissions in terms of the said r 64(1)(b). After the petitioners filed their written submissions, the Attorney General has filed written submissions in terms of the said r 64(2).

When the seven references were taken up together for hearing on 13 December 2012, seven parties, having filed petitions and
affidavits, sought to intervene in each of the seven references as intervenent-respondents. Article 125 of the Constitution or the Supreme Court Rules 1978 do not provide for interventions in references made to this court under art 125. However, in terms of art 134(3) of the Constitution, read with art 134(1), this court has discretion to grant to any other person or his legal representative a hearing as may appear to the court to be necessary in the exercise of its jurisdiction under Ch XVI of the Constitution. Accordingly, the court decided to give an opportunity to the parties who sought to intervene to make their submissions through their counsel. In view of certain averments contained in the petitions filed by the parties who sought to intervene in these proceedings, the court specifically inquired from all parties, including those who sought to intervene, whether anyone has any objection to this Bench hearing these references but there was no objection by any party, including those who sought intervention. Thereafter the court heard the submissions of all learned President’s Counsel and the other learned counsel for the petitioners, the Attorney General and the learned President’s Counsel and the other learned counsel who appeared for the parties who sought to intervene. After the conclusion of oral submissions the court in its discretion granted to all those who have been heard an opportunity to tender written submissions on or before 18 December 2012.

At the outset we wish to deal with the submissions made by the Attorney General in support of his contention ‘that there has been no proper reference by the Court of Appeal’ as set out in his written submissions filed before the hearing. This was the first matter dealt with by the Attorney General in his oral submissions. It is appropriate at this stage to set out the provisions of art 125(1), which is as follows:

‘The Supreme Court shall have sole and exclusive jurisdiction to hear and determine any question relating to the interpretation of the Constitution and accordingly, whenever any such question arises in the course of any proceedings in any other court or tribunal or other institution empowered by law to administer justice or to exercise judicial or quasi-judicial functions, such question shall forthwith be referred to the Supreme Court for determination. The Supreme Court may direct that further proceedings be stayed pending the determination of such question.’

In support of his submission that there has been no proper reference by the Court of Appeal in terms of art 125(1) of the Constitution, the Attorney General relied on a pronouncement made by Samarakone CJ in Billimoria v Minister of Lands, Land Development and Mahaveli Development (1978–80) 1 SLR 10.

In his written submissions filed before the hearing the Attorney General has quoted a part of Samarakone CJ’s pronouncement in Billimoria which is relevant to his submission. However, I quote below the entire passage which contains Samarakone CJ’s pronouncement, including the part quoted in the written submissions of the Attorney General. That passage is as follows:

‘Counsel have invited us to make order on constitutional disputes. It appears from the order of the Court of Appeal that some dispute as to the interpretation of the Constitution did arise in the course of the argument. Article 125 of the Constitution requires any dispute on the interpretation of the Constitution to be referred to this Court. What is contemplated in Article 125 is “any question relating to the interpretation of the Constitution” arising in the course of legal proceedings. This presupposes that in the determination of a real issue or controversy between the parties, in any adversary proceedings between them, there must arise the need for an interpretation of the provisions of the Constitution. The mere reliance on a constitutional provision by a party need not necessarily involve the question of the interpretation of the Constitution. There must be a dispute on interpretation between contending parties. It would appear that Article 125 is so circumscribed that it must be construed as dealing only with cases where the interpretation of the Constitution is drawn into the actual dispute and such question is raised directly as an issue between the parties or impinges on an issue and forms part of the case of one party, opposed by the other, and which the Court must of necessity decide in resolving that issue.’

Relying on the pronouncement contained in the passage quoted above, the Attorney General
contended that proceedings in the course of which a reference under art 125 could be made are restricted to ‘adversary proceedings between parties’ and at the time the Court of Appeal made the reference there were no adversary proceeding in the sense of an issue which forms part of the case of one party and opposed by the other and which the court must of necessity decide in resolving that issue. The Attorney General, citing the decision in Walker Sons and Co (UK) Ltd v Gunatilake (1978–80) 1 SLR 231 at 245, where the Supreme Court has stated that—

‘[w]e have in this country over the years developed a cursus curiae of our own which may be summarized thus … Three judges as a rule follow a unanimous decision of three judges,’

invited us to follow Samarakone CJ’s pronouncement in Billimoria relating to the scope of art 125 of the Constitution. The Attorney General invited our attention to the decision in Prema Javantha v Divisional Secretary, SC Reference No 4/2011, where the Supreme Court referred to the decision in Billimoria to point out the situations in which a reference under art 125 could be made and invited us to follow the decisions in Billimoria and Prema Javantha and to hold that there is no valid reference made by the Court of Appeal.

The Attorney General further submitted that this court has the power to refuse to entertain the reference or to return it to the court which referred the question to the Supreme Court and cited in support Prema Javantha and Abeywickrema v Pathirana (1984) 1 SLR 215.

All learned counsel who made submissions on behalf of the parties who sought to intervene in these proceedings associated themselves with the submissions of the Attorney General on the question whether there is a valid reference by the Court of Appeal. In the written submissions filed (after the hearing) on behalf of the parties who sought intervention there is no fresh material or submissions not covered by the Attorney General’s written and oral submissions.

The learned counsel who appeared for the petitioner in SC Reference No 4/2012 in his written submissions filed before the hearing has also taken up the position, for the reasons stated in his written submissions, that the reference made by the Court of Appeal is not a valid reference. However, the learned counsel referring to a passage from the order of court in Premachandra v Jayawickrama [1994] 4 LRC 95 (which will be referred to later) has invited this court to answer the question referred to this court as a practical measure to avoid further delay. In the written submissions, the learned counsel has contended that (i) Samarakone CJ’s pronouncement in Billimoria was obiter and (ii) Samarakone CJ made his pronouncement in relation to inter partes proceedings and that he has not considered what the position would be in an ex parte proceeding.

In addition, the learned counsel for petitioner in SC Reference 4/2012 has submitted that the exclusive jurisdiction vested in the Supreme Court by art 118(a) and the first limb of art 125 (‘The Supreme Court shall have sole and exclusive jurisdiction to hear and determine any question relating to the interpretation of the Constitution …’) is absolute and subject only to the Constitution and therefore the jurisdiction of the Supreme Court to interpret the Constitution or any provision thereof whenever it is necessary or relevant to do so in the opinion of court is absolute and by no means limited to cases where a valid reference is made under art 125(1).

In the written submissions filed on behalf of the petitioner in SC Reference 5/2012 the learned President’s Counsel for that petitioner has subscribed to the view that the pronouncement in Billimoria is obiter.

The court first deals with that submission. Billimoria was not a reference made under art 125(1) of the Constitution. It was an appeal with leave to appeal granted by the Supreme Court. It was an appeal against an order made by one Bench of the Court of Appeal setting aside a stay order issued by a different Bench of the same court on the basis that the Bench which issued the stay order had issued it per incuriam. In his judgment Samarakone CJ has stated that ‘[t]he only question we need to decide in this appeal is whether the stay order was made per incuriam …’ ((1978–80) 1 SLR 10 at 12). The decision of the Supreme Court, in the words of Samarakone CJ, was that ‘I am of opinion that the stay order in question was made after consideration and was not one
made per incuriam’ (at 13). Thus, there was no occasion or necessity to consider the scope of art 125(1) for the decision of the appeal the Supreme Court had to decide in that case.

Samarakone CJ’s judgment in the case indicates the circumstances in which his pronouncement relating to art 125(1) came to be made. The passage in which his pronouncement is contained begins as follows:

‘Counsel have invited us to make order on constitutional disputes. It appears from the order of the Court of Appeal that some dispute as to the interpretation of the Constitution did arise in the course of the argument. Article 125 of the Constitution requires any dispute on the interpretation of the Constitution to be referred to this Court.’ (Our emphasis.)

After those words Samarakone CJ made his pronouncement on the scope of art 125(1). The word ‘dispute’ used by Samarakone CJ in the above passage does not appear in art 125 and the word used is any ‘question’ relating to the interpretation of the Constitution. There can be a question relating to the interpretation of the Constitution without a dispute relating to the interpretation of the Constitution. For a dispute to arise, there has to be a contention by one party with regard to the correct interpretation of a constitutional provision, opposed by another party giving different interpretation to the same constitutional provision. However, a question relating to the interpretation of the Constitution can arise on the submissions of one party when the other party and the court agree that a question relating to the interpretation of the Constitution has arisen from the submissions of the first party.

This has happened in Premachandra v Jayawickrama. The relevant passage from the order of court is as follows ([1994] 4 LRC 95 at 100):

‘The four applications were taken up for hearing together in the Court of Appeal on 21 June 1993. On the next day, in response to an inquiry from the court, Mr L C Seneviratne PC, appearing for the chief ministers, made his submissions in regard to certain preliminary objections of law. The court and all counsel agreed that questions of constitutional interpretation arose and counsel were invited to assist court by framing those questions.’ (Our emphasis.)

The five questions framed in that case were thereafter submitted to the Supreme Court in terms of art 125. The Supreme Court having said (at 103):

‘It is unfortunate that these questions have not been framed with greater precision … It would have been far more satisfactory if, after hearing the parties, the questions had been framed with specific reference to the grounds of challenge relevant to, and arising from the facts of, the pending applications,’

nevertheless proceeded to consider and answer the questions referred to it by the court. It is pertinent to note that Billimoria had not been considered by the Supreme Court in its order.

This shows that even in the absence of a dispute between contending parties as to the correct interpretation of a constitutional provision, a question for the interpretation of the Constitution can be referred to the Supreme Court. The Supreme Court, having regard to the facts giving rise to the dispute and the pleadings, if any, filed in the court, tribunal or other institution making the reference and the terms of the question referred to it, may decide whether such question shall be entertained and answered.

There may also be a situation where a court ex mero motu may decide to make a reference for the interpretation of the Constitution in a situation where both or all parties concede that a particular view is the correct interpretation of a constitutional provision. The interpretation of the Constitution being a question of law, a court is not bound by the concessions of parties on a question of law. In such a situation there is nothing in art 125 to prevent a court from making a reference under art 125 ex mero motu.

At the hearing a submission has been made that there were no proceedings in the Court of Appeal in the course of which a reference could be made under art 125 as the Court of Appeal was merely considering ex parte whether notice should be issued on the respondents. We are unable to accept this submission. The writ jurisdiction of the Court of Appeal is invoked by an application (petition supported by affidavit and documents, if any). Proceedings
in an application commence when it is taken up in court for support. The application by which the jurisdiction of the court is invoked then becomes a part of the proceedings. If the court refuses to issue notice, the proceedings end there and if notice is issued the proceedings continue until the matter is finally decided. If a court, in ex parte proceedings, takes the view that there is a question relating to the interpretation of the Constitution, the better procedure would be, as rightly contended by the Attorney General, to notice the other party and the Attorney General and hear them for that limited purpose. However, there is nothing in art 125 to limit references to inter parte proceedings.

In his pronouncement Samarakone CJ has said that:

‘What is contemplated in art 125 is “any question relating to the interpretation of the Constitution” in the course of legal proceedings. This presupposes that in the determination of a real issue or controversy between the parties, in any adversary proceedings between them, there must arise a need for an interpretation of the provisions of the Constitution.’ (Our emphasis.)

Article 125 refers to legal proceedings and not to adversary proceedings, which term, if used, has the effect of curtailing the scope of art 125.

We have already set out that part of Samarakone CJ’s judgment which indicate the circumstances in which the pronouncement relating to art 125 has been made. He has stated that:

‘It appears from the order of the Court of Appeal that some dispute as to interpretation of the Constitution did arise in the course of the argument.’

The order of the Court of Appeal referred to by Samarakone CJ is not available to us and also the submissions, if any, made by counsel when they invited the court to make order on constitutional disputes. It may well be that Samarakone CJ’s pronouncement is worded in the way it appears in his judgment on the material and the submissions, if any, available to his Lordship at that time.

In any event Samarakone CJ’s pronouncement in Billimoria on art 125 is to be treated with high respect. In subsequent decisions this court has faithfully referred to it in considering the references made to this court. No counsel disputed before us the position that when there are divergent views between parties as to the correct interpretation of a constitutional provision a reference under art 125 could be validly made. What the petitioners contended, in particular the learned counsel for the petitioner in SC Reference No 4/2012, is that the situation in which a valid reference could be made under art 125 is not limited to the situation set out in Samarakone CJ’s pronouncement and is not exhaustive and that there may be other situations in which such references could be validly made. For the reasons we have already given we agree with this contention and hold that there is a valid reference before us.

In his written submissions filed before the hearing the Attorney General has stated that—

‘[t]he art 125(1) grants sole and exclusive jurisdiction to Your Ladyship’s court to hear and determine any question relating to the interpretation of the Constitution, in view of the words “subject to the provisions of the Constitution” in art 118 and the points made in para 8.0 below it is respectfully submitted that when it comes to the removal of Judges of the Supreme Court or the Court of Appeal, the Supreme Court or the Court of Appeal does not have any jurisdiction, including the writ jurisdiction and the jurisdiction to interpret any provision of the Constitution.’

In para 8.2 of the written submissions it is stated that the power to remove judges of the Supreme Court and the Court of Appeal vested in the legislature and the executive under our Constitution is a check on the judiciary. In such a context, judicial involvement in the removal proceedings, even if only for purposes of judicial review or interpretation of the Constitution, which forms part of such removal, is counter-intuitive because it would eviscerate the important constitutional check placed on the judiciary by the framers of our Constitution.

We are unable to accept this submission in the absence of any indication in art 125 or in art 107 that the jurisdiction of this court in terms of the first limb of art 125 is limited as contended by the Attorney General.
The question referred to this court by the Court of Appeal, as set out at the commencement of this order, relates to the interpretation of art 107(3) of the Constitution. Article 107, which provided for the appointment and removal of the judges of the Supreme Court and Court of Appeal, is reproduced below:

‘107(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 of the Republic 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 a 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 …’

At this stage it is pertinent to refer to the provisions of the Ceylon (Constitution) Order-in-Council (Cap 379, CLE 1956 Revision), referred to as the Soulbury Constitution, and the 1972 Republican Constitution with regard to the removal of judges. Section 52(2) of the Ceylon (Constitution) Order in Council is as follows:

‘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.’

The Republican Constitution 1972 provided as follows:

‘122(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 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 …’

In terms of the 1978 Constitution, the process for the removal of a judge commences when a resolution for an address of Parliament to be presented to the President for the removal of a judge on the ground of proved misbehaviour or incapacity is entertained by the Speaker or placed on the Order Paper of Parliament. Such resolution shall be signed by not less than one-third of the total number of members of Parliament and shall contain full particulars of the alleged misbehaviour or incapacity. The address of Parliament to be presented to the President could be supported and adopted only when the allegations of misbehaviour or incapacity become proved misbehaviour or incapacity.

The requirement of a resolution setting out the full particulars of the alleged misbehaviour or incapacity, signed by not less than one-third of the total number of members of Parliament, the requirement of proved misbehaviour or incapacity as the ground of the address of Parliament for the removal of the judge, the requirement of 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 Preamble to the 1978 Constitution assures to all people, inter alia:

‘FREEDOM, EQUALITY, JUSTICE, FUNDAMENTAL HUMAN RIGHTS and THE INDEPENDENCE OF THE JUDICIARY as the intangible heritage that guarantees the
dignity and well being of succeeding genera-
tions of the People of SRI LANKA.’

Thus the supreme law of Sri Lanka—the
Constitution—ratified the immutable repub-
lican principle of the independence of the
judiciary as one attribute of the intangible
heritage that guarantees the dignity and well
being of the people of Sri Lanka.

In Visuvalingam v Liyanage (1983) 1 SLR 203
at 236–238 Sharvananda J (as he then was) in
his separate judgment in the Full Bench of nine
judges of the Supreme Court (which examined,
ter alia, the question whether the judges of
the Supreme Court and the Court of Appeal
ceased to hold office as a result of the failure
to observe the provisions of art 157A read
with art 165 of the Constitution) highlighted
the importance of the independence of the
judiciary in a democratic society as follows:

‘The main aspirations of the Constitution
are set out in its luminous preamble. Rule of
law is the foundation of the Constitution and
independence of the judiciary and fundamental
human rights are basic and essential features of
the Constitution. It is a lesson of history that
the most valued constitutional rights presup-
pose an independent judiciary through which
alone they can be vindicated. There can be no
free society without law, administered through
an independent judiciary. It is and should be
the pride of a democratic government that it
maintains and upholds independent courts of
justice where even its own acts can be tested.
The Supremacy of the Constitution is protected
by the authority of an independent judiciary to
act as the interpreter of the Constitution. So
solicitous were the framers of the Constitution
to make the position of the Judges independent
and entrenched that they invested them with
the status of irremovability save on the limited
grounds and manner specifically set out in its
provisions ... a Judge of the Supreme Court or
of the Court of Appeal ... is not removable by
the Executive; the only way he can be removed
is by an order of the President in terms of
Article 107(2). Article 108 provides that their
salaries are determined by Parliament and are
charged on to the Consolidated Fund and that
the salary payable to and pension entitlement
of a Judge of the said Courts shall not be
reduced after his appointment. It is manifest
that these provisions are designed to safeguard
the independence of the Judges by affording
them security of tenure. These provisions have
not been put into the Constitution merely for
the individual benefit of the Judges; they have
been put there as a matter of public policy.
The security of tenure of Judges has been
vouched to the Judges not only for their own
protection but for the protection of the State
itself. The framers of the Constitution had
considered it to be in the interest of the public
and not merely of the individual Judges that
their security of tenure should be sacrosanct
and sanctioned by the Constitution.’ (Our
emphasis.)

The above-quoted passage from Sharvananda
J’s judgment highlights the public policy
underlying the constitutional provisions which
guarantee the tenure of the judges of the
Supreme Court and the Court of Appeal.

Article 107 of the Constitution provides the
mechanism for the removal of such judges. It is
a special constitutional process which has new
features not found in the Soulbury Constitution
and in the Republican Constitution of 1972.

Article 107 has not specified the body or the
authority which shall investigate or inquire
into the allegations of misconduct or incapa-
city set out in the resolution presented in terms
of the proviso to art 107(2). The Constitution
has provided in art 107(3) 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 a 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.’

In terms of art 107(3), Parliament shall by law
or by Standing Orders provide for all matters
relating to:

(i) the presentation of such an address (the
address under art 107(2)),

(ii) the procedure for passing of such resolu-
tion,

(iii) the procedure for the investigation and
proof of the alleged misbehaviour or incapacity,

(iv) the right of such judge to appear and to be
heard in person or by representative.
Parliament has not enacted any law to provide for any or all matters set out in art 107(3).

Parliament on 4 April 1984 passed Standing Order 78A which now appears under the heading ‘Rules of Debate,’ in the Standing Orders of Parliament. The said Standing Order is set out below.

‘Rules of Debate

*78A(1) Notwithstanding anything to the contrary in the Standing Orders, where notice of a resolution for the presentation of an address to the president for the removal of a judge from office is given to the Speaker in accordance with art 107 of the Constitution, the Speaker shall entertain such resolution and place it on the Order Paper of Parliament but such resolution shall not be proceeded with until after the expiration of a period of one month from the date on which the Select Committee appointed under para (2) of this Order has reported to Parliament.

(2) Where a resolution referred to the para (1) of this Order is placed on the Order Paper of Parliament, the Speaker shall appoint a Select Committee of Parliament consisting of not less than seven members to investigate and report to Parliament on the allegations of misbehaviour or incapacity set out in such resolution.

(3) A Select Committee appointed under para (2) of this Order shall transmit to the judge whose alleged misbehaviour or incapacity is the subject of its investigation, a copy of the allegations of misbehaviour or incapacity made against such judge and set out in the resolution in pursuance of which such Select Committee was appointed, and shall require such Judge to make a written statement of defence within such period as may be specified by it.

**(4) The Select Committee appointed under para (2) of this Order shall have power to send for persons, papers and records and not less than half the number of members of the Select Committee shall form the quorum.

(5) The Judge whose alleged misbehaviour or incapacity is the subject of the investigation by a Select Committee appointed under para (2) of this Order shall have the right to appear before it, and to be heard by, such Committee, in person or by representative and to adduce evidence, oral or documentary, in disproof of the allegations made against him.

(6) At the conclusion of the investigation made by it, a Select Committee appointed under para (2) of this Order shall within one month from the commencement of the sittings of such Select Committee, report its findings together with the minutes of evidence taken before it to Parliament and may make a special report of any matters which it may think fit to bring to the notice of Parliament;

(7.1) Provided however, if the Select Committee is unable to report its findings to Parliament within the time limit stipulated herein the Select Committee shall seek permission of Parliament for an extension of a further specified period of time giving reason therefor and Parliament may grant such extension of time as it may consider necessary.

(7.2) Where a resolution for the presentation of an address to the President for the removal of a Judge from office on the ground of proved misbehaviour or incapacity is passed by Parliament, the Speaker shall present such address to the President on behalf of Parliament.

(8) All proceedings connected with the investigation by the Select Committee appointed under para (3) of this Order shall not be made public unless and until a finding of guilt on any of the charges against such Judge is reported to Parliament by such Select Committee.

(9) In this Standing Order “Judge” means the Chief Justice, the President of the Court of Appeal and every other Judge of the Supreme Court and Court of Appeal appointed by the President of the Republic by Warrant under his hand.’ (Our emphasis.)

In terms of para (2) of Standing Ord 78A, where a resolution referred to in para (1) of the Standing Order (a resolution for the presentation of an address to the President for the removal of a judge from office is given to the Speaker in accordance with art 107 of the Constitution) is placed on the Order Paper of Parliament, the Speaker shall appoint a Select Committee of Parliament consisting of not less than seven members to investigate and report to Parliament on the allegations of misbehaviour or incapacity set out in such resolution. The Select Committee appointed as aforesaid shall transmit to the judge whose alleged misbehaviour or incapacity is the subject of
its investigation, a copy of the allegations of misbehaviour or incapacity made against such judge and set out in the resolution in pursuance of which such Select Committee was appointed, and shall require such judge to make a written statement of defence within such period as may be specified by it.

The Select Committee shall have the power to send for persons, papers and records. The judge whose alleged misbehaviour or incapacity is the subject matter of the investigation by the Select Committee shall have the right to appear before it and be heard by such Committee, in person or by representative, and to adduce evidence, oral or documentary, in disproof of the allegations made against him.

At the conclusion of the investigation made by it, the Select Committee shall within one month from the commencement of the sittings of such Select Committee report its findings together with the minutes of evidence taken before it to Parliament and may make a special report of any matters which it may think fit to bring to the notice of Parliament. Sub-paragraph (8) of Standing Ord 78A provides that all proceedings connected with the investigation by the Select Committee shall not be made public unless and until a finding of guilt on any of the charges against such judge is reported to Parliament by the Select Committee.

If the Select Committee is unable to report its findings to Parliament within the time limit stipulated in sub-para (6) of Standing Ord 78A the Select Committee shall seek permission of Parliament for an extension of a further specified period of time giving reason therefor and Parliament may grant such extension of time as it may consider necessary.

The petitioners in their applications filed in the Court of Appeal (forwarded to this court in terms of r 64(1)(d) of the Supreme Court Rules 1978) and in the written submissions filed in this court have contended that Standing Ord 78A confers judicial power on the Select Committee to investigate the allegations of misbehaviour or incapacity set out in the resolution presented to the Speaker in terms of art 107(2) and give its findings which may include a finding of guilty of an allegation or allegations made against a judge is ultra vires art 4(c) of the Constitution. They have further contended that judicial power cannot be conferred upon the Select Committee by Standing Order which is not law.

The petitioners have relied on the determination made by seven judges of this court (Re the Nineteenth Amendment to the Constitution, Special Determination Nos 11, 13, 15, 16–21, 25–28, 30–35, 37–40 of 2002 (2002) 3 SLR 85). The Attorney General also relied on the same determination to support his submissions on the balance of power between the three organs of the government and the checks provided by the Constitution in respect of the power attributed to one organ of the government. In view of this we propose to quote from that determination the parts that are relevant to the balance of power ((2002) 3 SLR 85 at 98–100):

‘This balance of power between the three organs of government, as in the case of other Constitutions based on a separation of power is sustained by certain checks whereby power is attributed to one organ of government in relation to another. The dissolution of Parliament and impeachment of the President are some of these powers which constitute the checks incorporated in our Constitution … Therefore, executive power should not be identified with the President and personalised and should be identified at all times as the power of the People. Similarly, legislative, power should not be identified with the Prime Minister or any party or group in Parliament and thereby be given a partisan form and character. It should be seen at all times as the power of the People. Viewed from this perspective it would be a misnomer to describe such powers in the Constitution as “weapons” in the hands of the particular organ of government. These checks have not been included in the Constitution to resolve conflicts that may arise between the custodians of power or, for one to tame and vanquish the other. Such use of the power which constitutes a check, would be plainly an abuse of power totally antithetic to the fine balance that has been struck by the Constitution. The power that constitutes a check, attributed to one organ of government in relation to another, has to be seen at all times and exercised, where necessary, in trust for the People. This is not a novel concept. The basic premise of Public Law is that power is held in trust. From the perspective of Administrative Law in England, the “trust” that is implicit in the conferment of power
has been stated as follows: “Statutory power conferred for public purposes is conferred as it were upon trust, not absolutely—that is to say, it can validly be used only in the right and proper way which Parliament when conferring it is presumed to have intended.” (Wade and Forsyth Administrative Law (8th edn, 2000), p 356). It has been firmly stated in several judgments of this Court that the “rule of law” is the basis of our Constitution (Visuvalingam v Liyanage (1983) 1 SLR 203 and Premachandra v Jayawickrema [1994] 4 LRC 95). A V Dicey in Law of the Constitution postulates that “rule of law” which forms a fundamental principle of the Constitution has three meanings, one of which is described as follows: “It means, in the first place, the absolute supremacy or pre-dominance of regular law as opposed to the influence of arbitrary power, and excludes the existence of arbitrariness of prerogative, or even of wide discretionary authority on the part of the government. Englishmen are ruled by the law, and by the law alone …” The Attorney-General has appropriately cited the dictum of Bhagawati J (later, Chief Justice of India) in the case of Gupta and Others v Union of India AIR 1982 SC 1—where he observed: “If there is one principle which runs through the entire fabric of the Constitution, it is the principle of the Rule of Law and under the Constitution, it is the judiciary which is entrusted with the task of keeping every organ of the State within the limits of the law and thereby making the Rule of Law meaningful and effective.” To sum up the analysis of the balance of power and the checks contained in the Constitution to sustain such balance, we would state that the power of dissolution of Parliament and the process of impeachment being some of the checks put in place, should be exercised, where necessary, in trust for the People only to preserve the sovereignty of the People, and to make it meaningful, effective and beneficial to the People. Any exercise of such power (constituting a check), that may stem from partisan objectives would be a violation of the rule of law and has to be kept within its limits in the manner stated by Bhagawati, J. There should be no bar to such a process to uphold the Constitution.’ (Our emphasis.)

The power of removal of the judges of the Supreme Court and the Court of Appeal conferred on the President upon an address of Parliament is a check provided by the Constitution to sustain the balance of power between the three organs of the government. As pointed out in the determination of the Divisional Bench of seven judges presided by Silva CJ, this check has not been included in the Constitution ‘to resolve conflicts that may arise between the custodians of power or for one to tame and vanquish the other’, but only as a check to be exercised, where necessary, in trust for the people.

The exact nature of the investigation contemplated by art 107(3) of the Constitution is a question which has not received judicial attention. In this reference it is necessary to consider this particular matter as it has a link to the question referred to this court by the Court of Appeal. ‘Is it mandatory under art 107(3) of the Constitution for Parliament to provide for matters relating to the forum before which allegations are to be proved?’ is a part of the question referred to this court.

Without a definite finding that the allegations have been proved, no address of Parliament could be made for the removal of a judge. Thus the ‘investigation’ referred to in art 107(3) is an indispensable step in the process for the removal of a judge of the Supreme Court and the Court of Appeal. The investigation leads to a finding whether the allegations made against the judge have been proved or not. If the finding is that all or some allegations have been proved, it is a final decision on which an address of Parliament could be made. The finding that the charges have been proved is the indispensable legal basis for the address.

Thus, the finding that the allegations have been proved is a finding that adversely affects the constitutional right of a judge to hold office during good behaviour. It is not a fact-finding body like a Commission of Inquiry appointed under the Commissions of Inquiry Act. When a Commission of Inquiry makes a finding and recommendations such findings or recommendations do not determine or affect the rights of persons whose conduct is the subject of the inquiry by the Commission. The authority which appointed the Commission of Inquiry may or may not take action on the recommendations of the Commission of Inquiry. In the case of a finding made by a Select Committee Parliament has to take cognisance of such finding that the allegations against the
judge have been proved and make an address of Parliament to be presented to the President for the removal of the judge. Thus, the final decision of the Select Committee is what that eventually takes effect. The finding of the Select Committee is not subject to confirmation or approval by some other authority. It stands by itself. So the address of Parliament to be presented to the President is an inevitable consequence of a finding that the charges have been proved.

Thus a finding after the investigation contemplated in art 107(3) that the allegation against the judge have been proved is a final decision which directly and adversely affects the constitutional right of the judge to continue in office.

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 only 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 Parliament. The Standing Orders are not law within the meaning of art 170 of the Constitution, which defines what is meant by ‘law’.

A Parliamentary Select Committee appointed in terms of Standing Ord 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 Ord 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 the proviso to art 107(2) is the subject matter of its investigation. The power to make a valid finding, after the investigation contemplated in art 107(3), can be conferred on a court, tribunal or a body, only by law and by law alone.

This is the reason why the framers of the Constitution have advisedly used the word ‘law’ when they enacted art 107(3), which reads:

‘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 a 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.’ (Our emphasis.)

There is a presumption that Parliament will not use words in vain or unnecessarily. The reason for the use of the word ‘law’ in art 107(3) is clear from what we have stated above. Therefore in our opinion it is mandatory for Parliament to provide by law the body competent to conduct the investigation contemplated in art 107(3) and give a legally valid and binding finding with regard to the allegations of misbehaviour or incapacity investigated by it.

The matters relating to proof being matters of law also will have to be provided by law and the burden of proof, the mode of proof and the degree of proof also will have to be specified by law to avoid any uncertainty as to the proof of the alleged misbehaviour or incapacity without leaving room for the body conducting the investigation to decide the questions relating to proof according to its subjective perception.

The right of the judge under investigation to appear at the investigation and be heard being a fundamental principle of natural justice should also be provided by law with a clear indication of the scope of the ‘right to be heard’ such as the right to cross-examine witnesses, to call witness and adduce evidence, both oral and documentary.

Matters relating to the presentation of an address and the procedure for the passing of such resolution are matters which can be stipulated by Standing Orders but there is nothing to prevent Parliament from providing for such matters by law as well.

The selection of the body to investigate the allegations of misbehaviour or incapacity and its composition and the manner in which the investigation is to be conducted (procedure) are all matters to be decided by Parliament in its wisdom keeping in mind the necessity to ensure ‘equal protection of the law’ enshrined in the Constitution.

At the hearing submissions were made that the Select Committee of Parliament in investigating the allegations contained in the resolution exercises judicial power and as such
it is contrary to art 4(c) of the Constitution and that Standing Ord 78A is contrary to the Constitution, especially to arts 12(1), 13(5) and 14(1)(g). However, after careful consideration of the submissions and the question referred to this court by the Court of Appeal, it is not necessary to decide those questions in order to answer the question referred to us. Accordingly, we express no opinion nor give any finding on those submissions.

The Attorney General and the learned President's Counsel and the other learned counsel for the parties who sought to intervene submitted that the power of removal of the judges of the Supreme Court and the Court of Appeal is a power of Parliament. We are unable to accept this submission. There is a constitutional right given to the members of Parliament to move a resolution containing the allegations of misbehaviour or incapacity against a judge of the Supreme Court and the Court of Appeal and the right to make an address of Parliament to be presented to the President for the removal of such judge for proved misbehaviour or incapacity. The power of removal of such judge is a power of the President.

In view of the reasons we have set out above we answer the question referred to us, as set out at the beginning of this order, as follows.

'IT is mandatory under Article 107(3) of the Constitution for Parliament to provide by law the matters relating to the forum before which the allegations are to be proved, the 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.' (Our emphasis.)

This answer to the question referred to us and this order is applicable to SC Reference Nos 4–9/2012.

The reference made to this court involves a matter which concerns the judges of the Supreme Court and the Court of Appeal. In dealing with the question we therefore kept in mind that the objectivity of our approach itself may incidentally be in issue. It is therefore in a spirit of detached objective inquiry, which is a distinguishing feature of judicial process, that we attempted to find an answer to the question referred to us. We have performed our duty faithfully bearing in mind the oath of office we have taken when we assumed the judicial office which we hold.

Before we conclude it is pertinent to invite attention of all concerned to the words the late Hon Anura Bandaranayake MP, the then Speaker of Parliament, contained in his ruling dated 20 June 2001, which is faithfully approved and followed by our Parliaments up to the present day. He said as follows.

'However, Members of Parliament may give their mind to the need to introduce fresh legislation or amend the existing standing orders regarding Motions of Impeachment against Judges of the Superior Courts. I believe such provision has already been included in the Draft Constitution tabled in House in August 2000.' (See Hansard (20 June 2001), Column 1039.)

The 2000 Draft Constitution did not see the light of the day as a new Constitution.

We express our gratitude to the excellent assistance rendered by the learned Attorney General, the learned President's Counsel and the other learned counsel who appeared for the petitioners and the learned President's Counsel and the other learned counsel who appeared for the parties who sought to intervene.
The petitioner, the Chief Justice, sought a writ of certiorari to quash the findings and/or the decision contained in the report of Parliamentary Select Committee appointed by the first respondent, the Speaker of Parliament, under Standing Ord 78A of Parliament to investigate alleged acts of misconduct or incapacity of the petitioner, pursuant to a resolution presented to the first respondent in terms of art 107(2) of the Constitution.

HELD: Application for writ of certiorari granted.

There was no provision in the Constitution or any law which ousted the jurisdiction of the Court of Appeal under art 140 of the Constitution to exercise judicial review on findings or orders of persons or body of persons exercising authority to determine questions affecting the rights of subjects and to grant orders in the nature of the writs of certiorari etc. That jurisdiction was wide and could not be abdicated by the other arms of government, namely the legislature or executive. A Parliamentary Select Committee appointed in terms of standing Ord 78A derived its power and authority solely from the said Standing Order, which was not law. On the facts the Parliamentary Select Committee had no legal power or authority to make a finding affecting the legal rights of the petitioner against whom the allegation was made in the resolution under the proviso to art 107(2). It followed that the report of the Parliamentary Select Committee appointed by the first respondent, the Speaker of Parliament, under Standing Ord 78A of Parliament to investigate alleged acts of misconduct or incapacity of the petitioner. The facts are set out in the judgment of Sriskandarajah J.

Sriskandarajah J.

The petitioner in this application has sought a writ of certiorari to quash the findings and/or the decision contained in the report of the second to eighth respondents marked P17. The petitioner stated that the second to twelfth respondents were appointed by the first respondent, the Hon Speaker of Parliament, to a Select Committee (PSC) under Standing Ord 78A of Parliament to investigate alleged acts of misconduct or incapacity of the petitioner, pursuant to a resolution presented to the first respondent in terms of art 107(2) of the Constitution.

The power of the Court of Appeal to exercise judicial review on findings or orders of persons or body of persons exercising authority to determine questions affecting the rights of subjects is wide and this power has been provided to the Court of Appeal by the Constitution of the Democratic Socialist Republic of Sri Lanka 1978. Therefore this power cannot be abdicated by the other arms of government, namely the legislature or executive.

Article 140 of the Constitution provides that:

‘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.’

The honourable Attorney General contended that the jurisdiction conferred on the court of appeal under art 140 of the Constitution shall
be exercised ‘subject to the provisions of the Constitution’.

He adverted us to arts 38(2) and 81 of the Constitution, which deal with impeachment of the President, expulsion of members of Parliament and imposition of civic disability. As regards impeachment of the President, the jurisdiction is vested in the Supreme Court to inquire into the matter and in case of the members of Parliament a special Presidential Commission of Inquiry established under the Special Presidential Commission of Inquiry Law 1978 and consisting of a member or members each of whom is a judge of the Supreme Court, Court of Appeal, High Court or District Court recommends that any person should be subject to any disability. However, he further submitted that in the case of the impeachment of a judge of the Supreme Court or Court of Appeal the legislature in its own wisdom, under art 107, has not provided a mechanism for the judiciary to determine the misbehaviour or incapacity of such judge. He further submitted that under art 4(c) of the Constitution, in addition to the legislative power of the people, Parliament exercises judicial power of the people directly according to law. By this provision the Constitution has impliedly excluded the involvement of the judiciary in the impeachment process of the judges of the Supreme Court and Court of Appeal.

The learned Attorney General submitted that the provision contained in art 4(c) of the Constitution by necessary implication has the effect of ousting the jurisdiction of the court. As the exercise of powers under art 140 is subject to the provisions of the Constitution, the jurisdiction of the Court of Appeal with regard to judicial review is impliedly excluded as regards the impeachment of the aforesaid judges.

The Constitution in arts 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 art 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.

The jurisdiction under art 140 of the Court of Appeal is not ousted by any ouster clause by any law. This principle is enunciated in Atapattu v People’s Bank (1997) 1 SLR 208 at 221–223 where it was held by the Supreme Court, inter alia, as follows:

**‘OUSTER CLAUSE**

Since section 71(3) [of the Finance Act 1963] enacts that every determination of the Bank shall be final and conclusive and shall not be called in question in any court, it was contended that the effect of section 22 of the Interpretation Ordinance, as amended by Act No. 18 of 1972, was that a decision by the Bank refusing substitution could not be reviewed by the Court of Appeal in the exercise of its writ jurisdiction under Article 140. There is an apparent conflict between the ouster clause (which is pre-Constitution legislation), and Article 140. While generally a Constitutional provision, being the higher norm, must prevail over statutory provision, there are some constitutional provisions which enable pre-Constitution written law to continue to apply. The first is Article 16(1), which is inapplicable here, because that deals only with inconsistency with fundamental rights. The second is Article 168(1), which provides: “Unless Parliament otherwise provides, all laws, written laws and unwritten laws, in force immediately before the Constitution, shall, mutatis mutandis, and except as otherwise expressly provided in the Constitution, continue in force.” However, this would make the ouster clause operative only “except as otherwise expressly provided” in Article 140. The meaning of that phrase was considered by a bench of five Judges in Wickremabandu v Herath (1990) 2 Sri LR 348, in relation to a similar question, whether the ouster clause in section 8 of the Public Security Ordinance derogated from the Jurisdiction of this Court under Article 17 and 126. H. A. G. de Silva, J, and I held that the conferment of jurisdiction of this Court by those Articles was express contrary provision, with the result that Article 168(1) did not make the ouster clause operative vis-à-vis the fundamental rights jurisdiction. The Privy Council held in Shanmugam v Commissioner for Registration of Indian and Pakistani Residents (1962) 64 NLR 29, that “to be express provision with regard to something it is not necessary that that thing should be specially mentioned; it is sufficient that it is directly covered by the language however broad the language may be which covers it so long as the applicability arises directly from the language used and
not by inference from it.” Articles 17 and 126 constitute “express provision”, because they directly confer jurisdiction; although they make no specific mention of the ouster clause in section 8, the language used is broad enough to confer an unfettered jurisdiction. The position is the same in regard to Article 140: the language used is broad enough to give the Court of Appeal authority to review, even on grounds excluded by the ouster clause. But there is one difference between those Articles and Article 140. Article 140 (unlike Article 126) is “subject to the provisions of the Constitution”. Is that enough to reverse the position, so as to make article 140 subject to the written laws which Article 168(1) keeps in force? 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 (1962) 64 NLR 419). 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). Where the Constitution contemplated that its provisions may be restricted by the provisions of Article 138 which is subject to “any law”.

The impeachment motion under consideration was signed and presented to the honourable Speaker of Parliament by 117 members and as they are interested parties in these proceedings, the honourable Attorney General submitted that they are necessary parties. As the petitioner has failed to cite them as parties, he contended that the application should be dismissed in limine. The learned President’s counsel for the petitioner responding to this submission contended that by reason of the determination of the Supreme Court interpreting art 107 of the Constitution, a Parliamentary Select Committee appointed in terms of standing Ord 78A derives its power and authority solely from the said Standing Order, which is not law: Jayaratne v Yapa [2013] 2 LRC 106 at 123:

‘A Parliamentary Select Committee appointed in terms of Standing Ord 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 Ord 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 the proviso to art 107(2), is the subject matter of its investigation. The power to make a valid finding, after the investigation contemplated in art 107(3), can be conferred on a court, tribunal or a body, only by law and by law alone.’ (Amaratunga, Sripavan and Dep JJ’s emphasis.)

In view of the above determination, the quashing of the impugned decision will not affect the rights of the members who subscribed to the impeachment motion, as it does not prevent Parliament from proceeding with the said motion to impeach the petitioner in terms of the said determination.

According to the determination of the Supreme Court in Jayaratne v Yapa [2013] 2 LRC 106, the Select Committee appointed under and in terms of standing Ord 78A has no legal power or authority to make a finding affecting the legal rights of the judge against whom the allegation is made in the resolution under the proviso to art 107(2). In view of the above determination and the finding and/or the decision, the report of the second to eighth 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.

In view of this finding this court has not considered the grounds urged by the petitioner. Application for writ of certiorari is allowed without costs.

Gooneratne J.
I agree.

Salam J.
I agree.
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