

The Commonwealth Latimer House Principles

Facilitator's Guide



The Commonwealth

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Commissioned by the Commonwealth Secretariat. Drafted by Dr Karen Brewer, Secretary-General of the Commonwealth Magistrates' and Judges' Association (CMJA) and CMJA Editorial Board members Dr Peter Slinn, Chairperson, and H H Judge Keith Hollis, assisted by the Latimer House Working Group.

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Foreword

This Facilitator's Guide provides a framework to assist all who work to encourage understanding and practical application of the principles of ethical and governance separation of powers, and ways of achieving this, for example through dialogue between members of the executive, legislature and judiciary.

It adds to the resources made available by the Commonwealth Secretariat, which also include the guides, templates and model laws which are offered by the Commonwealth Office of Civil and Criminal Justice Reform and provide the focus for its work.

Our Commonwealth Principles on the Three Branches of Government, generally known as the Latimer House Principles, are fundamental to the wider values and principles of the Commonwealth Charter. By making training materials and action points available in readily accessible format, our aim is to facilitate wider implementation of the Latimer House Principles and broader adherence to them.

In recommending this Guide for study and use, I encourage all who draw on it for guidance and support to be mindful of the need to build and continually reinforce integrity and impartiality in public life, and to maintain the delicate balance of independence and interdependence between the institutions that combine to deliver accountable and responsive democratic governance and administration.

The Right Hon Patricia Scotland QC
The Secretary-General of the Commonwealth

Preface

The Governance and Peace Directorate of the Commonwealth Secretariat supports the promotion of democracy and good governance in the Commonwealth. Its work includes monitoring and analysing political developments, observing elections, providing technical assistance to strengthen democratic institutions and supporting the Secretary-General's good offices to promote and protect Commonwealth values and principles.

Adopted in 2003, the Commonwealth (Latimer House) Principles delineate the relationship between the three branches of government (Executive, Legislature and Judiciary) and provide guidance on the separation of powers.

Political and governance challenges in Commonwealth countries, often arise from imbalances in, or an absence of, separation between the three branches of government, whether deliberate or unintentional. Addressing these challenges requires a unique methodological tool to foster dialogue and understanding between the three branches of government.

In 2012, the Secretariat commissioned partner organisations of the Latimer House Working Group, comprised of the Commonwealth Lawyers Association, Commonwealth Legal Education Association, Commonwealth Magistrates and Judges Association, Commonwealth Parliamentary Association and the Commonwealth Secretariat, to develop such a unique tool in the form of two training modules – a comprehensive module to examine all aspects of the Principles, and an abridged version to introduce the concepts. The modules were conceived as a Commonwealth tool to promote awareness and dialogue among stakeholders within member countries on political and governance issues related to accountability, transparency and the separation of powers between the three branches of government.

The Toolkit's methodology goes beyond training and learning. It aims to utilise dialogue, mediation and consensus building skills to promote active facilitated discussion and problem solving. This methodology creates an environment of mutual respect and knowledge sharing that enables practitioners to identify challenges

and find mutually acceptable ways of resolving them. The Toolkit therefore constitutes a strong foundation on which to build the governance capacity of and enhance the functional relations between Commonwealth Executives, Legislatures and Judiciaries. I am confident that it will be effective in expanding understanding and implementation of the Commonwealth (Latimer House) Principles.

Developing the legal concepts of the Principles into a learning tool involved complex challenges, a significant amount of time and a great deal of patience on the part of all who were involved.

The Secretariat is grateful to the following staff of the 2014-2015 Good Offices Section, Nita Yawanarajah and Dr Tres-Ann Kremer, and from the Rule of Law Division, Jarvis Matiya and Mark Guthrie, for initiating and steering the Toolkit to completion. We are also grateful to the Commonwealth Magistrates' and Judges' Association (CMJA) and its Editorial Board for co-ordinating and consolidating the contributions from the Latimer House Working Group to produce the first draft.

My thanks go to members of the Latimer House Working Group for sharing their knowledge and expertise in this effort.

Katalaina Sapolu
Director, Governance and Peace Directorate
Commonwealth Secretariat

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Icons



Preparation: items needed in order to proceed with the section



Reference: key background information, a pull-out of which can be found at the back of the book



Information: key information that is essential for a particular section



Questions: review questions about the understanding of the section



Time: the recommended amount of time to complete a particular section

1. Introduction

The Toolkit on the Latimer House Principles has three components:

- A handy *copy of The Latimer House Principles* (or *Pocket Principles*) that fits comfortably into a coat pocket, handbag or briefcase for easy reference, anywhere and at any time.
- The *Practitioner's Handbook*, the central learning tool, presents concepts, poses questions and gives examples of law and policy to prompt discussion of the challenges and devise appropriate recommendations.
- This *Facilitator's Guide* is used in conjunction with the Handbook. The Guide provides easy-to-follow instructions on organising and managing the plenaries and working groups, session-by-session, in 1-5 day modules. It introduces case studies from around the Commonwealth to demonstrate the challenges that could arise in the application of the Principles.

It is essential that members of the Facilitation Team are familiar with the contents of the Toolkit prior to getting started on the Dialogue Programme.

1.1 Programme

The Toolkit is designed for use in national-level awareness and dialogue on the Latimer House Principles. It can be easily adapted to fit into differing timeframes and situations. This Guide focuses on the following two options:

- A Comprehensive 5-day Module for practitioners from the three branches of power (Executive, Legislature, Judiciary). This option involves close examination and analysis of the 10 Principles in plenary sessions and breakout groups. It also provides an opportunity for dialogue to resolve differences.
- A 1-day Abridged Module, which can be an add-on to any workshop, training course or meeting organised by one of the branches. This abridged model can accommodate only a basic introduction to the Principles to raise awareness.

Note: Instructions apply to the Comprehensive Module unless otherwise stated and should be modified as necessary for the abridged version.

In guiding the Dialogue Programme, the two-fold motivating drive of the Facilitation Team is to:

- Find ways to resolve existing tensions and disputes within and between the three branches of government in the jurisdiction where the activity is being held.
- Conduct the activity in such a way as to establish methods of work for improving the functioning of each branch and the government as a whole.

1.2 Objectives

The Toolkit sets out to advance understanding and application of the Latimer House Principles in Commonwealth countries. To achieve this goal, the Toolkit:

- Identifies the issues that give rise to tensions between the three branches of government;
- Promotes dialogue and deepens working relations across the three branches of government;
- Stimulates understanding of the role of these institutions in society;
- Extends this understanding to the oversight institutions, both government (e.g., public accounts commissions, ombudsman/woman offices) and non-government (law, media, civil society), that work to ensure democratic principles are upheld;
- Establishes best practices in countries across the Commonwealth;
- Addresses existing gaps in the implementation of the Commonwealth's core values and standards.

1.3 Anticipated outcomes

- An understanding of the Principles and how they relate to other Commonwealth values on democracy and the separation of powers;

- The critical evaluation and analysis of the Principles as they apply to the practitioner's own jurisdiction;
- Potential remedies for resolving, in a timely manner, difficulties between the branches of government;
- Country specific recommendations for implementing the Principles; and
- Improved relations between the three branches of government.

Box 1.1

Who is Involved?

The Facilitation Team

A **Programme Director**, selected by the Commonwealth Secretariat, heads the Facilitation Team. She/he is a qualified professional from one of the branches of government and/or a legal academic, with experience in formulating such programmes and expertise in the field of good governance and the rule of law.

The Programme Director is responsible for the smooth running of the programme in all areas, from adapting and fine-tuning the agenda to credible presentation of the concepts and to the compilation of recommendations and the final report.

The **Political** and **Rule of Law divisions** of the **Commonwealth Secretariat** and the **Latimer House Working Group** provide support as required.

The **Facilitators** are selected from a list compiled by the Commonwealth Secretariat, with the assistance of the Latimer House Working Group and partner organisations. They are (or have been) members of Executives, Legislatures, Judiciaries and/or the legal profession in jurisdictions other than the country in which the programme is being held. Appropriate nationality is therefore an important consideration in the selection of facilitators. Gender balance, as far as this is possible, is another.

Facilitators are selected on the basis of their knowledge and expertise on the separation of powers, the rule of law and good



governance. They must have mediation skills to build trust among practitioners, as well experience in facilitating similar programmes and/or training.

Rapporteurs assist the Programme Director and Facilitators, recording key discussion points in both the Plenary sessions and the Working Group sessions. The working groups select their rapporteurs to take notes during the sessions and make a report to the Feedback Plenary at the end of each day. The Rapporteur for the plenary sessions helps the Facilitation Team to co-ordinate the recommendations from each session.

Box 1.2

Who is Involved?

Practitioners

The Facilitation Team works with practitioners from the three branches of government:

- The Executive: Ministers and senior/mid-level government employees.
- The Legislature / Parliament: Members of Parliament (MPs), including members of the opposition and relevant staff.
- The Judiciary: Judges and magistrates at all levels and court personnel.

National oversight institutions, the media and civil society organisations, as well as the legal profession (in both government departments and private practice) may also have an interest in making an input, especially on Principle IX (Oversight of Government) and X (Civil Society).

The Commonwealth Secretariat, working in close co-operation with the host government, selects a wide range of practitioners. This broad mix helps to ensure full and frank discussion of the issues and that recommendations command authority among members of the institutions expected to implement them.



There will likely be varying degrees of legal knowledge among such a broad range of participants. Some will have little legal experience while others are well practiced in this field. Nonetheless, to achieve the objectives and expected outcomes, it is essential that representatives of all government branches share their perspectives.

Practitioners must take part in every session, irrespective of whether they are from the Executive, Legislature or Judiciary.

Section One

1

Preparing for the Programme

- Preparing for the Programme
- Guidelines for Organising and Managing the Working Groups
- Setting the Agendas

2. Preparing for the Programme

Notes

2.1 Commonwealth Secretariat Needs Assessment

This Needs Assessment begins the process of putting the Latimer House Dialogue Programme into action in the host country. The assessment is used for the following purposes:

- *To identify areas of concern* in the relationships between the three branches of government and *compile documentation* on the issues. For example, in an impasse arising from the conduct of elections, supporting documents may include official, non-governmental and media reports on incidents and results.
- *To inform the selection of practitioners*: For example, in the case cited above it would be appropriate to select (among others) magistrates and judges specialising in electoral law, electoral commissioners and ministers, as well as parliamentarians from all political parties. Or, in the case of tensions stemming from the impeachment of a judge, practitioners could be selected from among members of any relevant parliamentary committee or the judicial appointments process and senior civil servants advising government on the issue.

2.2 Scoping of the Issues

The next step is the Scoping exercise, which focuses on the key principles at issue in the jurisdiction as identified in the Needs Assessment.

The Scoping exercise promotes frank discussion in a confidential setting. It is an opportunity for members of each of the three branches of government to elucidate the challenges to the proper functioning of the separation of powers doctrine, within and between them.

The purpose is to build trust, empathy and relationships with individuals and to gain deeper insights and broader perspectives.

Notes

The Programme Director and facilitators, assisted by the Commonwealth Secretariat, conduct the exercise over three days (Box 2.1). It involves:

- Face-to-face discussions, primarily with members of the Executive, Legislature, Judiciary and the legal profession, on a one-to-one or group basis;
- Private and confidential meetings with leaders and members of the branches of government, where circumstances allow;
- Discussions, as necessary, with members of civil society and the media, and representatives of the police, prosecution service, opposition parties, national human rights commissions and offices of the ombudsman/ombudswoman to fill information gaps in the Needs Assessment.

All members of the Facilitation Team should be fully informed about the disputes and challenges faced by or between the three branches of government.

At all times team members must bear in mind the cultural sensitivities and norms of the various stakeholders. The Commonwealth Secretariat will brief the Facilitation Team on these aspects in advance of the Dialogue Programme.

Box 2.1. Timetable for Scoping of the Issues



The Programme Director is responsible for setting the timetable in consultation with the local representatives. Schedule the exercise as follows:

Day 1: Members of the Executive and Parliament

Day 2: Members of the Judiciary, legal profession, civil society, the media and any other sector identified

Day 3: Analyse the information and fine-tune the Dialogue Programme:

- Shape it to address existing tensions within the jurisdiction;
- Adjust the timing and approach to activities and presentations (e.g., emphasise the most relevant

Notes

case study, or set of general and country-specific questions and/or invite a participant to share a personal experience related to the most significant challenge);

- Adapt the Dialogue Programme, taking into account the collective skills of the practitioners and any public concerns about the relationship between the three branches of government.

Box 2.2. Add-on Option



In this preparatory stage assess the option of adding a *study site visit* to the programme to encourage better understanding between branches. For example, arrange for MPs to visit a court in session or a mock trial (organised by a local university or educational institution) and for judges to observe a parliamentary or committee debate.

Box 2.3. Encourage Practitioners to be Prepared



Distribute the *Practitioner's Handbook* and *Pocket Principles* to participants in advance of the workshop so they can be prepared to play a full part in the dialogue. Instruct them to read the following sections of the *Handbook* prior to the start of the Module:

- Section One: Context and Background of the Latimer House Principles
- Section Three: Guidelines and Plans of Action under Resources

At the end of each day instruct practitioners to read the notes on the Principles to be covered in the following day's sessions.

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3. Guidelines for Organising and Managing the Working Groups

The recommended format for interrogation of the Latimer House Principles uses a mix of *Plenary sessions* and *Working Group sessions*.

Breaking out of the plenaries into working groups provides practitioners with a structured opportunity to discuss the issues in a free and frank spirit of openness. Working group discussions stimulate broad participation, foster interaction and should aim to promote a sense of equality and togetherness.

3.1 Getting the Best out of the Dialogue

Note: Facilitators should raise any questions or concerns about the proceedings with the Programme Director at the earliest opportunity.

3.1.1 Allocating practitioners to groups

The full list of practitioners should be available in a timely manner to enable the Facilitation Team to form the groups prior to the start of the Dialogue. Getting the balance right in terms of branch representation, experience, knowledge and skills is important. A balanced representation will ensure wide-ranging perspectives are brought into the dialogue for a high-quality discourse and to foster realistic results.

Allocate practitioners using the following guidelines:

- Limit the overall number of practitioners (plenary) to between 30 and 45. Divide into three working groups of 10-15 participants each.
- Set up the working groups with equal numbers of practitioners from each branch of government (and, where applicable, from oversight institutions, media and civil society).
- Select a mix of levels for each breakout group: ministers as well as senior/mid-level civil servants; MPs as well as chairs of select/public affairs committees, parliamentary

counsel and senior staff; judges and magistrates as well as registrars.

- Consider the number of practitioners whose work in any one branch cuts across other institutions and weigh this against those who are not in daily contact with other institutions.
- Strive for gender balance to the extent possible.
- Assign a facilitator to each group based on his/her area of expertise and knowledge of the issues.

Stick with the pre-selected groups through the Dialogue. If it becomes necessary to make changes, try to retain the mix.

3.1.2 Developing the recommendations

From each session, practitioners must produce an agreed list of recommendations in keeping with the S.M.A.R.T formula (i.e., **S**pecific, **M**easurable, **A**ttainable, **R**elevant and **T**ime bound). The recommendations must include an institution or individual with responsibility for achieving the goals, and indicate a timeframe for doing so.

Put in place a *rapporteur* to take notes on the main points of the discussion and the recommendations, and to report these to the Feedback Plenary:

- Select rapporteurs in a transparent and open fashion (e.g., ask for volunteers and/or nominations);
- Encourage the collegial support of the group in making sure the key points from the discussions are included in the rapporteur's 5-minute report to the Plenary;
- Change the rapporteur by session or by day, depending on group dynamics, to allow wider involvement;
- Ensure the group completes the tasks in the time allocated.

3.1.3 Dealing with the discussion

In discussing the challenges, always keep the emphasis on the views of practitioners. How did the challenge arise? Were there warning signs? It is their experiences of the challenges that will be the key in finding solutions.

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Keep the discussion open, constructive and focused on the issues

to avoid confusion or confrontation. For example, when the spotlight is on a specific branch of government and the challenges it faces, guard against accusations and finger pointing among representatives and encourage empathy and understanding of each other's positions. Keep the focus on issues, not personalities.

Ensure every practitioner feels respected and valued. The contribution of those with less confidence may be of greater interest than that of others more inclined to give their opinion. In the case of shy or passive practitioners:

- Be observant and offer encouragement when it appears that they wish to make a contribution;
- Pose a question that relates directly to his/her work;
- Divide the group into pairs at the start of the session to help build confidence.

In the case of participants who dominate the discussion, do not compete with them, stifle their enthusiasm or get defensive, but at the same time do not allow them to control the discussion. Instead, set rules (e.g. a 2-minute time limit on contributions) and/or take the initiative and ask such participants to present on a particular point at a specific time.

Be creative. Maintain a lively level of discourse by mixing up the approaches. For example:

- Invite one or two of the practitioners to prepare a list of points on how the Principle under review is/is not being implemented in their branches;
- Split the group into smaller units of practitioners from the same branch of government to discuss the session case study; or instruct those from the executive to examine a case about parliamentarians, the parliamentarians to consider one on the Judiciary and the Judiciary one on the Executive.

Be relaxed. Promote a relaxed and comfortable atmosphere. For example:

- Encourage good humour during the sessions while maintaining focus on substance;
- Use a quote, saying or a joke at the beginning of the day to set the tone for a relaxed session.

4. Setting the Agendas

Notes

This chapter sets out sample agendas for the Comprehensive Module on the Latimer House Principles and the Abridged Module.

Chapter 5 suggests times for each session of the Comprehensive Module. Timing suggestions for the abridged version are set out in the applicable agenda. The Programme Director will use these as a guide in setting session times based on the challenges identified as well as skills levels and knowledge of the practitioners as identified in the Needs Assessment and Scoping Exercise.

For both versions, it is best to address the 10 Principles in the order they appear.

4.1 Comprehensive Module

The agenda for the Comprehensive Module (below) covers the ideal 5-day model, of which the first day is dedicated to activities to put practitioners at ease, introduce programme content and address administrative matters.

This includes introducing the Facilitation Team, taking stock of expectations and addressing rules of engagement (Box 4.1).

It is also an appropriate time to seek collective validation of the key issues that were previously identified with individuals in the Scoping exercise. Divide practitioners into branch groups, outline the issues, get feedback, discuss and modify as agreed.

Where presenters are required for particular sessions (see Day 1, Overview Activity and Day 4 presentations on principles IX and X) select experts from overseas to avoid possible backlash against a local presenter.

Notes

Box 4.1. Rules of Engagement



Settle these at the start of the module to avoid timewasting or tension later on:

- The Chatham House Rule will prevail. This means participants are free to use the information received, but neither the identity nor the affiliation of the speaker(s) or any other participant, may be revealed. The Chatham House Rule originated at Chatham House with the aim of providing anonymity to speakers and to encourage openness and the sharing of information. It is now used throughout the world as an aid to free discussion.
- To the extent possible, suspend protocols in relation to using titles for the duration of the Dialogue.

The main discussion takes place in **Working Groups** to which practitioners have been pre-assigned (see page 9).

When the Working Group sessions get underway, there are two **Plenary sessions** each day. Each day, except the first, starts with a **Recap Plenary**, which reviews the previous day's deliberations and outlines the upcoming sessions. The **Feedback Plenary** at the end of the day's sessions takes reports of the recommendations arising from the working groups (Box 4.2).

Box 4.2. Feedback Plenary



- At the end of each day's working group sessions, practitioners move back into the Plenary.
- The Programme Director will invite the rapporteur of each Group to make a 5-minute presentation of the issues and recommendations to emerge from the sessions.

Notes

- The Plenary rapporteur will make a brief summary of the main points, on which the Programme Director will seek amendments and additions to promote consensus of the Plenary.
- The Programme Director will then briefly run through the next day's sessions and the session notes in the Practitioner's Handbook that participants must read in preparation.

The **Dialogue Secretariat** meets each day to develop the final recommendations (Box 4.3). This is an open, transparent and collective exercise that has the potential to positively impact how practitioners from the three branches of government interact after the Dialogue.

Note: This agenda can be condensed into 3-days by cutting back on the Day One introductory activities and reducing session times.

Box 4.3. The Dialogue Secretariat

The Dialogue Secretariat comprises:

- The Programme Director and facilitators;
- Representatives of the Commonwealth Secretariat and partner organisations in the programme;
- Plenary/working group rapporteurs (at the discretion of the Programme Director).

The Secretariat will meet each day at the conclusion of business to:

- Consider the day's activities and identify any adjustments that may be needed;
- Distil the observations and recommendations from the working groups and add these to the developing draft of final recommendations;
- Review the programme for the forthcoming day in the light of discussion;



Notes

- The recommendations should adhere to the S.M.A.R.T. formula (i.e., be **S**pecific, **M**easurable, **A**ttainable, **R**elevant and **T**ime bound) and a key individual, agency or institution assigned to take each one forward.

Box 4.4.**Comprehensive Module Agenda (Duration: 5 Days)****Day 1****Plenary**

- Activities to welcome practitioners and put them at ease: Introduce the Facilitation Team; take stock of expectations; address rules of engagement (Box 4.1).
- Seek validation of the key issues identified during the scoping exercise.

Lunch**Plenary**

- Organise an overview activity (e.g., panel discussion with representatives from each branch of government, or a guest speaker).

Daily Dialogue Review

- Dialogue Secretariat meets to consider the day's activity, summarise recommendations and prepare for the next day's activity.

Day 2**Plenary**

- Introduction to the Principles
- Principle I: The Three Branches of Government
- Principle II: Parliament and the Judiciary

Lunch**Working Groups**

- Principle III: Independence of Parliamentarians
- Principle IV: Independence of the Judiciary

Feedback Plenary

- Working group main points and recommendations

Daily Dialogue Review

- Dialogue Secretariat meets to consider the day's activity, summarise recommendations and prepare for the next day's activity.

Day 3**Recap Plenary**

- Summary of Day 2 main points and recommendations on Principles I-IV
- General introduction to Principles V-VIII

Working Groups

- Principle V: Public Office Holders
- Principle VI: Ethical Governance

Lunch**Working Groups**

- Principle VII: Accountability Mechanisms
- Principle VIII: The Law-Making Process

Feedback Plenary

- Working group main points and recommendations

Daily Dialogue Review

- Dialogue Secretariat meets to consider the day's activity, summarise recommendations and prepare for the next day's activity.

Day 4**Recap Plenary**

- Summary of Day 3 main points and recommendations on Principles V-VIII
- General Introduction to Principles IX-X: Guest presenter(s) on oversight institutions, civil society

Lunch**Working groups**

- Principle IX: Oversight of Government
- Principle X: Civil Society

Notes

Feedback Plenary (Working group summaries)**Dialogue Review**

- Dialogue Secretariat meets to finalise draft recommendations and implementation plans.

Day 5**Plenary**

- Circulate draft recommendations and implementation plans
- Read, discuss and record any areas of disagreement
- If there are major areas of disagreement, use working group sessions to iron out differences

Lunch

Dialogue Secretariat meets to iron out any cross branch discomforts expressed in the discussion, and modify as necessary.

Final Plenary continues

- Reach consensus on modified draft and finalise.
- Distribute evaluation forms for completion before practitioners leave the venue.

4.2 Abridged Module

The agenda for the abridged version is set out in one full day or two half days to facilitate its use as an add-on to a planned workshop, training or meeting organised for any one of the three branches of government.

The first half-day is introductory and covers Principles I through IV. Practitioners will become familiar with the Principles and be able to evaluate and apply them to a given case study. The follow-up agenda covers the rest of the principles (V through X) and focuses on critical evaluation and analysis of the learner's own jurisdiction.

Box 4.5.**Abridged Module Agenda****Introductory Session (Duration: ½ day)**

Practitioners using this module will have very little knowledge of the Latimer House Principles. Since it will not be possible to cover all the Principles in half a day, the focus should be on the following core areas delivered in the session formats indicated:

Plenary Session (Duration: 30 minutes)

Introduction to the Principles (Including presentations from members of each branch of government)

Principle I: The Three Branches of Government

Working Group (Duration: 1 hour 45 minutes)

Principle I: The Three Branches of Government (to complement the Plenary presentation)

Principle II: Parliament and the Judiciary

Principle III: Independence of Parliamentarians

Principle IV: Independence of the Judiciary

Follow-up Session (Duration: ½ day)

The purpose of this follow-up session is to address the remaining Principles, (V-X) as follows:

Plenary Session (Duration: 15 minutes)

Principle V: Public Office Holders

Working Group Discussion (Duration: 1 hour 30 minutes)

Principle VI: Ethical Governance

Principle VII: Accountability Mechanisms

Principle VIII: The Law-Making Process

Plenary Session (Duration: 30 minutes)

Principle IX: Oversight of Government

Principle X: Civil Society



Section Two

2

Interrogating the Principles Session by Session

Each of the sessions contains the following parts:

- **The Principle** as set out in the 2003 text of the Latimer House Principles
- **Background Commentary** explaining the concepts behind the Principle
- **Law and Policy Considerations** on which to devise strategies and recommendations
- **Questions to Reflect On** are general and country-specific and cover topics from the above

Note: The terms '*Parliament*' and '*Legislature*', as well as '*Executive*' and '*Government*' are used interchangeably throughout the text in keeping with their mixed usage across Commonwealth jurisdictions.

5. Interrogating the Principles Session by Session

Notes

This Chapter is a guide to engaging practitioners with the concepts of the Latimer House Principles, as outlined in Section Two of the Practitioner's Handbook.

Introduction to the Latimer House Principles and the ten Principles will be delivered in eleven sessions.

The concluding session (Session 12) is devoted to reaching consensus on a final set of recommendations and to obtain the practitioners' evaluation of the Dialogue Programme.

Each of the sessions that cover the Principles contains:

- The objective of the Principle being examined;
- Instructions on the Facilitator's Presentation and the discussion;
- Session tools comprising a Background Commentary, general and country-specific questions and case studies with questions.

The Facilitator develops the discussion using these elements to address some of the challenges that could give rise to conflict, whether in the practitioners' jurisdiction or area of professional work or practice.

Note: The case studies are pre-allocated, one to each of the three working Groups. There are some extra ones, which can be used in Plenary or Working Group sessions as needed (for example, as an add-on to advance the discussion or as a more appropriate choice when modifications are made to the agenda to resonate with practitioners).

Notes

5.1 Session 1

5.1.1 Introduction: The Separation of Powers in a Democratic Country

Objective

To communicate the basics of the separation of powers doctrine and fundamental values to which Commonwealth governments are committed.

Practitioner's Handbook Reference

Section One, Context and Background of the Latimer House Principles (pp. 9-13)

Duration: 15 minutes

Format: Plenary

Session Instructions

Note: The Programme Director leads the activity.

This session is particularly appropriate for practitioners who are not familiar with the separation of powers doctrine and related constitutional principles.

Presentations

- Introduce the Facilitation Team. This is important as the group is meeting for the first time (although individuals may be familiar with each other in working life).
- Briefly outline the Dialogue Programme's objectives and methodology.
- Main presentation on Commonwealth fundamental values, the Latimer House Principles and the separation of powers doctrine (by Programme Director or an expert from a different jurisdiction). Base this on:
 - ✓ *Section One of the Practitioner's Handbook*
 - ✓ *Background Commentary (below)*

5.1.2 Session Tool

Notes

Background Commentary

Introduction: The Separation of Powers in a Democratic Country

Every society needs rules that set out legal rights and duties, and the mechanisms to fairly enforce those rules. This is known as 'rule of law'.

In most countries, rights are guaranteed through a written Constitution, the supreme law of the land, which sets out the rights of citizens and the powers of the Legislature, Executive and Judiciary. In order for a democracy to work, the three branches of government must exercise their power within the limits prescribed by law.

- The **Parliament** (or **Legislature**) has one (unicameral) or two (bicameral) legislative houses. Parliament's primary functions are to make, amend and repeal laws, and to hold the Executive to account.
- The composition of the **Executive** (or **Government**) varies in accordance with the constitutional system in place. Executive power may be vested in a Head of State, advised by ministers. In the Westminster system, ministers, grouped in a Cabinet, are collectively accountable to Parliament for the conduct of the Executive. Members of the Executive are usually MPs.
- Members of the **Judiciary** are magistrates and judges appointed by an independent process to enforce the law. The courts may invalidate actions of the Executive that exceed the powers conferred by law and have the power to invalidate laws made by Parliament that are found to be inconsistent with the Constitution.

The doctrine of separation of powers prevents the concentration of power by requiring each branch to restrain the exercise of authority to its own sphere. This means, for example:

- The Executive should not make law or administer justice and Parliament should not pass laws that are arbitrary and/or inconsistent.
- It would be an abuse of power for the Executive to imprison or tax people without legal authority or for

Notes

the Judiciary to conduct a trial in an unfair manner and pass sentences beyond the scope of its powers.

- Attempts by the Executive and/or Parliament to weaken the authority of the courts by limiting judicial review or subjecting judicial decisions to critical comment, would constitute a threat to the separation of powers.
- Failure to respect boundaries between parliamentary privilege and the exercise of judicial power would also be threatening, for instance where the courts are asked to invalidate the appointment or removal of a Head of the Executive.

To ensure the balance of power is maintained, each branch must keep a check on the others to prevent abuses and/or efforts to influence others.

(Extracted from Background Commentary, Section Two, Practitioner's Handbook, page 18)

5.2 Session 2

Notes

5.2.1 Principle I: The Three Branches of Government

Objective: To give practitioners an understanding of, and respect for, the role of each separate branch in society, and in good governance.

Duration: 1 hour 45 minutes

Format: Working Groups

Session Instructions

Note: Practitioners are expected to be familiar with the Background Commentary, Law and Policy Considerations and the Discussion Questions from the Practitioner's Handbook.

Presentation

Base this on:

- **Background Commentary** in Session Tools (below)
- **Law and Policy Considerations** in the Practitioner's Handbook (p. 20-21)
- Findings from the Commonwealth Secretariat **Needs Assessment** and the **Scoping of the Issues** exercise.

Address the following overarching themes:

- Roles and functions of the three branches of government
- Institutional and functional separation of power
- Individuals with dual roles

Discussion

Note: See Questions and Case Studies in Session Tools (below)

Use the **General and Country-Specific Questions** to get the discussion started and to gauge practitioners' understanding of the role of each branch of government in society and in good governance.

Use the previously allocated **Case Study** to develop the discussion and map action, as follows:

- Apply the Principle to the case study.

Notes

- Evaluate responses.
- Identify up to five achievable recommendations based on specific issues identified. Ensure practitioners focus on realistic actions relating to the topic under discussion.

5.2.2 Session Tools

Notes

Background Commentary

Principle I: The Three Branches of Government

Most members of the Commonwealth share the legacy of common law, with its emphasis on the rule of law and procedural safeguards secured through an independent Judiciary. Many also share Westminster style political systems in which ministers are accountable to Parliament.

Even those Commonwealth countries that have modified the parliamentary system have retained constitutional freedoms and rights that are in keeping with the separation of powers doctrine.

Within constitutionalism, political sovereignty rests in the people. Parliament, in safeguarding the sovereignty of the people must not only make laws but also hold the Executive to account for its day-to-day responsibility of administering the state. The Judiciary, in its role of adjudicating, must be independent, impartial and execute its mandate under the Constitution.

The separation of powers must be institutional (no branch should affect the operations of another) as well as functional (respecting but not encroaching on the power of the others).

Constitutions of Commonwealth countries do not all have the same separation of powers. Some emphasise separation of institutions, which prevents overlapping membership. Others prefer a separation of functions, empowering each institution to exercise the function for which it is designed (and perhaps, by extension, performing no other). In reality, any system of separation of powers must involve at least a measure of both.

Some countries have rigorously maintained separation of the Judiciary from Legislative and Executive powers, and the separation of judicial officers from political activity.

In countries where the Westminster model prevails, checks and balances depend on convention whereas in those countries where the Constitution is the supreme law, all Executive and Legislative action must conform to that Constitution.

Abuse of power can occur as a result of disregard for constitutional provisions or merely lack of will in respecting them.

Notes

The 1998 Preamble to the Latimer House Guidelines on Parliamentary Supremacy and Judicial Independence states: *‘Each institution must exercise responsibility and restraint in the exercise of power within its own constitutional sphere so as not to encroach on the legitimate discharge of constitutional functions by the other institutions.’*

All stakeholders must understand the role of each institution. Cross branch communication is encouraged, but this should not compromise their functioning or institutional independence.

(Extracted from Background Commentary, Section Two, Practitioner's Handbook, page 18)

5.2.3 General and Country-Specific Questions

Notes

Principle I: The Three Branches of Government

General

- What is your understanding of the separation of powers doctrine and its application in your jurisdiction?
- What are the constitutional functions of each branch of government and the areas of potential overlap?

Country Specific

- What are the challenges in applying the doctrine of separation of powers in your branch of government?
- What steps could be taken to counter these challenges?

Notes

Case Study 2.1

Extradition process challenged

The Executive, claiming to be exercising its prerogative over foreign affairs, seeks to hand over an alleged fugitive offender to a foreign power in keeping with an existing extradition treaty.

The alleged offender claims that the procedure adopted is an abuse of process and mounts a legal challenge.

- How do the facts illustrate application of the doctrine of separation of powers?
- What steps can the Judiciary and the Executive take to ensure respect for the doctrine?
- What measures could be adopted to avoid any future occurrences of such conflict (e.g., constitutional amendment, training, reference to other bodies such as the Office of the Ombudsman or Human Rights Commission)?

Case Study 2.2

Notes

Seeking redress in the courts against statutory sentence

Parliament has passed a law prescribing a minimum 10-year prison sentence for the offence of carjacking.

A person convicted of the offence seeks redress from the courts on the basis that the statutory imposition of the sentence is unconstitutional.

- How do the facts illustrate the application of the doctrine of separation of powers?
- What steps can Parliament and the Judiciary take to resolve the issue?
- What measures could be adopted to avoid any future occurrences of such conflict (e.g., training of parliamentarians, pre-enactment review or certification of legislation)?

Notes

Case Study 2.3

Constitutional amendment struck down

The Supreme Court has struck down a constitutional amendment enacted by Parliament, on the grounds that it violates the basic structure of the Constitution.

- How do the facts illustrate the application of the doctrine of the separation of powers?
- What steps can Parliament and the Judiciary take to resolve the conflict?
- What measures could be adopted to avoid any future occurrences of such conflict (e.g., Constitutional amendment, exercise of judicial restraint)?

5.3 Session 3

Notes

5.3.1 Principle II: Parliament and the Judiciary

Objective: To ensure that practitioners understand Parliament's law-making role, the Judiciary's role in interpreting and applying the law and the complementary role that both play in ensuring good governance.

Duration: 1 hour 30 minutes

Format: Working Groups

Session Instructions

Note: Practitioners are expected to be familiar with the Background Commentary, Law and Policy Considerations and the Discussion Questions from the Practitioner's Handbook.

Presentation

Base this on:

- **Background Commentary** in **Session Tools** (below)
- **Law and Policy Considerations** in the Practitioner's Handbook (p. 23)
- Findings from the **Commonwealth Secretariat Needs Assessment** and the **Scoping of the Issues** exercise.

Address the following overarching themes:

- Deficiencies of statutes
- Interpretation of the law
- Contempt issues

Discussion

See Questions and Case Studies in Session Tools (below)

Use the **General and Country-specific Questions** to get the discussion started and to gauge practitioners' understanding of Parliament's law-making role, the Judiciary's role in interpreting and applying the law and the complementary role that both play in ensuring good governance.

Notes

Use the previously allocated **Case Study** to develop the discussion and map action, as follows:

- Apply the Principle to the case study.
- Evaluate responses.
- Identify up to five achievable recommendations based on specific issues identified. Ensure practitioners focus on realistic actions relating to the topic under discussion.

5.3.2 Session Tools

Notes

Background Commentary

Principle II: Parliament and the Judiciary

The separation of powers represents a delicate balance. Constitutions in Commonwealth countries have established and empowered Parliament as the constitutional authority. Parliament is the representative body elected by the people and accountable to the people and it confers powers on the Executive and other bodies through its authority to enact legislation.

In doing so it is required to ensure that:

- Every executive and administrative act affecting legal rights, interests or legitimate expectations is founded in the law and legally justified;
- Everyone, including the government and its servants, is subject to the law;
- The rule of law is public and precise, enabling people to conform to the laws of the land.

Parliament is recognised as the highest authority in the law-making process but it is not the sole lawmaker. The Judiciary also has important responsibilities:

- The courts establish ‘common law’ or ‘judge-made law’ where the existing law is not clear;
- The courts are responsible for interpreting the laws made by Parliaments;
- The Judiciary determines constitutional functions as such issues arise and in so doing, interprets related constitutional provisions;
- The Judiciary may have the power to overrule Parliament by declaring primary legislation invalid or in breach of constitutional provisions;
- In some states, the court can set a time limit when it requires Parliament to amend any offending provisions;

Notes

- Judges are involved in government commissions of inquiry in some Commonwealth countries (although some, such as Australia, view this as inconsistent with the principles of judicial independence).

(Section Two, Practitioner's Handbook, page 22)

5.3.3 General and Country-Specific Questions

Notes

Principle II: Parliament and the Judiciary

General

- How should the Judiciary respond to unconstitutional usurpation of executive and/or legislative power?
- Why has parliamentary supremacy been held responsible for the establishment of apartheid in South Africa?

Country Specific

- To what extent, if at all, does the doctrine of parliamentary supremacy apply in your jurisdiction?
- From the standpoint of (a) a parliamentarian and (b) a member of the Judiciary, to what extent, if at all, should the courts be able to override the will of Parliament in order to protect the fundamental values enshrined in the Constitution and in relevant international instruments? Give reasons for your answer.

Notes

Case Study 3.1

Gender, citizenship and the Constitution

The Constitution adopted by Parliament in the 1960s contains no provision relating to gender equality.

The citizenship law, also enacted by Parliament in the 1960s, provides that a child can only acquire citizenship by birth if his/her father is a citizen.

The law is challenged on behalf of a child born to a citizen mother and non-citizen father.

- How do the facts illustrate the relationship between the adjudicatory power of the courts and the legislative power of Parliament?
- How should the courts resolve the issue?
- What measures could be adopted to avoid any such conflict in the future (e.g. constitutional or statutory amendment, ensuring compliance with international human rights norms)?

Case Study 3.2

Notes

Criminalisation of controversial issues: Who decides?

The Penal Code imposes severe penalties for matters concerning consenting homosexual acts conducted in private.

A person convicted under this law seeks relief from the courts on the basis that the criminalisation of such activity is unconstitutional.

- Should the question of criminalisation of such cases be considered as a matter of policy for Parliament alone to determine? Why/why not?
- What steps should the courts take to resolve the issue?
- What measures could be taken to address such delicate issues of policy?

Notes

Case Study 3.3

When Parliament and the judiciary clash

Parliament purports to pass a motion dismissing the Prime Minister. There are fewer members present than the quorum prescribed by the Constitution for transaction of business.

Confronted with a constitutional challenge by the 'deposed' Prime Minister, the Speaker of the House argues that the proceedings of Parliament were not justiciable (subject to trial in a court of law) and therefore the courts had no jurisdiction to pronounce upon the validity of the motion.

- Do the facts indicate a clash between the historic privileges of Parliament and the exercise of judicial power?
- What steps should be taken to resolve any such clash?
- What measures could be adopted to avoid future occurrences of such a situation (e.g., examining the powers and role of the Speaker)?

5.4 Session 4

Notes

5.4.1 Principle III: Independence of Parliamentarians

Objective

To enable practitioners to understand the nature of, and constraints upon, the constitutional independence of Parliament and the importance of the responsible exercise of that independence to the good governance of the state. In particular, to ensure that parliamentarians have a full understanding of their role in the legislative process, of the mechanisms by which they should hold the Executive to account and the extent and limitations of parliamentary privilege.

Duration: 1 hour 30 minutes

Format: Working Groups

Session Instructions

Note: Practitioners are expected to be familiar with the Background Commentary, Law and Policy Considerations and the Discussion Questions from the Practitioner's Handbook.

Presentation

Base this on:

- **Background Commentary** in **Session Tools** (below)
- **Law and Policy Considerations** in the Practitioner's Handbook (p. 26-27)
- Findings from the **Commonwealth Secretariat Needs Assessment** and the **Scoping of the Issues** exercise

Address the following overarching themes:

- Parliamentary sovereignty
- Separation of Executive and Parliament

Discussion

See Questions and Case Studies in Session Tools (below)

Use the **General and Country-specific Questions** to get the discussion started and to gauge practitioners' understanding of

Notes

the constitutional independence of Parliament and its importance to the good governance of the state.

Use the previously allocated **Case Study** to develop the discussion and map action, as follows:

- Apply the Principle to the case study.
- Evaluate responses.
- Identify up to five achievable recommendations based on specific issues identified. Ensure practitioners focus on realistic actions relating to the topic under discussion.

5.4.2 Session Tools

Notes

Background Commentary

Principle III: Independence of Parliamentarians

Given that the main constitutional function of Parliament is to hold the Executive to account, it should be able to discharge its responsibilities free from Executive domination.

Independence should not be viewed as aggressive. Operational autonomy is a necessary prerequisite for good parliamentary governance. It should not be a barrier to fostering good relations with the Executive and can be essential in assuring the passage of legislation and public sector policies in the interest of the people.

For the purpose of enabling Parliament to discharge its functions unimpeded, Members of Parliament have been granted special freedoms, privileges and immunities. These are:

- *Institutional autonomy* – The principle of parliamentary independence is often institutionalised in written cConstitutions. In countries without a written Constitution, institutional autonomy and the separation of powers can be established by constitutional conventions.
- *Administrative autonomy* – Administrative independence and accountability is best achieved by parliamentary corporate bodies (e.g., parliamentary bureaux, commissions and service boards) with responsibility for overseeing provision of the necessary facilities, property, staff and services, according to experience in a number of Commonwealth countries and independent reviews on the effectiveness of governance structures in parliamentary settings. Parliamentary autonomy can also be expressed in legislation that establishes corporate bodies.
- *Financial autonomy* – Control may rest with Parliament or the Executive or through a collaborative model in which Parliament determines its budget in consultation with the Executive. When Parliament does not have financial independence there is always a danger that the Executive will exercise undue control over expenditure, to the detriment of the parliamentary process.

5.4.3 General and Country-Specific Questions

Notes

Principle III: Independence of Parliamentarians

General

- Failure to ensure the independence of parliamentarians has proved to be a systemic weakness of parliamentary systems of government in the Commonwealth. Why?

Country Specific

- To what degree are Members of Parliament in your jurisdiction independent?
- What are some of the challenges that constrain independence of parliamentarians in your jurisdiction?
- What steps could be taken to strengthen their independence?

Notes

Case Study 4.1

A challenge to become an independent member

In cases where a political party notifies the Speaker of the House that a sitting MP is no longer a member of the party, by law the MP must vacate his/her seat.

An MP who has been subject to such a notification challenges the Speaker's decision on the grounds that she is entitled to remain as an independent member.

- In what ways, if at all, does parliamentary privilege protect the Speaker's decision?
- Does such a measure give too much power to the leadership of political parties?
- What value do independent members bring to a democratic Legislature?

Case Study 4.2

Notes

Unlawful interference in the conduct of parliamentary business

In an appearance before the Public Accounts Committee, a Police Commissioner denies having removed a policeman from a probe into the management of a police pension scheme, despite evidence to the contrary.

- How, if at all, does the Police Commissioner's behaviour constitute 'unlawful interference' in the conduct of parliamentary business?
- What action should Parliament take against the Police Commissioner?

Notes

Case Study 4.3

A press report leads to an MP charged with corruption

A newspaper publishes an article accusing a named independent MP of taking bribes from the leader of a political party in order to secure the MP's vote in a crucial division.

The MP is subsequently arrested and charged under the Corrupt Practices Act.

- Assuming the Director of Public Prosecutions decides there is insufficient evidence to press charges, what action would you advise the MP to take against the newspaper?
- If the DPP were to press charges, on what grounds could the MP claim parliamentary privilege? (For example, in this case criminal proceedings would infringe on article 9 of the Bill Rights, which forms part of the law of the relevant jurisdiction.)
- What policy grounds are there for restricting the ambit of the article 9?

Case Study 4.4

Notes

When language may infringe on rights

There are two official languages in the Commonwealth country involved.

An individual is summoned before a standing committee of Parliament as a witness. He submits supporting documents in one language only.

The Chairman of the Committee refuses to circulate the documents on the basis that the Committee has accepted a motion to consider only documents written in both languages and the documents submitted do not meet this criterion [*Knopf v. Canada (Speaker of the House of Commons) (F.C.A.)*, 2007 FCA 308, [2008] 2 F.C.R. 327-(Canada)].

- In what way, if at all, do witness documents in a single language infringe on the rights of those individuals who require the documents in both languages?
- How is parliamentary privilege exercised in this case?

Notes

5.5 Session 5

5.5.1 Principle IV: Independence of the Judiciary

Objective

To enable practitioners to understand the nature of, and constraints upon, the constitutional independence of the Judiciary, the importance of the responsible exercise of that independence to the good governance of the state, and of the relationship between the independence of the Judiciary and that of other arms of government.

Duration: 1 hour 30 minutes

Format: Working Groups

Session Instructions

Note: Practitioners are expected to be familiar with the Background Commentary, Law and Policy Considerations and the Discussion Questions from the Practitioner's Handbook.

Presentation

Base this on:

- *Background Commentary* in *Session Tools* (below)
- *Law and Policy Considerations* in the Practitioner's Handbook (p. 31-33)
- Findings from the *Commonwealth Secretariat Needs Assessment* and the *Scoping of the Issues* exercise

Address the following overarching themes:

- Judicial appointments
- Administration and remuneration
- Removal of the judicial office holders

Discussion

See Questions and Case Studies in Session Tools (below)

Use the *General and Country-specific Questions* to get the discussion started and to gauge practitioners' understanding of the constitutional independence of the Judiciary and its

Notes

- Apply the Principle to the case study.
- Evaluate responses.
- Identify up to five achievable recommendations based on specific issues identified. Ensure practitioners focus on realistic actions relating to the topic under discussion.

Notes

5.5.2 Session Tools

Background Commentary

Principle IV: Independence of the Judiciary

Any judge or magistrate, in coming to a judicial decision or in making any judicial intervention, has to do so in accordance with his/her judicial oath. This applies to:

- The finding of any relevant disputed facts, or the summing up to a jury, on the basis of the evidence before the court and in accordance with the relevant standard of proof;
- The interpretation of the law;
- The application of the facts and the law to the decision of the court and the pursuant sentence or remedy reached.

The judge or magistrate must be able to make these decisions independent of pressures from the Executive (or from litigants, lobbyists and the media), unaffected by his/her terms and conditions of service (e.g., physical and financial security, security of tenure, individual rights), and with confidence in his/her own level of skills and knowledge.

The main difficulties in the administration of the law and Constitution (other than those created by personal behaviour) relate to the management of the courts themselves (i.e., listing of cases, ticketing of judicial officers, appointment of judges and other such practical matters).

Arrangements for managing the courts differ across the Commonwealth. Many countries have judicial commissions to appoint judges, but the balance of representation on such bodies can be controversial as to whether, and how many, government representatives should be involved or whether judges should be in the majority.

The degree to which members of the Judiciary may be involved in the administration of the courts (and of their budgets) may depend on other constitutional principles in play (for example the right of the democratically elected Legislature to determine how public money is spent). Independence can also be affected by manipulation of judicial itineraries and case listing or trial ticketing. Even when these are apparently under control of the Judiciary, the pressures of work may be such that the

administration could take over responsibility in these areas.

Notes

The Legal Profession

Legal assistance must be carried out independently if it is to be effective. The independence and impartiality of the legal profession is based on ethical conduct set out in much the same way as the ethical guidelines in place for judicial officers.

In codes of conduct developed over the last 50 years, legal professionals are obliged to:

- Maintain and promote the highest standards of excellence and integrity.
- Support the Legislature by participating fully in consultative processes.
- Promote and assert the independence of the courts.
- Speak out against improper administrative action or lack of action.
- Help to create public awareness of legal issues, particularly ethics and human rights.

(Extracted from Background Commentary, Section Two, Practitioner's Handbook)

Notes

5.5.3 General and Country-Specific Questions

Principle IV: Independence of the Judiciary

General

- What measures can judicial officers adopt to preserve and strengthen their independence?
- Would the same measures apply to both judges and magistrates (stipendiary or lay)?
- What steps can the senior Judiciary take to support the independence of the Junior judiciary and magistracy?
- Should the Judiciary manage the court budget? What are the respective drawbacks in the Judiciary managing its own court budget and the Judiciary relying on the administration to manage court budgets? Would the independence of the Judiciary be prejudiced by the privatisation of the court service?
- How could the Judiciary best manage the budget? Who should negotiate the sums involved with the administration and who should be accountable for budget management?
- In small communities, where judicial officers, advocates, and public servants may be well known to one another, what particular steps should the judicial officer take to ensure that he/she is not only independent but also perceived by the wider community to be acting independently? What are the particular difficulties? How can these be addressed?

Country Specific

- To what extent, if any, is there a conflict between judicial independence and accepting administrative or practice directives from one's Chief Justice?
- To what extent, if any, is judicial independence affected by the appointment of contractual expatriate judges?
- What particular judicial independence issues are raised by cases involving organised crime? How can these be dealt with?

- Does the judicial officer have a role in promoting this aspect of judicial independence to the political leaders of the country and to the general public? How could this be done?
- What can judicial officers do to raise public awareness of the constitutional importance of judicial independence?

Notes

Case Study 5.1

Selecting a new Chief Justice

A Chief Justice retires and a replacement is sought.

- How, if at all, should the appointments process differ from that of other members of the higher Judiciary?
- Who may be on the selection panel if this is a matter exclusively for the Judicial Appointments Commission?
- To what extent should the Executive be involved?
- To what extent should there be political involvement, for example a parliamentary committee being required to interview the candidates or to endorse the panel's final choice?
- To what extent should there be lay involvement?

Case Study 5.2

Notes

Confusion in the removal of a judicial officer

A senior member of the Judiciary is removed from office. There is confusion over the process that led to his removal.

Constitutional provisions confer authority on the President to remove a senior judge whilst legislation provides that the Judicial Services Commission should investigate any allegations against a judge before removal:

- What arrangements should be in place for the removal of a senior member of the Judiciary?
- What arrangements should be in place to determine disputes as to the legality of the removal?

Notes

Case Study 5.3

Issues of national security

A person is charged under the Terrorism Act.

- In what circumstances could issues of national security lead to a hearing being held in camera or evidence being redacted from public access?
- Who should decide the circumstances?

Case Study 5.4

Notes

An Executive seeks to curb the independence of the legal profession

The Executive is unhappy with the legal profession, members of which have been defending citizens against arbitrary arrest.

An independent Bar Association has been effective in regulating members of the legal profession.

The Executive procures passage of legislation abolishing the Bar Association. It also required lawyers to take an oath of allegiance to the Head of the Executive and agree to be regulated by the government appointed registrar of the courts before they can practise.

- What action should the Bar Association take to recover its independence?
- How can the Bar Association ensure that the rights of citizens are protected in this case?
- Given the need to ensure citizen's access to justice, should members of the Bar Association consider a proposal to boycott the courts?

Notes

5.6 Session 6

5.6.1 Principle V: Public Office Holders

Objective

To enable practitioners to understand the need for appointments to public office to be based on merit and integrity and for the appointment process to be transparent and to sensitise all public officers to issues relating to the elimination of discrimination of any form in the public domain.

Duration: 1 hour 30 minutes

Format: Working Groups

Session Instructions

Note: Practitioners are expected to be familiar with the Background Commentary, Law and Policy Considerations and the Discussion Questions from the Practitioner's Handbook.

Presentation

Base this on:

- *Background Commentary* in *Session Tools* (below)
- *Law and Policy Considerations* in the Practitioner's Handbook (p. 37)
- Findings from the *Commonwealth Secretariat Needs Assessment* and the *Scoping of the Issues* exercise

Address the following overarching theme:

- Ethics and public/private life tensions

Discussion

See Questions and Case Studies in Session Tools (below)

Use the *General and Country-specific Questions* to get the discussion started and to gauge practitioners' understanding of the need for public office appointments to be based on merit and integrity, a transparent selection process and sensitisation on the elimination of all forms of discrimination in the public domain.

Notes

- Apply the Principle to the case study.
- Evaluate responses.
- Identify up to five achievable recommendations based on specific issues identified. Ensure practitioners focus on realistic actions relating to the topic under discussion.

Notes

5.6.2 Session Tools

Background Commentary

Principle V: Public Office Holders

Public officers carry out their duties for the benefit of the public as a whole. If they neglect their duties, or are found guilty of misconduct in the course of carrying out those duties, they may be found to be in breach of the public trust.

Public office includes both non-elected public servants and elected officials and ministers.

Appointments – be they within the Executive, Parliament or Judiciary – must follow the general principles of appointment to public office, based on merit and integrity. These principles can be set out in legislation or through publicly advertised policies.

The appointment process should include the following:

- A system of checks to safeguard against nepotism and all forms of discrimination (whether on political, racial, religious or gender grounds);
- Procedures to ensure appointments are advertised where required and take into account qualifications and experience;
- A transparent and objective selection process that is free of political influence and personal favouritism.

A government that is reflective of the community encourages full participation of its citizens in the democratic process. Every effort should be made to ensure that the community is reflected in public office.

For example, many Commonwealth countries have increased women's representation through the adoption and implementation of quotas and other affirmative action measures in Constitutions (e.g., India, Uganda). This is in keeping with targets endorsed by Commonwealth Heads of Government (Box 6.1).

Notes

- (Extracted from Background Commentary, Section Two, Practitioner's Handbook, page 35)

Notes

*5.6.3 General and Country-Specific Questions**Principle V: Public Office Holders**General*

- What are the underlying reasons for the failure of governments to achieve the Commonwealth's modest target of 30 per cent women in decision-making in all sectors by 2005? What steps can your institution take to improve the situation?
- The term 'gender equality' is often viewed as synonymous with the term 'women's issues'. What steps can your institution take to help to shift this perception to one in which equality is seen as the responsibility of everyone?
- To what extent is discrimination against minorities a problem in parliamentary elections and judicial appointments?

Country Specific

- What steps have been taken in your country to bring about gender equality among holders of public office?
- Is there a case for gender specific election lists and/or positive gender discrimination in appointments? How would you present such a case?
- Is enough being done to achieve representation in public office that is genuinely reflective of the community, including minorities, disabled persons, and those from different racial and religious backgrounds? If not, what measures could be put in place to improve the situation?
- To what extent do existing laws protect against discrimination? Are there institutions at national level to hear discrimination complaints?

Case Study 6.1

Notes

Seeking constitutional redress on grounds of discrimination, freedom of association

The Electoral Act provides that candidates may only stand for election to the Legislature if they are members of a registered political party.

The Political Parties Registration Act prohibits registration of a party based 'on sex, ethnicity, religion or other sectional division'.

The Christian Women's Party has been refused registration. The party seeks constitutional redress on grounds of sex and religious discrimination and breach of the right to freedom of association.

- What reasons might be given for requiring registration of political parties?
- How should the courts resolve the issue?
- What steps could be taken to achieve greater representation of women in the Legislature?

Notes

Case Study 6.2

Using personal influence to secure an appointment

A minister uses his influence to bypass the constitutional process for appointment of commissioners to the Public Service Commission to secure the appointment of his brother to one of the vacancies that has arisen.

- Who should investigate the minister's action?
- What action should be taken against this minister?
- What further measures should be adopted to ensure integrity of appointments?
- What is the role of your institution in ensuring integrity of appointments?

Case Study 6.3

Notes

The right of disabled persons to apply for public office without discrimination

A paraplegic applies for the job of Commissioner with the Judicial Services Commission.

The interview panel refuses his application on the grounds that he would not be able to access the Commission's offices as the building has not been adapted for wheelchairs.

- What relevance is there in considering his restricted access when such limitations may be found across a range of situations?
- What measures could your institution adopt to assure the right of persons with a disability to apply for public office?

Notes

Case Study 6.4

Protecting MPs, judicial officers against false accusations

An MP/judicial officer, known for her (sometimes controversial) independent and robust approach, has been the subject of a serious accusation of corruption.

The accusation is untrue and deliberately aimed at preventing her appointment to ministerial position/higher judicial office.

- How can MPs and judicial officers be protected adequately from such accusations?

5.7 Session 7

Notes

5.7.1 Principle VI: Ethical Governance

Objective

To impart the principles of ethical standards in public life and how to protect and enforce them; to enable practitioners to understand the purpose and nature of guidelines, the codes of ethical conduct and the development of measures to revise such codes.

Duration: 1 hour 30 minutes

Format: Working Groups

Session Instructions

Note: Practitioners are expected to be familiar with the Background Commentary, Law and Policy Considerations and the Discussion Questions from the Practitioner's Handbook.

Presentation

Base this on:

- **Background Commentary** in **Session Tools** (below)
- **Law and Policy Considerations** in the Practitioner's Handbook (p. 40)
- Findings from the **Commonwealth Secretariat Needs Assessment** and the **Scoping of the Issues** exercise

Address the following overarching theme:

- Codes of conduct and adherence to them

Discussion

See Questions and Case Studies in Session Tools (below)

Use the **General and Country-specific Questions** to get the discussion started and to gauge practitioners' understanding of the purpose and nature of guidelines, the codes of ethical conduct and the development of measures to revise such codes.

Use the previously allocated **Case Study** to develop the discussion and map action, as follows:

- Apply the Principle to the case study.

Notes

- Evaluate responses.
- Identify up to five achievable recommendations based on specific issues identified. Ensure practitioners focus on realistic actions relating to the topic under discussion.

5.7.2 Session Tools

Notes

Background Commentary

Principle VI: Ethical Governance

Those in public positions have a responsibility to behave in an ethical fashion. There has to be a basic code or guideline of ethical conduct that can be acknowledged and accepted as a basic standard to be followed, although many may seek to attain a higher standard.

In 1995, the first report of the UK Government's Committee on Standards in Public Life began by restating the general principles of these standards: selflessness, integrity, objectivity, accountability, openness, honesty and leadership. The report concluded that there was still a need for codes of conduct and systems for monitoring them.

Such codes (or guidelines) must be kept under review because societies are dynamic – new issues arise (for example, the rapid growth of the internet) and behaviour can change, (aspects of life regarded as acceptable in the eighteenth century, would be viewed as highly unethical today, and vice versa).

The report pointed out that the process of discussion and review keeps the issue of ethical behaviour in the minds of those in public positions, and discourages complacency.

Unethical behaviour that is illegal and corrupt requires constitutional machinery to enable investigation and, where appropriate, prosecution. Examples of corruption include:

- Taking a bribe in the awarding of a contract;
- Deciding on a public matter in a way that benefits private finance;
- Making false claims on expenses.

(Extracted from Background Commentary, Section Two, Practitioner's Handbook, page 39)

Notes

5.7.3 General and Country-Specific Questions

Principle VI: Ethical Governance

General

- To what extent should non-professionals be involved in developing professional codes of conduct?
- What special provisions may be required for the enforcement of court orders in cases of unethical conduct in public affairs?
- Should judicial bodies deal exclusively with the ethical behaviour of judges and parliamentary bodies exclusively with the ethical behaviour of parliamentarians?

Country specific

- What codes or equivalent rules exist in your jurisdiction to ensure ethical conduct? If there are none, what are the reasons for this?
- How can universal acceptance be assured amongst those who are subject to the code?
- Are some ethical principles universal and others peculiar to a jurisdiction, region or country?
- What steps taken in your jurisdiction would you recommend for the development and enforcement of codes of conduct in all areas of public life?

Case Study 7.1

Notes

Addressing the wrong doings of former ministers of government

A civil court action has been brought by the Attorney General against two former ministers accused of the tort of misfeasance in public office for allegedly transferring land, below the market rate, to a company owned by one of them [*Marin v A-G* [2011] 5 LRC 209 (*Caribbean Court of Justice on appeal from Belize*)].

- What, if any, prerogative does the government have to exercise this right, which is normally the right of citizens alone?
- Bearing in mind that Commonwealth countries have a duty to abolish corruption, could the government have chosen a different course of action to address the wrong doings of the former ministers? If yes, what would such action entail?

Notes

Case Study 7.2

Judicial officers and their involvement in politics

A senior judge was given leave in order to contest a seat in national elections.

He won the seat and remains on leave while in the government.

He is thinking of running for higher office.

- When, if at all, would it be acceptable for a judge in this position to return to the Bench?
- To what extent should a judicial officer be expected to withdraw from political life? (For example, would it be acceptable to display an election poster in the window of his/her own house or put a political party sticker on his/her car)?

Case Study 7.3

Notes

Judicial officers and social media

A judge posted comments on his Facebook page about a case that had been tried before him.

He also communicated via Facebook with one of the lawyers in the case about the trial, contrary to court procedure.

- What action should be taken against the judge?
- What ethical guidance should be drawn up about the use of social media by those in public office?
- What would be acceptable behaviour in relation to the use of social media?

Notes

5.8 Session 8

5.8.1 Principle VII: Accountability Mechanisms

Objective

To enable the different branches of government to understand the importance of accountability mechanisms; to ensure that these are effective and have the confidence and respect of the wider community.

Duration: 1 hour 30 minutes

Format: Working Groups

Session Instructions

Note: Practitioners are expected to be familiar with the Background Commentary, Law and Policy Considerations and the Discussion Questions from the Practitioner's Handbook.

Presentation

Base this on:

- *Background Commentary* in Session Tools (below)
- *Law and Policy Considerations* in the Practitioner's Handbook (p. 43-44)
- Findings from the *Commonwealth Secretariat Needs Assessment* and the *Scoping of the Issues* exercise

Address the following overarching theme:

- Executive and judicial accountability

Discussion

See Questions and Case Studies in Session Tools (below)

Use the *General and Country-specific Questions* to get the discussion started and to gauge practitioners' understanding of the importance of accountability mechanisms, the need to ensure that they are effective and have the confidence and respect of the wider community.

Notes

- Apply the Principle to the case study.
- Evaluate responses.
- Identify up to five achievable recommendations based on specific issues identified. Ensure practitioners focus on realistic actions relating to the topic under discussion.

Notes

5.8.2 Session Tools

Background Commentary

Principle VII: Accountability Mechanisms

The Latimer House Principles require each of the three branches of government to maintain high standards of accountability, transparency and responsibility in the conduct of all public business.

Parliament, as the law-making arm of democratic governments, is seen to be clearly and directly accountable due to its public nature. Members are elected on a regular basis; its affairs are public and the media is free to report on its work.

The Executive is accountable to Parliament and usually under the control of ministers (and also MPs) who are required to frequently appear before Parliament to account for the actions of the Executive and for its disbursement of public money. The development of public accounts committees and other parliamentary controlled oversight committees is welcome. Such committees should themselves be able to operate independently, not only from the Executive but also from the control or interference of political parties.

Regarding the degree of transparency and accountability in the Executive's dealings with outside agencies, especially commercial bodies, there should be:

- Limits on the use of commercial confidentiality;
- Compliance with the best international standards in procurement matters.

Members of the Judiciary are accountable at a number of levels:

- The judicial oath, the collegiality of the Judiciary and the concern of individual judicial officers to protect the reputation of the Judiciary.
- With the exception of the Supreme Court, the courts are held to account for their decisions in the system of appeals, which should be open, transparent and readily available for appropriate cases.

- ## Notes

(Section Two, Practitioner's Handbook, page 42)

Notes

5.8.3 General and Country-Specific Questions

Principle VII: Accountability Mechanisms

General

- Is the policy of zero tolerance on corruption in public affairs positive or does it jeopardise greater openness and discourage anti-corruption programmes?
- What systems should be in place to guarantee suitable remuneration and terms of service for public servants, including parliamentarians and judges?

Country Specific

- In your jurisdiction, what is the role of law officers (attorneys/solicitors general, directors of public prosecution, auditors general and information commissioners) in ensuring that accountability mechanisms are effective and have the confidence and respect of the wider community?
- What constitutional/legislative measures exist to protect the integrity of parliamentarians and judicial officers? How effective are these? What steps could be taken to improve the integrity of these institutions?
- What mechanisms are in place to increase understanding of the role of the three branches of government and to communicate concerns between the branches?
- Are live broadcasts of court proceedings an appropriate way to relay the decisions to the public? How should such broadcasts be conducted in your country?

Case Study 8.1

Notes

Civil servants and fixed term contracts

It is proposed that ministers appoint senior members of the civil service on fixed term contracts, in order to increase civil service accountability.

- How would civil servants on such contracts be accountable to Parliament for their actions?
- What mechanisms can be put in place to ensure that the civil service remains independent of party politics?
- What measures should be put in place to allow Parliament to scrutinise appointments to the Executive?

Notes

Case Study 8.2

Executive takes action against a judge

Unhappy with a recent decision of the court, a Head of Government suspends the judge in the case for misbehaviour pending dismissal.

The judge is not notified of the decision; the police enter his court office and march him out in full sight of his fellow judges, lawyers and litigants. He is then placed under house arrest for alleged fraud and corruption.

The judge is brought before a parliamentary committee within days, without receiving the full list of charges against him or being allowed representation by lawyers.

The Head of Government claims he has constitutional authority to remove the judge.

- What procedures should be in place to ensure that the judge, as a citizen, receives a fair trial?
- What constitutional or legislative provisions should be in place to ensure that accountability of the Judiciary is not compromised by such Executive actions?

Case Study 8.3

Notes

When a newspaper criticises a judge

The Editor of a newspaper is found guilty of contempt of court for publishing an article that is critical of a senior judge.

The article stated that the judge had behaved like a 'high school punk' when, at a public function, he described himself at the 'big boss'. It also called the judge's decision in a judgement involving a human rights issue, 'criminal' [*The King v Swaziland Independent Publishers (Pty) Ltd & Another*, [2013] SZHC 88 (Swaziland)].

- How, if at all, was the article likely to damage the administration of justice?
- Is the crime of scandalising the court justified in this case? If yes, how?

Notes

5.9 Session 9

5.9.1 Principle VIII: The Law-Making Process

Objective

To help practitioners ensure that laws accurately and clearly reflect the will of Parliament and, where appropriate, international commitments, without ambiguity or contradiction; where the law makes provision for discretionary action, any limits on such action by the Executive are clearly defined.

Duration: 1 hour 30 minutes

Format: Working Groups

Session Instructions

Note: Practitioners are expected to be familiar with the Background Commentary, Law and Policy Considerations and the Discussion Questions from the Practitioner's Handbook.

Presentation

Base this on:

- *Background Commentary* in *Session Tools* (below)
- *Law and Policy Considerations* in the Practitioner's Handbook (p. 47-48)
- Findings from the *Commonwealth Secretariat Needs Assessment* and the *Scoping of the Issues* exercise

Address the following overarching theme:

- Administrative agencies of government

Discussion

See Questions and Case Studies in Session Tools (below)

Use the *General and Country-specific Questions* to get the discussion started and to gauge practitioners' understanding of the need for laws to accurately and clearly reflect the will of Parliament and international commitments, without ambiguity or contradiction, and that any limits on discretionary action by the Executive are clearly defined.

Notes

- Apply the Principle to the case study.
- Evaluate responses.
- Identify up to five achievable recommendations based on specific issues identified. Ensure practitioners focus on realistic actions relating to the topic under discussion.

Notes

5.9.2 Session Tools

Background Commentary

Principle VIII: The Law-Making Process

The independence of members and precision in law making are essential elements in safeguarding the effectiveness of Parliaments. Flaws in the legislative process may be perceived as a major obstacle to the achievement of good governance.

Rules and procedures (i.e., standing orders) on how to conduct the business of Parliament and its committees effectively and efficiently should be in place. Guiding principles ensure suitable decision-making in an environment of competing interests. Consequently:

- All Members of Parliament are assured of equal rights, privileges and obligations;
- Political parties are represented on all committees;
- Opposition and minority parties have the right to put forward items for debate or legislation;
- Committees must include all parties in Parliament in accordance with a pre-determined formula.

It is important that gender is mainstreamed in all legislation and decisions and gender equality is promoted at every level of the law-making process.

As the body representing the people, Parliament must ensure that:

- The Constitution and laws reflect the views of the people;
- Politics and processes are healthy, and able to command far-reaching involvement and inputs from the general public.

The people have a moral claim to inclusivity and participation. The resulting sense of ownership is important for building public understanding, respect and support for the rule of law.

It is essential that the Legislature be given adequate resources to enable it to fulfil its functions. It needs to have control and authority to determine and secure budgetary requirements, unconstrained

Notes

(Section Two, Practitioner's Handbook, page 46)

Notes

5.9.3 General and Country-Specific Questions

Principle VIII: The Law-Making Process

General

- The basic problem with the parliamentary process is that parliamentarians, most of whom are non-lawyers, are ill equipped to deal with the complexity of modern legislation. Do you agree? If so, what steps could be taken to improve this situation?
- What is the best way to increase public awareness of how Parliament works and improve electorate access in the context of diminishing interest in conventional media?
- Should parliamentary proceedings be broadcast live for public consumption?

Country Specific

- How effective is the legislative process in your jurisdiction, particularly in relation to the active scrutiny of government bills? What steps could be taken to improve this situation?
- How should parliamentary debates be broadcast in your country?

Notes

- How are such norms to be identified?
- What measures would ensure that all national legislation is in compliance with those norms?
- Should Parliament be able to override such norms in the national interest?

Notes

Case Study 9.2

On backbench MPs introducing bills

As a backbench MP, you wish to introduce a bill to prohibit certain forms of gambling.

- What, if any, procedural obstacles are you likely to encounter?
- Are private member bills a useful aspect of parliamentary time and resources? If yes, in what ways?

Case Study 9.3

Notes

When legislation goes awry of international standards

The Legislature passes a law criminalising same-sex marriages and membership of gay rights organisations.

The legislation fuels localised violence against gay people.

Human rights and gay rights advocates and public figures, within the jurisdiction and around the world, raise their voices in widespread condemnation of the new law.

- Would the Executive have been justified in vetoing the bill? How might such a veto affect the separation of powers doctrine? Justify your answer.
- What measures could be adopted to ensure legislation that is passed is consistent with international norms?
- What is the role of the Judiciary and the Executive in ensuring that new legislation is consistent with the spirit of the Constitution and fulfils international obligations?

Notes

5.10 Session 10

5.10.1 Principle IX: Oversight of Government

Objective

To enable practitioners to understand the central importance of open government and to give participants an understanding of the powers and functions of bodies designed to promote and secure the effective oversight of governmental processes; to enable participants to appreciate the seminal role of independent and responsible media in reporting and critically commenting on the workings of the different arms of government.

Duration: 1 hour 30 minutes

Format: Working Groups

Session Instructions

Note: Practitioners are expected to be familiar with the Background Commentary, Law and Policy Considerations and the Discussion Questions from the Practitioner's Handbook.

Presentation

Base this on:

- *Background Commentary* in *Session Tools* (below)
- *Law and Policy Considerations* in the Practitioner's Handbook
- Findings from the *Commonwealth Secretariat Needs Assessment* and the *Scoping of the Issues* exercise

Address the following overarching theme:

- Corruption and autocracy in government

Discussion

See Questions and Case Studies in Session Tools (below)

Use the *General and Country-specific Questions* to get the discussion started and to gauge practitioners' understanding of the importance of open government, the bodies that secure effective oversight of governmental processes and the seminal role of independent and responsible media in reporting and

Notes

- Apply the Principle to the case study.
- Evaluate responses.
- Identify up to five achievable recommendations based on specific issues identified. Ensure practitioners focus on realistic actions relating to the topic under discussion.

Notes

5.10.2 Session Tools

Background Commentary

Principle IX: Oversight of Government

Over the past 50 years, institutions and structures have emerged that are integral to governance but independent from the main branches of government. They sometimes cut across the branches, sharing oversight functions and providing crucial extra checks and balances.

Public accounts committees (PACs) examine the Auditor General's reports on the accounts of ministries, government bodies and any other area involving expenditure and/or receipt of funds.

In a number of Commonwealth countries, multiple offices of *ombudsman* or *ombudswoman* have been established to examine issues arising from decisions made by the Executive or Parliament.

Most *human rights commissions* serve to protect and promote human rights as guaranteed under the Constitution. Other oversight mechanisms are *independent electoral commissions*, *anti-corruption commissions* and *auditors-general offices*.

The power and functions of these national institutions vary from country to country. The main requirement is that they must be demonstrably independent and have adequate funding, staffing and resources to function. They are usually expected to submit annual or periodic reports on their work to Parliament and/or to one or other parliamentary committee.

Media

Commonwealth Heads of Government have recognised freedom of expression as a fundamental value that supports good governance, and that free, vibrant and professional media, enhance democratic traditions and strengthen the democratic process.

Many Commonwealth countries have a record of using criminal defamation as a means to silence undesired criticism from the media despite the conclusions of eminent lawyers and jurists that the offence is flawed. From country to country one issue remains constant – what constitutes a fair balance between providing information and commenting on political or judicial issues.

Notes

Notes

*5.10.3 General and Country-Specific Questions**Principle IX: Oversight of Government**General*

- What effective methods and systems of oversight, accountability and confidence building can be developed to ensure a culture of transparency, openness and judicious use of public resources?
- What impact has social media had on the advancement or decline of democracy and good governance?
- Should social media be regulated in the same way as other media? How could this be achieved?

Country Specific

- Is the work of your country's Public Accounts Committee effective? What strategies could be put in place to improve its oversight role?
- Which other oversight mechanisms are in place in your jurisdiction? How effective are they? What strategies could be put in place to improve their performance?
- What specific measures should be in place to ensure equitable access to the media?
- What restrictions, if any, are there on media in reporting on the workings of government? Are these restrictions appropriate? What steps could be taken to remove the restrictions?

Case Study 10.1

Notes

Human rights organisation under pressure

An international non-governmental organisation (INGO) has produced a report on the state of the Judiciary in a particular country.

The Human Rights Commission of the country in question decides to publish an extract from the report [*State v Citizen's Constitutional Forum Ltd and Akuila Yabaki, HBC 195 of 2012-(Fiji)*].

- Should the Judiciary file a contempt of court motion against the INGO for 'scandalising the court'? Why?
- What steps can the Human Rights Commission take to ensure its independence is not jeopardised?

Notes

Case Study 10.2

Publishing confidential information online

A blogger publishes confidential information online, which is related to the national security of a non-Commonwealth country even though he is not based there.

The country in question seeks his extradition on charges of treason and trafficking in stolen property.

- What, if any, protection against extradition should the blogger receive?
- What should be done to reconcile the rights of the blogger against protecting the national security of a country?

Case Study 10.3

Notes

Filming judges and televising trials

A Supreme Court has decided to allow the production of a documentary film about the court and the judges, which will include shots taken inside the court and at the homes of the judges.

The Supreme Court has allowed television cameras inside the courtroom during the hearing of appeals and the public can now watch daily proceedings via a website.

- How acceptable, if at all, is it for judges to be filmed in this way?
- What new risks might it create for personal security?
- Is it likely that such documentary / film requests could become commonplace in the future?
- How likely is it that trials will be televised in the future?

Notes

5.11 Session 11

5.11.1 Principle X: Civil Society

Objective

To enable practitioners to understand the wider role that the institutions of civil society may play in the promotion and development of good governance: in particular, to help them identify the principal elements of civil society and their legitimate role in the processes of public accountability. Participants will be introduced to effective ways of accessing the resources of civil society and responding to civil society's legitimate concerns.

Duration: 1 hour 30 minutes

Format: Working Groups

Session Instructions

Note: Practitioners are expected to be familiar with the Background Commentary, Law and Policy Considerations and the Discussion Questions from the Practitioner's Handbook.

Presentation

Base this on:

- **Background Commentary** in **Session Tools** (below)
- **Law and Policy Considerations** in the Practitioner's Handbook (p. 55)
- Findings from the **Commonwealth Secretariat Needs Assessment** and the **Scoping of the Issues** exercise

Address the following overarching theme:

- The role of civic engagement and participation in ensuring good governance

Discussion

See Questions and Case Studies in Session Tools (below)

Use the **General and Country-specific Questions** to get the discussion started and to gauge practitioners' understanding of the wider role that civil society institutions can play in the promotion and development of good governance, as well as effective ways to

access civil society's resources and/or respond to their legitimate concerns.

Use the previously allocated **Case Study** to develop the discussion and map action, as follows:

- Apply the Principle to the case study.
- Evaluate responses.
- Identify up to five achievable recommendations based on specific issues identified. Ensure practitioners focus on realistic actions relating to the topic under discussion.

Notes

5.11.2 Session Tools

Background Commentary

Principle X: Civil Society

The goal of CSOs is to advance ‘... *positive social agendas that have at their heart a commitment to democratic values and the equal treatment of all people*,’ (Commonwealth Foundation 2013)

Civil society organisations are diverse. They include: volunteer organisations, indigenous peoples' organisations, non-governmental organisations, community-based organisations, labour unions, faith-based organisations, charitable and philanthropic organisations, professional associations and foundations as well as parts of media and academia.

Increasingly civil society organisations in countries across the Commonwealth are playing a role in safeguarding democratic values and taking up some state functions. They have a specific role in enhancing the rule of law and democratic values in the Commonwealth, as recognised by the Heads of Government Meeting in Coolumb, Australia, in March 2002.

Like the oversight bodies (Principle IX), civil society organisations monitor the performance of the Executive and Legislature in fulfilling their constitutional duties and in meeting the country's international obligations to promote political participation, respect human rights and fight against corruption.

A number of Commonwealth governments still regard civil society with suspicion. Some Executives have adopted stringent regulations to limit CSO access to resources. There is a common perception that civil society organisations lose their independence when their activities coincide with particular political tendencies.

Parliaments and governments are encouraged to involve civil society organisations in the implementation of Commonwealth fundamental values by involving them in decision-making and consulting them on government policy at local and national level, including in the drafting of legislation.

(Section Two, Practitioner's Handbook)

5.11.3 General and Country-Specific Questions

Notes

Principle X: Civil Society

General

- How can civil society best fulfil its role in developing and enhancing democracy and the accountability of the three branches of government?
- To what extent should receipts from donors abroad be subject to regulation or oversight?

Country Specific

- What role does civil society play in your jurisdiction? What challenges, if any, do CSOs face in performing this role? What steps could be adopted to improve their performance?
- Is civil society involved in decision-making at all levels of governance?
- To what extent are civil society organisations involved in decision-making in your branch of government? What challenges exist in the relationship? What measures could be adopted to mitigate these challenges?

Notes

Case Study 11.1

Civil society's role in protecting rights, changing attitudes and legislation

In an effort to avoid buying and distributing expensive medicines, the government of a Commonwealth country repudiates the connection between HIV and AIDS thereby denying millions of people access to essential retroviral drugs [*Minister of Health and Others v Treatment Action Campaign and Others* (2002) 5 SA 721 (CC); 5 July 2002[2002] 5 LRC 216 (South Africa)].

- What role can civil society play in ensuring the denial of a human right (in this case, the right to health) is addressed?
- In what ways can civil society assist in changing attitudes and legislation on such issues of concern?

Case Study 11.2

Notes

Civil society's role in protecting the rights of vulnerable members of society

The government introduces a bill to Parliament that would give more power to the customary courts and to the judges who preside over them. These customary courts are not linked to the courts that are vested with judicial power under the Constitution. The bill, if passed by Parliament, would affect the rights of certain vulnerable members of society who would be denied the choice of court or the right to have a lawyer present.

- What role does civil society have (a) in ensuring that the rights of vulnerable members of society are protected and (b) in the decision-making process?
- What action should be taken by civil society on a local, national or international level to make sure that governments respect their international commitments to equality before the courts?

Notes

Case Study 11.3

NGOs and registration

A poverty relief foundation has been refused registration as a non-governmental organisation (NGO) on the grounds that it may have received funds from an illegal or terrorist organisation.

- Is the registration of NGOs necessary? Why/why not?
- If NGO registration is necessary, what are the legitimate criteria for refusing an application?

5.12 Session 12

Notes

5.12.1 Final Recommendations of the Dialogue

Objective

To reach agreement on a list of recommendations modelled on the S.M.A.R.T formula (i.e., **S**pecific, **M**easurable, **A**ttainable, **R**elevant and **T**ime bound).

Duration: 1 hour 30 minutes

Format: Plenary

Session Instructions

*Note: This session follows the final **Feedback Plenary** to hear Group reports and recommendation on Principles IX and X (see **Comprehensive Module Agenda**, p. 18), after which the Dialogue Secretariat would have to meet to incorporate these into a final draft.*

Plenary

- Circulate draft recommendations to all participants.
- Read, discuss and record any areas of disagreement.
- Dialogue Secretariat meets (during coffee break or lunch) to formulate consensus language from any cross branch discomforts expressed in the discussion and modify as necessary.
- If there are major differences, an additional Working Group Session may be called by the Programme Director to help overcome them.
- Back in Plenary the Programme Director will point out any substantive changes made and seek consensus on the modified draft.
- Distribute evaluation forms (Annex I) for completion before practitioners leave the venue.

Notes

Box 5.1. Wrapping Up



The **Evaluation Form** for participants is annexed at the end of this Guide. The Programme Director should ensure that sufficient time is allocated at the end of the programme for participants to complete their evaluation forms and hand them back before leaving the venue.

The form can be easily adapted to fit the abridged module.

The Programme Director will provide the Commonwealth Secretariat with a **Programme Report** within six weeks. The report will present the analyses of the proceedings, recommendations, practitioner's evaluations and the Facilitation Team's observations on how to enhance use of the Toolkit. The Commonwealth Secretariat and its partner organisations in the Latimer House Working Group will use this feedback to improve preparation for the holding of future in-country Dialogue Programmes.

Section Three

3

Resources

- Evaluation Forms Assess the Dialogues on:
 - Objectives and Outcomes
 - Programme Content
 - Facilitation Team
 - Logistics
- Case Law Quoted

Evaluation Forms

Notes

Dialogue on the Latimer House Principles

Evaluation Form

Date (dd/mm/year): __ / __ / ____

Name:

email:

Government Branch:

Country:

Your frank and impartial feedback on the following statements and questions is important and appreciated, as are your comments.

In its on-going review of the Latimer House Principles Dialogue, the Commonwealth Secretariat will use your views to improve its content and form for future use across the Commonwealth.

Notes

Assessment of the Dialogue

1. Objectives and Outcomes

	<i>Strongly Agree</i>	<i>Agree</i>	<i>Neutral</i>	<i>Disagree</i>	<i>Strongly Disagree</i>
(a) The Dialogue generally met its overarching objectives.	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
(b) The objectives for each session were clearly identified and generally achieved.	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
(c) The programme generally met my expectations.	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
(d) I have gained a clear understanding of the Latimer House Principles, Commonwealth values on democracy and the separation of powers doctrine.	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
(e) The recommendations emanating from the Dialogue will enhance application of the Latimer House Principles and improve relations between the three branches of government in my jurisdiction.	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>

How do you rate the Dialogue Programme's overall usefulness?

Excellent Good Average Poor Very poor

○ ○ ○ ○ ○

Comment

How could the Dialogue be improved? Explain the reasons for your answer.

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2. Programme Content

	<i>Strongly Agree</i>	<i>Agree</i>	<i>Neutral</i>	<i>Disagree</i>	<i>Strongly Disagree</i>
(a) The issues raised were generally relevant to my work/my jurisdiction.	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
(b) The methodology encouraged and promoted learning and consensus building.	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
(c) The Handbook was generally helpful and easy to follow.	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
(d) The Handbook will be useful for my professional development and a helpful reference in my day-to-day work.	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
(e) The Dialogue recommendations were developed in a genuinely inclusive and transparent manner.	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>

How would you rate the overall relevance of the Dialogue Programme methodology?

Excellent	Good	Average	Poor	Very poor
<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>

Comments

Which areas of the Programme were of most interest/relevance to you?

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Notes

Which areas of the Programme were of least interest/relevance to you?

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How could the Dialogue Programme be improved?

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What steps will you take to ensure the recommendations are achieved?

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3. Facilitation Team

	<i>Strongly Agree</i>	<i>Agree</i>	<i>Neutral</i>	<i>Disagree</i>	<i>Strongly Disagree</i>
(a) Members of the Facilitation Team kept the dialogue open, constructive and focused on the issues.	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
(b) My Working Group Facilitator gave clear instructions and provided adequate time for questions and discussion:	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
(c) The Facilitators demonstrated a high level of mediation, Dialogue and consensus building skills.	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
(d) In the discussions I felt my contributions were appreciated and valued.	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
(e) Participation and interaction were encouraged and the quality of the discussions was generally high.	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
(f) I appreciated hearing about the experiences of presenters from other jurisdictions.	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>

How do you rate the performance of the Facilitation Team overall?

Excellent	Good	Average	Poor	Very poor
<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>

Comments

How could the performance of the Facilitation Team be improved?

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Notes

How did the Facilitation Team demonstrate its mindfulness of cultural, religious, gender and other diversity sensitivities?

How did the Facilitation Team manage the differences of opinion during Working Group / Plenary sessions?

4. Logistics

Rate the standard of each of the following:

(a) Venue

Excellent

Good

Average

Poor

Very poor

(b) Convenience of registration

Excellent

Good

Average

Poor

○

Very poor

(c) Programme handouts

Excellent

Good

O

Average

O

Poor

○

Very poor

(d) Food and beverages

Excellent	Good	Average	Poor	Very poor
<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>

(e) Helpfulness of Programme Directors

Excellent	Good	Average	Poor	Very poor
<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>

(f) Transportation

Excellent	Good	Average	Poor	Very poor
<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>

Comment

How could the administrative aspects of the Programme be improved?

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Any other comment?

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Thank you for completing this evaluation form

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Case Law Quoted

Most of the following headnotes of case law quoted in Section Two of this Manual have been reproduced by kind permission of Reed Elsevier (UK) Limited trading as LexisNexis, publishers of the Law Reports of the Commonwealth.

THE THREE BRANCHES OF GOVERNMENT

[2013] 3 LRC 426

Zuniga and Others v Attorney General

BELIZE

Court of Appeal
Sosa P, Morrison and Mendes JJA
20 October 2011, 3 August 2012

(1) Constitutional law – Separation of powers – Parliament – Judicial power – Statute providing for offence of deliberate non-compliance with injunction/court order – Statute stipulating fixed punishment for offence – Whether ousting sentencing jurisdiction of the courts – Whether infringing separation of powers doctrine – Appropriate test – Relevant considerations – Constitution of Belize 1981, s 7 – Supreme Court of Judicature (Amendment) Act 2010, s 106A.

(2) Constitutional law – Separation of powers – Parliament – Legislative power – Constitution giving Parliament power to legislate for ‘peace, order and good government’ – Statute providing for offence of deliberate non-compliance with injunction/court order – Whether statute passed for proper purpose – Whether court having power to review legislation on that ground – Whether question justiciable – Constitution of Belize 1981, s 68 – Supreme Court of Judicature (Amendment) Act 2010, s 106A.

(3) Constitutional law – Separation of powers – Parliament – Judicial power – Statute providing for offence of deliberate non-compliance with injunction/court order – Statute stipulating fixed punishment for offence – Statute establishing objective criteria for the determination of guilt and the grant of coercive orders – Whether infringing separation

of powers doctrine – Supreme Court of Judicature (Amendment) Act 2010, s 106A.

(4) Constitutional law – Separation of powers – Parliament – Statute providing for offence of deliberate non-compliance with injunction/court order – Statute stipulating fixed punishment for offence – Whether power effectively vesting sentencing power in executive – Whether infringing separation of powers doctrine – Belize Criminal Code, s 269 – Supreme Court of Judicature (Amendment) Act 2010, s 106A.

(5) Constitutional law – Fundamental rights – Right not to be subject to inhuman or degrading punishment – Statute providing for offence of deliberate non-compliance with injunction/court order – Statute stipulating fixed punishment for offence – Absence of reasonable excuse not an element of offence – Offence committed without any requirement of proof of moral blameworthiness – Whether mandatory punishment so grossly disproportionate as to infringe fundamental right – Appropriate remedy – Constitution of Belize 1981, ss 2, 7, 134(1) – Supreme Court of Judicature (Amendment) Act 2010, s 106A.

(6) Constitutional law – Fundamental rights – Protection from deprivation of property – Right subject to derogation in public interest – Statute providing for offence of deliberate non-compliance with injunction/court order – Statute giving courts power to issue ‘anti-arbitration’ injunctions – Whether infringing fundamental right – Relevant considerations – Public interest – Constitution of Belize 1981, ss 3(d), 17(1) – Supreme Court of Judicature (Amendment) Act 2010, s 106A.

(7) Constitutional law – Fundamental rights – Right to fair trial – Right to be presumed innocent – Statute providing for offence of deliberate non-compliance with injunction/court order – Burden of proof – Person acting in official capacity for or on behalf of body of persons at time when body committing offence deemed to be guilty of offence – No requirement that prosecution prove that person knew of injunction or advised, counselled or participated in commission of offence – Balance between burdens of proof on prosecution and defence – Whether unfair – Whether infringing fundamental right – Constitution of Belize 1981, s 6(5)(a), (10)(a) – Supreme Court of Judicature (Amendment) Act 2010, s 106A.

(8) Constitutional law – Fundamental rights – Right to fair hearing – Right of access to court – Service provisions – No provision deeming

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service to have been properly effected by method of service which claimant selected – Choice of methods of service – Defendant entitled to have notice of service – Role of presiding judge – Whether service provisions infringing fundamental rights – Constitution of Belize 1981, s 6 – Supreme Court of Judicature (Amendment) Act 2010, s 106A.

(9) Constitutional law – Constitution – Breach – Remedy – Statute providing for offence of deliberate non-compliance with injunction/ court order – Statute stipulating fixed punishment for offence – Doctrine of separation of powers infringed – Fundamental rights infringed – Appropriate remedy – Constitution of Belize 1981, ss 6–7 – Supreme Court of Judicature (Amendment) Act 2010, s 106A. The appellants challenged the constitutionality of s 106A of the Supreme Court of Judicature (Amendment) Act 2010 of Belize, as amended (the Amendment Act). Section 106A provided: ‘(1) ... without prejudice to the power of Court to punish for contempt ... by way of committal and seizure of assets, every person ... who knowingly disobeys or fails to comply with an injunction, or an order in the nature of an injunction, issued by the Court ... shall be guilty of an offence and shall be tried summarily in the Supreme Court by a judge sitting alone. (2) A complaint for an offence under subsection (1) above may be laid by the Attorney General or the aggrieved party or a police officer not below the rank of Inspector.’ Subsections (3) and (3a) established mandatory penalties to be imposed on persons found guilty of an offence against s 106A(1): in the case of a natural person, a \$BZ50,000–\$BZ250,000 fine or imprisonment for not less than five years or both and in the case of a continuing offence an additional \$BZ100,000 each day the offence continued; for a legal person or other entity, a \$BZ100,000–\$BZ500,000 fine and an additional \$BZ300,000 for each day of a continuing offence; and for a natural person where ‘extenuating circumstances’ existed, a \$BZ5,000–\$BZ10,000 fine and imprisonment of one–two years in default of payment. Subsection (5) made a person acting in an official capacity on behalf of a corporate or an unincorporated body prima facie guilty of an offence committed by that body. Subsection (8) vested in the Supreme Court the power to issue ‘anti-arbitration’ injunctions, where it was shown that such proceedings were or would be ‘oppressive, vexatious, inequitable or would constitute an abuse of the legal or arbitral process’ and to nullify arbitral awards made in breach of any such injunction. Subsections (9), (10), (11) and (12) prescribed the modes of

service of an injunction issued by the court and of any charge laid for breach of s 106A(1) and empowered the court to proceed with a criminal charge in the absence of the accused. The appellants challenged the provision on the following grounds: (i) s 106A violated the separation of powers doctrine and was passed for an improper purpose in that it was ad hominem legislation directed at the appellants, the interested parties and a company with which the appellants were at one time associated; (ii) to the extent that s 106A(3) imposed a mandatory sentence, it violated the separation of powers doctrine as it constituted an unlawful usurpation of judicial power by the legislature; (iii) s 106A(2) violated the separation of powers doctrine in that it vested in the Attorney General the power to determine the punishment which was to be imposed on a person convicted of an offence under s 106A(1), a power quintessentially reserved for the judiciary; (iv) s 106A(3) violated the right guaranteed by s 7 of the Constitution of Belize 1981 not to be subjected to inhuman or degrading punishment or other treatment in that the mandatory punishment provided for was grossly disproportionate; (v) s 106A(5) violated the right to be presumed innocent until proved guilty guaranteed by s 6(3)(a) of the Constitution in that it required an accused to disprove the mental element of the offence of knowingly disobeying or failing to comply with an injunction or like order; (vi) s 106A(8) violated the right to property guaranteed by ss 3(d) and 17(1) of the Constitution in that it deprived a party to an arbitration contract of his right to pursue arbitration or to enforce an arbitration award; in respect of a right to arbitrate deriving from an international treaty, it was contended further that s 106A(8) violated the right to the protection of the law; (vii) s 106A(9) violated the right to a fair hearing and access to court in that it made inadequate provision for the service of coercive orders and other related processes; (viii) s 106A(11) and (12) violated s 6(2) in that it permitted a criminal trial to proceed in the absence of an accused without making provision for adequate notice to be given. The judge at first instance found that sub-ss (8), (9) and (12) infringed the Belize Constitution. The appellants and the interested parties appealed to the Court of Appeal. The respondent cross-appealed against the judge's order declaring sub-ss (8), (9) and (12) to be ultra vires the Constitution and striking them down.

HELD: Appeals and cross-appeal allowed. Declarations made that s 106A(3) infringed the separation of powers doctrine and s 7 of the Belize Constitution; that s 106A(5) infringed s 6 of the

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Belize Constitution and that s 106A(1)–(7), (10)–(13) and (16) were invalid, null and void and of no effect.

(1) The legislative fixing of what might be considered an overly severe punishment did not constitute the assumption by the legislature of judicial powers. The power conferred upon Parliament to make laws for peace, order and good government enabled it not only to define what conduct constituted a criminal offence but also to prescribe the punishment to be inflicted on those persons found guilty of that conduct by an independent and impartial court established by law. In the exercise of its legislative power, Parliament might, if it thought fit, prescribe a fixed punishment to be inflicted upon all offenders found guilty of the defined offence. Accordingly the contention that s 106A(3) improperly required the judiciary to impose a disproportionate and severe minimum penalty on any person found guilty of an offence under s 106A(1) or s 106A(4) and accordingly ousted the jurisdiction of the court to determine the appropriate sentence in its discretion would be rejected ... Dicta of Lord Diplock in *Hinds v R*, *DPP v Jackson* (1975) 24 WIR 326 at 341–342 applied. *Dodo v State* [2001] ZACC 16, [2001] 4 LRC 318 and *Reyes v R* [2002] UKPC 11, [2002] 2 LRC 606 considered.

(2) It was not open to the Court of Appeal to review the Amendment Act on the ground that, in breach of s 68 of the Constitution, it had not in fact been passed for the peace, order and good government of Belize. Further, it was not possible to eke out an implied principle that the judiciary might second guess the elected representatives on the question of what purpose it was appropriate for legislation to serve. Such a power would put the judiciary in competition with the legislature for the determination of what policies ought to be pursued in the best interests of Belize. Such matters were not justiciable. In deciding whether legislation was inconsistent with the Constitution, a court was not concerned with the propriety or expediency of the law impugned. Moreover, the proposition that legislation was reviewable on ordinary public law principles would be rejected. It was inconceivable that it was intended that the Supreme Court would be empowered to strike down legislation on the ground, for example, that persons whose interests were affected by an Act of Parliament were not given an opportunity to be heard before enactment or that the legislators were biased or that they took into account irrelevant considerations ... *Riel v R* (1885) 10 App Cas 675, *Ibralebbe v R* [1964] 1 All ER 251, *A-G v Joseph* [2006] CCJ 3 (AJ), [2007]

4 LRC 199 and *R (on the application of Bancoult) v Secretary of State for Foreign and Commonwealth Affairs (No 2)* [2008] UKHL 61, [2008] 5 LRC 769 applied. *Building & Construction Employees & Builders Labourers' Federation (NSW) v Minister for Industrial Relations* (1986) 7 NSWLR 72 and *Union Steamship Co of Australia Pty Ltd v King* (1988) 166 CLR 1 considered.

(3) The separation of powers doctrine precluded the usurpation of judicial power by the legislature, but it did not deprive the legislature of the power by law to vest jurisdiction in the judiciary and direct it to exercise it, even if such jurisdiction might turn out to be applicable to a particular individual or a particular group, either because of the express parameters of the jurisdiction so vested or the way in which it was invoked in practice. What the legislature could not do was, having vested jurisdiction in the judiciary, whether specific or not, to direct the judiciary as to the outcome of the exercise of the jurisdiction so granted. Where the line was to be drawn between the one and the other would be difficult to determine in any given case; the precise contours of judicial power were hard to define. The best that could be done was to have regard to the following factors: the true purpose of the legislation, the situation to which it was directed and the extent to which the legislation affected, by way of direction or restriction, the discretion or judgment of the judiciary in specific proceedings. In the instant case, the Amendment Act was cast in terms of general application. In respect both of the offences it created and the anti-arbitration jurisdiction it bestowed, it established objective criteria for the determination of guilt and the grant of coercive orders. It left it to judiciary to determine by its ordinary processes who should be punished and what arbitrations should be restrained or awards vacated. Apart from the imposition of mandatory sentences, it left unrestricted the independent exercise of judicial power. It was not sufficient that the conduct of certain individuals prompted the passage of the legislation or that the government intended to use the Act to target those persons. Accordingly, the appellants' and interested parties' contention that the Act infringed the separation of powers doctrine would be rejected and the cross-appeal against the judge's order declaring s 106A(8) to be unconstitutional would be allowed ... Dicta of Lord Pearce in *Liyanage v R* [1966] 1 All ER 650 at 659 applied. *Australian Building Construction Employees & Builders Labourers' Federation v Commonwealth* (1986) 161 CLR 88 and *Building & Construction Employees & Builders Labourers' Federation (NSW) v Minister for Industrial Relations* (1986) 7 NSWLR 372 considered.

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(4) With respect to the selection of sentence, the question was whether, in effect, the law vested in the executive the power to determine the sentence to be imposed on an individual who breached a court order. Where there was a correlation between the elements of an offence and the more severe penalty, the case was more likely to involve the exercise of the ordinary prosecutorial function. In the instant case, there was no correlation between the more severe penalty and an element of the offence which would ordinarily be seen as the explanation for the harsher penalty imposed by Parliament. Where the police decided to prosecute under s 106A instead of s 269 of the Criminal Code, therefore, there would inevitably be more of a selection of the penalty to be imposed on the particular defendant than an attempt to match the seriousness of the conduct of the accused with the appropriate offence. The selection which the police were allowed to make by s 106A(2) therefore amounted more to the exercise of a sentencing function than the exercise of prosecutorial discretion. It was s 106A(3) which created the vice of permitting the executive to select the sentence to be imposed by mandating the Supreme Court to impose the minimum penalties provided for. It was s 106A(3) which would accordingly be declared invalid ... *Ali v R* [1992] LRC (Const) 401 followed. *Teh Cheng Poh alias Char Meh v Public Prosecutor, Malaysia* [1980] AC 458 distinguished.

(5)(i) Upon a determination of whether, under the Constitution, a punishment was so grossly disproportionate as to be an inhuman or degrading punishment, the following principles applied: (i) the prohibition against inhuman and degrading punishment was intended to protect against punishment which was so excessive as to outrage the society's standards of decency. A punishment which was merely disproportionate was not unconstitutional; rather, to be condemned as inhuman and degrading, a punishment had to be *grossly* disproportionate for the offender, such that members of society would find it abhorrent or intolerable; (ii) a minimum mandatory punishment was not in and of itself cruel and unusual. In order to determine whether the constitutional standard had been breached, a number of factors had to be considered, although no single factor was determinative; (iii) upon an assessment of whether the law imposed an inhuman or degrading punishment, if the punishment was not considered to be grossly disproportionate for the particular offender, the court would proceed to consider whether the punishment would be grossly disproportionate in relation to a reasonably hypothetical

offender. The hypothetical scenario had to be reasonable in view of the crime in question and realistic having regard to the nature of the crime. In most cases the proper approach was to develop imaginable circumstances which could commonly arise with a degree of generality appropriate to the particular offence. In the instant case, the offence under s 106A(1) was committed where a person knowingly disobeyed or failed to comply with an injunction and the absence of a reasonable excuse for the breach was not an element of the offence. Accordingly, an offender was exposed to the mandatory penalties provided for under s 106A(3), even though he or she might have had a perfectly justifiable excuse for ignoring or defying the order. The court had to judge disproportionality not only by those cases which might justify the harsh penalties imposed, but also by those reasonably hypothetical cases which might not; a penalty which was grossly disproportionate in a reasonably hypothetical situation was not saved because of an equally reasonably hypothetical case where it might not be. Given the wide variety of circumstances in which injunctions were issued, in relation to a wide variety of individuals who might breach orders in a wide variety of circumstances, it was probably inevitable that there would be hypothetical situations which were not far-fetched or extreme in respect of which a 'one size fits all' penalty would be found to be grossly disproportionate. Moreover, it was significant that the offence was committed without the need on the part of the prosecution to prove moral blameworthiness. In all the circumstances, the mandatory penalties imposed by s 106A(3) were grossly disproportionate and, accordingly, infringed s 7 of the Constitution ... *Smith v R* [1988] LRC (Const) 361 and *Aubeeluck v State* [2011] 1 LRC 627 applied. *R v Lyons* [1987] 2 SCR 309, *R v Luxton* [1990] 2 SCR 711, *R v Goltz* [1991] 3 SCR 48, *R v Morrissey* 2000 SCC 39, [2001] 3 LRC 336 and *R v Ferguson* [2008] 1 SCR 96 adopted.

(ii) Once it was determined that a law passed after the commencement of the Belize Constitution was inconsistent with any of its provisions, the Supreme Court had no choice but to declare the law to be null and void and of no effect, to the extent of the inconsistency. That was the effect of s 2 of the Constitution, which appeared to rule out the option of disapplying s 106A(3) on a case-by-case basis, but leaving it otherwise intact. Because s 106A(3) was not an existing law to which s 134(1) of the Constitution applied, the power of modification, adaption, qualification or the making of exceptions was not available. Neither did the Supreme Court of Belize have the power to read

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in or read out words in a statutory provision in order to save it from invalidity. It followed that the first option would usually be to declare the law to be invalid and void. In the instant case, no implied term could be formulated which would capture those situations where the mandatory penalty imposed by s 106A(3) would pass constitutional muster. Accordingly, s 106A(3) would be declared invalid ... *R v Ferguson* [2008] 1 SCR 96 adopted. *State v Vries* [1997] 4 LRC 1 considered.

(6) An order restraining a party to an arbitration agreement from commencing or continuing arbitration proceedings deprived him of his contractual right to arbitrate and a law which empowered the judiciary to make any such order failed to protect him from the deprivation of his property, contrary to s 3(d) of the Constitution. However, the rights protected by ss 3(d) and 17(1) were both subject to derogation in the public interest: the question was therefore whether prohibiting the pursuit of arbitration proceedings which were or would be ‘oppressive, vexatious and inequitable’ or would ‘constitute an abuse of the legal or arbitral process’, as specified in sub-s (8), was in the public interest. Prohibiting the pursuit of arbitration proceedings which bore the descriptions set out in s 106A(8) as understood at common law pursued the legitimate aim of promoting fairness between parties to an agreement to arbitrate. The right to arbitrate could not be fairly pursued if the arbitration process was itself abused. Arbitration proceedings which caused oppression, vexation or inequity were not in the public interest. Further, there was no fairer way to deal with arbitration proceedings which fitted those descriptions than by vesting in the Supreme Court the power, in its discretion, to grant injunctive relief. It followed that s 106A(8) did not infringe the Constitution ... *Wilson v First County Trust Ltd* [2003] UKHL 40, [2004] 2 LRC 618 considered. *Thomas v Baptiste* [1999] 2 LRC 733 not followed.

(7) In assessing whether s 106A(5) struck a proper balance between the interests of the individual and the interests of the state, it was important first to recall the fundamental importance of the right to be presumed innocent until proven guilty in the administration of criminal justice and its underlying rationale. Whether the legislative provision fell within the permissible reasonable limits would not be an easy question to answer. In making that assessment, among the factors which were relevant were: the extent to which the accused was required to disprove an essential element of the offence; the extent to which the matter

which the accused was required to prove flowed naturally from the facts which the prosecution had still to prove; the extent to which facts which the accused was required to prove were matters within his own knowledge or to which he had ready access; the extent to which it would be difficult for the prosecution to prove those matters; the severity of the punishment which was imposed where the accused failed to discharge the burden cast on him; the extent to which conduct which would otherwise not attract criminal condemnation would nevertheless be subject to criminal sanction under the impugned law; the importance of the goal which the impugned provision sought to attain and whether any such goal might have been achieved by some other less intrusive means. By virtue of s 106A(5) a person who was acting in an official capacity for or on behalf of a body of persons, whether corporate or incorporate, at the time that body committed the offence under s 106A(1) of knowingly disobeying or failing to comply with an injunction, was deemed to be guilty of the offence, unless he or she adduced evidence to show that the offence was committed without his or her knowledge, consent or connivance. In order to establish criminal liability under sub-s (5), the prosecution had to prove only that the corporate or incorporate body had committed the offence and that the accused was acting or purporting to act in an official capacity at the time the offence was committed; there was no requirement that the prosecution prove either that the accused knew of the injunction or in any way advised or counselled or participated in the commission of the offence. It followed that there was an unfair imbalance in what the prosecution had to prove to establish the offence and what the accused had to prove, albeit at a lower standard, to escape criminal liability. Further, the presumption which was created by s 106A(5) was not the only way in which the otherwise legitimate aim of the legislature could be achieved. In all the circumstances, the legislature had taken insufficient account of the right to be presumed innocent and s 106A(5) infringed the right guaranteed by s 6(5)(a) of the Constitution and was not saved by s 6(10)(a) ... Dicta of Lord Nicholls in *R v Johnstone* [2003] 3 All ER 884 at [51] and *Sheldrake v DPP, A-G's Ref (No 4 of 2002)* [2004] UKHL 43, [2005] 3 LRC 463 applied.

(8) In the instant case, there was no provision deeming service to have been properly effected by the particular method of service which the claimant selected. By providing for a choice of four methods 'as may be appropriate in the circumstances of the case', sub-s (9) anticipated the exercise by the presiding judge

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of his powers of superintendence over the method of service used to ensure that the defendant was indeed informed of the court proceedings or orders which might affect his interests. Accordingly, sub-s (9) did not infringe the right to a fair hearing or to access to court. In addition, sub-ss (11) and (12) did not infringe s 6 of the Constitution.

(9) Accordingly, the court would make the following declarations: (i) s 106A(3) violated the separation of powers doctrine and s 7 of the Constitution, (ii) s 106A(5) violated s 6 of the Constitution and (iii) s 106A(1)–(7), (10)–(13), (16) were invalid, null and void and of no effect.

[2012] 1 LRC 66

**Justice Alliance of South Africa and
Others v President of the Republic of
South Africa and Others**

[2011] ZACC 23

SOUTH AFRICA

Constitutional Court

Moseneke DCJ, Cameron, Froneman, Jafta, Khampepe,
Mogoeng, Nkabinde, Skweyiya, van der Westhuizen
and Yacoob JJ
18, 29 July 2011

(1) Constitutional law – Separation of powers – Independence of judiciary – Rule of law – Constitutional Court judge – Term of office – Extension – Constitution specifying that term could be extended by Act of Parliament – Act providing that President could request Chief Justice to continue in office for specified period – President requesting Chief Justice to extend term of office – Whether statutory provisions unconstitutional and invalid – Whether valid delegation of power – Relevant considerations – Constitution of the Republic of South Africa 1996, ss 2, 165, 176(1) – Judges’ Remuneration and Conditions of Employment Act 2001, s 8(a).

(2) Constitutional law – Separation of powers – Independence of judiciary – Appointment of judges – Fixed term of office – Principle of non-renewability – Constitutional Court judge – Constitution specifying that term of office could be extended by Act of Parliament – Act

providing that President could request Chief Justice to continue in office for specified period – Whether such provision unconstitutional and invalid – Whether differential treatment of Chief Justice valid – Constitution of the Republic of South Africa 1996, s 176(1).

(3) Constitutional law – Constitution – Enforcement – Remedies – Statutory provision for extending judge's term of office found to be constitutionally invalid – Whether suspension of declaration to be granted – Extension of term of office of Chief Justice under invalid provision to commence within four weeks – Effect of decision – Whether court could continue to function without Chief Justice – Relevant considerations.

Section 176 of the Constitution provided that: 'A Constitutional Court judge holds office for a non-renewable term of 12 years, or until he or she attains the age of 70, whichever occurs first, except where an Act of Parliament extends the term of office of a Constitutional Court judge.' Under s 174 of the Constitution there was a distinctive procedure for appointing the Chief Justice and the Deputy Chief Justice: they were both appointed by the President, after consultation with the Judicial Service Commission and the leaders of the parties represented in the National Assembly. Section 2 of the Constitution stated that the Constitution was the supreme law of the country and that any law or conduct inconsistent with it was invalid. Section 165 of the Constitution provided that the organs of state not only had to refrain from interfering with the courts but they also had to 'assist and protect the courts to ensure the independence, impartiality, dignity, accessibility and effectiveness of the courts'. In 2001 the Constitution was amended to give Parliament the power to extend the term of office of a Constitutional Court judge. Section 4 of the Judges' Remuneration and Conditions of Employment Act 2001 (the Act) provided that a Constitutional Court judge, whose 12-year term of office expired or who reached the age of 70 years before completing 15 years' active service, had to continue in office until the completion of 15 years' active service or until that judge attained the age of 75 years, whichever was the sooner. Section 8(a) of the Act permitted the further extension of the term of office of the Chief Justice exclusively. It allowed a Chief Justice, whose 12-year term in this court was to expire and who would have completed 15 years' active service, to remain the Chief Justice of South Africa at the request of, and for a period determined by, the President. In 2011, the President extended the

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term of office of the Chief Justice of South Africa for five years, with that extension to commence in August. The instant case involved three applications for direct access to the Constitutional Court to challenge the President's decision to extend the term of office of the Chief Justice. The applicants challenged the constitutionality of the law that authorised the process by which the term of office of the Chief Justice was extended and, if the law was found to be valid, put in issue the constitutional validity of the conduct of the President in the process of extending that term of office. The applicants all claimed standing in the public interest under s 38 of the Constitution and were granted direct access by the court. The applicants claimed that s 8(a) of the Act was invalid because it violated the provisions of s 176(1) of the Constitution. They contended that its provisions were an impermissible delegation of the legislative power of Parliament to extend the term of office of a Constitutional Court judge to the President. The respondents submitted, inter alia, that s 8(a) was part of an Act of Parliament that gave effect to s 176(1) of the Constitution and that under that provision Parliament extended the term of office of the Chief Justice and merely authorised the President to implement that extension. They contended that this was permissible delegation to the President to decide: whether to extend the term of office of a Chief Justice; if so, to determine the period of extension and to seek the consent of the incumbent. The central issue that arose for determination by the courts was whether s 8(a) of the Act was consistent with s 176(1) of the Constitution. That inquiry required the court to determine, inter alia, whether s 8(a) delegated the power to extend to the President and, if so, whether that delegation was permitted by s 176(1) of the Constitution. Other key issues that the court had to consider was whether the power conferred on the President to extend the term of office of the Chief Justice alone under s 8(a) was also compatible with s 176(1) of the Constitution and, if s 8(a) was invalid, whether or not a declaration of invalidity should be suspended, since the Chief Justice's post would be extended within four weeks.

HELD: Application allowed. Section 8(a) of the Judges' Remuneration and Conditions of Employment Act 2001 declared constitutionally invalid. Order for suspension of declaration denied.

(1) The interpretation of s 176(1) of the Constitution and s 8(a) of the Act necessarily engaged the concepts of the rule of law, the

separation of powers and the independence of the judiciary. The significance of the rule of law and its close relationship with the ideal of a constitutional democracy could not be over-emphasised. Section 2 of the Constitution enshrined the supremacy of the Constitution. The principle of the separation of powers emanated from the wording and structure of the Constitution. The Constitution delineated between the legislature, the executive and the judiciary, with appropriate checks and balances to ensure accountability, responsiveness and openness. Section 165 of the Constitution and case law highlighted the importance of judicial independence, which was further underscored by the oath or solemn affirmation taken by all judges when entering office. Judges undertook to uphold and protect the Constitution and administer justice 'without fear, favour or prejudice'. Judicial independence was crucial to the courts for the fulfilment of their constitutional role. Judicial independence in a democracy was recognised internationally. The international community had subscribed to basic principles of judicial independence through a number of international legal instruments. Section 8(a) of the Act conferred on the President an executive discretion to decide whether to request a Chief Justice to continue to perform active service and, if he or she agreed, to set the period of the extension. The term of office could not be extended unless the President so decided and the Chief Justice acceded to the request. The period of the extension too was in the exclusive discretion of the President and was unfettered, in the sense that he was not required to consult. In its purported delegation, Parliament had not sought to furnish any, let alone adequate, guidelines for the exercise of the discretion by the President. Parliament had delegated its power to the President and, in doing so, had granted him an executive discretion whether to extend the term of office or not. The contention that the President merely took an executive step to implement the extension granted by an Act of Parliament could not be sustained. There was no doubt that, as s 8(a) stood, Parliament had surrendered its legislative power in favour of an executive election whether to extend the term of an incumbent or not. The Constitution sometimes permitted Parliament to delegate its legislative powers and sometimes did not. The question whether Parliament was entitled to delegate had to depend on whether the Constitution permitted the delegation. Whether Parliament might delegate its law-making power or regulatory authority was a matter of constitutional interpretation dependent, in most part, on the language and context of the

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empowering constitutional provision. There were a number of textual and contextual indicators that s 176(1) of the Constitution did not empower Parliament to delegate the power to extend the term of service of a judge of the Constitutional Court. The words 'Act of Parliament extends' required that Parliament had to take the legally significant step of extending the term of active service of a judge of the court. The extension by the President did not qualify as an Act of Parliament as required. Section 176(1) explicitly referred to an Act of Parliament extending the term. That was a strong indication that the legislative power may not be delegated by the legislature. The primary reason for delegation was to ensure that the legislature was not overwhelmed by the need to determine minor regulatory details. Section 8(a) did not delegate the determination of mere minor detail to the executive but shifted all of the power granted by s 176(1) from Parliament to the executive. The provision usurped the legislative power granted only to Parliament and, therefore, constituted an unlawful delegation. Where the doctrine of parliamentary sovereignty governed, Parliament might delegate as much power as it chooses. In a constitutional democracy, Parliament might not ordinarily delegate its essential legislative functions. The power to extend the term of a Constitutional Court judge went to the core of the tenure of the judicial office, judicial independence and the separation of powers. The term or extension of the office of the highest judicial officer was a matter of great moment in South Africa's constitutional democracy. Up until the 2001 amendment to s 176(1) of the Constitution, the term of office of judges of the Constitutional Court was regulated exclusively by the Constitution. Another important consideration in deciding whether s 8(a) was constitutionally compliant was the constitutional imperative of judicial independence. The Constitutional Court was the highest court in all constitutional matters. The independence of its judges was given vigorous protection by means of detailed and specific provisions regulating their appointment. The Chief Justice was at the pinnacle of the judiciary and, thus, the protection of his or her independence was just as important. Section 176(1) of the Constitution created an exception to the requirement that a term of a Constitutional Court judge was fixed. That authority, however, vested in Parliament and nowhere else. Section 176(1) did not merely bestow a legislative power, but it also marked out Parliament's significant role in the separation of powers and protection of judicial independence. The nature of that power could not be overlooked and the Constitution's delegation to

Parliament had to be construed restrictively to realise that protection. Section 8(a) of the Act violated the principle of judicial independence. The provisions of s 8(a) amounted to an impermissible delegation and were invalid because they were inconsistent with the provisions of s 176(1) of the Constitution. Any steps taken or decision made pursuant to the provisions of s 8(a) of the Act were inconsistent with the Constitution and equally invalid.... *Executive Council, Western Cape Legislature v President of the Republic of South Africa* [1995] ZACC 8, 1995 (4) SA 877 (CC), *Ex p Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa* 1996 [1996] ZACC 26, 1996 (4) SA 744 (CC), *De Lange v Smuts NO* [1998] ZACC 6, [1999] 2 LRC 598, *Executive Council, Western Cape v Minister of Provincial Affairs and Constitutional Development* [1999] ZACC 13, 2000 (1) SA 661 (CC), *Dawood v Minister of Home Affairs* [2000] ZACC 8, [2000] 5 LRC 147, *Janse van Rensburg NO v Minister of Trade and Industry* [2000] ZACC 18, 2001 (1) SA 29 (CC), *South African Assn of Personal Injury Lawyers v Heath* [2000] ZACC 22, [2001] 4 LRC 99, *Re Constitutionality of the Mpumalanga Petitions Bill 2000* [2001] ZACC 10, 2002 (1) SA 447 (CC), *Affordable Medicines Trust v Minister of Health* [2005] ZACC 3, 2006 (3) SA 247 (CC) and *AAA Investments (Pty) Ltd v Micro Finance Regulatory Council* [2006] ZACC 9, 2007 (1) SA 343 (CC) applied.

(2) It was well established on both foreign and local authority that a non-renewable term of office was a prime feature of independence. Non-renewability was the bedrock of security of tenure and a dyke against judicial favour in passing judgment. Section 176(1) gave strong warrant to that principle in providing that a Constitutional Court judge held office for a non-renewable term. Non-renewability fostered public confidence in the institution of the judiciary as a whole, since its members functioned with neither threat that their terms would not be renewed nor any inducement to seek to secure renewal. The singling out of the Chief Justice, alone amongst the members of the Constitutional Court, was incompatible with s 176(1). The distinctive appointment process for the Chief Justice and Deputy Chief Justice indicated the high importance of their offices. It signified that their duties might require them to represent the judiciary and to act on its behalf in dealings with the other arms of government. They were the most senior judges in the judicial arm of government and their distinctive manner of appointment

current Chief Justice in relation to the institutional transformation of the judiciary need not grind to a halt. There was nothing that prevented the incumbent Chief Justice from continuing to give his assistance regarding those projects on a practical level to any temporary or future appointment to the office of Chief Justice. A suspension order would perpetuate an unconstitutional extension of the term of office of the head of the judiciary. The interests of justice and the rule of law demanded certainty on the issues before the court. An order suspending the declaration of invalidity was not warranted ... *Minister of Home Affairs v National Institute for Crime Prevention and the Reintegration of Offenders (NICRO)* [2004] ZACC 10, [2004] 5 LRC 363 and *Minister of Home Affairs v Fourie* [2005] ZACC 19, [2006] 1 LRC 677 applied. *Bengwenyama Minerals (Pty) Ltd v Genorah Resources (Pty) Ltd* [2010] ZACC 26, 2011 (4) SA 113 (CC) considered. *Dawood v Minister of Home Affairs* [2000] 5 LRC 147 distinguished.

[2012] 2 LRC 110

Fuller v Attorney General

[2011] UKPC 23

BELIZE

Privy Council

Lord Phillips, Lord Mance, Lord Clarke,

Lord Hamilton and Sir Henry Brooke

11–12 April, 9 August 2011

(1) *Constitutional law – Separation of powers – Judicial power – Extradition – Extradition proceedings – Supreme Court – Jurisdiction – Delay – Abuse of process – Fundamental rights – Protection – Appellant awaiting extradition – Appellant applying to Supreme Court for habeas corpus alleging delay rendering extradition abuse of process – Application refused because statute vesting relevant power in minister – Court of Appeal dismissing appeal six years later – Whether courts having jurisdiction to entertain abuse of process argument – Whether abuse of process – Extradition Act 1870 – Constitution of Belize 1981, s 5(2)(d).*

(2) *Extradition – Extradition proceedings – Delay – Abuse of process – Application for habeas corpus refused by Supreme Court – Court of Appeal dismissing appeal six years later – Whether delay*

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amounting to abuse of process – Whether rendering extradition unjust, oppressive or unlawful – Extradition Act 1870.

In 1990 a warrant was issued in Miami for the arrest of the appellant on a charge of first degree murder. The appellant left the United States and went to Belize. In January 1998 a Grand Jury in Florida indicted the appellant for murder. In August 1998 the United States Embassy in Belize made a formal request for the appellant's extradition to the United States. In October 1998 the appellant was arrested and remanded in custody. In February 1999 the Chief Magistrate ordered his extradition, remanding him to prison until then. In May 1999 the appellant obtained leave to apply for a writ of habeas corpus, essentially on the grounds that delay that had occurred had rendered the application for extradition an abuse of process. In June 1999 he was granted bail, pending the hearing of such application. In April 2002 the application was refused by the Chief Justice, sitting in the Supreme Court, on the ground that the Supreme Court had no jurisdiction to entertain a challenge to extradition based on abuse of process, the discretion to discharge a person in such circumstances vesting exclusively in the Minister of Foreign Affairs under s 11 of the Extradition Act 1870. In May 2002 the appellant obtained leave to appeal to the Court of Appeal and was granted bail. Nearly six years of inertia followed. In March 2009 the Court of Appeal dismissed the appellant's appeal. The appellant appealed to the Privy Council, which had to determine the extent of the jurisdiction of the Supreme Court on an application for habeas corpus in an extradition case. The appellant's arguments on the jurisdiction issue were as follows: the Constitution provided for the separation of powers and for the protection of fundamental rights and freedoms, including the right to personal liberty (s 5), which was in turn protected by the habeas corpus procedure; the Supreme Court had jurisdiction to enforce or secure the enforcement of any of the fundamental rights provisions of the Constitution (s 20); as abuse of process in extradition proceedings was capable of rendering the detention of the person whose extradition was sought unlawful, the separation of powers required the courts and not the executive to rule on the legality of detention; it followed that the courts had jurisdiction to consider whether there had been an abuse of process.

HELD: Appeal dismissed.

(1) The principle of separation of powers, part of the largely unwritten constitution of the United Kingdom, had been

recognised by the Privy Council as being entrenched in the Westminster-model written Constitutions of Commonwealth countries, referring to features equally found in the Constitution of Belize. Whatever overlap there might be between the exercise of legislative and executive powers, they were totally or effectively separated from the exercise of judicial powers, in accordance with the rule of law. The primary issue in the instant appeal was whether the Supreme Court had jurisdiction to entertain a challenge to extradition based on abuse of process. Extradition would not be lawful if it would violate a fundamental right. The appellant had raised his abuse of process challenge in the course of the habeas corpus proceedings before the Supreme Court. Habeas corpus was the remedy provided by s 5(2)(d) of the Constitution where the fundamental right to liberty had been infringed by detention. In reality it was not the detention that the appellant challenged but the extradition process itself. The lawfulness of the detention was not the same as the lawfulness of the extradition, albeit the two were interconnected. A person could be lawfully detained pending the determination of whether his extradition was lawful, but not if or when it was determined that the extradition was not lawful. The abuse of process argument went to the legality of the extradition proceedings. Abuse of process was a paradigm example of a matter that was for the court and not for the executive. The appellant had therefore made out his case that the Supreme Court had jurisdiction to entertain a challenge to extradition based on abuse of process ... Dicta of Lord Bingham of Cornhill in *Knowles v Government of the United States of America* [2006] UKPC 38, [2007] 2 LRC 123 at [27]–[28], *Ahnee v DPP* [1999] 2 LRC 676, *R (Kashamu) v Governor of Brixton Prison* [2001] EWHC Admin 980, [2002] QB 887, *DPP v Mollison* [2003] UKPC 6, [2003] 2 LRC 756 and *State v Khoyratty* [2006] UKPC 13, [2006] 4 LRC 403 applied. *Atkinson v United States Government* [1969] 3 All ER 1317 and *R v Governor of Pentonville Prison, ex p Sinclair* [1991] 2 All ER 366 distinguished.

Per curiam. That a party can insist on a reference to the Supreme Court makes it impossible to hold that the magistrates' court is the obvious forum for the determination of an abuse of process challenge ...

(2) The next question which arose in a country such as Belize, where fundamental human rights were entrenched in the Constitution but where extradition was governed by the 1870

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Act, was in what circumstances the Supreme Court could, or should, accede to a habeas corpus application on the ground that extradition would be so unjust or oppressive as to be unlawful, with the consequence that detention of the person whose extradition was sought could not be justified. The circumstances might extend further than those that could naturally be described as amounting to an abuse of process. The relevant delay so far as an allegation of abuse of process was concerned was not the delay in commencing the extradition proceedings, but the delay in pursuing them. Inordinate delay in pursuing extradition proceedings was capable of amounting to an abuse of process justifying the discharge of the person whose extradition was sought. On the facts, there was a period of inertia of nearly six years after the filing of the appellant's notice of appeal. Had the appellant wished to progress the appeal he could and should have made representations to the registry. That he did not do so indicated that he was only too happy that the hearing of his appeal be delayed. In the circumstances it was not arguable that justice demanded that the extradition proceedings be abandoned because of the delay that had occurred ... *Kakis v Government of the Republic of Cyprus* [1978] 2 All ER 634 and *Gomes v Government of Trinidad and Tobago* [2009] UKHL 21, [2009] 3 All ER 549 considered.

Per curiam. 'Abuse of process' is not a term that sharply defines the matter to which it relates. It can describe (i) making use of the process of the court in a manner which is improper, such as adducing false evidence or indulging in inordinate delay, or (ii) using the process of the court in circumstances where it is improper to do so, as for instance where a defendant has been brought before the court in circumstances which are an affront to the rule of law, or (iii) using the process of the court for an improper motive or purpose, such as to extradite a defendant for a political motive ...

[2013] 1 LRC 627

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Centre for Health Human Rights and Development and Others v Attorney General

[2012] UGCC 4

UGANDA

Constitutional Court

Mpagi-Bahigeine DCJ, Byamugisha, Kavuma,

Nshimye and Kasule JJA

5 June 2012

Constitutional law – Separation of powers – Judiciary – Executive – Legislature – Courts – Jurisdiction – Political question – Applicants bringing petition complaining of level of pre- and post-natal health care for mothers – Whether subject matter of petition political – Whether court having jurisdiction to hear petition – Constitution of the Republic of Uganda 1995, art 137.

The applicants brought a petition before the Court of Appeal of Uganda, sitting as the Constitutional Court, under art 137 of the Constitution of the Republic of Uganda 1995, which provided that the court, on petition, could determine any question as to the interpretation of the Constitution, including whether any Act of Parliament or any other law or any act or omission of any person or authority was inconsistent with or in contravention of a provision of the Constitution, and under art 45 of the Constitution, which contained a general guarantee of human rights. In their petition the petitioners alleged, inter alia, that the respondent, the Government of Uganda, through its failure to provide essential pre- and post-natal care, had breached the right to life of expectant mothers, as guaranteed under art 22 of the Constitution, as well as the right to health of expectant mothers. Further, they alleged that there was an unacceptable number of maternal deaths and that the supply of essential drugs was frequently exhausted. They also sought a declaration that the relatives of mothers who had died as a result of the alleged shortcomings in the government's pre- and post-natal healthcare provision were entitled to damages. In support, they alleged that the respondent's spending over the previous ten years had been 9.6% of its budget, as opposed to the required 15%. The respondent argued that the court had no jurisdiction to hear the petition because its subject

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matter constituted a political question and, in doing so, the court would have had to interfere with the political discretion which by law was a preserve of the executive and the legislature. The roles of the three branches of government were defined by the Constitution. Under art 79 of the Constitution, the Parliament, as the legislature, had ‘power to make laws on any matter for the ... good governance of Uganda ... No persons or body other than Parliament shall have power to make provision having the force of law’. Under art 111 the Cabinet, as the embodiment of the executive, had the function of ‘determin[ing], formulat[ing], and implement[ing] the policy of Government’. Article 126 provided for the exercise of judicial power. In response, the petitioners argued that, since the respondent’s acts and omissions in relation to constitutionally guaranteed rights were at issue, the court had jurisdiction to hear the petition.

HELD: Petition dismissed.

The purpose of the political question doctrine was to distinguish the role of the judiciary from those of the legislature and the executive and it was essentially a function of the separation of powers, whereby the court could determine that an issue which had been raised about the conduct of public business was a political issue to be determined by the legislature or the executive. Therefore, certain issues could not be decided by the courts because their resolution was committed to another branch of government and/or because those issues were not capable of judicial resolution. Furthermore, since the role of the court, as set out in art 137 of the Constitution, was to interpret the provisions of the Constitution, the petitioners had to prove that constitutional provisions had been violated. In the instant case, while it might have been true that the respondent had not allocated enough resources to the health sector, that was the political and legal responsibility of the executive and no other body had the power to determine and implement those policies. The court had no power to determine or enforce its jurisdiction on matters that required analysis of government policies for the health sector and their implementation. If the court were to determine the issues raised in the petition, it would be substituting its discretion for that of the executive, as granted to it by law. The petition was therefore dismissed ... *Ssemwogerere v A-G* [2005] 1 LRC 50 followed. *Marbury v Madison* (1803) 5 US 137, *Coleman v Miller* (1939) 307 US 433, *A-G v Tinyenfunza* (Constitutional Appeal

No 1 of 1997, unreported) and *Serugo v Kampala* (Constitutional Appeal 2/1998, unreported) considered.

Per curiam. The solution to the problem was not by a Constitutional Petition; other remedies, including the prerogative orders, are available by which the petitioners could pursue their concern with the unsatisfactory provision of basic health services for expectant mothers ...

[2012] 1 LRC 647

Attorney General v Mtikila

TANZANIA

Court of Appeal

Ramadhani CJ, Munuo, Msoffe, Kimaro,

Mbarouk, Luanda and Mjasiri JJA

9 April, 17 June 2010

(1) Constitutional law – Constitution – Amendment – Validity – Judicial review – Grounds – Basic structure of Constitution – Elections – Candidates – Qualifications – Membership of political party – Independent candidate – Constitutional amendment requiring candidates at presidential, parliamentary and local council elections to be members of, and sponsored by, political parties – Respondent wishing to stand for election as independent candidate – Respondent seeking declarations that amendment unconstitutional and affirming constitutional right of independent candidate to stand for election – Whether amendment subject to judicial review – Whether unconstitutional – Whether basic structure of Constitution invalidating such amendment – Constitution of the United Republic of Tanzania 1977, arts 21, 30(5), 98(1), Sch 2 – Eleventh Constitutional Amendment Act 1994.

(2) Constitutional law – Constitution – Interpretation – High Court – Jurisdiction – International instruments – Relevance – Whether High Court having jurisdiction to interpret Constitution – Whether permissible to refer to international instruments in interpreting Constitution – Constitution of the United Republic of Tanzania 1977, art 7(2).

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(3) Practice and procedure – Framing of issues – Rule requiring court to frame issues at first hearing – Court failing to frame issues but proceeding with hearing and to judgment – Whether failure to frame issues fatal to proceedings – Circumstances where such failure would be fatal – Civil Procedure Code (Cap 33 Rev Ed 2002), Ord XIV, r 1(5).

The Eighth Constitutional Amendment Act 1992 amended arts 39, 67 and 77 of the Constitution of Tanzania to introduce an additional qualification for candidates in presidential and parliamentary elections, requiring them to be members of and sponsored by political parties. The same requirement was also applied, by amending legislation, to candidates in local council elections. In 1993 the Revd Christopher Mtikila, the respondent, commenced proceedings in the High Court, asserting that the new requirement abridged the right of every citizen, under art 21(1) of the Constitution, to participate in national public affairs; Lugakingira J declined to declare the relevant provisions unconstitutional but declared that it was lawful for independent candidates to contest elections. This declaration was nullified by the Eleventh Constitutional Amendment Act 1994, which maintained the restriction of candidacy to members of political parties, amending art 21(1) to make it expressly subject to the other relevant articles and to laws concerning elections. In 2005 the respondent brought new proceedings seeking declarations that the constitutional amendment of 1994 to arts 39 and 67 was unconstitutional and that he had a constitutional right under art 21(1) to stand for election to Parliament as an independent candidate. In the High Court a bench of three judges declared the amendments to be unconstitutional and contrary to international Covenants to which Tanzania was a party. The Attorney General appealed to the Court of Appeal, which invited four amici curiae to assist the court. The principal issues before the court were whether the High Court had exceeded its jurisdiction and assumed legislative power, whether any constitutional provision could be declared unconstitutional, including whether the doctrine of incompatibility with the basic structure of the Constitution was applicable, and whether the High Court had erred in referring to international instruments in interpreting the Constitution.

HELD: Appeal allowed.

(1) The courts could not declare an article of the Constitution to be unconstitutional except where it had not been enacted

in accordance with the procedure prescribed by art 98(1) for amendments. Although art 30(5) conferred jurisdiction on the High Court to determine whether 'any law' was in conflict with the Constitution, the word 'law' did not include an Act amending the Constitution. The doctrine that the Constitution had a basic structure which was not amenable to amendment did not apply and persuasive Indian authorities on the point could not be adopted when considering the Constitution. Article 98(1) provided for the amendment of any provision of the Constitution: there was no article which could not be amended and therefore there were no basic structures. What were provided were safeguards: art 98(1)(a) required a two-thirds vote of all members of Parliament for any constitutional amendment and art 98(1)(b) required the support of two-thirds of all members from the mainland and two-thirds of all members from Zanzibar for any amendment to the eight matters listed in the Sch 2. Those eight matters could have been basic structures but even they were amendable, so there was nothing in the Constitution like basic structures. In the only circumstance where a court had jurisdiction to declare an article to be unconstitutional, where an amendment had not been enacted in accordance with the procedure stipulated by art 98(1), the courts would perform their constitutional function of maintaining checks and balances. Apart from such a case, the courts exercised calculated restraint to avoid meddling in the responsibilities of the other two pillars of state. Therefore the court did not have jurisdiction to declare that independent candidates were allowed to contest elections: that was a political, not a legal, issue and had to be settled by Parliament exercising its authority to amend the Constitution ... *Mbushuu v Republic* [1994] 2 LRC 335, *Mwalimu Paul John Mhozya v A-G (No 1)* [1996] TLR 130, *Jorge Castañeda Gutman v Mexico* (6 Aug 2008), IACHR, and *Kamau v A-G* [2011] 1 LRC 399 considered. *Kesavananda Bharati v State of Kerala* AIR 1973 SC 1461 not followed.

Per curiam. (i) The doctrine of basic structures of a Constitution is nebulous as there is no agreed yardstick of what constitutes such basic structures ...

(ii) The Attorney General and Parliament should consider the comment by the UN Human Rights Committee, that '[t]he right of persons to stand for election should not be limited unreasonably by requiring candidates to be members of parties

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or of specific parties’ ... UN Human Rights Committee, General Comment No 25, 12 July 1996, para 21 referred to.

(iii) Apart from the legal argument, there is a purely practical issue: if the court declared the requirement of political party membership unconstitutional for abridging the provisions of art 21, where would it stop? The next complaint would be why should a parliamentary candidate be required to be 21 years old, and a presidential candidate 40 years, rather than 18 years, the age of majority, and why must a presidential candidate be a citizen born in Tanzania? All these requirements abridge art 21 ...

(iv) If there are two or more articles or portions of articles of the Constitution which cannot be harmonised, it is for Parliament, not the courts, to deal with the matter. Members of Parliament, not the courts, are the custodians of the will of the people ...

(2) (i) Under the Constitution the High Court exercised jurisdiction over mainland Tanzania and also over the Union on matters pertaining to the Constitution, except insofar as the Constitution expressly provided in art 7(2) that Part II of Chapter 1, ‘Fundamental Objectives and Directive Principles of State Policy’, was not justiciable in any court. The High Court therefore had jurisdiction to entertain the petition in the instant case and in doing so was not purporting to exercise legislative power ...

(ii) The High Court had not erred in referring to international instruments, without regarding them as conclusive. The Court of Appeal itself had previously approved reference to international instruments in construing the Bill of Rights of the Constitution ... Dicta of Nyalali CJ in *DPP v Pete* [1991] LRC (Const) 553 at 565 applied.

(3) Although the failure of the High Court to frame the issues offended Ord XIV, r 1(5) of the Civil Procedure Code, such an omission could not be regarded as fatal unless, upon examining the record, it was found that the failure to frame the issue had resulted in the parties having gone to trial without knowing that the question was in issue between them and having therefore failed to adduce evidence on the point. Since the parties were fully ad idem as to what was at stake and had fully addressed the points in dispute and since the court had made its decision

based on their submissions, no injustice was occasioned and the court would not interfere solely on that score ... Dicta of Nihill P in *Janmohamed Umerdin v Hussein Amarshi* (1953) 20 EACA 41 at 42, *Abel Edson Mwakanyamale v NBC (1997) Ltd* (Civ App No 63 of 2003, unreported), Tan CA, and *Jaffari Sanya Jussa v Salehe Sadiq Osman* (Civ App No 51 of 2009, unreported), Tan CA, applied.

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[2013] 2 LRC 470

**Mohammad Faizal bin Sabtu v
Public Prosecutor**

[2012] SGHC 163

SINGAPORE

High Court

Chan Sek Keong CJ

8 May, 10 August 2012

(1) Constitutional law – Separation of powers – Judicial and legislative powers – Minimum sentences – Statute prescribing minimum sentences for certain offenders – Whether power to prescribe sentences part of legislative or judicial power – Whether prescription by legislature violating separation of powers – Relevant considerations.

(2) Constitutional law – Separation of powers – Judicial and legislative powers – Minimum sentences – Statute prescribing mandatory minimum sentences for drugs offences – Petitioner charged with drug offence – Previous admission by executive order to Drug Rehabilitation Centre – Petitioner liable to prescribed mandatory minimum sentence – Whether sentence violating separation of powers – Whether violating rights to personal liberty and to equal protection – Principle of proportionality – Application – Misuse of Drugs Act (Cap 185, 2008 Rev Ed), ss 33A(1)(a), 33A(1)(d), 33A(1)(e) – Constitution of the Republic of Singapore (1985 Rev Ed, 1999 Reprint), arts 9, 12.

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The petitioner was charged with a number of offences under the Misuse of Drugs Act ('MDA'), including one count of consumption of morphine under s 8(b)(ii). As he already had two previous admissions to Drug Rehabilitation Centres ('DRC'), s 33A(1)(a) of the MDA applied and, if convicted of the consumption charge, he would have to suffer the prescribed mandatory minimum sentence of five years' imprisonment and three strokes of the cane under ss 33A(1)(i) and 33A(1)(ii) respectively ('the prescribed mandatory minimum sentence'). He pleaded guilty and applied for a special case to be determined by the High Court. The stated question was whether ss 33A(1)(a), 33A(1)(d) and 33A(1)(e) (collectively 'the impugned s 33A MDA provisions') – which set out the conditions that, upon being satisfied, subjected an offender to the prescribed mandatory minimum sentence – violated the separation of powers embodied in the Constitution of the Republic of Singapore ('the Constitution') in requiring the court to impose a mandatory minimum sentence, with specific reference to 'admissions', as defined in s 33A(5)(c) of the MDA, to an 'approved institution' (in essence, a DRC). The stated question also raised additional issues as to whether the impugned legislation violated art 9 of the Constitution (right to life and personal liberty) or art 12 (right to equality). The petitioner submitted that s 33A(1)(a) directed the court to treat DRC admissions, which were executive orders, as convictions, which were judicial orders, in order to impose the enhanced minimum punishments in s 33A(1) on an offender. That legislative direction as to the effect of prior executive acts in the sentencing process intruded into the sentencing function, which was part of the judicial power and therefore violated the principle of separation of powers. The petitioner also submitted that s 33A(1)(a) violated the right to equal protection under art 12(1) of the Constitution, in subjecting an offender with two prior DRC admissions to the same treatment as an offender with two prior court convictions, and offended art 9(1) of the Constitution (the right to life and personal liberty) and – in reliance on the principle of proportionality – it was manifestly excessive, disproportionate and arbitrary, given that an offender who had two prior DRC admissions was effectively a first-time offender.

HELD: Stated question answered in the negative.

(1) The principle of separation of powers required each constitutional organ to act within the limits of its own powers. That meant that the legislative and executive branches of the

state could not interfere with the exercise of the judicial power by the judicial branch. However, the prescription of punishments for offences fell under the legislative power and not the judicial power. Although the courts had long assumed that it was part of the judicial function to impose punishments, that was always subject to the power of the legislature to prescribe the applicable punishments. The legislature, through statute, vested the courts with the discretionary power to punish offenders in accordance with the range of sentences prescribed by it. Since the power to prescribe punishments was therefore part of the legislative power and not the judicial power, it followed that no written law of general application prescribing any kind of punishment for an offence could trespass onto the judicial power. The legislative prescription of factors for the courts to take into account in sentencing offenders did not and could not intrude into the judicial powers ... *Palling v Corfield* [1970] HCA 53, (1970) 123 CLR 52, *Hinds v R* (1975) 24 WIR 326, *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* [1992] HCA 64, [1993] 2 LRC 190 and *Chew Seow Leng v PP* [2005] SGCA 11 considered.

(2)(i) Parliament had merely prescribed, via the impugned s 33A MDA provisions, the conditions which were to be treated as aggravating factors for the purposes of sentencing offenders to the enhanced minimum punishments set out in s 33A(1). Although they did have the effect of directing the courts to inflict, at the very least, the mandatory minimum punishments when the conditions were satisfied, that form of legislation was not constitutionally objectionable because it was in substance no different from s 33 read with Sch 2 which, inter alia, prescribed the mandatory death penalty for certain drug trafficking offences involving controlled drugs of or exceeding a specified quantity. The only distinction was that s 33A(1) fixed the minimum punishment, whereas s 33 read with Sch 2 stipulated a fixed punishment. Further, the impugned s 33A MDA provisions did not have the effect of prescribing the punishment to be imposed on particular individuals or of directing the outcome of pending criminal proceedings. The enhanced punishments under s 33A(1) applied generally to all offenders who fulfilled the prescribed conditions set out in the impugned s 33A MDA provisions. It followed that the impugned s 33A MDA provisions did not violate the principle of separation of powers ... *Liyanage v R* [1966] 1 All ER 650 and *Kable v DPP of NSW* [1996] HCA 24, (1996) 189 CLR 51 distinguished.

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(ii) All that s 33A(1)(a) of the MDA did was to treat a previous DRC admission as an aggravating factor in the same way that a previous conviction for a s 8(b) offence and/or a s 31(2) offence was treated as an aggravating factor under ss 33A(1)(b)–33A(1)(f). It did not convert a previous DRC admission into a previous conviction for any purpose whatsoever. It neither said that a previous DRC admission was a previous conviction, nor achieved such an effect. Furthermore it did not treat a previous DRC admission as an antecedent, ie as if it were a previous conviction. That a DRC admission was an executive decision was irrelevant and did not amount to the executive interfering with the sentencing function of the courts. Insofar as it directed that previous DRC admissions were to be treated as an aggravating factor in determining whether the mandatory minimum punishments in s 33A(1) were applicable, Parliament was doing no more than what the courts could have done if s 33A(1)(a) had not provided for that particular aggravating factor. Furthermore it was the trial court which determined the length of the custodial sentence and the number of the strokes of the cane to impose, subject to the mandatory minimum punishments set out in s 33A(1) (see paras [48]–[49], [53]–[54], [57], below). *Ali v R* [1992] LRC (Const) 401 considered. *Deaton v A-G and Revenue Comrs* [1963] IR 170, *Palling v Corfield* [1970] HCA 53, (1970) 123 CLR 52, *Hinds v R* (1975) 24 WIR 326 and *South Australia v Totani* [2010] HCA 39, (2010) 242 CLR 1 distinguished.

(iii) Section 33A(1)(a) did not violate the right to equal protection under art 12(1) of the Constitution. To hold otherwise would effectively compel the state to prosecute drug addicts without giving them a chance to rehabilitate themselves and become useful and productive members of the community (see para [58], below). *Ong Ah Chuan v Public Prosecutor*; *Koh Chai Cheng v Public Prosecutor* [1981] AC 648 applied.

(iv) The principle of proportionality, as a principle of law, had no application to the legislative power to prescribe punishments. If it were applicable, then all mandatory fixed, maximum or minimum punishments would be unconstitutional as they could never be proportionate to the culpability of the offender in each and every case. The courts had to impose the legislatively-prescribed sentence on an offender even if it offended the principle of proportionality. For those reasons the impugned s 33A MDA provisions did not violate art 9(1) of the Singapore

Constitution ... *Dodo v State* [2001] ZACC 16, [2001] 4 LRC 318 considered.

Per curiam. The courts should have regard to the principle of proportionality when sentencing offenders and should observe it as a general sentencing principle unless other policy considerations override it, such as the need to impose a deterrent sentence ...

[2012] 5 LRC 305

Ponoo v Attorney General

SEYCHELLES

Court of Appeal

MacGregor P, Domah and Twomey JJA

9 December 2011

(1) *Constitutional law – Fundamental rights – Right to fair trial – Protection against cruel, inhuman or degrading treatment or punishment – Separation of powers – Judicial power – Sentencing – Discretion – Mandatory minimum sentences – Legislation providing for mandatory minimum five-year sentence for breaking and entering – Whether infringing principle of separation of powers – Whether infringing independence of judiciary – Whether breaching fundamental right – Constitution of Seychelles 1993, arts 1, 5, 16, 19, 119(2) – Penal Code, ss 27A(1)(c) (i), 291(1)(a).*

(2) *Appeal – Time for filing appeal – Appeal from Constitutional Court to Court of Appeal – Constitutional Court Rules requiring appeals to be lodged within 10 days of decision – Court of Appeal Rules requiring appeals to be lodged within 30 days of decision – Whether Constitutional Court Rules or Court of Appeal Rules applying – Constitutional Court (Application, Contravention, Enforcement or Interpretation) Rules, r 13 – Court of Appeal Rules 2005, r 18(1).*

(3) *Practice and procedure – Affidavit – Counsel – Respondent Attorney General delegating handling of case to Principal State Counsel – Affidavit sworn by Principal State Counsel – Counsel unable to act as witness for client – Appropriate person to swear*

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affidavit – Discretionary powers of Court of Appeal to admit fresh affidavit – Court of Appeal Rules 2005, r 3.

The appellant was convicted of breaking into and entering a building and committing a felony therein (count 1) and for stealing a pair of shoes (count 2). It was his first conviction. He was sentenced to five years' imprisonment under count 1, pursuant to ss 27A(1)(c) (i) and 291(1)(a) of the Penal Code of Seychelles, which imposed a mandatory minimum five-year sentence for the offence, and 18 months' imprisonment under count 2, both terms to run concurrently. He brought a petition before the Constitutional Court challenging ss 27A(1)(c)(i) and 291(1)(a), arguing that they were void as being unconstitutional. He argued that the provisions contravened the doctrine of separation of powers laid down by art 1 of the Constitution of Seychelles 1993 and the independence of the judiciary guaranteed by art 119(2) of the Constitution. He argued that whilst the legislature could provide for a range of sentences, it could not lay down the minimum sentence that could be imposed by a court, as that would be an interference with the independence of the judiciary. The appellant also relied on art 16 of the Constitution, which provided that every person had a right to be treated with dignity worthy of a human being and not to be subjected to torture, cruel, inhuman or degrading treatment or punishment. The appellant submitted that the indiscriminate imposition of a minimum mandatory sentence by ss 27A(1)(c)(i) and 291(a) of the Penal Code contravened the principle of proportionality in sentencing him and therefore amounted to cruel and degrading treatment or punishment. He sought declaratory relief and an order that he be released from prison. The Constitutional Court dismissed his petition, holding that (i) ss 27A(1)(c)(i) and 291(a) of the Penal Code did not infringe the independence of the judiciary or the principle of separation of powers provided by arts 1 and 119(2) of the Constitution and (ii) a mandatory sentence did not per se amount to cruel, inhuman or degrading treatment. The appellant appealed to the Court of Appeal.

HELD: Appeal allowed in part. Sentence of five years' imprisonment quashed. Sentence of three years' imprisonment imposed. Impugned mandatory minimum sentence held not to violate Constitution.

(1) (i) Sentencing was intrinsically a matter for the courts, not for the legislature, and involved a judicial duty to individualise

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case should have been taken into account by the court for the justice of his case. The sentencing court should not have surrendered its intrinsic powers to the mandatory provision of the legislature ... Dicta of O'Dálaigh CJ in *Deaton v A-G* [1963] IR 170 at 183–184, of Lamer J in *R v Smith* [1988] LRC (Const) 361 at 379–380, of Lord Diplock in *Ali v R* [1992] 2 All ER 1 at 8, of Lord Steyn in *State v Khoyratty* [2006] UKPC 13, [2006] 4 LRC 403 at [12], of Lord Clarke in *Aubeeluck v State* [2011] 1 LRC 627 at [27], *Philibert v State* 2007 SCJ 274 and *Bhinkah v State* 2009 SCJ 102 applied. O'Malley *Sentencing Law and Practice* (2006) approved.

(ii) Article 119(2) of the Constitution, which provided that ‘[t]he Judiciary shall be independent and be subject only to this Constitution and the other laws of Seychelles’, was not to be interpreted as subjecting the judiciary to the legislature. Either the judiciary of Seychelles was independent under the Constitution or it was not. The most important aspect of the separation of powers was the absolute independence of the judiciary. Courts, by any stretch of the imagination, could not abdicate any part of their judicial function to the legislature. The words ‘the other laws’ in art 119(2) could only mean ‘the other laws unless declared to be unconstitutional under art 5 and only to the extent of the unconstitutionality’...

(iii) In the instant case, the proper question was not whether the five-year sentence violated the provision of art 16 of the Constitution relating to torture, cruel, inhuman and degrading treatment or punishment. Article 16 of the Constitution would apply only in the extreme cases where a mandatory minimum would appear to be wholly or grossly disproportionate to the offence charged ... Dicta of Lord Clarke in *Aubeeluck v State* [2011] 1 LRC 627 at [21] applied.

(iv) Article 5 of the Constitution provided that the Constitution was the supreme law and any other law found to be inconsistent therewith was, to the extent of the inconsistency, void. That meant in practical terms that the courts would read down the provision to impose a just punishment appropriate to the case, while taking into account the objective which the legislature had in mind when it imposed the penalty it did. It could not be said that by imposing a minimum of five years for the offence of burglary, Parliament imposed a punishment grossly disproportionate or contrary to art 16. However, the sentence was unconstitutional because the learned magistrate felt bound to impose the sentence

which the legislature had imposed. In addition the facts of the case suggested that for such a case as stealing a pair of shoes, the appellant should not undergo five years' imprisonment. There was no proportionality in the sentence meted out in the circumstances. Therefore (i) to the extent that the trial court felt that it was bound by the minimum mandatory sentence imposed by the legislature and further felt that all discretion had been removed from it to sentence the appellant according to his just deserts, there had occurred a breach of the right of the appellant under art 16 to a fair trial by an independent and impartial court established by law, (ii) a mandatory minimum sentence was not per se unconstitutional inasmuch as the legislature in the exercise of its legislative powers was perfectly entitled to indicate the type of the sentence which would fit the offence it created, so long as the sentence indicated did not contravene art 16 or was grossly disproportionate, (iii) accordingly, while ss 27A(1)(c)(i) and 291(a) of the Penal Code could not be said to have contravened art 1 of the Constitution in abstracto, there was a breach in concreto by the manner in which the appellant's sentence was determined and (iv) further, the mandatory minimum sentence of five years prescribed by the legislature for ss 27A(1)(c)(i) and 291(a) of the Penal Code did not violate art 16 of the Constitution. To redress the effect of the unconstitutionality following the breach which occurred of the fair hearing provision under art 19(1) of the Constitution, a custodial sentence of three years' imprisonment was an appropriate sentence to impose upon the appellant ...

(2) Rule 13(1) of the Constitutional Court (Application, Contravention, Enforcement or Interpretation) Rules stated that appeals from the Constitutional Court had to be lodged within 10 days of the court's decision, whilst r 13(2) stated that the Seychelles Court of Appeal Rules relating to appeals in civil matters applied to such appeals. However, r 13 of the Constitutional Court Rules flew in the face of the Seychelles Court of Appeal Rules 2005, which stipulated in r 18(1) that notices of appeal were to be lodged within 30 (working) days of the decision appealed against. That not only caused confusion but also anguish, especially for appellants unrepresented by counsel. The Constitutional Court could not make rules for the Court of Appeal: to do so would be ultra vires. Hence only rules of the Court of Appeal applied to appeals before the Court of Appeal. To that extent, r 13 of the Constitutional Court (Application, Contravention, Enforcement or Interpretation) Rules was null and void and of no effect ...

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(3) The respondent in the instant matter was the Attorney General, who had delegated his power to his Principal State Counsel. However, the Principal State Counsel, whilst appearing for the Attorney General, could not swear an affidavit in support of his answer to the petition. An affidavit was evidence and it was trite law that counsel could not also be a witness in the case of his client. It was also ethically unacceptable. The Court of Appeal, using its discretion under r 3 of the Court of Appeal Rules 2005, therefore allowed the respondent to amend his pleadings by substituting a fresh affidavit duly sworn by the Attorney General ...

[2009] 4 LRC 838

Naz Foundation v Delhi and Others

INDIA

High Court (Delhi)

A P Shah CJ and S Muralidhar J

2 July 2009

(1) Constitutional law – Fundamental rights – Right to privacy – Right to dignity – Statute criminalising consensual sexual acts between same-sex adults in private – Petitioner challenging statute – Constitutional right to life and personal liberty – Whether personal liberty encompassing right to privacy and right to dignity – Whether statute violating Constitution – Indian Penal Code 1860, s 377 – Constitution of the Republic of India 1950, arts 19, 21.

(2) Constitutional law – Fundamental rights – Right to privacy – Right to dignity – Scope – Limitation – Compelling state interest – Public morality – Statute criminalising consensual sexual acts between same-sex adults in private – Petitioner challenging statute – Whether compelling state interest of public morality justifying violation of right to privacy and dignity – Indian Penal Code 1860, s 377 – Constitution of the Republic of India 1950, art 21.

(3) Constitutional law – Fundamental rights – Right to equality – Freedom from discrimination – Limitation – Statute criminalising consensual sexual acts between same-sex adults in private – Petitioner challenging statute – Whether unfair discrimination –

Whether justifiable – Whether legitimate purpose – Indian Penal Code 1860, s 377 – Constitution of the Republic of India 1950, arts 14–15.

(4) Constitutional law – Separation of powers – Judicial power – Review of legislation – Fundamental rights – Statutory provision partially invalid – Doctrine of severability – Statute criminalising consensual sexual acts between same-sex adults in private – Petitioner challenging validity of statutory provision – Whether statutory provision to be declared invalid – Whether doctrine of severability to be applied – Indian Penal Code 1860, s 377 – Constitution of the Republic of India 1950.

The petitioner, NF, a non-governmental organisation working in the field of HIV/AIDS intervention and prevention, challenged the constitutionality of s 377 of the Indian Penal Code 1860, to the extent that it criminalised consensual sexual acts between same-sex adults in private. Section 377 relevantly provided that '[w]homever voluntarily has carnal intercourse against the order of nature with any man, woman ... shall be punished with imprisonment'. NF submitted that, by criminalising private, consensual same-sex conduct, s 377 violated the constitutional right to equality in arts 14–15 and the right to life and personal liberty, which encompassed the right to privacy and dignity, in art 21 of the Constitution. NF submitted that the provision not only perpetuated social stigma and police and public abuse of homosexual persons, but also jeopardised HIV/AIDS prevention efforts by forcing homosexual activity underground. The Ministry of Home Affairs opposed NF's petition, arguing that s 377 should be retained for reasons of public morality and health and that striking out the provision would open the floodgates to delinquent behaviour. The petition had been previously dismissed by the High Court on the ground that an academic challenge to the constitutionality of legislation could not be entertained. On appeal, the Supreme Court had remitted the matter to the High Court for consideration.

HELD: Petition allowed. Declaration made that s 377 of the Indian Penal Code 1860, so far as it criminalised consensual sexual acts of adults in private, breached arts 14–15 and 21 of the Constitution of the Republic of India 1950.

(1) Although the Constitution did not contain a specific provision as to privacy, 'personal liberty' in art 21, along with the

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rights to freedom of speech and movement in art 19, had been interpreted to include a right to privacy and a right to live with dignity. Dignity required the acknowledgement of the value of all individuals as members of a society. At its root were the autonomy of the private will and a person's freedom of choice and action. The right to privacy recognised that an individual had a right to a sphere of private intimacy and autonomy which allowed him/her to develop human relationships without interference from the outside community or the state. The way in which an individual gave expression to his/her sexuality was at the core of that area of private intimacy and if, in expressing sexuality, an individual acted consensually and without harming another, invasion of that precinct would be a breach of privacy. That view accorded with international law trends and case law. Section 377 of the Indian Penal Code 1860 denied an individual's dignity, criminalised his/her core identity solely on account of his/her sexuality and denied a homosexual person the right to full personhood and, thus, violated art 21 of the Constitution ... *Kharak Singh v State of UP* [1964] 1 SCR 332, *Gobind v State of MP* (1975) 2 SCC 148, *Maneka Gandhi v Union of India* [1978] 1 SCC 248, *Rajagopal v State of Tamil Nadu* (1994) 6 SCC 632 and *National Coalition for Gay and Lesbian Equality v Minister of Justice* [1998] 3 LRC 648 applied.

Per curiam. A developing jurisprudence and other law-related practice identifies a significant application of human rights law with regard to people of diverse sexual orientations and gender identities. At the international level, this was reflected in United Nations-sponsored human rights treaties, as well as under the European Convention on Human Rights. The relevant legal doctrine can be categorised as (a) non-discrimination, (b) protection of private rights and (c) the ensuring general human rights protection to all, regardless of sexual orientation or gender identity ... Yogyakarta Principles on the Application of Human Rights Law in Relation to Sexual Orientation and Gender Identity (2007) considered.

(2) Privacy-dignity claims under art 21 of the Constitution deserved to be examined with care and to be denied only when an important countervailing interest was shown to be superior or where a compelling state interest was shown. Popular or public morality, as distinct from constitutional morality derived from constitutional values, was based on shifting and subjective notions of right and wrong. The fundamental rights and directive principles of state

policy in the Constitution were the conscience of the Constitution, which recognised, protected and celebrated diversity. To stigmatise or to criminalise an individual on the basis of sexual orientation was against constitutional morality, which outweighed public morality. Enforcement of public morality did not constitute a 'compelling state interest' to justify the invasion by s 377 of the Indian Penal Code 1860 of the zone of privacy of adult homosexuals engaged in consensual sex in private without causing harm to each other or others. Nor was the floodgates argument founded on any substantive material ... *Gobind v State of MP* (1975) 2 SCC 148, *Dudgeon v United Kingdom* (1982) 4 EHRR 149, *Norris v Ireland* (1991) 13 EHRR 186, *National Coalition for Gay and Lesbian Equality v Minister of Justice* [1998] 3 LRC 648 and *Lawrence v Texas* (2003) 539 US 558 applied. Austin *The Indian Constitution – Cornerstone of A Nation* (1966) and Kirby 'Homosexual Law Reform: An Ongoing Blind Spot of the Commonwealth of Nations', speech delivered at the 16th Commonwealth Law Conference, Hong Kong (8 April 2009) considered.

(3) The right to equality in art 14 of the Constitution was not absolute and allowed discriminatory legislation where (i) the class of people affected was based on intelligible differentia and (ii) the differentia had a rational relation to a reasonable objective sought to be achieved by the statute. If a law was discriminatory, it had to be subject to 'strict scrutiny'. Article 15, which operated as a particular application of the general right to equality in art 14, prohibited discrimination on the basis of, inter alia, 'sex', which encompassed 'sexual orientation'. Applying the relevant criteria, s 377 had no legitimate purpose. Certain of the purported purposes of s 377 – to protect women and children and to prevent the spread of HIV/AIDS – were not substantiated. The submission that the decriminalisation of same-sex acts between adults would foster the spread of AIDS was completely unfounded. The criminalisation of private sexual relations between consenting adults, absent any evidence of serious harm, rendered the section's objective both arbitrary and unreasonable. Although s 377, prima facie, targeted acts rather than individuals, its effect was that a significant group of the population was, because of its sexual non-conformity, persecuted and marginalised. That discrimination was unfair and unreasonable and s 388 was thus in breach of arts 14–15 ... *Toonen v Australia* Communication 488/1992 (31 March 1994) UN HRC Document No CCPR/C/50/D/488/1992, *Romer v Evans* (1996) 517 US 620, *Vriend v Alberta* [1998] 3 LRC

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483, *National Coalition for Gay and Lesbian Equality v Minister of Justice* [1998] 3 LRC 648, *Corbiere v Canada* [1999] 2 SCR 203 and *Anuj Garg v Hotel Assn of India* [2007] INSC 1226, [2008] 1 LRC 771 applied. *Prinsloo v Van der Linde* [1998] 1 LRC 173 and *Harksen v Lane NO* [1998] 2 LRC 171 considered.

Per curiam. (i) A constitutional provision must be construed, not in a narrow and constricted sense, but in a wide and liberal manner so as to anticipate and take account of changing conditions and purposes so that the constitutional provision does not get atrophied or fossilised but remains flexible enough to meet the newly emerging problems ...

(ii) A constitutional tenet that can be said to be an underlying theme of the Indian Constitution is that of 'inclusiveness'. The Indian Constitution reflects this value deeply ingrained in Indian society, nurtured over several generations. The inclusiveness that Indian society traditionally displayed, literally in every aspect of life, is manifest in recognising a role in society for everyone. Those perceived by the majority as 'deviants' or 'different' are not on that score excluded or ostracised. Where society can display inclusiveness and understanding, such persons can be assured of a life of dignity and non-discrimination ...

(4) Although the courts should ordinarily defer to the wisdom of the legislature when engaged in judicial review of legislation, the degree of such deference was dependent on the subject matter under consideration. Where matters of 'high constitutional importance', such as constitutionally entrenched human rights, were under consideration, the courts were obliged to accord less deference to the legislature than would otherwise be the case. The judiciary was the ultimate interpreter of the Constitution and was tasked with determining the limits of exercise of power under the Constitution and protecting human rights. In the instant circumstances, where the constitutional rights relied upon were fundamental human rights, it was, accordingly, appropriate for the court to determine whether a statutory provision was invalid and to make a consequent declaration of invalidity. The doctrine of severability meant that s 377 could be declared unconstitutional to the extent that it affected private sexual acts between consenting adults in private ... Dicta of Lord Hoffmann in *R (on the application of Alconbury Developments Ltd) v Secretary of State for the Environment, Transport and the Regions*

[2001] UKHL 23, [2001] 2 All ER 929 at [70], *State of Madras v VG Row* 1952 SCR 597, *Peerless General Finance and Investment Co Ltd v Reserve Bank of India* (1992) 2 SCC 343, *Raja Ram Pal v Hon Speaker Lok Sabha* [2007] INSC 23, (2007) 3 SCC 184 and *Coelho v State of Tamil Nadu* [2007] INSC 31, (2007) 2 SCC 1 applied. *Chamarbaugwalla v Union of India* 1957 SCR 930 and *Seervai Constitutional Law of India* (4th edn, 1993), vol 1, paras 3.7, 3.9–3.11 considered.

[2009] 3 LRC 614

Qarase and Others v Bainimarama and Others

[2008] FJHC 241 & [2009] FJCA 9

FIJI ISLANDS

High Court

Gates Ag CJ, Byrne and Pathik JJ

5–20 March, 9 October 2008

Court of Appeal

Powell, Lloyd and Douglas JJA

6–9 April 2009

(1) *Constitutional law – Constitution – President – Powers – Prerogative powers – Existence – Scope – Coup d'état – Military establishing interim government – President subsequently declaring state of emergency – President purporting to dismiss Prime Minister, appoint military commander as interim Prime Minister, ratify acts of interim Prime Minister, rule directly and grant immunity to coup participants – Prerogative powers not mentioned in Constitution – Whether abrogated – Whether President's act justiciable – Whether constitutional – Relevant considerations – Appropriate relief – Constitution of Fiji 1990, s 163 – Constitution of Fiji 1997, ss 2–3, 60, 85–87, 96, 98, 109, 120, 187.*

(2) *Constitutional law – Constitutional breakdown – Doctrine of necessity – Application – Scope – Presidential powers – Coup d'état – Military establishing interim government – President purporting to dismiss Prime Minister, appoint military commander as interim Prime Minister – President ratifying dissolution of Parliament and call for fresh elections – Whether Parliament having power to appoint interim Prime Minister – Whether presidential actions*

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justified under doctrine of necessity – Constitution of Fiji 1997, ss 3, 60, 109(2).

There were a number of public and private hostile and acrimonious exchanges between the first defendant, B (the Commander of the Republic of Fiji Military Forces ('the RFMF')), and the first plaintiff, Q (the Prime Minister), leading to a series of requests by the RFMF to Q's government, which were not acceded to. On 5 December 2006 the RFMF took control of the streets of the capital and B assumed the executive authority of the state. B then purported to exercise presidential powers, appointing S as a caretaker Prime Minister to advise the dissolution of Parliament. On 4 January 2007 S tendered his resignation as caretaker Prime Minister to the Commander. In the afternoon of the same day B purported to hand back executive power to the President. Thereafter the President ratified the actions of B and appointed B as interim Prime Minister and other lay persons as ministers to advise him in a period of direct presidential rule. The President ratified the call for fresh elections and indicated that legislation in the intervening period, prior to the formation of a democratic government, was to be made by promulgation. The President thereafter gave directions for absolving B and his followers to facilitate their immunity. On 18 January 2007 the President, purportedly exercising his own deliberative powers as President, promulgated an unconditional grant of immunity. The Constitution provided, inter alia, that: 'The executive authority of the State is vested in the President' (s 85); 'The President is the Head of State and symbolises the unity of the State' (s 86); 'The President is the Commander-in-Chief of the military forces' (s 87); 'This Constitution prescribes the circumstances in which the President may act in his or her own judgment' (s 96(2)); 'The President, acting in his or her own judgment appoints as Prime Minister the member of the House of Representatives who, in the President's opinion, can form a government that has the confidence of the House of Representatives' (s 98); 'If a Prime Minister who has lost the confidence of the House of Representatives ... advises a dissolution of the House of Representatives, the President may, acting in his or her own judgment, ascertain whether or not there is another person who can get the confidence of the House of Representatives' (s 108(2)); 'The President may not dismiss a Prime Minister unless the Government fails to get or loses the confidence of the House of Representatives ...' (s 109(1)); 'The High Court ... has original jurisdiction in any matter arising

under this Constitution or involving its interpretation' (s 120(2)). Q and the other plaintiffs brought proceedings for declarations challenging the lawfulness of the acts carried out by the President following military intervention in the government of the state, submitting that the President's powers were circumscribed within the confines of the Constitution with regard to the dismissal of the Prime Minister and his Cabinet and the dissolution of Parliament. B and the other defendants maintained that the President retained reserve, prerogative powers, enabling him to act in an emergency for the public good and to ratify the acts of the military in the subsequent takeover, thus absolving the participants of any unlawfulness. The High Court, constituted as a Bench of three judges, gave permission for the proceedings to be covered by television for daily re-broadcast.

HELD: (in the High Court) Application dismissed. Validity of President's (i) acts of ratification, (ii) decision to rule directly and to make and promulgate legislation and (iii) grant of immunity upheld.

(1) In the absence of mala fides or arbitrariness, the existence only, but not the exercise, of the President's power to appoint ministers was susceptible to judicial review. The Constitution had neither expressly nor by necessary implication abrogated the application of any of the relevant prerogative powers formerly available to the Governor General: the greater the power, the clearer the requirement for the form and language of ouster. Those prerogative powers, the residue of discretionary or arbitrary authority which was formerly left in the hands of the Crown, included the power to preserve the state from civil strife and to act in an emergency to ensure the well-being and safety of the people. The dismissal of Q as Prime Minister, the dismissal of the Cabinet, the appointment of a caretaker Prime Minister to advise on the dissolution and the dissolution itself were not carried out in compliance with the appropriate sections of the Constitution. However, no specific mention was made in the Constitution of the prerogative as such, nor could repeal of the powers be read into such silence. The national security prerogative could only be abrogated by express words or by words of necessary implication. The prerogative as part of the common law of Fiji sat happily with statute law. Sections 85–87 of the Constitution could not be regarded as a code: the sections did not in detail set out the reserve powers of the President in matters of the prerogatives, those of

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defence of the realm, of national security and of securing the peace, protection and safety of the people. The ultimate reserve power of the President was indicated as a continuing common law power in ss 85–87 of the Constitution. Extraordinary powers were allowed to a head of state to find a way out of crisis, on the grounds of extremity, gravity and ensuing expediency. If the head of state acted in a crisis without mala fides and addressed the grave problems in a way that he believed honestly addressed those problems, whether in peacetime or war, the court would uphold his action. In the instant case, the President had intended to use the prerogative: his address to the nation had made it clear that he accepted that there was a grave crisis which he considered required hard and decisive decisions. Direct presidential rule was clearly a step outside the norm of the Constitution and a manifestation of an intention to exercise prerogative power. There was no suggestion that the President had failed to act honestly, impartially, neutrally and in what he gauged was in the best interests of the nation, i.e. of all of the inhabitants of Fiji. It was not for the court to inquire into the details of his acts or to comment on whether one action would have been better done another way. The President's decision to exercise prerogative powers to rule directly, until suitable elections could be conducted, necessarily involved ratifying the acts already carried out by B. On the facts, exceptional circumstances existed, not provided for by the Constitution, and the stability of the state was endangered. No other course of action was reasonably available and such action as was taken by the President was reasonably necessary in the interests of peace, order and good government. The President had a prerogative power, because an emergency had arisen, to rule directly until suitable elections could be conducted, which power included a power on the part of the President to dismiss the Prime Minister, dissolve the Parliament and to appoint ministers, including B as Prime Minister in the interim ... Dicta of Lord Cozens-Hardy MR in *Re X's Petition of Right* [1915] 3 KB 649 at 660, of Lord Parmoor in *A-G v De Keyser's Royal Hotel* [1920] AC 508 at 567, of Viscount Dunedin in *Bhagat Singh v King-Emperor* (1931) LR 58 IA 169 at 171–173, of Viscount Sankey LC in *British Coal Corporation v R* [1935] AC 500 at 519, of Viscount Simon in *King-Emperor v Benoari Lal Sarma* [1945] 1 All ER 210 at 212, of Lord MacDermott in *Ningkan v Government of Malaysia* [1970] AC 379 at 390–391, of Viscount Radcliffe and of Lord Upjohn in *Burmah Oil Co Ltd v Lord Advocate* [1964] 2 All ER 348 at 365, 396–397, of Lord Fraser of Tullybelton in *A-G of Fiji v DPP* [1983]

2 AC 672 at 678, of Lord Scarman, Lord Diplock and Lord Roskill in *Council of Civil Service Unions v Minister for Civil Service* [1985] LRC (Const) 948 at 1023, 1025–1026, 1036, of Nourse LJ in *R v Home Secretary, ex p Northumbria Police Authority* [1988] 1 All ER 556 at 575 and *Juan Ponce Enrile v Ramos, Chief, Philippine Constabulary* [1974] PHSC 353 applied.

Per curiam. (i) Prerogative powers are not immutable and coercive orders can be made against the state for breaches of an individual's constitutional rights ... *Gairry v A-G* [2001] UKPC 30, [2001] 4 LRC 671 applied.

(ii) The President's actions had not consolidated any revolution: the Constitution remained, and remains, intact. The government exists in the interim by way of direct presidential rule ...

(iii) Parliament is the constitutional forum for the consideration of new legislation. It would be constitutionally appropriate for the incoming Parliament to consider all decrees or promulgations made in the intervening period which have not received the scrutiny of the full parliamentary process. Promulgations with far-reaching effect on the lives of citizens require such scrutiny and representative assent. Meanwhile, such legislation is of lawful effect. Subsequently it will be for Parliament to decide whether to continue with such legislation or whether some amendment is necessary ...

(2) Unlike the prerogative or ultimate reserve power, which rested with one person only, the head of state, the doctrine of necessity was available, in appropriate circumstances, to every citizen. Those wishing to invoke that doctrine had to satisfy the conditions prescribed by authority. The head of state was in an extremely different, special and singular category: if he acted without mala fides and addressed grave problems, in a way that he believed honestly addresses those problems, the courts would uphold his actions. However, approaching the appraisal on the basis of allowing the President a very wide 'margin of appreciation', his actions satisfied the conditions prescribed, albeit for the exercise of a different power, by *Republic of Fiji v Prasad* [2001] 2 LRC 743 ... Dicta of Haynes P in *Mitchell v DPP* [1986] LRC (Const) 35 at 88–89, *Juan Ponce Enrile v Ramos, Chief, Philippine Constabulary* [1974] PHSC 353 and *Republic of Fiji v Prasad* [2001] 2 LRC 743 applied.

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The plaintiffs appealed to the Court of Appeal.

HELD: (in the Court of Appeal) Appeal allowed. Declarations granted that dismissal of Q and other ministers, dissolution of Parliament and purported acts of ratification by the President were unlawful and unconstitutional. Declarations granted that the appointments of B as Prime Minister and his ministers were not validly made. Declaration granted that it would be lawful for the President to appoint a caretaker Prime Minister, to advise a dissolution of Parliament and to advise the President that writs for the election of members of the House of Representatives be issued.

(1) (i) The consequences of a written Constitution creating the institutions of government with certain defined powers, and courts thereby invested with jurisdiction to adjudicate on whether the legislative and executive had acted within those powers, were: firstly, a fundamental change from parliamentary to constitutional sovereignty founded in people's consent; secondly, the roles of the common law and constitutional law were reversed and, thirdly, all law was governed by the Constitution: therefore the common law could not develop inconsistently with the Constitution. The Constitution had to be read in light of the common law (s 3(b)). The content of s 85 executive power was informed by the common law but it did not necessarily pick up all common law prerogatives. The right question was what was the scope of the s 85 power. In light of s 120(2) of the Constitution, it would be surprising if the existence and scope of the executive power or any other asserted power of the President could not be reviewed. Therefore the court was given express jurisdiction to interpret and determine whether a purported power exercised by the President existed pursuant to s 85 of the Fiji Constitution or otherwise. The defendants did not contend that as a matter of law the court could not consider the scope of the executive power under s 85 or whether the prerogative power had been abrogated by the Constitution. The court could say whether there was a power to appoint the Commander as Prime Minister. It could not, however, interfere with the President's choice of Prime Minister if that power existed ... *Theophanous v The Herald and Weekly Times Ltd* [1994] 3 LRC 369, *Pharmaceutical Manufacturers Association of South Africa* 2000 (2) SA 674 and *Ruddock v Vadarlis* [2001] FCA 1329, (2001) 110 FCR 491 considered.

(ii) The Constitution made it clear that it was a document that had the sanction and support of all levels of society, and all of the diverse communities that lived in the islands, with all of their faiths, traditions, languages and cultures. A Constitution with such aims and aspirations would aim to ensure that the circumstances in which a Prime Minister could be dismissed would be clearly defined. Section 109 of the Constitution dealt expressly with the circumstances in which the President might dismiss a Prime Minister, viz where the government failed to get or lost the confidence of the House of Representatives and the Prime Minister did not resign or get a dissolution of the Parliament. Section 109(2) provided that if the President dismissed a Prime Minister, the President could, acting in his own judgment, appoint a person as a caretaker Prime Minister to advise a dissolution of Parliament. In relation to the appointment or dismissal of a Prime Minister, s 109(2) and s 98 were the only provisions to state that the President could exercise his own judgment. In those cases such judgment was carefully confined or for a very limited purpose. The question for the court was whether under the Constitution the President had a discretion to dismiss a Prime Minister in circumstances other than those set out in s 109, and appoint another caretaker Prime Minister to advise a dissolution of Parliament and appoint an interim government. The answer to that question was to be found in s 96(2), which provided that the Constitution prescribed the circumstances in which the President might act in his own judgment. It was therefore clear that it was not intended that the President, in the exercise of discretion, could dismiss a Prime Minister in circumstances other than those set out in s 109 and in effect establish an interim government. The President, as a matter of textual constitutional interpretation, was limited by the terms of the Constitution, including his right to do anything otherwise than on advice was strictly limited ...

(iii) In the case of a Republic, such as Fiji, it was not clear that the prerogative powers would continue in existence after the adoption of a detailed written Constitution, such as that which was adopted in 1997. The relevant questions for the court were: what was included in the executive authority of the state vested in the President by s 85 and possibly s 86 of the Constitution, what other discretions were vested in the President by the Constitution and whether the implication of some other power of dismissal would be consistent with the Constitution. The absence of any reference to the prerogative in the Constitution was not conclusive. There

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was no basis for the suggestion that, once Fiji became a Republic, prerogative powers were vested in the President under the Constitution independently of the specific provisions thereunder. The provisions of the Constitution sought to limit clearly the circumstances in which the President could dismiss the Prime Minister, when other ministers of the Crown could be dismissed and other discretions confided in the President. The words of limitation in s 96(2), which clearly intended to limit precisely the discretions of the President to the circumstances prescribed in the Constitution, were not to be ignored. There was a clear intention to exclude laws inconsistent with the Fiji Constitution, which intention was inconsistent with the continued existence of the prerogative in the President, at least in relation to the President retaining reserve powers to dismiss the Prime Minister which were not found expressly in the Constitution ... *President of the Republic of South Africa v Hugo* 1997 (4) SA 1 considered. *British Coal Corporation v R* [1935] AC 500 and *A-G of Fiji v DPP* [1983] 2 AC 672 distinguished.

(iv) Section 187 of the Constitution conferred legislative power upon Parliament to confer emergency powers on the President. Moreover, s 163 of the 1990 Constitution, which it replaced, conferred powers upon the President to issue a 'Proclamation of Emergency' if the President was satisfied that a grave emergency existed whereby the security or economic life of Fiji was threatened. That made it inherently unlikely that the President, personally, acting otherwise than on advice, had those powers without such a conferral under the 1997 Constitution. The existence of s 187 was a clear indication that national security matters were not matters which were left to the prerogative. The existence of an implied right in the President arising from the prerogative, acting otherwise than on the advice of the Prime Minister to dismiss the government, to dissolve the Parliament and establish an interim government in the face of an emergency, was inconsistent with that provision. Under the Constitution it was the Prime Minister and his Cabinet who had the responsibility to lead the country through a crisis, and to advise the President in relation thereto. The defendants' argument was flawed and exposed the fact that what had occurred in the instant case and previous cases was simply a military coup or an unlawful usurpation of power ... *A-G v De Keyser's Royal Hotel Ltd* [1920] AC 508, *Burmah Oil Co Ltd v Lord Advocate* [1964] 2 All ER 348 and *R v Home Secretary, ex p Northumbria Police Authority* [1988] 1 All ER 556 distinguished.

(v) None of what was done in the circumstances as described was sanctioned by the Constitution. Throughout the period when the material events occurred Q retained and had not lost the confidence of the House of Representatives, so no power on the part of the President, or the Commander of the RFMF on behalf of the President, existed to dismiss the Prime Minister. Even if the President had the reserve or prerogative powers relied upon, notwithstanding the express terms of the Constitution, and assuming that such powers had been exercised by the President, they did not extend to what had been done. The first amicus curiae made the somewhat ambivalent submission that it might be possible for the President to delegate his authority in the way that the Queen delegated her authority to Governors General, but in the instant case there had been no prior delegation but rather subsequent ratification and, in any event, an authority could not delegate power to do that which it could not do itself ... Dicta of Wright J in *Firth v Staines* [1897] 2 QB 70 at 75 and of Harman J in *Boston Deep Sea Fishing and Ice Co Ltd v Farnham (Inspector of Taxes)* [1957] 3 All ER 204 at 208–209 applied.

Per curiam. (i) The circumstances in which the monarch, or the Governor General or Governor of a British Dominion or colony, can exercise the reserve powers of the Crown to dismiss a Prime Minister or Premier are a matter of great and ongoing controversy. The question whether the monarch or a representative of the Crown had any power to dismiss a Prime Minister who had the confidence of the lower house and no difficulty in obtaining supply is a controversial one ...

(ii) At the time that the 1997 Constitution was being drafted, Fiji had been beset by a major political upheaval and the abrogation of its existing Constitution. Hence the drafters of the 1997 Constitution, and the Fijian people, in adopting that Constitution, would have wanted as much certainty as they could obtain in the provisions dealing with the dismissal of a Prime Minister ...

(iii) Section 2 of the Constitution makes it clear that any law inconsistent with the Constitution is invalid to the extent of the inconsistency. That would include the prerogative if it permitted dismissal of the Prime Minister otherwise than as set out in the Constitution ...

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(2)(i) The existence of the principle of necessity had not been challenged by either party and could not be denied but its application to justify what was in effect a military coup was undoubtedly dubious. In any event, given the manner in which the case had been litigated in the High Court, the defendants/respondents could not rely on the doctrine of necessity as described in *Prasad*; the High Court judgment recorded that the doctrine had not figured as a matter of dispute between the parties: evidence and argument had not been directed to establish that issue. The respondents' submission was that 'state necessity' in the time of an emergency or crisis was the ultimate source of the President's power and differed from the doctrine of necessity described in *Prasad*, empowering the President to act outside the terms of the Constitution; alternatively, that it was a power implied under the Constitution. While such a power might exist in other jurisdictions, the framers of the Constitution, by including Ch 14 (Emergency Powers), intended to exclude the existence of any such power of state necessity as the source of the President's power to act as he had done in January 2007. The doctrine of necessity described in *Prasad* might well empower a President to act outside the terms of the Constitution but ultimately only for the purposes of restoring the Constitution. There was no room for the application of the *Prasad* principle in the instant case, apart from its limited application to ensure that writs for fresh elections were issued ... Dicta of Haynes P in *Mitchell v DPP* [1986] LRC (Const) 35 at 88–89 and *Republic of Fiji v Prasad* [2001] 2 LRC 743 considered.

(ii) Whatever the constitutionality of the events the subject of the instant proceedings, it could not be ignored that there had been an interim government in Fiji for more than two years. The dismissal of Q and the other ministers of his government and the dissolution of Parliament was unlawful and in breach of the Constitution. The appointments of B as Prime Minister and his ministers were not validly made. However, those events, though unlawful, had occurred. The only appropriate course was for elections to be held that enabled Fiji to get a fresh start. In order to issue writs for elections the President required the advice of the Prime Minister under s 60 of the Constitution. That section could be given a purposive construction, in accordance with s 3 of the Fiji Constitution, to cover circumstances where the Prime Minister had been forcibly removed from office and no other

Prime Minister had been validly appointed in his place. That would enable the President on the advice of an interim Prime Minister to dissolve Parliament and to issue writs for fresh elections under ss 109 and 60 of the Fiji Constitution in circumstances (a) where the Prime Minister had ceased to hold office in circumstances not contemplated by the Constitution, (b) where he had resigned without a successor being appointed and (c) where no provision was made for that eventuality in the Constitution. To that limited extent, the court could take cognisance of the principle of necessity or the de facto doctrine for the purposes of the instant proceedings. It would therefore be lawful for the President acting pursuant to s 109(2) of the Fiji Constitution, or as a matter of necessity, to appoint a person a caretaker Prime Minister, for the purpose of advising a dissolution of the Parliament and to advise the President that writs for the election of members of the House of Representatives be issued ...

Per curiam. (i) It would be advisable for the President to overcome the present situation by appointing a distinguished person independent of the parties to this litigation as caretaker Prime Minister, to advise a dissolution of the Parliament, assuming it is not already dissolved, and to direct the issuance of writs for an election under s 60 of the Constitution. This would enable Fiji to be restored to democratic rule in accordance with the Constitution and quash any arguments about the legitimacy of Q's governments or the Republic as currently constituted. In recommending this course, the court is fortified by the public statements of both the President and B that the mandate of the interim government was to uphold the Constitution and that the interim government was anticipated to take the people smoothly to the next elections ...

(ii) The validity of any acts of the interim government are not in issue in these proceedings and would be better dealt with on a subsequent occasion, if necessary. *Prasad* and the decision of the Privy Council in *Madzimbamuto v Lardner-Burke* recognise that acts done by those actually in control without lawful authority may be recognised as valid or acted upon by the courts, with certain limitations, viz so far as they are directed to, and are reasonably required for, the ordinary orderly running of the state, so far as they do not impair the rights of citizens under the lawful Constitution and so far as they are not intended to and do not in fact directly help the usurpation ... *Madzimbamuto v*

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Lardner-Burke [1968] 3 All ER 561 and *Republic of Fiji v Prasad* [2001] 2 LRC 743 considered.

(iii) While it was not for the court to delve into the public debate as to the acceptance or refusal of judicial appointments to the courts of Fiji, to refuse such appointments would deny the people of Fiji access to justice and the rule of law and undermine the Constitution, which provided in s 118 that judges are independent of the legislature and executive. In Fiji judges are appointed by the President on the advice of the Judicial Services Commission and not on the advice of any government, military or otherwise. Sustained and virulent personal attacks upon several individual judges of the High Court had clearly not deflected them from their judicial oaths, their duties and their endless work in delivering a fair and functioning judicial system. A fair and functioning legal system can substantially alleviate the situation of a people who aspire to democratic rule in times of instability ... Dicta of Viscount Simonds in *A-G of the Commonwealth of Australia v R* (1957) 95 CLR 529 at 540 applied.

[2012] 2 LRC 144

Khan and Others v Federation of Pakistan

PAKISTAN

Supreme Court
Iftikhar Muhammad Chaudhry CJ, Javed Iqbal, Mian
Shakirullah Jan, Tassaduq Hussain Jilani, Sarmad Jalal Osmany
and Amir Hani Muslim JJ
18, 21 February, 3, 21 March, 4 April 2011

Constitutional law – Judiciary – Contempt of court – Proclamation of emergency – Unconstitutional usurpation of authority by head of state – Judicial response – Executive decree requiring judges to swear new oath of office or cease to hold office – Supreme Court prohibiting senior judiciary from taking new oath – Supreme Court reconstituted by judges having taken new oath purporting to affirm validity of proclamation and decree – Constitution restored – Judges who had refused to take new oath reinstated – Contempt of court proceedings instituted against judges who had taken new oath – Whether constitutionally permissible for Supreme Court to proceed

against senior judiciary for contempt of court – Whether senior judiciary immune from such proceedings – Whether condonation applicable – Doctrine of necessity – Whether detailed reasons required in contempt proceedings – Constitution of Pakistan 1973, arts 204, 209, 270AA, 18th Amendment – Contempt of Court Ordinance 2003, s 3 – Proclamation of Emergency 2007 – Provisional Constitution Order 2007 – Oath of Office (Judges) Order 2007.

On 3 November 2007 the then President of Pakistan, who was also the Chief of Army Staff, issued three decrees, a Proclamation of Emergency, the Provisional Constitution Order 2007 and the Oath of Office (Judges) Order 2007. The Proclamation of Emergency placed the Constitution of Pakistan 1973 in abeyance with immediate effect. Under the Provisional Constitution Order the courts were to continue to function and exercise their powers and jurisdiction subject to the Oath of Office Order, under which all existing superior court judges ceased to hold office with immediate effect but would continue to hold judicial office if they swore an oath of office that they would abide by the Proclamation of Emergency and the Provisional Constitution Order, but would cease to hold office with immediate effect if they failed to take the new oath. On the same day, 3 November, a seven member Bench of the Supreme Court (in *Wajihuddin Ahmed (Justice Rtd) v Chief Election Comr* PLD 2008 SC 25) made an order: (i) restraining the government of Pakistan, ie the President and Prime Minister, from undertaking any action which was contrary to the independence of the judiciary, (ii) banning any judge of the Supreme Court or High Courts, including Chief Justices, from taking an oath under the Provisional Constitution Order or any other extra-constitutional step, (iii) restraining the Chief of Army Staff or other military personnel from acting on the Provisional Constitution Order or from administering a fresh oath to judges or undertaking any action which was contrary to the independence of the judiciary and (iv) declaring that any appointment of a Chief Justice and judges of the Supreme Court or the High Courts of the four Provinces under the new regime was unlawful and without jurisdiction. At the time when the emergency was proclaimed, there were 17 permanent judges of the Supreme Court and one ad hoc judge. Five of those judges chose to take the oath under the Oath of Office Order and one of them was appointed Chief Justice in place of the incumbent Chief Justice. The other 13 judges refused to take the oath. Likewise, some judges in the High Courts chose to take the oath and others did not.

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Those who refused or failed to take the new oath were physically stopped from performing their judicial functions and some, including the incumbent Chief Justice, were also imprisoned. On 23 November 2007 the validity of the Proclamation of Emergency, the Provisional Constitution Order and the Oath of Office Order were affirmed by a newly constituted Supreme Court (in *Khan v Musharraf*[2008] 4 LRC 157) in proceedings in which applications for a declaration that the three decrees were invalid and orders that the judges who had resigned be restored to office were refused. On 15 December 2007 the Constitution was restored and on 18 February 2008 fresh elections were held, a new Parliament came into existence and the former Chief Justice was restored to office. On 20 April 2010 the 18th Constitutional Amendment, which substituted a new art 270AA of the Constitution re-establishing parliamentary democracy to Pakistan, came into force and the amendments to the Constitution made in 2007 by the Chief of Army Staff were repealed and invalidated. In proceedings brought to determine the constitutional validity or otherwise of the dismissal of judges and appointment of new judges after the three decrees, the reconstituted Supreme Court (in *Sindh High Court Bar Association v Federation of Pakistan* [2010] 2 LRC 319) held: (i) that the Proclamation of Emergency, the Provisional Constitution Order and the Oath of Office Order were made unconstitutionally and without any valid legal basis, (ii) that the judges who were declared to have ceased to hold office for refusal or failure to take oath under the Oath of Office Order were deemed not to have ceased to be judges, (iii) that the replacement Chief Justice and all judicial appointments made in consultation with him were unconstitutional, void ab initio and of no legal effect and (iv) that those judges who took oath under the Oath of Office Order had violated the order made by the court on 3 November 2007 (in *Wajihuddin Ahmed*) and had rendered themselves liable for consequences under the Constitution for their disobedience of the order, including dismissal for misconduct by the President under art 209 of the Constitution on the recommendation of the Supreme Judicial Council made after inquiry. Subsequently notices were issued to 72 judges of the Supreme Court and High Courts requesting them to explain why proceedings should not be initiated against them for contempt of court under art 204, under which a court had power to punish any person who abused, interfered with or obstructed the process of the court in any way or disobeyed any order of the court or scandalised the court or otherwise did anything

which tended to bring the court or a judge into hatred, ridicule or contempt or did any other thing which, by law, constituted contempt of the court. Many of the affected judges tendered unconditional apologies and/or opted for early retirement, and the notices issued to them were discharged. However, contempt proceedings were instituted against six judges of the Supreme Court and the High Courts who failed or refused to apologise and were heard by a four member Bench of the Supreme Court. The issues arose (i) whether it was constitutionally permissible for the Supreme Court to proceed under art 204 against judges of the Supreme Court and the High Courts for contempt of court, (ii) if so, whether as a matter of propriety the Supreme Court should proceed against the appellants or, having regard to their status as superior court judges, should discontinue the proceedings and (iii) if the Constitution did not place restrictions on contempt proceedings against judges and if questions of propriety did not prevent the court from proceeding against the appellants under art 204, whether there was sufficient material before the court to charge the appellants with contempt of the Supreme Court for disobedience of the order of 3 November 2007. The court held that the Constitution and the law did not prohibit proceedings being taken against the appellants under art 204 of the Constitution despite their status as judges of the superior courts, and that they were not immune from proceedings under art 204. The appellants appealed by an intra-court appeal to a six-member Bench of the Supreme Court, contending (i) that they were still judges and as such proceedings could only be taken against them under the procedure for removal set out in art 209, which required the Supreme Judicial Council to conduct an inquiry into their conduct before making a recommendation to the President, and could not be taken by proceedings under art 204 for violation of the order of 3 November 2007, (ii) that the court should exercise its discretion to condone or excuse the conduct of the appellants because they had taken the new oath under a misunderstanding for which they should not be made culpable and (iii) that the four member Bench directing that contempt proceedings be taken against them had not given detailed reasons for their decision, but only made a short order.

HELD: Appeal dismissed.

(i) The Constitution, being an accord among the people, was not an ordinary legislative instrument but the supreme law of the land

Order instead of opting to do so and becoming active parties in an unauthorised constitutional deviation ...

(iii) Those judges including the appellants who made oath under the Provisional Constitution Order on or after 3 November 2007 did so on the basis that they accepted that they ceased to hold office with immediate effect on and from 3 November 2007. Moreover, when it was held in 2010 that all appointments of judges of the Supreme Court and the High Courts made during the period of the Proclamation of Emergency and the Provisional Constitution Order were unconstitutional, void ab initio and of no legal effect they ceased to hold office forthwith and it was clear from art 270AA of the Constitution, as substituted by the 18th Amendment, that the unconstitutional actions of 3 November 2007, including the appointments of the appellants, were not subsequently validated, affirmed or condoned by the Parliament. In the absence of protection provided by Parliament allowing or condoning their deviation from their constitutional appointment and oath, the appellants were not judges of the Supreme Court and High Courts under the Constitution as from the date of passing of the 18th Constitutional Amendment on 20 April 2010, and, applying the maxim that no man could take advantage of his own wrong, they could not take advantage of their own wrongs or manipulations to claim that they were still judges. In the absence of any judicial immunity available to them from proceedings under art 204 of the Constitution, the procedure under art 209 for judicial removal did not apply and contempt proceedings could be initiated against them for disobedience of the order of the court of 3 November 2007 ... *Sindh High Court Bar Association v Federation of Pakistan* [2010] 2 LRC 319 applied. *Union of India v Maj Gen Madan Lal Yadav* 1996 AIR SC 1340 and *Wajihuddin Ahmed (Justice Rtd) v Chief Election Comr* PLD 2008 SC 25 considered.

(iv) To accept the plea that the actions of the appellants be condoned would be tantamount to reverting back to the doctrine of necessity, which had been discredited by previous authority. Moreover, if the actions of the appellants were to be condoned, other persons who were responsible directly or indirectly for violation of the Constitution would also be entitled to have their actions condoned ... *Sindh High Court Bar Association v Federation of Pakistan* [2010] 2 LRC 319 applied.

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(v) In the absence of the detailed reasons, a short order which contained specific directions was to be considered as an order of the court and acted upon without waiting for detailed reasons, but in any event, in contempt proceedings detailed reasons were not required. A notice of contempt in terms of s 3 of the Contempt of Court Ordinance 2003 was always based on a prima facie opinion of the court, which only had to satisfy itself that there existed an arguable case for the alleged contemnor to meet. The court was not required to consider all the facts in depth, since a predetermination of the facts and circumstances would amount to prejudging the issue and would prevent there being a fair trial without any prejudice ... *Benazir Bhutto v President* PLD 1998 SC 388 applied.

(vi) The appellants ceased to hold office of judges of the superior courts with effect from the date of passing of the 18th Constitutional Amendment on 20 April 2010 but were entitled to service and pension benefits up to that date, unless ultimately they were found to be guilty for contempt of court ...

Parliament and the Judiciary

[2012] 1 LRC 343

Johnson v Republic

No J3/3/2010

GHANA

Supreme Court

Date-Bah, Owusu, Dotse, Anin-Yeboah and Aryeetey JJSC

16 March 2011

(1) Constitutional law – Fundamental rights – Right to life – Protection against inhuman or degrading treatment or punishment – Right to fair trial – Death penalty – Mandatory sentence – Judicial role – Appellant convicted of murder – Criminal Code providing for mandatory death sentence for murder – Appellant appealing against sentence – Whether sentence violating fundamental rights – Whether infringing principle of separation of powers – Criminal Code 1960, s 46 – International Covenant on Civil and Political Rights 1966,

art 6(1) – Constitution of the Republic of Ghana 1992, arts 3(3), 11, 13(1), 14(1), 15(2), 19(1), 125 (3) – Commonwealth (Latimer House) Principles on the Accountability of and the Relationship between the Three Branches of Government (2003).

(2) Criminal procedure – Trial – Judge and jury – Direction – Circumstantial evidence – Hearsay – Appellant convicted of murder – Prosecution case depending on circumstantial evidence – Trial judge directing jury on totality of evidence – Judge not referring to ‘circumstantial’ nature of evidence – Whether misdirection – Whether prosecution witness introducing hearsay evidence at trial – Whether defence counsel having objected to such evidence – Whether miscarriage of justice – Whether murder conviction to be upheld.

K was stabbed to death. The appellant was charged with (i) conspiracy to commit murder and (ii) murder. At the end of the trial the judge directed the jury to acquit the appellant on the conspiracy count. However, the jury ultimately convicted the appellant on both counts. The judge then acquitted the appellant on the conspiracy count but sentenced him to death for murder under s 46 of the Criminal Code 1960, which provided: ‘Whoever commits murder shall be liable to suffer death.’ The conviction was on the basis of circumstantial evidence led by the prosecution, viz that K had last been seen alive with the appellant; that K had had \$US90,000 with him at the time and that (the day after K’s death) the appellant had given \$12,000 in cash for safekeeping to a former girlfriend. The appellant appealed to the Court of Appeal against his conviction and sentence, submitting that the judge had wrongly admitted highly prejudicial hearsay evidence and had failed to give a proper direction on circumstantial evidence. The appellant also contended that the mandatory death sentence imposed on him violated the prohibition of inhuman and degrading treatment under art 15(2) of the Constitution, the right to protection from arbitrary deprivation of life under art 13(1) and the right to a fair trial under art 19(1). The appeal was dismissed by the Court of Appeal. The appellant appealed to the Supreme Court.

HELD: Appeal against conviction and (Date-Bah JSC dissenting) sentence dismissed.

(1) Section 46 of the Criminal Code 1960 was ‘existing law’ for the purposes of art 11 of the Constitution and was to be construed in conformity with the provisions of the Constitution. Article 14(1)

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(a) of the Constitution provided that a person could be deprived of his liberty in execution of a sentence or order of a court in respect of a criminal offence of which he had been convicted. It was significant that art 3(3) of the Constitution specifically provided for the mandatory death penalty as punishment for anyone convicted of high treason: the Constitution did not abhor or frown upon the imposition of the death sentence on the class of cases where the law provided therefor. Similarly, art 13(1), which provided that no one should be deprived of his life except in the exercise of the execution of a sentence of a court in respect of a criminal offence of which he had been convicted, meant that the intentional deprivation of life in such circumstances was consistent with the Constitution and the criminal jurisprudence of Ghana. The judiciary had no business questioning the propriety of laws passed by Parliament, except those that were inconsistent with the Constitution. That legislation imposed a mandatory death sentence for an offence did not mean that the judicial discretion of the courts had been taken away. In giving a generous and purposive interpretation to fundamental human rights provisions, thereby ensuring full protection for individual rights, judges should avoid usurping the duties of Parliament. That result was supported by the Latimer House principles. In view of the fact that the Constitution was, in the scheme of sources of law of Ghana, the Grundnorm, followed in that order by the laws passed by Parliament, which included the Criminal Code 1960, providing for the death penalty, the mandatory imposition of the death sentence by s 46 of the Criminal Code 1960 did not violate art 15(2) of the Constitution. Only Parliament could amend the Criminal Code 1960 to categorise the various degrees of murder and to remove the mandatory death sentence. Anything short of that would amount to the court usurping the functions of Parliament ... *Brown v A-G* (3 February 2010, unreported), Ghana SC, applied. *Mutiso v Republic* [2011] 1 LRC 691 considered. *A-G v Kigula* [2009] 2 LRC 168 not adopted.

Per curiam. Per Date-Bah, Owusu and Dotse JJSC. A constitutional issue can be raised for the first time on appeal at the Court of Appeal and even in the Supreme Court. When so raised it must be duly considered ... *A-G v Faroe Atlantic Co Ltd* [2005–2006] SCGLR 271 applied.

Per curiam. Per Owusu and Dotse JJSC. Where constitutional provisions on the subject matter are clear and there is no

ambiguity, there should be no hesitation in interpreting such constitutional provisions without reference to decided cases from other jurisdictions ... *Brown v A-G* (3 February 2010, unreported), Ghana SC, applied.

Per curiam. Per Owusu JSC. (i) The Criminal Procedure Code 1960 provided that sentences of death shall not be pronounced against juvenile offenders, pregnant women or those insane at the date of the offence. It is therefore not correct to argue that imposition of the mandatory death penalty in Ghana is rigid and admits of no alternatives ...

(ii) It is not true that after conviction the accused was denied the right to say anything in mitigation. Under s 288 of the Criminal Procedure Code 1960 the accused is asked whether he has anything to say why sentence should not be passed according to law. Whatever he says will form part of the record of proceedings, with a report in writing signed by the justice containing the recommendations or observations on the case which the judge thinks fit to make. It is upon this report that a decision will be taken by the President whether the sentence is to be carried out. Admittedly, however, whatever the accused says will not affect the sentence to be passed, which is mandatory ...

(iii) Even if the Supreme Court had come to the conclusion that the mandatory death penalty was unconstitutional and that, as in *Mutiso v Republic*, the *shall* should be construed to mean *may*, giving the court the discretion to decide on the sentence, nothing short of death would be the appropriate sentence that any court of law should impose on the appellant having regard to the gruesome nature of the murder and the motive behind it ... *Mutiso v Republic* [2011] 1 LRC 691 considered.

Per curiam. Per Dotse JSC. (i) In line with the guidelines established under the Latimer House principles the time has possibly come for Parliament to seriously consider whether to have a policy shift in the mandatory death penalty regime imposed on those convicted of murder. Clear guidelines should be established to indicate degrees of murder cases: it would be too much of an onerous responsibility for the trial court judges to carry out the task of deciding punishment for convicted murderers without any guidance. There appear to be good policy measures in the arguments that there ought to be categorisation

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of murder cases to distinguish and/or classify them into serious and minor cases ...

(ii) Prosecutors must be cautious in preferring murder charges against people who fall foul of the law. The situation where prosecutors classify an event as murder whenever death results and therefore liable to be arraigned for murder must cease ...

Per Date-Bah JSC (dissenting). The appellant's case against the constitutionality of his sentence was unanswerable. The soundness of the arguments adopted in numerous persuasive authorities from other common law jurisdictions, from the Commonwealth and the United States, on the issue was irrefutable and irresistible. Not all murders had the same culpability. Accordingly, s 46 of the Criminal Code 1960, by lumping together, without distinction, all murders and making them all punishable by death, fell foul of the constitutionally protected principle immanent in art 15(2) that the punishment imposed on a convicted murderer should be proportionate to the gravity of the particular crime of which he had been convicted. In matters of human rights, the Supreme Court, when interpreting Ghanaian constitutional provisions in *pari materia* with provisions in other Commonwealth jurisdictions and international human rights instruments, should depart from the discernible trend of decisions in those Commonwealth jurisdictions and international human rights fora only for tangible policy reasons. The argument that all murders were murders and should be treated equally was an unreasonably inflexible ideological position, belied by actual human experience, which should be rejected by the court. Human rights had a universal and international quality which inhered in all humans, unless there were compelling local reasons to displace them. Because of that universalist dimension of human rights, the court should be very slow to reject interpretations of human rights provisions in *pari materia* with provisions in the Constitution, when those interpretations had become widely-accepted orthodoxies in jurisdictions with a similar history to that of Ghana. That the Constitution provided for the penalty of death for high treason (art 3) was not determinative of the issue before the Supreme Court, which was the quite distinct one of whether the mandatory nature of the death penalty for *murder*, a criminal offence with a very wide range of moral culpability scenarios, was compatible with specific provisions in the Ghana Constitution which were in *pari materia* with constitutional

provisions in other Commonwealth jurisdictions. The mandatory sentence of death imposed on the appellant should be quashed. In its place, the applicable penalty in s 46 of the Criminal Code 1960 should be construed as imposing a discretionary and not a mandatory sentence of death. A punishment that did not distinguish between the gravity of the particular cases that triggered the punishment was inherently arbitrary and violated art 13(1) of the Constitution, which provided that life shall not be taken away in an arbitrary fashion. Furthermore, Ghana was a party to the International Covenant on Civil and Political Rights 1966, art 6(1) of which provided that '[n]o one shall be arbitrarily deprived of his life'. In the context of the international human rights jurisprudence on the issue it would be reasonable to construe art 13(1) of the Constitution purposively as prohibiting the arbitrary deprivation of life. In the Ghanaian context also, it would be a fair interpretation of the law to hold that a person charged with murder failed to be given a fair hearing in respect of the particular mitigating circumstances of his case if he was unable, in consequence of the overriding peremptory force of s 46 of the Criminal Code 1960, to persuade the trial judge to impose any sentence other than death. That constituted a violation of art 19(1) of the Constitution. The inability of trial judges to exercise a discretion to make the punishment fit the crime in cases of murder infringed the right of the accused to a fair trial. Finally, the imposition of a mandatory sentence by the legislature that constrained the discretion of the trial judge infringed the principle of the separation of powers, one of the underlying features of the Constitution, and violated art 125(3), which provided that judicial power was vested in the judiciary. Judges had to exercise final judicial power, which included the power to determine what sentence was appropriate on the facts of individual cases. Accordingly, the mandatory sentence of death should be quashed and replaced by a sentence of life imprisonment ... *Reyes v R* [2002] UKPC 11, [2002] 2 LRC 606, *Bowe v R* [2006] UKPC 10, [2006] 4 LRC 241, *A-G v Kigula* [2009] 2 LRC 168 and *Mutiso v Republic* [2011] 1 LRC 691 adopted.

Per curiam. Per Date-Bah JSC. The submissions reminded the Supreme Court of its responsibility, even in criminal appeals, to discharge its role as a constitutional court, in addition to its role as the final court of appeal. It is a sacred duty of the Supreme Court always to remember this dual role. Declaring a statutory provision void to the extent of its inconsistency with the Constitution is

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widely recognised locally and internationally as a quintessential judicial act of a constitutional court and not as an usurpation of a legislative role and the court must not be timorous about performing that duty. It also behoves the Supreme Court not to recoil from audacity in the protection of human rights and in keeping alive the hope of those who seek the court's enforcement of their constitutional rights ...

(2)(i) The non-direction on circumstantial evidence had not occasioned any substantial miscarriage of justice. Short of using the word ‘circumstantial’, the judge had taken pains to direct the jury on the totality of the evidence led by the prosecution which, if believed, would support the conviction. The testimony of the prosecution witnesses had destroyed the appellant’s alibi defence. The prosecution had led sufficient evidence from which the guilt of the appellant was proved beyond reasonable doubt, for which reason the jury rightly found him guilty of murder ... *Yirenkya v State* [1963] 1 GLR 66, *Amartey v State* [1964] GLR 256 and *Addai v Republic* [1973] 1 GLR 312 applied.

(ii) Counsel for the appellant had made no effective or formal objection to the alleged hearsay evidence at first instance. Counsel should have properly registered his objection based on grounds for so doing and insisted on the court recording the objection and ruling on it as a matter of course. He had failed to do so, allowing the prosecution witness to continue with his evidence. In any event, nowhere in the objection raised by counsel did he refer to the prosecution witness as testifying on hearsay evidence – all the pieces of evidence which together made the inference that the appellant had killed K were on record ...

Per curiam. Per Owusu JSC. The trial judge erred in acquitting the appellant on the conspiracy count. After the verdict of guilty it was incumbent on the judge to pass sentence on the appellant according to law at that stage of the proceedings. If there was no evidence in support of the charge of conspiracy, the judge at the conclusion of the case for the prosecution should have directed the jury to enter a verdict of not guilty and acquitted the accused at that stage ...

[1993] 2 LRC 153

Pepper (Inspector of Taxes) v Hart and related appeals

UNITED KINGDOM

House of Lords

Lord Bridge of Harwich, Lord Griffiths, Lord Emslie, Lord
Oliver of Aylmerton, and Lord Browne-Wilkinson

4 November 1991

House of Lords

Lord Mackay of Clashfern LC, Lord Keith of Kinkel, Lord
Bridge of Harwich, Lord Griffiths, Lord Ackner, Lord Oliver of
Aylmerton and Lord Browne-Wilkinson.

8-11, 17-78 June. 26 November 1992.

(1) Statute law – Construction – Hansard – Reference to proceedings in Parliament as an aid to construction – Ambiguous or obscure legislation – Whether court could look at parliamentary history of legislation or Hansard as an aid to interpretation.

(2) Constitutional law – Bill of Rights 1688 – Parliamentary privilege – Freedom of speech – Use of parliamentary materials in court proceedings – whether breach of Parliamentary privilege – Bill of Rights 1688, art 9.

(3) Income tax – Emoluments from office or employment – Benefits derived by directors and higher-paid employees from employment – Cash equivalent of benefit – Cost of providing benefit – Concessionary fees scheme operated by school for sons of teaching staff – Whether cost of benefit limited to additional costs directly incurred by school in providing benefit – Finance Act 1976, ss 61(1), 63(1)(2).

The taxpayers were nine masters and the bursar at an independent boys' school. Under a concessionary fees scheme operated by the school for members of its teaching staff the taxpayers' sons were educated at the school for one-fifth of the fees ordinarily charged to members of the public. The concessionary fees more than covered the additional cost to the school of educating the taxpayers' sons and since in the relevant years the school was not full to capacity their admission did not cause the school to

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lose full fees which would otherwise have been paid by members of the public for the places so occupied. The educations of the taxpayers' sons at reduced fees was a taxable benefit under s 61 (1) of the Finance Act 1976 and the taxpayers were assessed to income tax on the 'cash equivalent' of that benefit on the basis that they were liable for a rateable proportion of the expenses in running the school as a whole for all the boys, which proportion was roughly equal to the amount of the ordinary school fees. By s 63(1) of the 1976 Act the cash equivalent of the benefit was 'an amount equal to the cost of the benefit' and by s 63(2) the cost of the benefit was 'the amount of any expense incurred in or in connection with its provision'. The taxpayers appealed against the assessments claiming that since all the costs of running the school generally would have had to be incurred in any event the only expense incurred by the school 'in or in connection with' the education of their sons was the small additional or marginal cost to the school caused by the presence of their sons, which was covered by the fees they paid, and so the 'cash equivalent of the benefit' was nil. The Crown contended that the 'expense incurred in or in connection with' the provision education for the taxpayers' sons was exactly the same as the expense incurred in or in connection with the education of all other pupils at the school and accordingly the expense of educating any one child was a proportionate part of the cost of running the whole school. The Special Commissioner allowed the taxpayers' appeals holding that since the taxpayers' sons occupied only surplus places at the school at the school's discretion and the fees paid by the taxpayers fully covered and reimbursed the cost to the school of educating the taxpayers' sons no tax was payable by the taxpayers. The judge allowed an appeal by the Crown and his decision was affirmed by the Court of Appeal. The taxpayers appealed to the House of Lords, where it became apparent that an examination of the proceedings in Parliament in 1976 which led to the enactment of ss 61 and 63 might give a clear indication whether Parliament intended that the cost of the benefit, i.e.: 'the amount of any expense incurred in or in connection with its provision', in s 63(2) meant the actual expense incurred by the school in providing the benefit or the average cost of the provision of the benefit, the latter being very close to a market value test. The House of Lords then heard submissions on the questions whether it would be appropriate to depart from previous authority which prohibited the courts from referring to parliamentary materials in construing statutory provisions and whether the use of Hansard in such circumstances

would be an infringement of s 1, art 9 of the Bill of Rights 1688 is a breach of parliamentary privilege.

HELD: Appeals allowed.

(1) (Lord Mackay of Clashfern LC dissenting) Having regard to the purposive approach to construction of legislation the courts had adopted in order to give effect to the true intention of the legislature, the rule prohibiting the courts from referring to parliamentary material as an aid to statutory construction should, subject to any question of parliamentary privilege, be relaxed so as to permit reference to parliamentary materials where (a) the legislation was ambiguous or obscure or the literal meaning led to an absurdity, (b) the material relied on consisted of statements by a minister or other promoter of the Bill which led to the enactment of the legislation, together if necessary with such other parliamentary material as was necessary to understand such statements and their effect and (c) the statements relied on were clear ... Dictum of Lord Reid in *Warner v Metropolitan Police Comr* [1968] 2 All ER 356 at 367, *Pickstone v Freemans plc* [1988] 2 All ER 803 and *Brind v Secretary of State for the Home Department* [1991] LRC (Const) 512 applied. *Church of Scientology of California v Johnson-Smith* [1972] 1 All ER 378 distinguished. Dicta of Lord Reid in *Beswick v Beswick* [1967] 2 All ER 1197 at 1202, or Lord Reid and Lord Wilberforce in *Black-Clawson International Ltd v Papierwerke Waldhof-Aschaffenburg AG* [1975] 1 All ER 810 at 814-815, 828, and of Lord Scarman in *Davis v Johnson* [1978] 1 All ER 1132 at 1157 not followed. Dictum of Dunn LJ in *R v Secretary of State for Trade, ex p Strathclyde Anderson plc* [1983] 2 All ER 233 at 239 overruled.

Lord MacKay of Clashfern LC (dissenting). If reference to parliamentary materials were allowed as an aid to interpretation of a statutory provision which was ambiguous, or obscure or the literal meaning of which led to an absurdity, it would be incumbent on lawyers to examine the whole proceedings on the Bill in question in both Houses of Parliament, which would result in an immense increase in the cost of litigation involving questions of statutory construction. Accordingly, for practical considerations, the rule prohibiting the courts from referring to parliamentary material as an aid to statutory construction should not be relaxed ...

(2) The use of parliamentary materials as a guide to the construction of ambiguous legislation would not infringe s 1,

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art 9 of the Bill of Rights 1688 since it would not amount to a 'questioning' of the freedom of speech or parliamentary debate, provided counsel and the judge refrained from impugning or criticising the minister's statements or his reasoning, since the purpose of the courts in referring to parliamentary material would be to give effect to, rather than thwart through ignorance, the intentions of parliament and was not to question the processes by which such legislation was enacted or to criticise anything said by anyone in Parliament in the course of enacting it. Furthermore, since the Crown had not identified or specified the nature of any parliamentary privilege going beyond that protected by the Bill of Rights, the House could not determine the existence and validity of such a privilege as it would otherwise have been entitled to and accordingly, it would not be right to withhold from the taxpayers the benefit of a decision to which, in law, they were entitled ...

(3) Per Lord Keith, Lord Bridge of Harwich, Lord Griffiths, Lord Ackner, Lord Oliver and Lord Browne-Wilkinson. Section 63(2) of the Finance Act 1976 was clearly ambiguous because the 'expense incurred in or in connection with' the provision of in-house benefits could be interpreted as being either the marginal cost caused by the provision of the benefit in question or proportion of the total cost incurred in providing the service both for the public and for the employee (the average cost). However, the parliamentary history of the 1976 Act and statements made by the Financial Secretary to the Treasury during the committee stage of the Bill made it clear that Parliament had passed the legislation on the basis that the effect of ss 61 and 63 was to assess in-house benefits, and particularly concessionary education for teachers' children, on the marginal cost to the employer and not on the average cost of the benefit. Accordingly s 63 should be given that meaning ...

Per Curiam. Per Lord Griffiths. Section 63 (2) of the Finance Act 1976 although containing language which was ambiguous, could be construed in favour of the taxpayers without recourse to Hansard. The interpretation contended for by the Revenue, the hypothetical expense incurred by the college in providing the benefit, could produce unfair and absurd results. Accordingly, the preferable construction was that which based the assessment to tax on the actual cost to the employer ...

[192] LRC (Const) 623

Dow v Attorney General

BOTSWANA

Court of Appeal

Amissah JP, Aguda, Bizos, Schreiner and Puckrin JJA

3 July 1992

(1) Constitutional law – Fundamental rights – Freedom from discrimination – Citizenship – Statute providing that children of female citizen married to alien father not citizens by birth – Whether sex discrimination – Whether such discrimination permitted by the Constitution – Citizenship Act 1984 (Cap 01:01), ss 4, 5 – Constitution, ss 3, 15.

(2) Constitutional law – Judicial review – Standing – Statute providing that children of female citizen married to alien father not citizens by birth – Whether constitutional rights of mother adversely affected – Whether mother having locus standi – Citizenship Act 1984 (Cap 01:01), ss 4, 5 – Constitution, s 14.

The respondent, Unity Dow, was a citizen of Botswana by birth and descent. In 1984 she married a citizen of the United States of America. One child was born to them on 29 October 1979 (prior to their marriage) and two more children on 26 March 1985 and 26 November 1987 (after their marriage). The first child was a citizen of Botswana under s 21 of the Constitution. The Citizenship Act 1984 (Cap 01:01) later repealed s 21 of the Constitution and provided in s 4 that a person born in Botswana after the Act would be a citizen if at the time of his birth his father was a citizen, or, in the case of a child born out of wedlock, his mother was a citizen. Therefore the two children born after the marriage were not citizens of Botswana. The applicant contended that s 4 of the Citizenship Act 1984 contravened rights and freedoms guaranteed by s 2 of the Constitution namely the rights to liberty, protection of the law, immunity from expulsion from Botswana, protection from being subjugated to degrading treatment and to protection from discrimination on the basis of sex. Horwitz Ag J granted the respondent's application and declared ss 4 and 5 of the Citizenship Act ultra vires the Constitution (see [1991] LRC (Const) 574). The Attorney General appealed to the Court of Appeal contending inter alia that (a) the respondent could only

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complain of discrimination under s 15 of the Constitution, which expressly referred to discrimination, not under s 3, (b) legislation discriminating on the basis of sex, as the Citizenship Act 1984 did, was not unconstitutional since s 15(3) did not specifically refer to sex as a ground of discrimination, and (c) the respondent had no locus standi to bring the action.

HELD: (Schreiner an Puckrin JJA dissenting) Appeal dismissed subject to variation of declaration of Horwitz AG J varied by deleting reference to s 5 of the Citizenship Act 1984.

(1) Per Amisshah, Aguda and Bisos JJA. Sections 4 and 5 of the Citizenship Act were ultra vires the Constitution since (a) s 3 of the Constitution afforded equal protection to all persons irrespective of their sex and accordingly discrimination in the sense of unequal treatment in breach of s 3 was unconstitutional, (b) discrimination under s 15(3), which did not refer to sex, was stated in that subsection to be for the purposes of s 15 only and accordingly could not circumscribe the fundamental rights in s3 ... (c) it could not be inferred that sex discrimination was permissible since the Constitution had consistently used clear words whenever an exclusion from fundamental rights was intended (see pp 647-648, post), (d) s 15 (3), provided examples of groups that might be affected by discriminatory treatment and did not intend by the omission of the word 'sex' to exclude sex discrimination (the disabled, language or geography were also not mentioned in s 15 (3), yet discrimination on those bases would also be unconstitutional ... and (e) they were enacted after the Constitution and were not the same or substantially the same as previous enactments and were therefore not saved by s 15(9) (b) of the Constitution ... It was clear from s 3 of the Constitution itself and from s 18 (which provided for action to enforce breaches of the Constitution, including s 3) that s 3 was not a preamble and that actions could be brought for breaches ... The nature of a Constitution required that a broad and generous approach be adopted in its interpretation; that all relevant provisions bearing on the subject for interpretation be considered together as a whole in order to effect the object of the Constitution; and that derogation from rights and freedoms conferred by the Constitution be narrowly or strictly construed ...

Per Schreiner JA (dissenting) (Puckrin JA concurring). Discrimination on the ground of sex was not prohibited by the

Constitution since (a) s 3 did not deal discrimination, (b) s 3 did not create enforceable rights and freedoms but was a preamble in that (i) it was introduced by the word 'whereas' which was inappropriate to a section that created rights and (ii) the words in s 3 'the provisions of this Chapter shall have effect' referred to the other provisions of Ch II and not to s 3 itself ... (c) s 15 clearly defined discrimination as not including the ground of sex and (d) the court could not add 'sex' to the categories of discrimination in s 15(3) either by the *eiusdem generis* rule or on the basis that the list was not exhaustive ... Nor were ss 4 and 5 of the Citizenship Act 1984 in breach of ss 5 or 7 of the Constitution since the respondent's right to personal liberty was not infringed by the fact that her children did not have Botswana citizenship and the provisions of the Act did not necessarily involve the imposition of degrading treatment. Accordingly, ss 4 and 5 of the Citizenship Act 1984 were not *ultra vires* the Constitution ... The rule that a liberal or generous construction of a Constitution be adopted (rather than a technical or literal construction) applied only to those provisions intended to confer rights upon or introduce protections for the individual person and did not justify a departure from an absolute definition section or from the plain meaning of words (see pp 685, 686, post). *Minister of Defence of Namibia v Mwadinghi* 1992 (2) SA 355 doubted.

(2) Per Amissah and Aguda JJA. The respondent had locus standi in respect of s 4 of the Citizenship Act 1984 since she had demonstrated that her constitutional right of freedom of movement under s 14 of the Constitution was likely to be infringed if her children were refused entry to Botswana under s 4 of the Act. However, the respondent did not have locus standi in respect of s 5 of the Act since she did not have any children born outside Botswana and there was only a remote possibility that she would give birth to children abroad in the future ... The appeal would therefore be allowed in part by deleting reference to s 5 of the Citizenship Act 1984 in the declaration of Horwitz Ag J ...

Per Bizos JA. The court would act to protect the respondent's dignity and, since whatever aggrieved her children directly affected her, the respondent accordingly had locus standi ... *Jacobs en 'n Ander v Waks en Andere* 1992 (1) SA 521 referred to.

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Per Schreiner JA (Puckrin JA concurring). The respondent had locus standi since she had alleged that ss4 and 5 of the Citizenship Act 1984 had contravened her constitutional rights ...

Per curiam (per Amissah JA). (i) The words 'other matters of personal law' in s 15(4)(c) of the Constitution referred to the person's transactions determined by the law of his tribe, religious group or other personal factor as distinct from the territorial law of the country ...

(ii) (per Amissah and Aguda JJA). Although international treaties were not binding within Botswana unless enacted by Parliament, the courts ought not to interpret legislation in a matter that conflicted with Botswana's international obligations unless it was impossible to do otherwise ...

Per Puckrin JA (dissenting). It was only in the event of doubt that national law should be interpreted in accordance with the state's international obligations ...

Cases referred to in judgements:

Abdiel Caban v Kazim Mohammed & Maria Mohammed 441 US 380, 60 L Ed 2D 297 (1979)

Adediran v Interland Transport Ltd [1991] 9 NWLR 155

Argentum Reductions (UK) Ltd, Re p 1975] 1 All ER 608, [1975] 1 WLR 186

A-G for New South Wales v Brewery Employees Union of New South Wales (1908) 6 CLR 469

A-G of the Gambia v Jobe [1985] LRC (Cons) 556, [1984] AC 689, [1984] 3 WLR 174 Gam Pc

A-G of Namibia, ex p, Re Corporal Punishment by Organs of State [1992] LRC (Const) 515, 1991 (3) SA 76, Nam SC

A-G Transvaal v Additional Magistrate for Johannesburg 1924 AD 421

A-G v British Broadcasting Corporation [1980] 3 A; ER 161. [1980] 3 WLR 109, [1981] AC 303, HL

A-G v Moagi [1981] BLR 1

A-G v Prince Ernest Augustus of Hanover [1957] 1 All ER 49, [1957] AC 436, [1957] 2 WLR 1, HL

Birds Galore Ltd v A-G [1989] LRC (Const) 928

Boyd v United States 116 US 616, 29 L Ed 746 [1986]

Cabinet of the Transitional Government of South West Africa v Eins 1988 (3) SA 369 (A) 369

Catnic Components Ltd v Hill & Smith Ltd [1982] RPC 183, HL

Claim of Viscountess Rhondda [1922] 2 AC 339

Colonial Treasurer v Rand Water Board [1907] TS 479

Corey v Knight (1957) Cal App 2d 671

Craig v Boren, Governor of Oklahoma 429 US 190, 50 L Ed 2d 319 (1976)

Daoo Ltd & Others v Krugersdorp Municipal Council 1920 AD 530

Darymple v Colonial Treasurer [1910] TS 372

Director of Education, Transvaal v McCagie and Others 1918 AD 616

Ditcher v Denison (1857) 11 Moore PC 325

Dockstader v Clark (1903) 11 BCR 37

Dred Scott v Sanford (1857) 19 How 393

[2009] 4 LRC 838

Naz Foundation v Delhi. (India)

(See The Three Branches of Government above)

[2009] 1 LRC 453

Constitutional Reference No 1 of 2008

NAURU

Supreme Court

Millhouse CJ

4–5, 7 April 2008

(1) *Constitutional law – Parliament – Proceedings – Judicial review – Privilege of non-impeachment – Constitution conferring power on Parliament to declare powers, privileges and immunities of Parliament and its members – Constitution and statute granting Parliament powers, privileges and immunities of UK House of Commons – Whether courts having jurisdiction to review parliamentary proceedings – Whether Parliament having exclusive authority to regulate its own proceedings – Parliamentary Powers, Privileges and Immunities Act 1976, s 21.*

(2) *Constitutional law – Parliament – Proceedings – Quorum – Constitution requiring quorum for sitting of Parliament – Parliament purporting to sit and transact business in absence of quorum – Whether such action valid – Constitution of Nauru 1968, arts 2, 45.*

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(3) *Constitutional law – Parliament – Membership – Citizenship – Constitution imposing citizenship qualification for membership of Parliament – Constitution containing no bar on member of Parliament having dual citizenship – Statutory provision and standing order purporting to disqualify dual citizens from membership – Whether such disqualification invalid – Constitution of Nauru 1968, arts 30, 36.*

(4) *Constitutional law – Parliament – Sessions – Speaker – Powers – Constitution providing for Speaker to appoint place and time of parliamentary sessions, in accordance with advice of President – Whether Speaker bound to act only on such prior advice – Constitution of Nauru 1968, art 40.*

A sitting of Parliament was suspended but resumed a few days later. Only certain members of Parliament were informed of the resumption of the sitting; nine were never informed of the resumption of the sitting and so were absent for the duration of the resumed sitting. Those members of Parliament present at the resumed sitting purported to carry out certain parliamentary business. The Speaker then suspended the House. The Minister for Justice, acting under art 55 of the Constitution, referred to the Supreme Court for its opinion a number of questions as to the validity of the actions taken at the resumed sitting. The Supreme Court had to consider a number of provisions of the Constitution in determining the matter, including art 2 (‘(1) This Constitution is the supreme law of Nauru ...’), art 30 (‘A person is qualified to be elected a member of Parliament if ... he ... is a Nauruan citizen and has attained the age of twenty years ...’), art 36 (‘Any question ... concerning the right of a person to be ... or to remain a Member of Parliament shall be ... determined by the Supreme Court.’), art 37 (‘The powers, privileges and immunities of Parliament and of its members and committees are such as are declared by Parliament.’), art 40 (‘Each session of Parliament shall be held at such a place and shall begin at such time ... as the Speaker in accordance with the advice of the President appoints ...’), art 45 (‘No business shall be transacted at a sitting of Parliament if the number of its members present, other than the person presiding at the sittings, is less than one-half of the total number of members of Parliament.’) and art 90 (‘Until otherwise declared by Parliament, the powers, privileges and immunities of Parliament and of its members and committees shall be those of the House of Commons of the Parliament of the United Kingdom

of Great Britain and Northern Ireland and of its members and committees as at the commencement of this Constitution.’). The Supreme Court also considered s 21 of the Parliamentary Powers, Privileges and Immunities Act 1976, which provided that ‘Parliament and members shall have all the powers, privileges and immunities ... [of] the House of Commons of the Parliament of the United Kingdom and its members ... except any of such powers, privileges and immunities as are inconsistent with or repugnant to the Constitution’. At the hearing before the Supreme Court, the judge admitted affidavits from nine members of Parliament, each of whom swore he was not present in Parliament on the day of the resumed sitting. The first point for decision was the extent, if any, of jurisdiction in the Supreme Court to review proceedings in Parliament.

HELD: Jurisdiction of court to review proceedings in Parliament upheld. Reference answered to the effect that (i) parliamentary business purportedly transacted at resumed sitting ultra vires, null and void for lack of quorum, (ii) it was unlawful for the Speaker to call or to refuse to call a sitting of Parliament in direct contravention of the advice of the President and (iii) only the Supreme Court had the authority to decide whether a person could be or remain a Member of Parliament.

(1) Parliament was not a sovereign Parliament but was bound by the Constitution which, under art 2(1), was the supreme law. In addition to the powers, privileges and immunities provided by the Parliamentary Powers, Privileges and Immunities Act 1976, art 90 of the Constitution conferred on Parliament the powers, privileges and immunities of the UK House of Commons. However, Parliament, unlike the House of Commons, was burdened and bound by a Constitution and the common law privilege of non-impeachment protecting parliamentary proceedings from judicial review could not obstruct the jurisdiction of the court to ensure that constitutionally provided methods of law-making were observed. Section 21 of the 1976 Act, in repeating the conferment on Parliament and its members of the powers, privileges and immunities of the House of Commons, expressly excepted any powers, privileges or immunities inconsistent with, or repugnant to, the Constitution; although that exception was technically surplusage, it was an acknowledgment by Parliament that it was bound by the Constitution ... Dicta of Barwick CJ in *Cormack v Cope* (1974) 131 CLR 432 at 454, of Hardie Boys, Tompkins and

[2012] 4 LRC 490

Supreme Court Reference No 3 of 2011
Reference by the East Sepik Provincial
Executive

[2011] PGSC 41

PAPUA NEW GUINEA

Supreme Court

Injia CJ, Salika DCJ, Sakora, Kirriwom and Gavara-Nanu JJ

12 December 2011

(1) Constitutional law – Parliament – Proceedings – Justiciability – Issue arising as to whether Parliament complying with procedures set out in Constitution – Whether issue justiciable – Relevant considerations – Constitution of Papua New Guinea 1975, ss 134, 142, 145 – Prime Minister and National Executive Council Act 2002, s 6.

(2) Constitutional law – Parliament – Prime Minister – Vacancy – Constitution setting out circumstances where vacancy in office of Prime Minister arising – Parliament declaring such vacancy – Whether decision valid – Whether Parliament having inherent power to declare such vacancy – Relevant considerations – Constitution of Papua New Guinea 1975, ss 19, 142(5), 155(4) – Prime Minister and National Executive Council Act 2002, s 6.

(3) Constitutional law – Parliament – Prime Minister – Removal – Validity – Physical or mental unfitness – Prime Minister undergoing medical treatment – Parliament declaring office of Prime Minister vacant – Whether conditions for removal fulfilled – Whether decision valid – Constitution of Papua New Guinea 1975, s 142(5) – Prime Minister and National Executive Council Act 2002, s 6.

(4) Constitutional law – Parliament – Membership – Disqualification – Validity – Unsound mind – Prime Minister undergoing medical treatment – Parliament declaring office of Prime Minister vacant – Whether conditions for removal fulfilled – Whether decision valid – Constitution of Papua New Guinea 1975, s 103(3)(b) – Public Health Act (Cap 226).

(5) Constitutional law – Parliament – Membership – Disqualification – Validity – Absence from three consecutive sittings of Parliament

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without leave – Prime Minister undergoing medical treatment – Speaker pronouncing Prime Minister disqualified by absence – Whether conditions for disqualification fulfilled – Whether decision valid – Constitution of Papua New Guinea 1975, ss 59, 104(2) (d), 135 – Organic Law on National and Local Level Government Elections, ss 228–229.

(6) Constitutionallaw–Parliament–PrimeMinister–Appointment–Validity – Parliament in session – Constitution providing that, where vacancy in office of Prime Minister, appointment of new Prime Minister to be considered on ‘next sitting day’ – Speaker and Parliament purporting to appoint new Prime Minister on date of vacancy – Whether valid – Constitution of Papua New Guinea 1975, s 142(2) – (3).

Following the 2007 general election Sir Michael Somare, the member for East Sepik Provincial, was appointed Prime Minister. On 24 March 2011 Sir Michael travelled to Singapore for medical consultation, returning to Papua New Guinea on 28 August 2011. On 17 May 2011 Parliament passed a motion that leave of absence be granted to Sir Michael for the duration of the May meeting of Parliament. On 2 August 2011 N asked the Speaker for leave to move a motion without notice. Leave was granted. N then moved a motion that so much of the Standing Orders be suspended as would prevent the moving of a motion without notice. That motion was carried. N then moved a second motion that, pursuant to s 142(2) of, and Sch 1.10(3) to, the Constitution and the inherent powers of Parliament, that Parliament declare the office of Prime Minister to be vacant and that Parliament proceed forthwith to elect and appoint a new Prime Minister: that motion was carried. The Speaker then called for nominations for the election of the Prime Minister. N moved a motion nominating Peter O’Neill as Prime Minister. Seventy members voted in favour of the motion that Mr O’Neill be elected as Prime Minister; twenty-four members voted against. N then moved a motion to the effect that Parliament be adjourned to allow Mr O’Neill to present himself to the Governor General to be sworn in as Prime Minister. A special reference under s 19 of the Constitution was subsequently brought by the East Sepik Provincial Executive. The reference emanated from decisions made by the National Parliament on 2 August 2011 to declare a vacancy in the office of Prime Minister then held by Sir Michael and immediately thereafter to appoint Peter O’Neill as the new Prime Minister.

Section 142 of the Constitution established the office of Prime Minister and made provision for the appointment, dismissal and removal from office of the Prime Minister; s 134 provided that except as was specifically provided by a constitutional law, the question whether procedures prescribed for Parliament had been complied with was non-justiciable. Also subject of the reference was a subsequent pronouncement by the Speaker of Parliament on 6 September 2011 that Sir Michael had ceased to hold office as member for the East Sepik Provincial seat by reason of his absence without leave during three consecutive meetings of Parliament. The referrer challenged the constitutional validity of Parliament's decisions of 2 August and the Speaker's decision of 6 September.

HELD: Questions in reference answered as set out in Appendix. (Salika DCJ and Sakora J dissenting) Sir Michael Somare to be restored to office as Prime Minister.

(1) The question whether Parliament had complied with the procedures prescribed under s 142 of the Constitution was justiciable. To rule otherwise would be to destroy the body of jurisprudence on constitutional law relating to strict compliance with mandatory provisions of the Constitution, which the courts had developed and applied consistently over almost two decades in many important constitutional cases. It would permit Parliament to commit breaches of constitutional provisions which empowered Parliament to make decisions in important matters of constitutional significance within prescribed parameters with impunity. It would allow Parliament to flout the Constitution, a Constitution that had withstood the test in the country's short history as an independent nation. In the case of s 142 it would produce a high turnover of Prime Ministers and members of the National Executive Council, thereby creating political instability ... *Haiveta v Wingti (No 3)* [1994] PNGLR 197 followed. *Mopio v Speaker* [1977] PNGLR 420 considered.

Per Injia CJ. The National Court had exclusive jurisdiction to determine any questions as to whether the seat of a member of Parliament had become vacant ...

Per Gavara-Nanu J. Parliament was a public body made up of individual members who discharged public functions; its decisions were collectively made by that body of members, therefore any decisions made by Parliament which either went

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beyond or were outside of its powers were amenable to judicial review. The autochthonous nature and the whole scheme of the Constitution allowed for the decisions of Parliament and the Speaker to be amenable to the review jurisdiction of the court where their decisions raised issues of law ...

Per Salika DCJ. Whether the procedures under s 142(5)(c) of the Constitution and s 6 of the Prime Minister and National Executive Council Act were complied with was justiciable. However, under s 134 of the Constitution, everything that went on in Parliament was prima facie non-justiciable, unless the constitutional law specifically said the procedure in a constitutional law had to be followed by Parliament. The events of 2 August 2011 on the floor of Parliament proved that Papua New Guinea was a thriving parliamentary and constitutional democracy. The court had no jurisdiction to inquire into such events because they were not justiciable ...

Per Sakora J (dissenting). The impugned motions on 2 August 2011, not pursuant to s 145 of the Constitution, were within the competence and right of a Member of Parliament to move and within the competence and power of Parliament to entertain and determine according to its own procedures prescribed under its Standing Orders ...

(2) (Salika DCJ and Sakora J dissenting) Consistent with the principle of a government of limited power under the Constitution, Parliament's power to create a vacancy in the office of Prime Minister had to be derived from express provision in the Constitution. Parliament could not under the guise of its 'inherent power' per se or in connection with s 142(2) invent a vacancy situation that did not exist by express provision in the Constitution. The decision of Parliament on 2 August 2011 to declare a vacancy in the office of Prime Minister held by Sir Michael purportedly under s 142(2) of the Constitution ('The Prime Minister shall be appointed ... from time to time as the occasion for the appointment of a Prime Minister arises, by the Head of State, acting in accordance with a decision of the Parliament ...') was unconstitutional and invalid. It was settled law that a vacancy in the office of Prime Minister was a prerequisite for the appointment of a new Prime Minister. As no such vacancy arose it followed that Sir Michael was not lawfully removed from office as Prime Minister. Therefore Sir Michael was to be restored to office as Prime Minister of Papua New Guinea forthwith but (per

Kirriwom J) subject to the inhibitions illustrated at the hearing of his fitness to resume duties and perform the functions of the office of the Prime Minister ... *SCR No 11 of 2008, Re Organic Law on the Integrity of Political Parties and Candidates 2003* [2010] PGSC 3, [2010] 5 LRC 1 followed.

Per Injia CJ. In a constitutional reference under s 19 which concerned a challenge to the validity of a law that was said to infringe a constitutional right, the referrer carried the initial burden of establishing a prima facie case that the law infringed the right in question. The onus of proving the validity of the law then shifted to the party relying on its validity ... *Southern Highlands Provincial Government v Somare* [2007] PGSC 2 and *SCR No 11 of 2008, Re Organic Law on the Integrity of Political Parties and Candidates 2003* [2010] PGSC 3, [2010] 5 LRC 1 followed.

Per curiam. Per Injia CJ. Removal of a Prime Minister by Parliament on specified grounds and the procedures by which he is removed are expressly stipulated in the Constitution. This removes any notion of parliamentary sovereignty similar to that enjoyed by the United Kingdom House of Commons that says that Parliament's decisions, including in law-making, are beyond the reach of judicial scrutiny ...

Per Salika DCJ (dissenting). (i) There were situations when a vacancy in the office of Prime Minister occurred without a process due to the unavailability of the Prime Minister. Such instances included unforeseen circumstances where death or loss at sea occurred and even when any process prescribed under s 142(5) (c) was frustrated or the body responsible to invoke the process refused to act or abused its powers. On the facts, the Prime Minister being critically ill for over five months and therefore unable to perform the duties of Prime Minister, a vacancy arose. The court's inherent powers under s 155(4) of the Constitution could be invoked to declare that Sir Michael was mentally and physically unfit to run the country so that Parliament's decision on 2 August 2011 was in order. The executive power of the people had been abused when the NEC failed to invoke s 142(5)(c) of the Constitution and s 6 of the Prime Minister and National Executive Council Act. That deliberate failure had to be seen as an abuse and misuse of the people's power, such that it was now left to the Supreme Court to find that there was a vacancy in the office of Prime Minister ...

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(ii) It had always been possible to move a motion without notice that Parliament declare a vacancy in the office of Prime Minister for whatever reason, in the same way as a vote of no confidence. It was merely that no one had ever tried it before. That was to test the strength of the government in any democracy and it was a perfectly legitimate parliamentary practice ...

Per Sakora J (dissenting). Life, political or otherwise, was full of instances where an occasion could arise creating a vacancy in the office of Prime Minister, apart from those specifically provided for under s 142(5). For example, a vacancy in the office of Prime Minister could arise from death, absence for long periods and simply going ‘missing’ ...

Per curiam. Per Salika DCJ. There is nothing in the constitutional law or the Prime Minister and National Executive Council Act as to what happens where the National Executive Council failed to invoke s 142(5)(c) and s 6 provisions as soon as possible and where the constitutional process is frustrated. There is a gap in the law and it is a fundamental gap because the NEC could manipulate the process for political convenience rather than act in the best interest of the country ...

(3) The constitutional process for removal of a serving Prime Minister by reason of physical or mental unfitness under s 142(5)(c) in conjunction with s 6 of the Prime Minister and National Executive Council Act 2002 comprised 11 steps. However, much of the factual matters that were the subject of dispute with regard to Sir Michael's medical condition and the treatment he was receiving, his ability to continue in office as Prime Minister and his prospects of resignation or retirement, were based on material and information that related to events that occurred outside of the chamber of Parliament and were not the subject of proceedings on 2 August. The referrer and the interveners supporting it had established a prima facie case that the occasion did not arise under s 142(5)(c) for a new Prime Minister to be appointed in that the conditions for the removal of the Prime Minister were not fulfilled. The purported decision of Parliament made on 2 August 2011, that a vacancy in the office of Prime Minister occurred under s 142(5)(c), was unconstitutional and invalid ...

Per curiam. Per Injia CJ. If the top chief executive of the country is unavailable to perform the duties of the office on medical

grounds for a considerable period, that does raise questions concerning his fitness to continue in office. In other constitutional democracies, if the head of the executive is in that situation it is reasonable for the public to expect him to do the right thing – resign or retire – and do so voluntarily. It is pitiful that laws in most constitutional democracies, including Papua New Guinea, offer no relief from their yearning for a functioning executive and effective leadership. Early forced or compulsory resignations or retirement from public office is nowhere to be found in the laws of constitutional democracies and the public should not hold any illusions that voluntary resignations and retirements will come that easily, either ...

(4) Similarly, the referrer and those interveners supporting it had established a prima facie case that Sir Michael was not of unsound mind and incapable of managing his own affairs within the meaning of Part VIII of the Public Health Act and s 103(3)(b) of the Constitution. They had shown that Sir Michael's medical condition was a temporary ailment that required close management and medical treatment in the period between 30 March to 26 August 2011 and that in that period, he lacked full capacity to perform his official duties. Sir Michael's condition in that period and up to the time he gave evidence before the trial judge did not come within the meaning of a person of unsound mind in s 103(3)(b) and Part VIII of the Public Health Act.

To the extent that Parliament on 2 August purportedly determined that a vacancy existed by virtue of the operation of s 103(3)(b) and proceeded to elect a new Prime Minister under that provision, those decisions were made in breach of s 103(3)(b) and s 142(2) and were unconstitutional and invalid ...

Per Kirriwom J. Sir Michael was not a person of unsound mind within the meaning of s 103(b) of the Constitution and the Public Health Act (Cap 226) ...

(5) Sir Michael had been absent without leave for only the June and August meetings of Parliament. He had been granted leave by Parliament for his absence from the May 2011 meetings. Therefore he had not missed three consecutive sittings without leave and had remained a member of Parliament at all material times. The decision of the Speaker of Parliament to inform Parliament that Sir Michael had ceased to hold office as the member for East

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Sepik Provincial seat – for absence without leave from three consecutive meetings of Parliament – was unconstitutional and invalid. The Speaker’s decision was in breach of ss 104(2)(d) and 135 of the Constitution and of ss 228 and 229 of the Organic Law on National and Local Level Government Elections ...

Per Gavara-Nanu J. (i) Upon a fair and liberal interpretation of s 104(2)(d), which included due consideration of the purpose for which leave was granted to Sir Michael, and the fact that the only type of leave that Parliament could grant to Sir Michael under s 104(2)(d) was leave for three consecutive meetings of Parliament, the leave granted to Sir Michael was by operation of law (s 104(2)(d)) *deemed* to be for three consecutive meetings of Parliament, namely meetings for May, June and August 2011 ...

(ii) The decision by the Speaker to declare Sir Michael’s seat vacant without first giving Sir Michael an opportunity to be heard was in clear breach of the principles of natural justice as embodied in s 59 of the Constitution. The decision was also, pursuant to s 141(a) of the Constitution, harsh and oppressive ...

(6) (Sakora J dissenting) The appointment of a new Prime Minister under the second leg of s 142(2) occurred during the life of Parliament. Under s 142(3) the appointment of a new Prime Minister should be the first matter for consideration ‘on the next sitting day’ after Parliament convened and was informed of a vacancy in the office of Prime Minister. A new Prime Minister should not be appointed on the first day of the session or sitting when Parliament was informed of the resignation of the Prime Minister. The decision of Parliament on 2 August 2011 to appoint Peter O’Neill as the new Prime Minister ‘on the same day’ in the same session of Parliament after it had created a vacancy was unconstitutional and invalid. Moreover, there could be no valid appointment of a new Prime Minister without there being a valid removal of the incumbent Prime Minister ... *Haiveta v Wingti* (No 3) [1994] PNGLR 197 applied.

Per Kirriwom J. The requirement to comply with s 142(3), because Parliament was in session, was mandatory. The impugned motion failed to do so, so that the resolution of Parliament had to be declared void. The appointment of Peter O’Neill as Prime Minister was therefore unconstitutional ...

Per curiam. Per Kirriwom J. When the intention and purpose of the Constitution is clear and unambiguous, there is no need to read other meanings and interpretations into the law that is already clear enough on record that the founding fathers of the supreme law did not envisage nor contemplate ...

Per Salika DCJ. After Parliament declared there was a vacancy in the office of Prime Minister, s 142(3) came into play and as Parliament was in session the appointment of the Prime Minister should take place on the next sitting day. In the instant case the s 142(3) process was bypassed. The net result was that while the declaration of a vacancy in the office of Prime Minister was valid, the appointment of Peter O'Neill as Prime Minister was not ...

Per Sakora J (dissenting). (i) Concerning the events of 2 August 2001 the proper and pertinent question to ask was: did an occasion arise for the appointment of a Prime Minister? There was nothing under the Constitution or any other law to say that Parliament could not do what it did on 2 August 2011. What Parliament did that day was parliamentary business covered by the Standing Orders. Circumstances were present and ripe for Parliament to conclude, as it did by a huge majority vote, that an occasion arose to appoint a new Prime Minister. Therefore Parliament's vote on the question of 'vacancy' was unnecessary: the carrying of the motion with a huge majority constituted an occasion that arose for the appointment of a Prime Minister ...

(ii) In any event, the same result could be justified on the basis of the doctrine of state necessity, which was relevant and applicable to the circumstances of the reference ...

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Independence of Parliamentarians

[2012] 1 LRC 647

Attorney General v Mtikila

(See The Three Branches of Government above)

3 LRC 144 (Zambia)

Attorney General and Another v Kasonde and Others

ZAMBIA

Supreme Court

Bweupe Ag CJ, Sakala, Chaila, Chriwa and Muzyama JJ
20, 26 January, 10 February 1994

(1) Constitutional law – Interpretation of Constitution – Whether literal or purposive approach to be applied – Lacuna – Literal interpretation producing unreasonable, unfair, discrimination – Whether court required to read words into constitutional provision – Constitution of the Republic of Zambia 1991, art 71 (2)(c).

(2) Constitutional law – Parliament – Membership – Political party – ‘Floor-crossing’ – Member of Parliament elected as member of a party – Constitutional provision disqualifying member upon changing party – Members resigning from party – Whether such members disqualified or permitted to sit as independents – Constitution of the Republic of Zambia 1991, art 71 (2)(c).

The respondents were members of Parliament who had been elected in 1991 as members of the Movement for Multi-Party Democracy (‘the MMD’). At a press conference on 12 August 1993, at which a ‘Declaration of Liberty’ was read out which referred to a proposed new ‘National Party’, three of them announced their resignations from the MMD; later the fourth respondent announced her resignation, from the same date. On 13 August 1993 the National Secretary of the MMD notified the Speaker of the National Assembly that the respondents were no longer members of the party. On 27 August 1993 the Speaker wrote to the respondents informing them that under

art 71(2)(c) of the Constitution they had ceased to be members of Parliament as from 13 August. Article 71(2)(c) provided 'A member of the National Assembly shall vacate his seat in the Assembly... In the case of an elected member, if he becomes a member of a political party other than the party, of which he was an authorised candidate when he was elected to the National Assembly or, if having been an independent candidate, he joins a political party'. The respondents, by petitions or originating summons in the High Court against the Attorney General and the MMD, sought declarations that the Speaker's decision was null and void and that they were still members of Parliament. Before the High Court the Attorney General alleged that the respondents had formed and joined the National Party and had thereby vacated their seats under art 71(2)(c) of the Constitution; alternatively, he argued that they were disqualified even if they had not joined another party because the purpose of art 71(2)(c) was to prevent a member who left his or her party from continuing to sit even as an independent. The Registrar of Societies testified that the National Party had been registered on 10 September 1993 and that none of the respondents had been named as an office bearer. In the High Court Mambilima J held that the respondents by their own statements had intended to form and join the National Party referred to at the press conference, and that they had therefore vacated their seats when the party was registered on 10 September 1993. She further held that if a member of Parliament resigned from the party for which he or she was elected but did not join any other party, under art 71(2)(c) that member would retain his or her seat as an independent. The appellants now appealed to the Supreme Court against the latter finding. The four respondents cross-appealed against the decision that they had joined the National Party and thereby vacated their seats.

HELD: Appeal and cross-appeal allowed.

(1) In order to promote the general legislative purpose underlying a constitutional provision, the purposive approach to interpretation was to be preferred to the literal approach which had been applied by the High Court. Where a strict interpretation of a statute gave rise to an unreasonable and unjust situation, the court could remedy it by reading in words necessary to make the constitutional provision fair and non-discriminatory ... *Nothman v Barnet Council* [1979] 1 ALL ER 142

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and *Shariz v President of Pakistan* 1993 All PLD 481 applied. Article 71(2)(c) was clearly intended to prohibit 'floor-crossing' by members of Parliament generally but it discriminated against a member of Parliament who changed his or her party, or a member elected as an independent who later joined a party, by omitting expressly to disqualify a member elected for a party who later resigned to sit as an independent. Such unreasonable and unfair discrimination offended against art 23 of the Constitution and it was the duty of the court to remedy it, which it would do by reading in, at the end of art 71(2)(c), the words 'or vice versa'. The appeal was allowed because, when the respondents resigned from the MMD on 12 August 1993 to sit as independents, they had vacated their seats in the National Assembly in accordance with the purposive interpretation of art 71(2)(c) preferred by the court. The cross-appeal was allowed because there was no evidence that the respondents had joined any other political party ...

[*Editors' note*: Article 23 of the Constitution of Zambia, so far as material, provides: '(1) ... no law shall make any provision that is discriminatory either of itself or in its effect.']

Cases referred to in judgement:

A-G v Achiume (1983) ZR 1, Zamb SC

Barnes v Jarvis [1953] 1 All ER 1061, [1953] 1 WLR 649, UK DC

Barrell (Pauper) v Fordree [1932] AC 676, UK HL

Becke v Smith (1835) 2 M & W 191, 150 ER 724, UK Ex d

DPP v Ngandu (1975) ZR 253, Zamb SC

Eyston v Studd (1574) 2 Plow 463

Heydon's Case (1584) 3 Co Rep 7a

Kammins Ballrooms Co Ltd v Zenith Investments (Torquay) Ltd

[1970] 2 All ER 871, [1971] AC 850, [1970] 3 WLR 287, UK HL

Nothman v Barnet London Borough Council [1978] 1 All ER 1243,

[1978] 1 WLR 220, UK CA; affd [1979] 1 All ER 142, [1979] 1

WLR 67, UK HL

R v Kuntawala (1940) 2 NLR 79, NR HC

R v Tonbridge Overseers (1884) 13 QBD 339, UK CA

Seaford Court Estates Ltd v Asher [1949] 2 All ER 155, [1949] 2

KB 481, UK CA

Shariz v President of Pakistan 1993 All PLD 481, Pak SC

Shop and Store Developments Ltd v LRC [1967] 1 All ER 42, [1967]

1 AC 472, [1967] 2 WLR 35, UK HL

Stock v Frank Jones (Tipton) Ltd [1978] 1 All ER 948, [1978] 1

WLR 231, UK HL

Legislation referred to in judgement**Notes**

Constitution of the Republic of Zambia 1964

Constitution of the Republic of Zambia 1991, arts 11, 19-23, 67,
71(2)(c), 72(2)(a)

Electoral Act 1991, No 2, ss 7 and 8

Local Government (Amendment) Act 1993

[2010] 5 LRC 1

**Supreme Court Reference (11 of 2008),
Re Organic Law on the Integrity of Political Par-
ties and Candidates 2003**

[2010] PGSC 3

PAPUA NEW GUINEA

Supreme Court of Justice

Injia CJ, Salika DCJ, Sakora, Kirriwom and Gavara-Nanu JJ

7 July 2010

(1) Constitutional law – Constitutional reference – Standing – Referrer applying to Supreme Court for interpretation and finding of validity of certain provisions of law – Members of Parliament intervening – At hearing intervener introducing question of constitutionality of provision of law not specified in original reference – Intervener lacking standing – Whether intervener entitled to raise issue – Whether court having discretion to consider additional provision – Constitution of Papua New Guinea 1975, ss 12(4), 19.

(2) Constitutional law – Constitution – Amendment – Validity of amendment – ‘Basic structure’ doctrine – Enactment of legislation restricting member of Parliament from withdrawing support for political party and compelling MP to vote only in accordance with party members’ resolution on certain matters – Whether Parliament having authority to alter structure of Constitution – Whether amendments consistent with Constitution – Whether amendments valid – Constitution of Papua New Guinea 1975, ss 12, 50, 111, 114, 127, 129–130 – Organic Law on the Integrity of the Political Parties and Candidates 2003.

(3) Constitutional law – Fundamental rights – Freedom of association and assembly – Limitation – Enactment of legislation

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restricting member of Parliament from withdrawing support for political party – Provisions providing for misconduct investigation where member of Parliament resigning from party – Whether provisions infringing freedom of association and assembly – Whether saved as reasonably justifiable in a democratic society – Whether valid – Constitution of Papua New Guinea 1975, ss 38, 47 – Organic Law on the Integrity of the Political Parties and Candidates 2003, ss 57–61, 65–67.

(4) Constitutional law – Fundamental rights – Right to vote and stand for public office – Right to exercise public functions – Implication for members of Parliament – Enactment of legislation compelling member of Parliament to vote only in accordance with party members’ resolution on certain matters – Whether provisions infringing constitutional rights of members of Parliament – Whether valid – Relevant considerations – Constitution of Papua New Guinea 1975, s 50 – Organic Law on the Integrity of the Political Parties and Candidates 2003, ss 65–74.

(5) Constitutional law – Parliament – Privilege – Freedom of speech, debate and proceeding in Parliament – Enactment of legislation compelling member of Parliament to vote only in accordance with party members’ resolution on certain matters – Whether provisions infringing parliamentary privilege – Relevant considerations – Bill of Rights (1688), s 9 – Constitution of Papua New Guinea 1975, s 115 – Organic Law on the Integrity of the Political Parties and Candidates 2003, ss 65–67, 69–70, 72–73.

(6) Constitutional law – Political parties – Funding – Enactment of legislation permitting non-citizens to make financial contributions to political party – Constitution prohibiting non-citizens from making such contributions – Constitution prohibiting candidates for election from accepting such contributions – Whether legislation infringing Constitution – Whether valid – Constitution of Papua New Guinea 1975, ss 129–130 – Organic Law on the Integrity of the Political Parties and Candidates 2003, s 81.

The referrer, the Executive Council of the Fly River Provincial Government, brought a reference to the Supreme Court as to the constitutionality of the Organic Law on the Integrity of the Political Parties and Candidates 2003 (‘the OLIPPAC’). Prior to the enactment of the OLIPPAC, the political system in Papua New Guinea (‘PNG’) was fluid and political instability was rife,

particularly during the formation of government after general elections, when it was common for an MP to withdraw support from the political party he or she belonged to when elected and to join another political party instead. It was considered necessary to reform the law and, with overwhelming bipartisan support, ss 12, 111, 114, 127, 129–130 of the Constitution of Papua New Guinea 1975 were amended in order to authorise the enactment of the OLIPPAC. The amendments to the Constitution and the subsequent enactment of the OLIPPAC were implemented without any question raised as to their constitutionality until the instant reference. The intended effect of ss 57–61, 65–67 of the OLIPPAC was to restrict MPs from withdrawing support for the political parties of which they were members. If an MP resigned from a political party during the parliamentary term, the OLIPPAC provided for an investigation by the Ombudsman Commission into the resignation and a determination whether the MP was guilty of misconduct, during which time the MP had to remain a member of the party and exercise his or her voting rights in accordance with party instructions. The intended effect of ss 65–74 was to compel an MP who was an endorsed candidate of a registered party at an election to vote only in accordance with a resolution of the members on certain matters, including a motion of no confidence in the Prime Minister, the election of a Prime Minister (other than following a general election), the approval of the national budget and the enactment of a constitutional law. During the hearing before the Supreme Court, counsel for the seventh intervenor introduced a question as to the constitutionality of s 12(4) of the Constitution, which was not included in the original reference to the court. The following issues arose for consideration: (i) whether the seventh intervenor had standing under s 19 of the Constitution to raise s 12(4) as an issue in the instant reference; (ii) whether the amendments to the Constitution which enabled the OLIPPAC to be enacted were valid; (iii) whether the OLIPPAC provisions contravened s 47 of the Constitution, which guaranteed the freedom of association and assembly, taking into consideration s 38 of the Constitution, which provided that a right could be regulated or restricted where the purpose of such regulation or restriction fulfilled certain conditions, including being ‘reasonably justifiable in a democratic society having a proper respect for the rights and dignity of mankind’; (iv) whether the OLIPPAC provisions contravened s 50 of the Constitution, which guaranteed the right to vote and stand for public office;

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(v) whether the OLIPPAC provisions contravened s 115 of the Constitution, which provided for the privilege and immunities of Parliament, including (sub-s (2)) the freedom of speech, debate and proceeding in the Parliament and (vi) whether s 81 of the OLIPPAC, which permitted non-citizens to make financial contributions to a registered political party, contravened ss 129(1)(c) and 130(1)(b) of the Constitution, which prohibited non-citizens from making, and candidates from accepting, any such contributions ...

(1) The seventh intervenor conceded correctly that he lacked standing to bring a reference questioning the constitutional validity of s 12(4) of the Constitution. Section 19 of the Constitution, which prescribed the parties who had standing to apply to the Supreme Court on a special reference, did not include members of Parliament. However, in discharging its constitutional function under s 19 to ‘give its opinion on any question relating to the interpretation or application of any provision of a Constitutional Law, including ... any question as to the validity of a law’, the court had the discretion to have regard to all relevant constitutional provisions that had bearing on the issues raised in the reference, even if those provisions were not expressly mentioned in the reference. Section 12(4) was part of the amendments made to the Constitution to authorise the enactment of the OLIPPAC and was interwoven with the constitutional and the OLIPPAC provisions in question in the instant matter and could, thus, be considered by the court notwithstanding the seventh intervenor’s lack of standing. Moreover, it was within the general power of the court under s 19 to give its opinion on the constitutionality of other provisions of a law or a proposed law which, while not themselves part of the reference, were directly affected by the interpretation to be given by the court of the specific provisions raised in such reference ...

(2) The correct approach to interpreting the PNG Constitution, which was an autochthonous law, was to adopt the approach that the Constitution itself provided and not to adopt legal doctrines or constitutional interpretations developed elsewhere. The philosophical and ideological underpinnings of democratic governments and constitutional democracies embodied in the 'basic structure' doctrine, developed by courts in other jurisdictions, were inapplicable in the interpretation of the PNG Constitution. The structure of the Constitution was

conceptual only and of itself did not impose any limits on the exercise of power. When questions arose as to the interpretation and application of a constitutional law, such questions had to be determined against prescribed limits on those powers. Questions raised in the instant matter as to the amendments to the Constitution and the enactment of the OLIPPAC provisions brought into play the limits on government powers prescribed by the Constitution. It was within Parliament's authority to alter the structure of the Constitution and those questions were justiciable. Section 12 of the Constitution prescribed the formal and mandatory requirements for enacting an Organic Law as that the law (i) had to be made in respect of a matter expressly authorised by the Constitution; (ii) could not be inconsistent with the Constitution and (iii) had to be expressed to be an Organic Law. The OLIPPAC fulfilled those requirements. Overall, the amendments to ss 12, 111, 114, 127, 129–130 of the Constitution were consistent with other provisions of the Constitution, except to the extent that those amendments restricted or prohibited the exercise of the right under s 50(1) (e) to hold public office and exercise public functions. Section 50(2) provided that the right could be 'regulated by a law that is reasonably justifiable for the purpose in a democratic society that has a proper regard for the rights and dignity of mankind'. It was trite law that whilst it was permissible for a law to regulate the exercise of a right, it should not restrict or prohibit the exercise of that right. To the extent that the amended sections of the Constitution permitted the OLIPPAC to impose restrictions and prohibitions on the exercise of the right in s 50(1)(e), those amended sections were inconsistent with s 50(2) and were therefore of no force or effect ... Dicta of Kapi J in *SCR No 2 of 1982; Re Organic Law on National Elections (Amendment) Act 1981* [1982] PNGLR 214 at 239–240 applied.

Per curiam. The Constitution has unique and dynamic features as a complete code of law that is comprehensive and exhaustive on every aspect of good governance. The sheer volume in content bears testimony to this fact. Comparing the Papua New Guinea Constitution with the Constitutions of modern constitutional democracies around the world, it stands out as perhaps the most voluminous and comprehensive. The Constitution has over 270 substantive provisions with four schedules which cover over 200 pages. In addition to that are various Organic Laws which are also constitutional laws. The Constitution has other unique

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characteristics. The Constitution itself provides the principles of interpretation and the sources of aids to interpretation. Unless expressly provided for in the Constitution, recourse to doctrines of constitutional interpretation and materials developed or used elsewhere as aids should be discouraged. It is of course useful for the court to be assisted in interpreting provisions of constitutional laws and to have access to information and materials from countries with constitutional systems similar to ours and, more often than not, the court may in an appropriate case require counsel to provide them ...

(3) A political party represented a purely voluntary association of persons who shared a common political ideology and policy platform. The effect, inter alia, of ss 57–61, 65–67 of the OLIPPAC was that an MP was prevented from leaving a political party that he or she had freely joined, except on given grounds, and, even where an MP resigned on the basis of a specified ground, he or she was compelled to remain with the party from which he or she had chosen to resign for an indefinite period pending the decision of the Ombudsman Commission as to whether the MP was guilty of misconduct in office. The effect of those sections contravened the MP's right to freedom of association pursuant to s 47 of the Constitution. Although that right could be regulated or restricted by a law which fulfilled the conditions set out in s 38 of the Constitution, for a law to be compliant with s 38, it had to be passed to give effect to certain public interests and reasonably justifiable in a democratic society, having proper respect for the rights and dignity of mankind. The restrictions imposed by the OLIPPAC were not necessary to achieve any of the purposes set out in s 38 and could not be justified as the only available way to bring about political stability. The previous unacceptable conduct of many MPs could be corrected by Parliament through the education of both members and the electorate. Nor was the OLIPPAC reasonably justifiable in a democratic society. A law which empowered a state investigative body to investigate the voluntary activities of a political party with respect to membership and resignation of MPs posed a real threat to individual liberties and freedoms. Such a law was in fact destructive to the survival of a multi-party system and the participatory system of democracy that underlay the PNG system of government. Sections 57–61, 65–67 of the OLIPPAC were, accordingly, inconsistent with s 47 of the Constitution ... *Karingu, Enforcement of Rights Pursuant to Constitution s 57* [1988–89] PNGLR 276 applied.

(4) An MP's right to vote on a proposed law was amongst the most fundamental of his or her duties and there was no authority to deny the performance of that duty under any circumstance. The right to vote had to be a real exercise of legislative power and not one that was pre-determined by decisions made and instructions issued outside of the parliamentary chamber. Section 50(1)(e), when read liberally, provided for the right of an MP to be allowed a reasonable opportunity to perform the function of the office to which he had been elected, the right to express himself or herself freely in Parliament during debates and to have complete freedom in debates and to vote on a Bill for enactment. The restrictions and prohibitions imposed on MPs' performance of their representative duties in Parliament under s 50(1)(e) of the Constitution by ss 65–67, 69(3), 70, 72(1)(a)–(b), (2) and 73(1)(a)–(b), (2) of the OLIPPAC were unconstitutional. The OLIPPAC provisions restricted and prohibited an MP's exercise of his or her right under s 50(1)(e) in contravention of s 50(2), which authorised a law to regulate, rather than restrict, that right. Where a law restricted or prohibited the exercise of the right under s 50, the law was invalid for that reason alone, in which case it was not necessary to consider the latter part of s 50(2). Nevertheless, a prima face case of infringement of s 50(1)(e) had been established and the OLIPPAC provisions were not reasonably justifiable for the purpose for which they were enacted, in a democratic society, having proper regard for the rights and dignity of mankind. Accordingly, ss 65–67, 69(3), 70, 72(1)(a)–(b), (2) and 73(1)(a)–(b), (2) of the OLIPPAC were inconsistent with s 50 of the Constitution and were declared unconstitutional ...

(5) The term 'parliamentary privileges' in s 115 of the Constitution was a broad concept that embraced an MP's rights. The office an MP held entailed the very essential element of an MP's rights to exercise his or her mind freely on the issues raised and debated in Parliament and to speak and express his or her views on such issues. Historically, the primary function of Parliament was discussion, debate and decision. That could not be achieved when the people's duly elected representatives were not free and independent. To preserve the hard-won powers of Parliament, and to enable the unrestricted and unhindered exercise of those powers, certain rules were promulgated which accorded MPs certain legal rights described as 'privileges and immunities'. One such important right was the freedom of speech, debate and

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proceeding in Parliament, which right preserved the security and independence of parliamentarians and was essential for an MP to engage in full and meaningful debates in Parliament. The rights and privileges accorded to MPs by s 115 were provided by constitutional law and privileges. They could be qualified only by an amendment to the Constitution or by an Organic Law that was expressly authorised by the Constitution for that purpose. Neither of those conditions had been met and the rights and privileges under s 115 could not be removed by any other law without direct contravention of the Constitution. Accordingly, ss 65–67, 69–70, 72–73 of the OLIPPAC were unconstitutional and invalid ... Bill of Rights (1688), *Erskine May's Treatise on the law, privileges, proceedings and usage of Parliament* (18th edn, 1971) and Commonwealth (Latimer House) Principles on the Accountability of and the Relationship between the Three Branches of Government (2003) approved.

(6) Section 81, as conceded by the parties, was inconsistent with the Constitution because it allowed non-citizens to make financial contributions to a political party, which was expressly prohibited by ss 129(1)(c) and 130(1)(b) of the Constitution. An Organic Law provision in respect of a matter that was not authorised to be made by an Organic Law was inconsistent with the Constitution and, therefore, invalid ...

[2011] 3 LRC 1

R v Chaytor and Others

[2010] UKSC 52

UNITED KINGDOM

Supreme Court

Lord Phillips P, Lord Hope DP, Lord Rodger, Lady Hale, Lord Brown, Lord Mance, Lord Collins, Lord Kerr and Lord Clarke JJSC
18–19 October, 10 November, 1 December 2010

Constitutional law – Parliament – Parliamentary privilege – Scope – Freedom of speech and proceedings in Parliament – Exclusive jurisdiction – Members of Parliament – Criminal charges – Members charged with offences of false accounting in submitting

claims for allowances and expenses – Whether such charges triable in criminal courts – Whether such claims amounting to ‘proceedings in Parliament’ – Whether within exclusive jurisdiction of Parliament – Whether members protected by privilege from trial in criminal courts – Bill of Rights 1689, art 9 – Defamation Act 1996, s 13(4), (5)(b).

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The appellants, three former members of Parliament and a member of the House of Lords who was granted permission to intervene, were separately charged with offences of false accounting in relation to claims which they had submitted to the appropriate parliamentary authority, the Fees Office of the Department of Finance and Administration, for allowances and expenses. Before trial they challenged the jurisdiction of the court to try them, on the ground that the criminal proceedings would infringe parliamentary privilege by bringing into question ‘proceedings in Parliament’ over which, under art 9 of the Bill of Rights 1689, no court had jurisdiction and by invading the exclusive jurisdiction of Parliament. This claim was dismissed at first instance and by the Court of Appeal, which, however, certified that the matter raised a question of law of general public importance. The Supreme Court granted leave to appeal.

HELD: Appeals dismissed.

(i) The submission of claim forms for allowances and expenses was an incident of the administration of Parliament, not part of the proceedings in Parliament, and therefore did not qualify for the protection of parliamentary privilege. Scrutiny of such claims by the courts would have no adverse impact on the core or essential business of Parliament, which consisted of collective deliberation and decision making, and would not inhibit debate or freedom of speech therein or any of the varied activities in which members of Parliament engaged in performing their parliamentary duties; it would only inhibit the making of dishonest claims. There were good policy reasons for giving art 9 of the Bill of Rights 1689 a narrow ambit, restricting it to the important purpose for which it was enacted – freedom for Parliament to conduct its legislative and deliberative business without interference from the Crown or the Crown’s judges. The protection of art 9 was absolute, capable of variation by primary legislation but not capable of waiver, even by parliamentary resolution. References in s 13(4) of the Defamation Act 1996 to protection from legal

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liability for words spoken or things done ‘for the purposes of or incidental to, any proceeding in Parliament’ and in s 13(5)(b) to ‘the presentation or submission of a document to either House or a committee’ were not capable of extending the ambit of art 9 and could not apply to the conduct alleged in the charges against the appellants ...

Per Lord Rodger. The prosecution of the appellants did not infringe art 9 of the Bill of Rights by impeaching or questioning the freedom of speech, the freedom of debates or the freedom of proceedings of the House or its members ...

Per curiam. Per Lord Phillips. Although the extent of parliamentary privilege is ultimately a matter for the courts, it is one on which the court will pay careful regard to any views expressed in Parliament by either House or by bodies or individuals in a position to speak on the matter with authority ... Dicta of Lord Denman CJ in *Stockdale v Hansard* (1839) 9 Ad & E 1 at 147–148, 157 considered.

(ii) The exclusive cognisance of the House of Commons posed no bar to the jurisdiction of the Crown Court to try the appellants. Parliament had never challenged, in general, the application of criminal law within its precincts and had accepted that the mere fact that a crime had been committed within the precincts was no bar to the jurisdiction of the criminal courts. The House of Commons had not asserted an exclusive jurisdiction to deal with criminal conduct, even when that related to or interfered with proceedings in the House or a committee; when appropriate, the police would be invited to intervene with a view to prosecution. The House had asserted a disciplinary jurisdiction over claims for allowances and expenses and had set up a review of such claims, but had not asserted exclusive jurisdiction over them. Indeed, the House itself had referred to the police, for consideration of criminal proceedings, the possibility that criminal offences might have been committed and had excluded from that review any claims that were under police investigation ...

Per Lord Rodger. Unless a matter fell within the exclusive jurisdiction of Parliament, so that it did not fall within the jurisdiction of the ordinary civil or criminal courts or of any other body, art 9 could not itself legitimately purport to exclude

all consideration of the matter outside Parliament: art 9 could not be intended to apply to any matter for which Parliament could not validly claim the privilege of exclusive cognisance. Therefore there was really only one basic question: did the matter for which the appellants were being prosecuted fall within the exclusive jurisdiction of Parliament, more specifically, of the House of Commons? The House neither had nor claimed any power to try anyone for a criminal offence; the most the House could do was to punish the offender for contempt, a jurisdiction which was not exclusive because it overlapped with the jurisdiction of the ordinary courts to deal with the offence. Since 1667 the House of Commons had not claimed the privilege of exclusive cognisance of conduct constituting an 'ordinary crime', even when committed by a member of Parliament within the precincts of the House. While the appellants' alleged conduct could well be regarded as a contempt which the House could punish and presupposed the existence of the system of allowances, nothing in the particulars in the indictments indicated, or even suggested, that the prosecution of the charges would raise any issues as to decisions of the House or of its Committees, or of any officers acting on its behalf, as to the system or its operation. Nor would the prosecution touch on any other core activities of members of the House which the privilege of exclusive cognisance existed to protect: their right, for example, to debate, to speak, to vote, to give notice of a motion, to present a petition, to serve on a committee and to present a report to the House ... Dicta of Stephen J in *Bradlaugh v Gossett* (1884) 12 QBD 271 at 283 applied. *Ex p Wason* (1869) LR 4 QB 573 distinguished.

Per Lord Clarke. The privilege of exclusive cognisance belonged to Parliament, which could waive or relinquish it, not to individual members. Parliament had never asserted that privilege in cases of the type before the court and had waived or relinquished any right it might otherwise have had to claim the privilege in the present matter, having referred the investigation of allegations such as those made against the appellants to the police with a view to possible prosecution and having co-operated with the police; Parliament could not then assert the exclusive cognisance relied upon and it was not open to the appellants as individual members to do so. The dictum of Lord Brougham LC to the contrary, made arguendo in *Wellesley v Duke of Beaufort* (1831) 2 Russ & M 639 at 655, might apply to the art 9 privilege but could not apply to the exclusive cognisance privilege ... Dicta of Lord Brougham LC

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in *Wellesley v Duke of Beaufort* (1831) 2 Russ & M 639 at 655 considered.

Per curiam. Per Lord Phillips. (i) This does not exclude the possibility that, in the course of a criminal prosecution, issues might arise involving areas of inquiry precluded by parliamentary privilege, although that seemed unlikely in view of the particulars of the charges in the instant cases ...

(ii) Where a crime is committed within the House of Commons, it may well also constitute a contempt of Parliament; the courts and Parliament have different, overlapping jurisdictions. Where a prosecution is brought, Parliament will suspend any disciplinary proceedings; conversely, if a member is disciplined by the House, the Crown Prosecution Service will consider whether a prosecution would be in the public interest ...

(iii) Parliament has by legislative and administrative changes to a large extent relinquished any claim to have exclusive cognisance of the administrative business of the two Houses. Decisions relating to matters of administration are normally taken by parliamentary committees and, while such decisions are protected by privilege from attack in the courts, their implementation is not subject to privilege ...

(iv) In actions in contract and tort arising out of the internal administration of the House, the courts are unlikely to accept the submission, in the unlikely event that it is advanced, that their jurisdiction is precluded by the exclusive cognisance of the House. However, different considerations apply to claims for judicial review in relation to the conduct by each House of its internal affairs. The courts respect the right of each House to reach its own decision in relation to such matters. However, the apparent presumption in Parliament that statutes do not apply to activities within the Palace of Westminster unless they expressly provide to the contrary is open to question ... *R v Graham-Campbell, Ex p Herbert* [1935] 1 KB 594, *Bear v State of South Australia* (1981) 48 SAIR 604, *Re McGuinness's Application* [1997] NI 359 and *R v Parliamentary Commissioner for Standards, ex p Al Fayed* [1998] 1 WLR 669 considered.

[1998] SC 626

P.V. Narasimha Rao vs State**INDIA**

Supreme Court Of India

(Cbi/Spe)

S.C.Agrawal, J. S.P.Bharucha J. G.N.Ray, J. S.C. Agrawal, J.

17 April 1998

{see: <http://indiankanoon.org/doc/1708249/>}

[2011] 4 LRC 109

Leigh v Attorney General

[2010] NZCA 624

NEW ZEALAND

Court of Appeal

William Young J, O'Regan P and Ellen France J

17 June, 17 December 2010

(1) Tort – Defamation – Defamatory statements – Meaning – Action for defamation – Application to strike out – Applicable principles – Claimant working as government adviser – Claimant leaving position following decision to appoint supervisor overseeing content of claimant's work – Briefing paper dealing with claimant's work and circumstances of departure – Claimant's work criticised by minister in Parliament – Context of criticism – Whether statements capable of bearing defamatory meaning – Whether action to be struck out.

(2) Constitutional law – Parliament – Parliamentary privilege – Scope – Freedom of speech and proceedings in Parliament – Absolute privilege – Statements in Parliament – Defamation – Alleged defamatory statements repeated by member in Parliament – Whether protected by parliamentary privilege – Whether a bar to claimant's plea of republication – Bill of Rights 1688 (UK), art 9.

(3) Constitutional law – Parliament – Parliamentary privilege – Scope – Freedom of speech and proceedings in Parliament – Absolute privilege – Defamation – Preparation of materials for the purpose of answering a parliamentary question – Whether amounting to 'proceedings in Parliament' – Whether protected by absolutely privilege – Bill of Rights 1688 (UK), art 9 – Defamation Act 1992, s 13.

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(4) Tort – Negligence – Negligent misstatement – Ingredients – Application to strike out proceedings – Claimant working as government adviser – Claimant leaving position following decision to appoint supervisor overseeing content of claimant’s work – Briefing paper dealing with claimant’s work and circumstances of departure – Whether beyond proximity required for negligent misstatement action – Policy considerations – Whether action to be struck out.

L worked in the Ministry for the Environment between July 2005 and May 2006 as a communications adviser in relation to climate change issues. In mid-May 2006 another communications adviser, C, was appointed to oversee the content of the communications strategy on which L was working. L left shortly afterwards. In November 2007 L was interviewed by a reporter about the circumstances in which C had been employed. L apparently confirmed that she saw C’s appointment as politically motivated. The matter was canvassed in a news item broadcast on television and questions were subsequently asked in Parliament about the circumstances of C’s appointment. The then Minister for the Environment requested information from the ministry to allow him to respond to further parliamentary questions. G, the then Deputy Secretary of the ministry, was asked to provide information about L’s contract with the ministry and the circumstances of her departure. G prepared a briefing paper outlining the circumstances. L claimed that the content of the briefing paper was defamatory, suggesting that she was incompetent, irresponsible, overly emotional and not fit to be employed by the government as a professional communications consultant (the first cause of action). She also claimed that the briefing paper was presented to the minister at a meeting at which further defamatory statements were made orally (the second cause of action). During question time in the House of Representatives the minister made various criticisms of L’s performance during her time at the ministry. In proceedings against the Attorney General L claimed that the statements in the House were republications of the defamations in the briefing paper and in the oral statements, which aggravated the damage suffered as a result of the original defamation. Finally, L claimed that the ministry was negligent in not taking due care in the preparation of the briefing paper and the oral statements (the third cause of action). The respondents applied to strike out L’s claim on a number of grounds. The judge found that the statements in the briefing paper were incapable of bearing the

defamatory meanings attributed and struck out the first cause of action. The judge also concluded that the oral statements, while not capable of bearing the pleaded meaning that L was overly emotional, could bear the other defamatory meanings alleged. The judge found that that s 13 of the Defamation Act 1992, which provided that proceedings in the House were protected by absolute privilege, and art 9 of the Bill of Rights 1688, which provided that debates or proceedings in Parliament should not be questioned in any court, precluded the pleading that the minister's statement amounted to a republication of the briefing paper or the oral statements. The judge found that the relationship between L and the ministry was not sufficiently proximate to impose a duty of care, that policy considerations militated against the imposition of a duty of care and therefore the third cause of action was struck out. L appealed and the respondents cross-appealed to the Court of Appeal, which had to determine the following issues. (a) Were the statements capable of bearing the defamatory meanings pleaded? (b) Could L claim for damage to her reputation resulting from what the minister had said about her in Parliament and subsequent media reporting of what the minister had said? (c) Were the statements made by the ministry and G covered by absolute privilege? (d) Did the ministry owe a duty of care to L in preparing the statements?

HELD: Appeal allowed in part. First cause of action reinstated. Cross-appeal dismissed.

(1) There was no dispute about the principles applicable to strike-out: the causes of action had to be so clearly untenable that they could not possibly succeed. As pleaded, there was an available contextual analysis to support the alleged defamatory meaning. There was something of a political imbroglio developing in the course of which L had been critical of the government. It was pleaded that the ministry knew that the statements would be used by the minister for political purposes, including 'to defend allegations of lack of integrity' in the conduct of the relevant minister. What was said was capable of being read as suggesting there was 'no smoke without fire', especially when the apparent criticism was tied in to the reported circumstances of L's departure. The omission of anything favourable to L in the briefing paper was potentially very important, especially given that she was a senior communications specialist contracted for her experience and expertise. Even taking a neutral context, the words could still bear the alleged defamatory

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meaning. The ministry's response, while ambiguous, to the extent it reflected on L's character, was capable of being read against her. The references to the six drafts, to a review by C which 'indicated desirable changes', and to L responding by packing up and leaving before the end of her contract without any explanation other than to charge for work including the 15 minutes in the office on her last day were at least capable of interpretation as irresponsibility. Similarly, the ordinary reasonable person might infer that L's state of concern was an overly emotional response to the fact someone else, C, had been brought in to oversee her work. Therefore the statements in the briefing paper were capable of bearing the defamatory meanings pleaded ... Dicta of Blanchard J in *New Zealand Magazines Ltd v Hadlee (No 2)* [2005] NZAR 621 and *A-G v Prince* [1998] 1 NZLR 262 applied.

(2) The concept underlying art 9 was the need to ensure that members of Parliament could speak freely without fear of later legal consequences. L, in seeking to rely on republication in the House, had questioned debate in the House in a manner contrary to art 9. If the minister's comments could be relied on in the way pleaded, that would potentially have constrained debate and also entailed the risk of the court stepping into an area within Parliament's exclusive jurisdiction. It was clear that the most significant consequences for L were directly associated with what the minister had said in the House. More importantly, it was inherent in the allegation, that what was said was defamatory, that it was false. Where the publication in the House was relied on to make the respondents liable or expose them to greater liability, art 9 was a bar to the pleaded republication. Reference to media statements as republications also involved a challenge to what the minister had said ... Dicta of Lord Browne-Wilkinson in *Prebble v Television New Zealand Ltd* [1994] 1 LRC 122 at 130, 133 and of Jerrard JA (dissenting) in *Erglis v Buckley* [2004] QCA 223, [2004] 2 Qd R 599 at [31], [34], applied. *Buchanan v Jennings* [2004] UKPC 36, [2005] 1 LRC 813 distinguished.

Per curiam. Cases such as the present involve a tension between the competing values of protecting robust democracy and protecting the reputation of individuals. In terms of where the balance is struck between the competing values, it is relevant that the standing orders provide for those persons who consider their reputation has been damaged by a reference in the House to seek a response which can be incorporated into the parliamentary

record. It is not the case that persons in L's position need be left without any remedy at all ...

(3) Whether or not the preparation of materials for the purpose of answering a parliamentary question amounted to 'proceedings in the House' protected by absolute privilege under art 9 of the Bill of Rights 1688, as retained by s 13 of the Defamation Act 1992, was a finely balanced issue. There were good policy reasons for giving the absolute protection afforded by art 9 a narrow ambit and the balance was best struck by not extending it to the preparatory materials. It was not as though there was no protection for those in the position of G as the defence of qualified privilege was available to them ... Dicta of Lord Phillips in *R v Chaytor* [2010] UKSC 52, [2011] 3 LRC 1 at [28], [47], [61], applied.

Per curiam. The jurisprudence on art 9 is developing and the legislation allows for that ... Dicta of Lord Browne-Wilkinson in *Prebble v Television New Zealand Ltd* [1994] 1 LRC 122 at 129–130 considered.

(3) The briefing paper was not prepared as a reference or to address L's competence for the sake of prospective employers. Rather, material had to be prepared in what appeared to be a short time frame to explain the circumstances of L's departure in the context of criticism about how it was C was retained. The case fell outside the requisite proximity for an action for negligent misstatement. Policy considerations were also against the imposition of a duty of care ... *Midland Metals Overseas Pte Ltd v Christchurch Press Co Ltd* [2002] 2 NZLR 289 considered. *Spring v Guardian Assurance plc* [1994] 4 LRC 302 distinguished.

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[2013] 1 LRC 274

**Siddique and Others v Federation
of Pakistan and Others**

PAKISTAN

Supreme Court

Iftikhar Muhammad Chaudhry CJ, Jawwad S Khawaja

and Khilji Arif Hussain JJ

14–15, 18–19 June 2012

(1) Constitutional law – Fundamental rights – Enforcement – Public interest jurisdiction – Question of public importance – Qualification or disqualification of members of legislature – Prime Minister convicted of contempt of court for wilfully flouting, disregarding and disobeying court order – Petition seeking disqualification of Prime Minister from membership of Parliament – Whether petition required to specify fundamental rights infringed – Constitution of Pakistan 1973, arts 9, 10A, 14, 17, 25, 184(3).

(2) Constitutionallaw–Parliament–Membership–Disqualification–Jurisdiction – Speaker – Court – Disqualification for conviction of acting in manner prejudicial to integrity or independence of judiciary or which defamed or brought judiciary into ridicule – Prime Minister convicted of contempt of court for wilfully flouting, disregarding and disobeying court order – Constitution authorising Speaker to refer to Election Commission ‘any question’ of disqualification of member of Parliament – Speaker ruling that court order did not give rise to ‘any question’ of disqualification of Prime Minister – Whether Speaker acting in administrative or quasi-judicial capacity when deciding whether any such question arose – Whether Speaker’s ruling justiciable by Supreme Court – Whether matter to be remitted to Speaker for decision – Whether Prime Minister disqualified from being member of Parliament – Relevant considerations – Whether acts or decisions of Prime Minister during any such disqualification valid – Constitution of Pakistan 1973, arts 63(1) – (2), 69, 204(2).

In March 2008 the Attorney General of Pakistan wrote to his Swiss counterpart withdrawing a request which had been made by the Government of Pakistan in 1997 to be made a civil party to proceedings brought by the Swiss authorities against Z and others relating to money laundering and payment of illegal

commissions and kickbacks by two Swiss companies to obtain Pakistan government contracts. The Attorney General's request was made in pursuance of the National Reconciliation Ordinance 2007 and stated that the Pakistan government wished to withdraw from the Swiss proceedings and no longer wished to proceed against Z. In September 2008 Z was elected President of Pakistan. On 16 December 2009 the Supreme Court of Pakistan declared that the Ordinance was ultra vires the Constitution and that all proceedings terminated by the Ordinance were to be treated as being revived, and directed the government to take immediate steps to seek the revival of the request to be added as a civil party in the Swiss proceedings. In January 2012, after the government had failed to take action to implement the court's order, the court initiated contempt proceedings against the respondent, the Prime Minister, for wilfully flouting, disregarding and disobeying the order. Article 63(1)(g) of the Constitution provided that a person was to be disqualified from being a member of Parliament for a period of five years if he was convicted by a court for acting in any manner prejudicial to the integrity or independence of the judiciary or which defamed or brought the judiciary into ridicule. On 26 April 2012 the court (in *Federation of Pakistan v Gilani* [2013] 1 LRC 223) found the respondent guilty of contempt and, mindful that his conviction was likely to cause him to be disqualified from being a member of Parliament under art 63(1) (g), imposed a symbolic sentence of imprisonment till the rising of the court. The respondent did not appeal against the finding of the court and conviction, which was notified to the Speaker of the National Assembly by the assistant registrar of the court. Article 63(2) provided that if 'any question' arose whether a member of Parliament had become disqualified from being a member the Speaker was required, unless he decided that no such question had arisen, to refer the question to the Election Commission. The Speaker ruled that the court order did not give rise to any question of the disqualification of the respondent because the charges against him were not 'relatable' to the grounds of disqualification in art 63(1)(g). The petitioners, who included Opposition leaders, filed constitutional petitions with the Supreme Court claiming that the Speaker's ruling violated their fundamental rights. The respondents to the petition, who included the Prime Minister and the Speaker supported by the Attorney General, contended that the petitions did not, as required by art 184(3) of the Constitution, involve a question of public importance with reference to the enforcement of any fundamental rights conferred

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by the Constitution, since they did not specify which, if any, fundamental rights had been infringed. The respondents further contended that the Speaker's ruling was not justiciable, because art 63(2) gave the Speaker complete unfettered and exclusive discretion to decide if 'any question ... has arisen' whether a member of Parliament had become disqualified, and the Speaker's ruling was part of the proceedings of Parliament which the courts were barred from inquiring into by art 69, which further provided that the validity of any proceedings in Parliament could not be called into question on the ground of irregularity, and that no officer or member was subject to the jurisdiction of any court in respect of the exercise of powers for 'regulating procedure or the conduct of business, or for maintaining order' in Parliament.

HELD: Petitions granted; declaration that respondent Syed Yousaf Raza Gillani was disqualified from being a member of the Majlis-e-Shoora (Parliament) and ceased to be Prime Minister of Pakistan with effect from 26 April 2012; direction to Election Commission to issue notification of disqualification of Syed Yousaf Raza Gillani from being a member of the Majlis-e-Shoora (Parliament) with effect from 26 April 2012.

(1) In order successfully to invoke the public interest jurisdiction of the court under art 184(3) of the Constitution a petitioner was required to satisfy the two-fold requirement that the petition raised a question of public importance, which was with reference to the enforcement of fundamental rights. The petitions before the court fulfilled that test because (i) the Prime Minister had been convicted by the Supreme Court of wilfully, deliberately and persistently defying a direction issued by the court, and such persistent defiance at the highest level was substantially detrimental to the administration of justice and tended to bring not only the court but also the entire judiciary of Pakistan into ridicule, and (ii) the ruling of the Speaker declaring that no question of disqualification of the respondent had arisen despite the concluded judgment of the Supreme Court defied the principles of the independence of the judiciary and the separation of powers and also constituted a violation of the due process clause under art 10A of the Constitution. Both matters raised questions of public importance with reference to the enforcement of the fundamental rights enshrined in arts 9 (security of the person), 10A (right to fair trial and due process), 14 (the dignity of man), 17 (the freedom of association and the right to be governed by

chosen representatives) and 25 (equality of citizens) and therefore met the requirement of art 184(3) of the Constitution ... *Benazir Bhutto v Federation of Pakistan* PLD 1988 SC 416, *Mian Muhammad Nawaz Sharif v President of Pakistan* PLD 1993 SC 473, *Munir Hussain Bhatti v Federation of Pakistan* PLD 2011 SC 407 and *Re Corruption in Hajj Arrangements in 2010* PLD 2011 SC 963 applied. *Abdul Haq v Muhammad Yasin* PLD 1956 Lahore 209, *Pakistan v General Public* PLD 1989 SC 6 and *Jamat-e-Islami v Federation of Pakistan* PLD 2008 SC 30 distinguished.

Per curiam. Per Khilji Arif Hussain J. (i) In 1988 the court had begun the process of progressively relaxing the requirement of locus standi, to implement the protection of the rule of law given by the Constitution by reading the fundamental rights provisions in harmony with other constitutional provisions and initiating the vital process of harmonising the remedies and processes under the original jurisdiction of the court, under art 184(3), with the fundamental rights, seen as collective public rights as much as private individual rights. Thus the court had substantially whittled down the requirement of a formal petition, converting a telegram into a petition and even initiating cases suo moto. Similarly, in defining 'a question of public importance with reference to the enforcement of any of the fundamental rights', the court had admitted petitions which raised the interpretation of any fundamental right or which might affect the enforcement of the fundamental right of the public at large which, by definition, raised matters of public importance. The court had also held that the fundamental rights provisions were to be read in the light of the Principles of Policy set out in the Constitution and in accordance with the aspirations for social justice and substantive equality incorporated therein ...

(ii) It is anachronistic to insist that individual fundamental rights be identified in public interest litigation. In certain classes of cases the threshold of meeting the test of 'public importance with reference to the enforcement of ... fundamental rights' is invariably low because by their very nature they raise questions of public importance concerning fundamental rights. In particular, the test of maintainability of a petition is easily met in three categories of cases requiring the interpretation of constitutional provisions governing the structure, functioning and accountability of the institutions of state, namely (i) cases that raise questions concerning the independent functioning,

Province of Baluchistan PLD 1989 Quetta 25, *Muhammad Naeem Akhtar v Speaker, Sindh Provincial Assembly* 1992 CLC 2043, *Asad Ali v Federation of Pakistan* PLD 1998 SC 161 and *Mining Industries of Pakistan (Pvt) Ltd v Deputy Speaker, Balochistan Provincial Assembly* PLD 2006 Quetta 36 applied. *Kanwar Intezar Muhammad Khan v Federation of Pakistan* 1995 MLD 1903 and *Ayatullah Dr Imran Liaquat Hussain v Election Commission of Pakistan* PLD 2005 SC 52 distinguished.

(ii) The plea for the respondent that the matter should be remitted to the Speaker for her to make a fresh decision could not be entertained because the Speaker had deferred her original decision until one day before the end of the period of 30 days specified by art 63(2) of the Constitution for such decision; the specified period, having now expired, could not be enlarged ... *Azmat Ali v Chief Settlement and Rehabilitation Comr* PLD 1964 SC 260, *Umar Draz Khan v Muhammad Yousaf* 1968 SCMR 880 and *Begum B H Syed v Afzal Jahan Begum* PLD 1970 SC 29 distinguished.

(iii) If the Speaker in the performance of the administrative task of determining whether a question of disqualification had arisen went beyond her constitutional remit, misapplied the applicable law or misused her discretion, her decision was reviewable by the superior courts. Moreover, where a court of competent jurisdiction found a member of Parliament guilty of an offence of acting in any manner prejudicial to the integrity or independence of the judiciary or which defamed or brought the judiciary into ridicule, contrary to art 63(1)(g), the Speaker was bound to refer the matter to the Election Commission, which in turn was obliged to issue a notification of disqualification of the concerned member on the basis of the verdict of the court. Since the respondent Prime Minister had not filed an appeal against the judgment convicting him of contempt he was disabled from raising arguments concerning the validity of his conviction and immunity from prosecution, and the judgment against him was final, with all the consequences that followed, including disqualification from being a member of Parliament on and from the day and time of his conviction. In those circumstances the Speaker ought to have referred the question of the respondent's disqualification to the Election Commission and in lieu of any such reference the court itself would direct the respondent's disqualification to the Election Commission. It followed that the

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respondent was disqualified from being a member of Parliament and ceased to be Prime Minister of Pakistan with effect from 26 April 2012 ... Dicta of Nasir-Ul-Mulk J in *Federation of Pakistan v Gilani* [2013] 1 LRC 223 at [15] applied.

(iv) With effect from 26 April 2012 the Prime Minister, having been convicted under art 204(2) of the Constitution, was disqualified from being a member of the National Assembly but continued to hold the office of the Prime Minister contrary to the Constitution and the law. Therefore all decisions made and actions performed by the Prime Minister after that date had no constitutional sanctity; however, the federal government or the provincial governments could refer such matters to Parliament for ratification or otherwise, in light of the law previously laid down by the court ... *Asma Jilani v Government of Punjab* PLD 1972 SC 139 and *Sindh High Court Bar Association v Federation of Pakistan* [2010] 2 LRC 319 applied.

Per Jawwad S Khawaja J. The amendment of cl (g) of art 63(1) in 2010 by the Eighteenth Constitutional Amendment was of material significance in the instant case, leaving no room for the exercise of decision-making by the Speaker when a member of Parliament was 'convicted by a court of competent jurisdiction' and was thereby disqualified ...

Per curiam. Per Iftikhar Muhammad Chaudhry CJ. (i) The courts derive their powers and jurisdiction from the Constitution and the law and the decisions rendered by them can be revised, reviewed or scrutinised by no forum other than the one provided under the Constitution or the law within the judicial hierarchy ...

(ii) A similar approach had been adopted and prevailed in India, where the superior courts had adjudicated upon the validity of rulings by the Speaker and set them aside on several occasions ... *Ravi S Naik v Union of India* AIR 1994 SC 1558, *Mayawati v Markandeya Chand* (1998) 7 SCC 517, *Jagjit Singh v State of Haryana* AIR 2007 SC 590, *Rajendra Singh Rana v Swami Prasad Maurya* AIR 2007 SC 1305 and *Sudhakar v Jeevanraju* (25 January 2012, unreported), Ind SC, considered.

Per curiam. Per Jawwad S Khawaja J. There is no justification for muddying the crystal and undefiled waters of the constitutional stream with alien and antiquated nineteenth century Diceyan

concepts of parliamentary supremacy. These concepts have lost currency even in their own native lands. It is about time, 65 years after independence, that we unchain ourselves from the shackles of obsequious intellectual servility to colonial paradigms and start adhering to our own people's Constitution as the basis of decision-making on constitutional issues ... Dicta of Lord Steyn in *R (on the application of Jackson) v A-G* [2005] UKHL 560, [2006] 2 LRC 499 at [102] applied.

Per curiam. Per Khilji Arif Hussain J. The jurisprudence of the Supreme Court of India on this subject is particularly worth noting ... *Raja Ram Pal v Honourable Speaker, Lok Sabha* 2007 (3) SCC 184 considered.

LRC 122 (New Zealand)

Prebble v Television New Zealand Ltd

NEW ZEALAND

Privy Council

Lord Keith of Kinkel, Lord Goff of Chieveley, Lord Browne-Wilkinson, Lord Mustill and Lord Nolan.

3–5 May, 28 June 1994

(1) Constitutional law – Parliament – Parliamentary privilege – Bill of Rights – Libel action by member of Parliament – Plea of justification – Allegation that appellant made misleading statements to Parliament and caused legislation to be passed as part of fraudulent conspiracy – Whether particulars infringing parliamentary privilege – Whether particulars should be struck out – Bill of Rights 1688, art 9.

(2) Practice and procedure – Stay of proceedings – When appropriate – Libel action by member of Parliament – Court ordering particulars infringing parliamentary privilege to be struck out – Whether stay of proceedings required in interests of justice – Whether exclusion of material made it impossible fairly to determine issue between parties – Bill of Rights 1688, art 9.

The respondent, a New Zealand television company, transmitted a programme in which it was alleged that the appellant, then the Minister for State Owned Enterprises in the New Zealand

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government, had secretly conspired with certain highly placed businessmen and public officials to give the businessmen an unfair opportunity when certain state-owned assets were privatised to obtain those assets on unduly favourable terms in return for donations to his political party and in particular had improperly manipulated the sale of Air New Zealand to a specific consortium to repay business friends for favours and had then, following his sacking, arranged for incriminating documents and computer files to be either shredded or deleted. The appellant brought an action for libel against the respondent, which pleaded justification, including allegations that the appellant and other ministers made statements in the House of Representatives which were misleading in that they suggested that the government did not intend to sell off state-owned assets when in fact the appellant was conspiring to do so and that the conspiracy was implemented by introducing and passing legislation in the House. The appellant applied to strike out those particulars, which it was claimed infringed parliamentary privilege. The judge held that, even though the allegations were made in defence of proceedings brought by a member of the House, they should be struck out as infringing art 9 of the Bill of Rights 1688, which provided that the freedom of speech and debates or proceedings in Parliament were not to be impeached or questioned in any court or place outside Parliament. The respondent appealed to the Court of Appeal which upheld the judge's decision but further held that, in view of the inability of the respondent to deploy all the relevant evidence in support of the plea of justification, it would be unjust to allow the appellant to continue with his action and ordered a stay of the appellant's action unless and until privilege was waived by the House of Representatives and by any individual member or former member whose words or actions might be questioned in the defence. The Privileges Committee of the House of Representatives thereafter considered the question of waiver but held that the House had no power to waive the privileges protected by art 9. The appellant appealed to the Privy Council against the order staying his action. The respondent contended that the principle of parliamentary privilege only operated to protect the questioning of statements made in the House in proceedings which sought to assert legal consequences against the maker of the statement for making that statement, or, alternatively, that parliamentary privilege did not apply where it was the member of Parliament himself who brought proceedings for libel and the privilege would operate so as to prevent a respondent who wished

to justify the libel from challenging the veracity or bona fides of the appellant in making statements in the House.

HELD: Appeal allowed.

(1) The basic concept underlying art 9 of the Bill of Rights was the need to ensure so far as possible that a Member of Parliament and witnesses before committees of Parliament could speak freely without fear that what they said would later be held against them in the courts. The important public interest protected by the privilege was to ensure that a member or witness, when he spoke, was not inhibited from stating fully and freely what he had to say. That principle, coupled with the wider principle that the courts and Parliament were both astute to recognise that their respective constitutional roles and that the courts would not allow any challenge to be made to what was said or done within the walls of Parliament in performance of its legislative functions and protection of its established privileges, undoubtedly prohibited any suggestion being made in court proceedings (whether by way of direct evidence, cross-examination or submission) that statements made in the House were lies or were motivated by a desire to mislead and also prohibited any suggestion that proceedings in the House were initiated or carried through into legislation in pursuance of an alleged conspiracy. The fact that the maker of the statement was the initiator of the court proceedings could not affect the question whether art 9 was infringed since the privilege protected by art 9 was the privilege of Parliament itself and an individual member of Parliament could not by waiving his own privilege determine whether or not the privilege of Parliament was to apply or override the collective privilege of the House to be the sole judge of such matters, since they lay entirely within the jurisdiction of the House. If a suggestion in cross-examination or submission that a member or witness was lying to the House were to be allowed, that could lead to exactly the conflict between the courts and Parliament which the principle of non-intervention by the courts was designed to avoid. It followed that the judge had been right to strike out those particulars of the defence which infringed parliamentary privilege. However, this did not mean that no references could be made in court proceedings to what had taken place in the House. As in the United Kingdom since 1980, Parliament no longer asserted a right (separate from art 9) to restrain publication of its proceedings. There was no objection to proof of what was said in,

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or done by, the House as a matter of historical record without any accompanying allegation of impropriety or any other questioning ... *R v Murphy* (1986) 5 NSWLR 18, *Wright v Lewis* (1990) 53 SASR 416 and *Rost v Edwards* [1991] LRC (Const) 136 doubted.

A stay of proceedings on the ground that the exclusion of material on the grounds of parliamentary privilege made it impossible fairly to determine the issue between the parties ought only to be granted in the most extreme circumstances since the effect of a stay was to deny justice to the appellant by preventing him from establishing his good name in the courts. On the facts, a stay was not warranted since the burden of the libel related to acts done by members of the government out of the House to which questions of parliamentary privilege had no application and the allegations struck out were comparatively marginal. Accordingly, the stay would be rescinded and to that extent the appeal would be allowed ...

Cases referred to in judgement

Adam v Ward [1917] AC 309, [1916-17] All ER Rep 157, UK HL
Bradlaugh v Gossett (1884) 12 QBD 271
British Railways Board v Pickin [1974] 1 All ER 609, [1974] AC 765, [1974] 2 WLR 208, UK HL
Burdett v Abbot (1811) 14 East 1, 104 ER 501
Church of Scientology of California v Johnson-Smith [1972] 1 All ER 378, [1972] 1 QB 522, [1971] 3 WLR 434
Comalco Ltd v Australian Broadcasting Corp (1983) 50 ACTR 1, ACT SC
Derbyshire CC v Times Newspapers Ltd [1993] 2 LRC 617, [1993] 1 All ER 1011, [1993] AC 534, UK HL
News Media Ownership v Finlay [1970] NZLR, 1089, NZ CA
Pepper (Inspector of Taxes) v Hart [1993] 2 LRC 153, [1993] 1 ALL ER 42, [1993] AC 593, UK HL
R v Murphy (1986) 5 NSWLR 18, NSW SC
Rost v Edwards [1991] LRC (Const) 136, [1990] 2 All ER 641, [1990] 2 QB 460
Stockdale v Handsard (1839) 9 Ad & El 1, 112, ER 1112
Wright v Lewis (1990) 53 SASR 416, S Aus SC

Legislation referred to in judgement

Australia

Parliamentary Privileges Act 1987 (Cth), s 16(3)

New Zealand

Crimes Act, 1961, s 108

Imperial Laws Application Act 1988

Legislature Act 1908, s 242

State Sector Act 1988

State-Owned Enterprises Act 1986

United Kingdom

Bill of Rights 1688, art 9

Other sources referred to in judgement1 Bl Com (17th edn) 163

[1996] 1 LRC 584

**M'membe and Another v Speaker of
the National Assembly and Others****ZAMBIA**

High Court

Kabazo Chanda J

27 March 1996

(1) Constitutional law – Separation of powers – Parliament – Judicial review – Whether courts enjoying power to inquire into actions of Parliament – Applicants claiming to have suffered injustice caused by Parliament – Purported ouster of courts' jurisdiction – Remedies – Whether certiorari, mandamus and prohibition available – National Assembly (Powers and Privileges) Act (Cap 17), s 34.

(2) Constitutional law – Separation of powers – Parliament – Contempt – Detention – Application for habeas corpus – Whether Parliament carrying out judicial functions – Whether Parliament enjoying power to punish for contempt – Inherent common law power of Parliament to protect its dignity and honour – Applicants detained for indefinite period for contempt of Parliament – Principles of natural justice – Whether applicable – Whether followed.

(3) Constitutional law – Parliament – Contempt – Appropriate test – Whether articles complained of offensive, scandalous or contemptuous – Whether word used tending to lower person in estimation of right-thinking members of society.

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(4) Constitutional law – Parliament – Privilege – Comment on parliamentary proceedings – Whether comment on speech in Parliament constituting breach of parliamentary privilege.

The two applicants wrote articles in the Post newspaper opposing the government attack on a recent court judgment. The first applicant was alleged to have used some words to the following effect: 'Ernest Mwansa's underwear is an imitation' and 'Ernest Mwansa must shut up'. The second applicant was also alleged to have used scandalous words in his article. The Vice-President raised a point of order and complained to the Speaker about the said articles, which, he alleged, were a breach of the privileges and immunities of the House. The Speaker then made a ruling in the House on 20 February 1996 in which he found a prima facie case of contempt of the House against the three writers. He decided that some of the terms and phrases used in all the three articles were injurious to and contemptuous of the dignity and standing of the House. He then referred the matter to the Standing Orders Committee of the House for further consideration. The Standing Orders Committee considered the case against the applicants and resolved that they were guilty of gross contempt of the House and a breach of the privileges thereof. The committee committed the applicants to custody for an indefinite period until they became contrite or until the House resolved to discharge them. Each of them was also ordered to pay a fine. The writers were then summoned by the Speaker to appear at the bar to be informed of the decision of the House. They failed to go to Parliament on that day as they were not at their offices where the summonses were directed. Their counsel tried to enter Parliament Building to explain to the Speaker why his clients had been unable to comply with the summonses, but he was turned away at the gate and was thus unable to see the Speaker. Warrants of committal were prepared against them. The applicants later went to Parliament to find out why they had been summoned, whereupon they were apprehended and detained in custody. The applicants now applied to court seeking the grant of a writ of habeas corpus ad subjiciendum to secure their release from custody. The court was asked to consider the following questions: (1) whether the superior courts in Zambia had the power to query the propriety or legality of any act done by Parliament; (2) whether the action taken by Parliament in detaining the applicants was proper and legal and (3) whether the publications by the applicants contained words or terms that were scandalous and a contempt of the House.

HELD: *Application granted; release of applicants ordered.*

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(1) Superior courts in Zambia possessed the power to inquire into the correctness and lawfulness of legislative and administrative functions which affected the whole country and outsiders at large. Such power included complaints by parliamentary officials or employees involving allegations of grave injustices done to them by the institution. The purported ouster of courts' jurisdiction by s 34 of the National Assembly (Powers and Privileges) Act as amended by Act No 23 of 1976 referred only to minor parliamentary matters which belonged purely to the internal administrative arrangements and functions of Parliament, such as the date the House adjourned, cost-saving measures, power to remove strangers from the House and a myriad of other internal matters. The courts could nevertheless intervene even in such matters to settle a dispute between Parliament and any aggrieved individual who claims to have suffered grave injustice caused to him by Parliament. In this sense, therefore, orders of certiorari, mandamus and prohibition may be issued against any parliamentary committee which exercised a quasi-judicial function ...

(2) The Zambian Parliament was not a court of law or a court in any judicial sense, because, unlike its counterpart in Britain, it did not carry out judicial functions, and accordingly was neither at par with, nor a court subordinate to, the High Court. Although it was not a court, Parliament enjoyed the power to punish for contempt, which power was inherent in the nature of its status and was exercisable in order to protect its dignity and honour. Such power included the common law power to imprison, and not only to reprimand. Other Commonwealth Parliaments also exercise the power of committal in order to deter those who deliberately planned to ridicule its members and officials, or lower its dignity through odious utterances or writings. Parliament, even in the absence of express constitutional or other statutory provisions, had the power to commit to prison any person whom it found guilty of contempt of it, or of breach of any of its privileges. In such cases Parliament had to follow the standard procedure of reading the charge to the accused and asking each why he should not be found guilty of contempt and so forth. The person charged with the contempt had to appear before the bar and failure to appear at the required time and date was no reason for dispensing with such legal procedure and rules of natural justice. However,

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in the instant case the applicants had been improperly remanded in custody indefinitely awaiting a formal hearing at the bar of Parliament, because the proper procedure had not been followed. An indefinite remand in that way constituted an unorthodox disciplinary procedure and was incompatible with the spirit of our legal system. The two applicants were to be released from prison forthwith. But the first applicant had to surrender himself to Parliament when it next sat to answer formally to the charge of contempt of the House ...

(3) The test to be applied in determining whether the articles in the Post newspaper of which Parliament complained were offensive, scandalous to or contemptuous of the House or any of its members or officials was that applied in the law of defamation, viz whether the word or phrase uttered or written tended to lower the person against whom it was used in the estimation of right-thinking members of his society generally. However, what was defamatory in one society might not be defamatory in another. On the facts, the language used was insulting and abusive in Zambian society and degraded, dishonoured and humiliated the person referred to. Similarly, telling a member of Parliament and a minister to shut up was humiliating. It followed that a prima facie case of contempt of the House had been established ...

(4) Where a member of Parliament made a speech in Parliament which was later reported in a newspaper, any member of the general public whether a newspaper writer or not, was entitled to comment on such speech. Such comment could not be said to be a breach of privilege. There was no rule anywhere which prohibited comment on the speeches of members of Parliament spoken in the House. It followed that neither of the two applicants did anything to cause a breach of parliamentary privilege ...

[2008] 2 F.C.R.

Knopf v. Canada (Speaker of the House of Commons) (F.C.A.)

2007 FCA 308

CANADA

Federal Court of Appeal,
 Décary, Linden and Trudel JJ.A. – Ottawa,
 September 4; November 5, 2007.
 {see: <http://reports.fja.gc.ca/eng/2007/2007fca308/2007fca308.html>}

Independence of the Judiciary

[2013] 1 LRC 263

Province of Sindh (through Chief Secretary and Another v Rizvi and Others

PAKISTAN

Supreme Court
 Mian Shakirullah Jan, Jawwad S Khawaja and
 Amir Hani Muslim JJ
 16 February, 9 May 2012

Constitutional law – Separation of powers – Judiciary – Appointment of judges – Rules providing that judicial appointments to be made on recommendation of committee of High Court judges – Provincial government purporting to amend Rules with effect that judges to be appointed by Public Service Commission – Whether amendments constitutional – Whether infringing separation of powers – Constitution of Pakistan 1973, arts 175, 203 – Sindh Judicial Service Rules 1994.

The appointment of judicial officers in the district judiciary in the Province of Sindh was governed by the Sindh Judicial Service Rules 1994. Rule 5 of the 1994 Rules stipulated that appointments to the judicial service were to be made on the recommendation of the Provincial Selection Board ('PSB'), a committee comprising not less than three High Court judges. In 2008 the Government of Sindh, by notification, amended the 1994 Rules to give the

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Sindh Public Service Commission ('SPSC') a significant role in the recruitment of judges to the Sindh judicial service, by stipulating that recruitments to the posts of civil judges and judicial magistrates were to be made by initial appointment through the SPSC on the requisition of the High Court of Sindh. The respondents, which included the Sindh High Court Bar Association ('SHCBA') and the Sindh Bar Council ('SBC'), were aggrieved by those amendments to the 1994 Rules and challenged their constitutional validity before the High Court, arguing that the amendments violated the separation of the judiciary from the executive and thus adversely affected the independence of the judiciary, thereby breaching, inter alia, art 175(3) ('The Judiciary shall be separated ... from the Executive ...') and art 203 ('Each High Court shall supervise and control all courts subordinate to it') of the Constitution. The Province of Sindh and the SPSC claimed that the amendments did not adversely affect the independence of the judiciary or its separation from the executive. A five-member Bench of the High Court set aside the amendments made by the Sindh government to the appointment mechanism, commenting adversely on the competence, good faith and performance of the SPSC. The Province of Sindh and the SPSC appealed to the Supreme Court.

HELD: Appeals dismissed.

In matters of appointment, security of tenure and removal of judges the independence of the judiciary should remain fully secured. The impugned notification, which took away the power of selection from the High Court and gave it to the SPSC, which the High Court had correctly deemed to be an executive body, did not meet constitutional standards. The impugned notification had the effect of negating the independence of the judiciary and the separation of powers envisaged in arts 175 and 203 of the Constitution because the High Court was involved neither in the selection of judges nor in their appointment. Changes made by the 1994 Rules to the process of appointment of judges were to be considered a contemporaneous statutory exposition of arts 175 and 203 of the Constitution. The impugned notification was unconstitutional for making judicial appointments the exclusive preserve of the Sindh government and the SPSC. The amendments to the 1994 Rules were therefore ultra vires the Constitution and of no legal effect ... *Government of Sindh v Sharaf Faridi* PLD 1994 SC 105, *Al-Jehad Trust v Federation of Pakistan* PLD 1996

SC 324 and *Munir Hussain Bhatti v Federation of Pakistan* PLD 2011 SC 407 followed.

Per curiam. The High Court was called upon only to judge the legal and constitutional validity of the impugned notification. Comments in the High Court judgment – that the impugned notification was not just mala fide in law but also mala fide in fact – were uncalled for. By passing judgment on the competence or good faith of the SPSC or over the SPSC's performance as an institution, the court risked tainting the institutional credibility of the SPSC. Therefore the remarks and observations made by the High Court in respect of the SPSC were not affirmed by the Supreme Court ...

[2010] 2 LRC 450

Re Chief Justice of Gibraltar

[2009] UKPC 43

GIBRALTAR

Privy Council

Lord Phillips, Lord Hope, Lord Rodger, Lady Hale,

Lord Brown, Lord Judge and Lord Clarke

15–18 June, 12 November 2009

Constitutional law – Judiciary – Chief Justice – Removal – Inability to discharge functions – Misbehaviour – Senior lawyers formally notifying Governor of loss of confidence in Chief Justice – Constitution prescribing procedure to determine question of removal of Chief Justice – Governor on advice of Judicial Service Commission appointing judicial tribunal to inquire into question of removing Chief Justice – Question of removal referred to Privy Council on advice of tribunal – Principles to be applied – Appropriate test – Relevant considerations – Standard of proof applicable – Whether Chief Justice to be removed from office – Bangalore Principles of Judicial Conduct (2002) – Commonwealth (Latimer House) Principles on the Accountability of and the Relationship between the Three Branches of Government (2003) – Guide to Judicial Conduct (2004) – Gibraltar Constitution Order 2006, s 64.

On 17 April 2007 all the Queen's Counsel in Gibraltar, except for the Speaker in the House of Assembly, were among the signatories

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to a memorandum to the Governor which expressed 'deep concern at a state of affairs which has developed seriously affecting the administration of justice and the reputational image of Gibraltar' and stated that they had lost confidence in the ability of the Chief Justice to discharge the functions of his office. At the Governor's request they submitted a supplementary memorandum setting out in detail the reasons for their dissatisfaction with the Chief Justice. Copies of the memoranda were supplied to the Chief Justice and his solicitors sent a preliminary response to the Governor. In accordance with the prescribed constitutional procedure, all those documents were considered by the Judicial Service Commission, which advised the Governor to appoint a tribunal under s 64(4) of the Gibraltar Constitution Order 2006. The Governor did so on 14 September 2007 and on 17 September he suspended the Chief Justice, under s 64(6). The tribunal of three senior judges sat in July 2008 to hear evidence of fact from 18 witnesses who gave oral evidence and 11 others who submitted written statements. In its report, dated 12 November 2008, the tribunal made findings of fact in relation to each of 23 episodes, criticising the conduct of the Chief Justice in relation to all but one of them. Although the tribunal found no single instance of misbehaviour that showed that the Chief Justice was unfit to hold office, it concluded that his conduct had directly affected the way in which he discharged part of the responsibilities of his office, such as his relations with the Governor and the government and with representatives of the Bar; in the context of Gibraltar as a small jurisdiction the significance of public perception was inevitably magnified and the Chief Justice's conduct was held to have polarised public opinion in a way which was damaging to the reputation of his office and the interests of good governance and to have antagonised a large number of those practising before him. The tribunal therefore concluded that the Chief Justice was unable to discharge the functions of his office and that this inability warranted his removal from office. Under s 64(4) of the Constitution Order, acting on the advice of the tribunal, the Governor requested that the question of the removal of the Chief Justice be referred to the Judicial Committee of the Privy Council.

HELD: (Lord Hope, Lord Rodger and Lady Hale dissenting) The Chief Justice should be removed from office.

Per Lord Phillips, Lord Brown, Lord Judge and Lord Clarke.
(i) There was considerable jurisprudence on the test of both

‘misbehaviour’ and ‘inability’ in the context of the removal from office of a judge or public official, demonstrating a degree of overlap between the two. Applying authoritative guidance recently given by the Board, four questions were to be considered in determining whether a judge’s conduct could be characterised as ‘misbehaviour’ for the purposes of removal from office. (a) Had the judge’s conduct directly affected his ability to carry out the duties and discharge the functions of his office? (b) Had that conduct adversely affected the perception of others as to the judge’s ability to carry out those duties and discharge those functions? (c) Would it be perceived as inimical to the due administration of justice if the judge remained in office? (d) Had the judge’s conduct brought his office into disrepute? ‘Inability’ in s 64(2) was to be given the wide meaning which the word naturally bore and was not to be restricted to unfitness through illness but extended to unfitness through a defect in character. If for whatever reason a judge became unable properly to perform his judicial function it was desirable in the public interest that there should be power to remove him, provided always that the decision was taken by an appropriate and impartial tribunal. It was therefore open to the tribunal to proceed on the basis that defect of character and the effects of conduct reflecting that defect, including incidents of misbehaviour, were cumulatively capable of amounting to ‘inability to discharge the functions of his office’ within s 64(2). The issue of standard of proof was not an easy one because judicial independence was of cardinal importance. However, the tribunal had correctly held that, as the instant proceedings were not concerned with disciplining a judge for misconduct, when the criminal standard of proof would have been applicable, it was appropriate to apply the civil standard of proof to determine issues of fact bearing upon the question whether the Chief Justice was fit to perform his office, which itself was not a question of fact subject to a standard of proof but a matter for judicial assessment: most of the primary facts were matters of record and not disputed ... Dicta of Gray J in *Clark v Vanstone* [2004] FCA 1105, (2004) 211 ALR 412 at [85], of Lord Scott of Foscote in *Lawrence v A-G* [2007] UKPC 18, [2007] 5 LRC 255 at [23], [25] and *Stewart v Secretary of State for Scotland* 1998 SC(HL) 81 applied.

(ii) The actions of the Chief Justice and his wife had rendered his position untenable and the Board would therefore advise that he should be removed from office. The conduct of the Chief Justice had brought him and his office into disrepute. A number

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of incidents that qualified as misbehaviour were incidents in a course of conduct that had resulted in an inability on his part to discharge the functions of his office. This conduct infringed almost every one of the relevant principles cited from the Bangalore Principles of Judicial Conduct (2002) and the *Guide to Judicial Conduct* (2004) of the Judges' Council of England and Wales.

The Chief Minister had realistically said that the terminal process had begun with Mrs Schofield's publicised statements to the Bar Council and to the Kenyan Jurists that the Chief Minister was trying to hound her husband out of office and ended when the Chief Justice brought judicial review proceedings in which he publicly adopted that allegation. With regard to the second question (b) posed in (i) above, the tribunal had before it an abundance of evidence, including the lawyers' memoranda, of the perception of others as to the consequences of the Chief Justice's conduct: although that conduct had polarised the legal profession, with some lawyers at times supporting the Chief Justice, the large number who had signed the memoranda portrayed the fairly held views of a significant proportion of the legal practitioners. Those views reflected the conclusion of the majority of the Board that the Chief Justice was seen as supporting his wife's public utterances, having failed to dissociate himself from them. As to the effect that perceptions of bias caused by the Chief Justice's conduct would have on his ability fairly to try cases, he had himself accepted that he would have problems sitting on any case involving the government in which the Chief Minister was involved, either as a witness or because a government policy for which he was responsible was in issue: the tribunal had rightly observed that these were likely to be among the most important of such cases, so far as concerned their impact on the public, although it had queried the practicability of identifying cases involving the government which did not involve the Chief Minister. However, the majority did not endorse the tribunal finding that the Chief Justice's allegation that the Attorney General had been involved in an attempt to remove him in 1999 could give rise to any appearance of bias ten years later, although there would be a risk of applications to recuse himself in hearings involving the Attorney General. Moreover, while there would be a risk that the Chief Justice would be perceived as favouring those lawyers who had supported him and his wife, as opposed to those who had subscribed to the memoranda, it would not be right in principle

to consider as a ground for removal of a judge an appearance of bias based on resentment that the judge might be thought to feel towards advocates who had sought his removal; were this not so, an application to a judge to recuse himself might be self-fulfilling. Nevertheless, while not accepting all the allegations of apparent bias that would arise if the Chief Justice continued to sit, those that were accepted were significant: a Chief Justice unable to sit on cases involving the government would be substantially disabled from performing his judicial function. With regard to the linked third and fourth questions set out in (i) above, no question had ever been raised as to the Chief Justice's judicial ability to resolve issues of fact and law; however, the question was whether his behaviour had brought himself and his office into such disrepute that it would damage the administration of justice if he continued to serve as Chief Justice, his conduct having shown repeated and serious shortcomings and misjudgements in his public behaviour. The office of Chief Justice carried demands well beyond those placed upon ordinary judges, however senior, and the tribunal had rightly criticised his conduct in that office in relation to twelve episodes which demonstrated defects of personality and attitude; two of those also resulted in an inability to preside over hearings involving the Chief Minister because of the appearance of bias ...

Per Lord Hope (Lord Rodger and Lady Hale concurring) (dissenting). (i) Careful attention had to be given to the meaning of 'inability to discharge the functions of his office' and 'misbehaviour', as the only grounds specified in s 64(2) of the 2006 Order for the removal of judges, and to the application of that meaning to the facts of the case. Those expressions were not to be read narrowly. The principle of judicial independence was protected by the procedure prescribed, placing responsibility upon the Board, but also by the principle that judicial officers should be removed only in circumstances where the integrity of the judicial function itself had been compromised. The authorities offered little guidance as to how the circumstances of the case should be approached. The word 'misbehaviour' took its meaning from the statutory context: if the conduct was such as to bring the office itself into disrepute it could properly be characterised as misbehaviour but the question would remain whether it was conduct of such gravity that the judge should be removed from office. The conduct had to be so manifestly and totally contrary to the impartiality, integrity and independence of the judiciary that

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the confidence of individuals appearing before the judge, or of the public in its judicial system, would be undermined, rendering the judge incapable of performing the duties of his office ... Dicta of Gonthier J in *Therrien v Minister of Justice* 2001 SCC 35, [2001] 5 LRC 575 at [147], of Gray J in *Clark v Vanstone* (2004) 211 ALR 412 at [85] and *Lawrence v A-G* [2007] 5 LRC 255 applied.

(ii) The case against the Chief Justice had not been made out and he should not be removed from office. The case had been treated by the tribunal and by the majority of the Board as one of inability: they had both held that, while no single one of several instances of misbehaviour showed that the Chief Justice was unfit for office, his conduct overall showed that he was unable to discharge the functions of his office. The phrase 'wholly unfitted to perform judicial functions' captured the essence of the meaning of 'inability' in this context, rightly setting a high standard to protect judicial independence against allegations which did not reach that standard. The majority held that certain of the episodes identified by the tribunal demonstrated defects of personality. However, the Chief Justice's attitude to his wife's behaviour could not be regarded as a defect in his character or personality, because there was no sound basis to allege that he was guilty by association with her activities or that he had endorsed her behaviour by his own remarks: she and the Chief Justice were distinct individuals, leading separate lives. Therefore the conclusion of the majority that his wife's behaviour was one of the circumstances that rendered his position untenable could not be supported: his ability to perform his functions had to be judged by his own actions alone, not those of his wife. It was difficult to find anything in the Bangalore Principles or in the *Guide to Judicial Conduct* telling the judge what to do in the unusual circumstances of this case. To suggest that the Chief Justice's pre-occupation with the principle of judicial independence was a defect of personality ventured into very dangerous territory: the importance of that principle was not in doubt, nor were there any reasons to doubt his good faith in seeking to do all he could to uphold it. A Chief Justice had to be given some latitude in performing his important duty to preserve and uphold that principle. Moreover, the Chief Justice was not without some justification for his suspicions in his dealings with the government. Although there were instances where his conduct showed a lack of judgment, there had been no criticism of the Chief Justice's ability to perform his judicial functions and for most of the time he fulfilled his other duties

without criticism. As the tribunal was not prepared to say that the events of the concluding period amounted to misbehaviour of such gravity as to justify removal, the case had to stand or fall on the issue of inability. Taking the whole progress of events in the round, including the absence of criticism of his conduct on the bench and the Chief Minister's acceptance that there were long periods of harmonious relationship between the Chief Justice and the executive, it had not been shown that the Chief Justice's conduct demonstrated inability to perform the functions of his office, in the sense that he was wholly unfitted to perform them. However, the Chief Justice having been suspended from office for more than two years and exposed to a long and bruising inquiry which had hardened attitudes on each side, it was probably unrealistic to think that he could resume his functions; he should therefore be given the opportunity to resign and, if he did so, no adverse inferences of any kind should be drawn against him ... *Stewart v Secretary of State for Scotland* 1996 SC 271; *aff'd* 1998 SC(HL) 81 applied. Commonwealth (Latimer House) Principles on the Accountability of and the Relationship between the Three Branches of Government (2003) considered.

[2013] 2 LRC 126

Bandaranayake and Others v Rajapakse and Others

SRI LANKA

Court of Appeal

Skisandarajah, Gooneratne and Salam JJ

7 January 2013

Constitutional law – Constitution – Judiciary – Judge – Removal – Chief Justice – Parliamentary Select Committee – Report – Supreme Court ruling that Parliamentary Select Committee having no power or authority to make findings capable of adversely affecting constitutional right of judge to hold and continue in office during good behaviour – Judge seeking to quash findings and/or decision contained in report – Whether certiorari to be granted – Whether jurisdiction ousted – Relevant considerations – Constitution of the Democratic Socialist Republic of Sri Lanka 1978, arts 107(2), 140 – Standing Orders of Parliament, Standing Order 78A.

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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 had no legal validity and as such the court had no alternative but to issue the writ of certiorari requested ... *Atapattu v People's Bank* (1997) 1 SLR 208 followed. Dicta of Amaratunga J in *Jayarathne v Yapa* [2013] 2 LRC 106 applied.

[2010] 5 LRC 436

Muhwezi and Others v Attorney General and Another

[2010] UGCC 3

UGANDA

Constitutional Court

Mukasa Kikonyogo DCJ, Mpagi-Bahigeine, Twinomujuni,

Byamugisha and Kavuma JJA

14 May 2010

(1) Constitutional law – Constitution – Separation of powers – Judiciary – Inspectorate of Government having power to prosecute cases involving corruption, abuse of authority or of public office – Judge appointed as Inspector-General of Government (IGG) – Whether role of IGG incompatible with judicial office – Whether appointment of IGG null and void – Appropriate test – Relevant considerations – Effect of nullity of appointment – Constitution of the Republic of Uganda 1995, arts 126, 128, 223, 225–227.

(2) Constitutional law – Constitution – Inspectorate of Government – Constitution conferring independence on inspectorate – Statute providing complaint to be made by complainant to Inspector-General of Government (IGG) – President directing IGG to investigate petitioners – Whether proper procedure followed – Whether independence of IPG compromised – Whether resulting report unconstitutional – Whether subsequent investigation and arrest of petitioners lawful – Constitution of the Republic of Uganda 1995, art 227 – Inspectorate of Government Act 2002, s 24(3).

(3) Constitutional law – Constitution – ‘Corruption’ – Scope – Inspectorate of Government – Constitution authorising inspectorate to prosecute all offences of ‘corruption’ – Whether including embezzlement, obtaining by false pretences, causing financial loss, forgery and uttering false documents – Prevention of Corruption Act 1970 – Constitution of the Republic of Uganda 1995, art 230(1) – Inspectorate of Government Act 2002, s 2.

The Constitution established the Inspectorate of Government as an independent body ‘not ... subject to the direction or control of any person or authority’. M, a sitting judge of the High Court,

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was appointed as Inspector-General of Government ('IGG'). On her appointment she did not resign her office as judge. In February 2006 the President directed the IGG to investigate the four petitioners in relation to the administration of certain donor funds. Section 24 of the Inspectorate of Government Act 2002 provided that '(1) A complaint or allegation under this Act may be made by an individual or by any body of persons ... addressed to the Inspector-General'; art 230(1) of the Constitution provided that the Inspectorate of Government had the power to 'investigate ... prosecute or cause prosecution in respect of cases involving corruption, abuse of authority or of public office' and art 223(4) provided that the IGG 'shall not, while holding office, hold any other office of emolument in public service'. The IGG subsequently made a report to the President, implicating the four petitioners in the misuse of the funds. In October 2007 the four petitioners were charged with various offences of abuse of office, theft, embezzlement, causing financial loss, making false documents, forgery and uttering false documents, all in connection with the donor funds under investigation. At trial, the petitioners pleaded not guilty and objected to being prosecuted by the IGG, submitting that it was unconstitutional for the IGG to prosecute them. They obtained a court order staying the proceedings until the constitutionality of the proposed trial was determined by the Constitutional Court. That court had to resolve the following issues. (a) Whether the commencement of the investigations by the IGC and subsequent arrest of the petitioners violated the Constitution. (b) Whether the appointment of the IGG from the judicial bench contravened the Constitution. (c) Whether the prosecution of the petitioners contravened the Constitution.

HELD: Petition successful in part. Declaration that appointment of an IGG who was a judicial officer contravened the separation of powers doctrine and was void.

(1)(i) The Constitution made provision for the separation of powers. It was a fact that the three organs of state were not rigidly separated in functions and powers. The separation of powers between the executive and the legislative might overlap here and there, but the distinction was very clear. However, the Constitution provided for the strict separation of powers between the judiciary on one hand and the executive and the legislative on the other hand. That separation was embedded in the doctrine of the independence of the judiciary in art 128 of the Constitution ...

(ii) The role of a judicial officer was not compatible with the position of IGG and the Constitution did not permit a person to hold both offices at the same time. Under arts 126 and 128 of the Constitution the main roles of a judicial officer were: (a) to adjudicate over disputes in society, (b) to interpret the law and (c) to enforce the law. On the other hand, under arts 225–227 of the Constitution the duties and functions of the IGG included the power to investigate, arrest or cause arrest, prosecute or cause prosecution in respect of cases involving corruption, abuse of authority or of public office. As it was a cardinal principle of jurisprudence that a judge be independent, impartial and just to all manner of people, the functions and powers of the IGG were incompatible with those of a judicial officer. To the extent that the IGG appointee was a sitting judge, the appointment was null and void ... Dicta of Chaskalson P in *South African Association of Injury Lawyers v Heath* [2001] 4 LRC 99 at [1]–[2], [5]–[8], [11], [26], [29]–[31], [34]–[35], [46], applied.

(iii) Article 223(4) of the Constitution did not permit an individual to hold the position of judge and that of IGG at the same time. ‘Emolument’ meant any advantage, profit or gain received as a result of one’s employment or one’s holding of office and did not consist only of salaries and allowances in monetary terms. The office of a judge was most respected, of great prestige to the holder. Holding the office conferred gains, of which M continued to avail. Her salary was increased to fit that of a judge, although it was not paid by the judiciary, and her period of service continued to earn her a pension in the public service. She should have relinquished the office of a judge in order to take up the office of the IGG. Hence her holding of the office of IGG was unconstitutional and void ...

(iv) Nevertheless, that did not affect the findings on the other issues. The office of the IGG had to be separated from the holder of the office. The powers exercised by the IGG were vested in the inspectorate, which was not a one-person body; under art 223 of the Constitution the inspectorate consisted of the IGG and Deputy and there were also other officers to help the inspectorate fulfil its mandate. Any defect in the appointment of the IGG did not nullify everything the IGG did in office, provided she or he had acted within the constitutional mandate of the office. Therefore whatever M did while in office as IGG remained valid as long as it was within the mandate of the inspectorate ...

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(2) Under s 24(3) of the Inspectorate of Government Act 2002 the complaint had to be (a) made by the complainant or his/her legal representative (b) be in writing and addressed to the IGG and (c) signed or thumb-printed by the complainant. The President had done all of those in the impugned letter to the IGG. Like anyone else, he had the right to make a complaint to the IGG. Under art 227 of the Constitution, which established the inspectorate as an independent body, it was the absolute right of the IGG to investigate and to determine how to do so. Whether the President ‘directs’ or ‘instructs’ the IGG was of no consequence, since the office of the IGG was independent. It was most likely for a head of state to use terms of command like ‘direct’, ‘order’ or ‘instruct’, even where the officer ordered, directed or instructed had powers under the Constitution to choose to act or not to act. In the instant case, there was no evidence that the President interfered in any way with the investigations. He simply ‘presidentially’ requested the IGG to perform her duties under the Constitution. The resulting report on the investigation could not be said to be unconstitutional. Therefore the investigations and subsequent arrest of the petitioners were done lawfully under the powers conferred on the IGG by the Constitution ...

(3) The powers of the IGG under art 230(1) of the Constitution gave it the mandate to prosecute all those offences contained in the new definition of ‘corruption’ in s 2 of the Inspectorate of Government Act 2002, which defined ‘corruption’ as ‘the abuse of public office for private gain’ and as including, without being limited to, inter alia, bribery, theft of public funds, forgery and false accounting in public affairs, and was not limited to the definition of corruption in the Prevention of Corruption Act 1970. That new definition covered all the offences contained in the charge sheet under which the petitioners were charged. Therefore the prosecution of the petitioners did not contravene the Constitution ...

[2012] 2 LRC 280

Tikoniyaroi and Another v State

[2011] FJCA 47

FIJI ISLANDS

Court of Appeal

Marshall, Chitasiri and Sriskandarajah JJA

5, 29 September 2011

(1) Judiciary – Judge – Bias – Allegation of apparent bias – Judge acquainted with victim's father and state witnesses – Judge informing defendants and counsel but not inviting recusal – No objection by counsel – Appropriate test for bias – Degree of acquaintanceship required in small close-knit communities – Appropriate test for miscarriage of justice based on bias – Whether counsel required to take instructions – Basis for recusal decision – 'Reasonable and informed observer' – Whether matter properly left to counsel.

(2) Appeal – New evidence – Appropriate test to decide if new evidence admissible in appeal – Whether test satisfied.

The appellants were convicted of murder and robbery. During the course of their trial at the local first instance court, the trial judge indicated to them and their counsel that he was vaguely acquainted with the victim's father and two of the state witnesses. Counsel for the appellants did not object to the trial judge continuing with the hearing and no one made any application for recusal of the judge. The appellants' appeal to the Court of Appeal (the first appeal) was allowed after the court decided to admit fresh evidence of fact. The court held that, without taking instruction, the appellants' counsel at trial could not validly speak for their clients on the issue of recusal of the judges. That court found that that amounted to a miscarriage of justice on the ground of apparent bias of the judge and allowed the appeals and quashed their convictions. Before the first Court of Appeal judgment had been handed down, the appointments of the judiciary were revoked and only one original judge was re-appointed. Subsequently the state filed a petition for special leave to appeal against the first Court of Appeal judgment on the ground that the proceedings were a nullity, as the judgment had not been given by a duly constituted court. The Supreme Court

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quashed the first Court of Appeal decision and ordered another appeal before a differently constituted Court of Appeal.

HELD: Appeals dismissed. Convictions and sentences of court below confirmed.

(1) Per Marshall JA (Chitاسiri JA concurring). One of the matters which had to be addressed when deciding whether there was apparent bias was the principle of law, distilled from decided cases, on whether relationships of blood, friendship, close business or professional association gave rise to a situation of apparent bias. In close-knit communities, such as in many common law jurisdictions including Fiji, it was common that members of the justice system were acquainted with witnesses, victims and their families. As such, only very close friendships or family relationships raised a question, at common law, to be asked and answered in relation to possible apparent bias. Moreover, members of the judiciary had taken oaths of impartiality and fairness. There were, however, situations where the possibility of apparent bias had to be raised and considered and the issue of recusal of the judge arose. A judge who was merely an acquaintance of a victim's family member many years before was not in a position of apparent bias and, in the instant case, the trial judge's acquaintanceship with the victim's father and the state witnesses was neither close nor recent and did not raise apparent bias. To suggest that judges, appointed because of their integrity and having sworn an oath of office, would influence a criminal trial in favour of a conviction just because they were acquainted with a member of the victim's family or a state witness was bizarre. The common law provided no support for such a proposition. Where justice had to be dispensed in a relatively close community, such as in the instant case, the administration of criminal justice would be undermined if it was to be regarded as 'apparent bias'. Accordingly, the trial judge need not have raised the fact of his acquaintanceship with the victim's father or the state witnesses. He raised the issue out of an abundance of caution, for which he could not be faulted. The trial judge was not inviting the defendants or counsel to make submissions on his recusal and no recusal issue arose. The court had to apply the principle that where the trial had taken place and there was an appeal on the ground that the trial judge should not have sat on account of apparent bias, the only issue was whether a miscarriage of justice had taken place. If the record showed that the judge had acted

fairly and correctly throughout, then there was no miscarriage of justice. In the instant case, the record showed that the trial judge had acted correctly throughout and included a summing up that was a model of impartiality ... *R v Gough* [1993] 3 LRC 612, *Webb v R* (1994) ALJR 582 and *Koya v State* [1998] FJSC 2 considered.

Per Sriskandarajah JA (Chitasiri JA concurring). In the instant case the allegation of bias was raised at the appeal stage, so that the instant court had the benefit of looking into the record to see how the trial judge conducted the trial. The record showed that the judge had disclosed to the defendants that he knew two state witnesses and the father of the victim. That was to give the defendants the opportunity to make an appropriate application if they wished. By taking into consideration the nature of Fiji's society by size, it was inevitable that local judges would come to know many people. If such judges were to disqualify themselves from hearing cases only because they knew certain witnesses, the judicial system would not function. Accordingly, considering the instant proceedings, there was no material to show that the judge's decision had been affected or coloured by personal interest or a tendency to support the prosecution. In the absence of any resemblance of bias in the proceedings or the order, the appellants' complaints that the failure of the trial judge to recuse himself from hearing the case had denied them a fair trial had no merit and failed as a ground of appeal ...

Per curiam. Per Marshall JA. (i) Two issues arose in a situation where a judge held a hearing on an application that he recuse himself. Firstly, any trend for judges who, after careful consideration, did not think that the facts or connections justified their recusal, but saw recusal as an easier or softer option, had to be resisted, since it encouraged forum shopping. Secondly, the situation where a judge becomes a judge in his own cause had to be avoided. If, contrary to the position in the instant case, a recusal hearing whether by the trial judge or another judge was necessary, the law on actual or apparent bias came into play. The court should investigate the actual circumstances and make findings thereon and impute them to the 'reasonable and informed observer'. It followed that the word 'informed', which qualified the word 'observer', was of vital importance ... *Koya v State* [1998] FJSC 2 considered.

(ii) There was a difference between the issue in the instant case and the situation where counsel had run amok without any instructions

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from his client. Many matters which arose in the course of a trial were routine. Where counsel was fully and properly instructed and he understood his client's mindset with regard to the conduct of the defence, routine matters could be left to counsel. The inquiry of the judge in the instant case was a routine matter which could have been safely left to counsel to decide on ...

(2) The statutory criminal framework in Fiji allowed new evidence of fact in an appeal only if stringent conditions were satisfied. The Court of Appeal as previously differently constituted had sought evidence from the second appellant about what had happened during the trial in relation to the judge's acquaintanceship with the victim's father and the state witnesses. However, that was not new factual evidence and was therefore inadmissible at the appeal and should not have been considered ...

Public Office Holders

[2002] PGSC 1

Peipul v The Leadership Tribunal

PAPUA NEW GUINEA

Supreme Court

Amet CJ, Kapi DCJ, Los, Injia & Sawong JJ

24 May 2002

{see: <http://www.pacii.org/pg/cases/PGSC/2002/1.html>}

[2013] 5 LRC 211

Bohn v Republic of Vanuatu and Others

[2013] VUSC 42

VANUATU

Supreme Court

Lunabek CJ

5 April 2013

Fundamental rights – Right to equality – Freedom from discrimination – Parliamentary elections – Qualifications – Rural constituency – Applicant, naturalised citizen, elected to represent

rural constituency – Act specifying requirement that candidate originate from constituency or be adopted by custom into family originating from constituency – Applicant’s qualification for candidacy in election challenged – Applicant challenging constitutional validity of Act – Whether Act infringing fundamental rights – Appropriate test – Relevant considerations – Constitution of the Republic of Vanuatu 1980, art 5(1)(k) – Representation of the People Act 1982, s 23A(1), (2), (4).

The applicant, B, was a non-indigenous citizen who had moved to Vanuatu and subsequently had become naturalised while living in a rural community. He successfully participated as a candidate in a parliamentary election. Qualification for participation in an election was governed by the Representation of the People Act 1982, s 23A (as amended by the Representation of the People (Amendment) Act 2012), which provided under sub-ss (1) and (2) that only a person originating from a rural constituency could represent that constituency. Under the terms of sub-s (4), origin was defined by reference to the relevant person’s parents or grandparents having lived in the constituency or by reference to adoption by custom into a family originating in the constituency. A number of people brought a petition before the Supreme Court questioning B’s qualification for participation in the election, on the grounds that he had not been adopted by custom. In response, B brought his own application before the Supreme Court challenging the validity of s 23A by reference to art 5(1)(k) of the Constitution of Vanuatu, which provided for ‘equal treatment under the law or administrative action’ for all citizens, subject to respect for the rights and freedoms of others and to legitimate public interest under art (5)(1) and with the exception of laws made for the protection or advancement of women, children or members of under-privileged groups under art (5)(1)(k). B argued that s 23A was unconstitutional, in that it infringed his constitutional rights by the way in which it categorised citizens for the purposes of qualifying for participation in elections, whereas the Constitution made no distinction between indigenous and naturalised citizens. Further, he argued that s 23A discriminated between citizens on the basis of race or place of origin, whereas the Constitution explicitly recognised fundamental rights for all citizens without reference to race or place of origin. The respondents argued that the provisions of s 23A were legitimately made for the purpose of preventing an individual from one rural constituency contesting an election in another constituency.

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HELD: Application granted. Section 23A of the Representation of the People Act 1982 and related provisions declared inconsistent with Constitution and, to the extent of the inconsistency, of no force.

The Constitution, and particularly those provisions protecting entrenched fundamental rights and freedoms, was to be given a generous and purposive construction. It was clear that s 23A(4) placed emphasis on the citizen's race and place of origin in qualifying as a candidate for elections to Parliament in rural constituencies. The operation of s 23A had the effect that only a native citizen originating from a rural constituency was eligible to stand for election, whereas citizens by naturalisation, citizens who resided or worked in a rural constituency which was not their place of origin and citizens who lived in their spouses' places of origin were not qualified to stand for elections. However, the purpose of art 5(1)(k), read together with other rights provisions, was to ensure equality in the formulation and application of the law. That right to equality under the law, to the equal protection and benefits of the law contained in art 5(1)(k), was granted with the direction contained in art 5(1) itself that it be applied without discrimination, inter alia, based on the 'race' or 'place of origin' of the individual person. In the instant case, s 23A had clearly infringed the applicant's constitutional rights under art 5(1) in its operation and effect. He had been required to fulfil the requirements of s 23A, based on the grounds 'race' and 'place of origin', to be an eligible candidate to stand for elections to Parliament, but the requirements of s 23A had not been imposed on other citizens. Section 23A discriminated between indigenous citizens and naturalised citizens by their categorisation and had a differential impact on the applicant in the benefits accorded by law, and those limitations enacted in s 23A were discriminatory and infringed the constitutional rights of the applicant under art 5(1)(k). Moreover, in light of the purpose of s 23A asserted by the first respondent, the section had not been enacted to serve any legitimate public interest under art 5(1) nor had it been enacted to provide protection for women, children or another under-privileged group under art 5(1)(k). Accordingly, sub-s (1), (2) and (4) of s 23A were unconstitutional in that they were inconsistent with the provisions of the Constitution and were, to the extent of the inconsistency, of no force or effect.

Per curiam. (i) The discrimination under consideration is limited to discrimination caused by the application or operation of the law. It does not extend to discrimination caused by private activities. Article 5(1)(k) is not a general guarantee of equality; it does not provide for equality between individuals or groups or for an obligation to accord equal treatment to others. It is concerned with the application of the law.

(ii) It is not for the courts to legislate or to substitute their view on public policy for those of the legislature. Not all legislative classifications must be rationally supportable before the courts: for example, much economic and social policy-making legislation was beyond the institutional competence of the courts, which should therefore be reluctant to question legislative and governmental choices in such areas. This does not mean that the courts should abdicate their constitutional duties. Where the enactment infringes entrenched fundamental rights and freedoms, the court enjoys powers under the Constitution to remedy same ...

(iii) The word 'native' was not defined by the Act and it was unnecessary to provide a definition for the purposes of the instant case.

Ethical Governance

[2011] 5 LRC 209

Marin and Another v Attorney General

[2011] CCJ 9 (AJ)

BELIZE

Caribbean Court of Justice

de la Bastide P, Saunders, Bernard, Wit and Anderson JJ

27 June 2011

Tort – Misfeasance in public office – Locus standi – Attorney General bringing proceedings against respondents, former ministers, alleging sale of national lands at undervalue – Whether appropriate for state to institute such proceedings – Whether tort protecting

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private or class interests only – Whether Attorney General having locus standi to institute claim for damages for misfeasance in public office – Whether appropriate remedy in criminal proceedings – Appropriate test – Relevant considerations – Constitution of Belize 1981, s 50 – Inter-American Convention Against Corruption 1996.

The Attorney General brought proceedings against the appellants, M and C, both former ministers, alleging that, while in office, M caused 56 parcels of land, comprising 10 acres, being national land, to be wrongfully transferred to a company beneficially owned and/or controlled by C at an undervalue, in breach of the National Lands Act (Cap 191). The Act empowered the minister, after consultations with the Advisory Committee, to prescribe the prices at which national land could be sold. The Attorney General claimed that the appellants knew that the sale at such a price would cause damage to the government, that the appellants acted in bad faith and that such behaviour constituted misfeasance in public office. Each parcel of land was sold for \$4,000 but it was alleged that other parcels of land in the same area and in the same condition had been transferred at an average of \$19,460 per parcel. The Attorney General claimed special damages in the sum of \$924,056.60, being the sum which the government lost, and exemplary damages. In his defence M asserted that, at all material times, he acted in the honest belief that he had lawful authority to transfer the property in the manner which he adopted; since the Advisory Committee under s 5 of the Act had not been appointed, it could not be consulted. In his defence C denied having any interest in company that purchased the land and denied colluding with M in any scheme concerning the sale of the land. At first instance the Chief Justice raised as a preliminary issue the question whether the Attorney General was the proper plaintiff in the action; he then ruled that the tort of misfeasance in public office was not a claim which could be brought by the Attorney General. The Attorney General appealed successfully to the Court of Appeal, which, following a line of Indian cases and *Gouriet v Union of Post Office Workers* [1977] 3 All ER 70, reinstated the claim. The appellants appealed to the Caribbean Court of Justice, where it was assumed, for the purposes of the appeal, that the appellants by virtue of the acts alleged had committed misfeasance in public office and that the government had suffered damage and loss as a consequence. The only preliminary issue that remained to be settled concerned the competence of the Attorney General to sue.

HELD: (de la Bastide P and Saunders J dissenting) Appeal dismissed.

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(de la Bastide P and Saunders J dissenting) The primary purpose of the law of torts was to provide compensation for loss sustained by the unlawful conduct of others. The tort of misfeasance required strict proof of its ingredients, viz establishing that a public officer had abused power vested in him by virtue of his office whereby some person or entity with a sufficient interest to sue suffered consequential loss or damage. There was no additional element which required the identification of a plaintiff as a member of a class to whom the public officer owed a particular duty: it was the office in a wide sense on which everything depended. All of the cases on the tort of misfeasance brought in the jurisdictions where it had been utilised had been at the instance of individuals, defining over the years the essential nature of the tort. What seemed to be of paramount importance was the abuse of power by a public official against someone or an entity with a sufficient interest to claim compensation for loss suffered by that abuse of power. The objective of the tort was to make a public officer personally liable for misuse and abuse of power intended to be used for the public good but which was used for his own benefit. Allowing the state to sue public officers in the tort of misfeasance was in no way creating a new principle but was simply the logical application of the principles which had already been developed by the common law. The state, acting through the Attorney General, clearly had a sufficient interest in the subject matter of the litigation to found legal standing to sue. The injury was caused to the state by the deliberate and wrongful underselling of state lands. It followed that the state could therefore sue the appellants for misfeasance in public office and the Attorney General was clearly the proper official to bring civil proceedings to recover loss sustained by the state as a result of tortious conduct ... Dicta of Lord Steyn in *Three Rivers DC v Bank of England* [2000] 3 All ER 1 at 9, of Lord Bingham in *Watkins v Secretary of State for the Home Department* [2006] UKHL 17, [2006] 2 All ER 353 at [8] applied. *Northern Territory of Australia v Mengel* (1995) 69 ALJR 527 considered.

Per curiam. Per Bernard J. (i) Closely allied to the tort of misfeasance is the criminal offence of misconduct in public office, both having as their focus the abuse of power by a public officer. There is no doubt that criminal prosecution will send a strong

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message to public officers who utilise powers entrusted to them for their own benefit and which result in financial loss to the state. These options of criminal prosecution are not within the remit of the Attorney General, but solely the function of the Director of Public Prosecutions ...

(ii) The novelty of the state being capable of suing under the tort is by no means fatal, but just widens the category of those entitled to sue for abuse of power by a public officer, as has been done before, provided there is a sufficient interest to found standing and economic loss has been established ...

(iii) The court found itself in virgin territory in deciding the point raised in the appeal; no case had emerged in any Commonwealth jurisdiction where governments or states had sought to use the tort against public officials abusing powers conferred on them for their own financial gain. The objective is to make a public officer personally liable for misuse and abuse of power intended to be used for the public good but which was used for his own benefit. Admittedly the criminal offence of misfeasance in public office has always been available to a state and may have been the preferred option for punishing corrupt public officials, hence the total absence of any precedent where the tort was used. Of course, if the objective is to recover economic loss due to the public officer's abuse of his power, the tort of misfeasance would be the appropriate remedy ...

(iv) It is beyond dispute that corruption is increasing exponentially in our world economies, thereby imposing on governments the need to take firm action against public officers who abuse their office for personal enrichment ... Dicta of Lord Bingham in *Watkins v Secretary of State for the Home Department* [2006] UKHL 17, [2006] 2 All ER 353 at [8] considered.

(v) There is no doubt that criminal prosecution will send a strong message to public officers who utilise powers entrusted to them for their own benefit and which result in financial loss to the state. These options of criminal prosecution, however, are not within the remit of the Attorney General, but solely the function of the Director of Public Prosecutions as provided for in s 50 of the Belize Constitution, and which shall not be subject to the direction or control of any other person or authority. In any event, the Attorney General may be more concerned with recovering

loss to the public purse, which in this case is the economic value of the national lands ...

Per curiam. Per Wit J. (i) Criminal law should not be used by the state with the *main* objective of getting compensation for damages suffered by the state even though it is clear that such a result could be obtained through the backdoor of high fines or, where legislation allows it, through the side door of compensation orders ...

(ii) The relationship between the state and its public officer is comparable to that of principal and agent. The public officer is a fiduciary and has fiduciary duties. The equity route will in most cases be the preferable private law approach for the state, as equity can tackle all possible forms of corruption committed by public officers (even those that did not cause damage) and it would seem arguable that the burden of proof for deliberate breaches of fiduciary duty might be less heavy than that in the tort action. The tort of misfeasance and the breach of the public officer's fiduciary duty are not that far apart, at least not when the state is involved. As both may give rise to compensation for damage, a claim for breach of fiduciary duty may very well lie in parallel with a claim in the tort of misfeasance. An overlap between equity and tort is, however, nothing new or unusual ... Dicta of Lord Browne-Wilkinson in *Henderson v Merritt Syndicate Ltd* [1994] 4 LRC 355 at 393 and of Sir Richard Scott V-C in *Medforth v Blake* [1999] 3 All ER 97 at 111 applied.

(iii) The public law powers flowing from the Attorney General's position as the guardian of the public interest cannot be used as a reason why the state can avail itself of the private law tort of misfeasance. The *parens patriae* powers of the state are part of its function as a repository of sovereignty and have nothing to do with, and are separate from, the powers of the state in its corporate emanation ...

Per curiam. Per Anderson J. (i) The mere fact that the appellants may not have been actuated by malice towards the state or that the state could not be humiliated or shamed by the abuse of power seems to be immaterial. It is likewise of no consequence that the plaintiff is not an individual or group of individuals, since it is perfectly possible for corporate entities such as companies and public authorities to sue. All that appears necessary for the state

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to take action is that the appellants intentionally undertook the unlawful act of underselling state lands with the improper motive of conferring a benefit on the development company, knowing that the state would suffer injury as a consequence ...

(ii) In contemporary society, in proceedings by and against the Crown, the rights of the parties are to be as nearly as possible the same as in a suit between individual persons ...

(iii) The question of availability of alternative causes of action cannot logically be determinative of the competence of the Attorney General to sue in misfeasance. That other causes of action are available cannot rob the Attorney General of any competence he has to bring proceedings in tort ...

Per de la Bastide P and Saunders J (dissenting). As a matter of policy the court should not extend the tort of misfeasance to accommodate actions by the state. The overwhelming consensus throughout the entire Commonwealth, reflected in authoritative judicial statements of principle of general application, was that the tort protected the peculiar interests of a private entity or a member of a class. The distinctive character of the tort of misfeasance was that it applied to the abuse of public office and the infliction of damage on a relatively defenceless citizen (corporate or otherwise) or class of persons. Inherent in the relationship between wrongdoer and victim was inequality in power, status and authority. With the exception of one case where the point was not discussed, no reported case had been seen in which the state had been a claimant in a civil suit founded on tortious misfeasance or where the courts had entertained a suit in misfeasance by a public authority against its own officer. Neither of these possibilities is discussed or alluded to in any text or other legal material cited to the court. On the contrary, the common law was replete with references to the type of claimant who fell within contemplation of the tort. It was impossible for the state to situate itself within that paradigm. Allowing the state to pursue tortious misfeasance in the instant case has the effect of ascribing the same legal consequence to qualitatively different violations. The similar treatment accorded reduced the gravity of the fiduciary obligations owed by public servants toward the state, flew in the face of the resolve of Parliament and undermined the international commitment undertaken by the state in ratifying the Inter-American Convention Against Corruption 1996.

Extending the tort of misfeasance unnecessarily to give the Attorney General another choice of civil remedies did not strike a blow for the maintenance of probity by public officials. Quite the contrary, it had the opposite effect. It offered the miscreant the softer option of civil liability. Such extension would serve to erode rather than promote integrity in public life and neither the interest of the State of Belize nor the state of Caribbean jurisprudence was enhanced by it ... Dicta of Smith J in *Tampion v Anderson* [1973] VR 715 at 720, of O'Sullivan JA in *Gershman v Manitoba Vegetable Producers' Marketing Board* (1976) 69 DLR 114 at 123, of Blanchard J in *Garrett v A-G* [1997] 2 NZLR 332 at 350, of Iacobucci J in *Odhavji Estate v Woodhouse* 2003 SCC 69, [2003] 3 SCR 263 at [30], of Pill LJ in *A-G's Reference (No 3 of 2003)* [2004] EWCA Crim 868, [2005] 4 All ER 303 at [48] and *Cannon v TAHCHE* [2002] 5 VR 317 applied. *Three Rivers DC v Bank of England* [2000] 3 All ER 1 considered.

Per curiam. Per de la Bastide P and Saunders J. (i) The equitable causes of action are tailor-made for a case like the instant one, where ministers of government are alleged to have flouted their solemn responsibilities ...

(ii) It is impossible to conceive of any circumstance where corrupt acts occasioning serious material loss to the state would suffice to ground an action in tortious misfeasance but be insufficient to make out a *prima facie* case establishing the commission of a criminal offence. As a matter of public policy, serious infractions by a public servant, such as misbehaviour in office, neglect of duty and breach of trust, are to be treated as crimes, subject to the right of any person or body of persons to recover damages for injury flowing from such misconduct. In the absence of some plausible explanation for eschewing criminal and equitable proceedings, it is not in the public interest that the court should extend the common law in order to facilitate an action *in tort* against those who are alleged to have engaged in criminal acts ...

(iii) Departure from received common law is justified when its purpose is to improve the law; when the departure is consistent with public policy; in instances, for example, when there is a *lacuna* in the existing law that must be filled; or when the peculiarities of our social, political, cultural or economic landscape so dictate, or when evolving principles of equity and good conscience prompt the development. The radical departure offered here does not

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respond to any of these imperatives. It is unwarranted. There is nothing so peculiar about the Belizean or Caribbean context that justifies it and it does not improve the law in any way ...

Accountability Mechanisms

[2013] 5 LRC 444

R v Swaziland Independent Publishers (Pty) Ltd and Another

[2013] SZHC 88

SWAZILAND

High Court
Maphalala J
17 April 2013

(1) Fundamental rights – Right to fair trial – Presumption of innocence – Contempt of court – Scandalising the court – Summary procedure – Respondents cited for contempt – Respondents called upon to show cause why contempt order should not be made – Whether procedure violating applicant’s fundamental right – Constitution of the Kingdom of Swaziland Act 2005, ss 21, 139(3).

(2) Fundamental rights – Freedom of expression – Contempt of court – Scandalising the court – Respondents publishing articles critical of courts and Acting Chief Justice – Attorney General citing respondents for contempt of court – Whether respondents’ criticism protected by freedom of expression – Appropriate test – Relevant considerations – Constitution of the Kingdom of Swaziland Act 2005, ss 24(3)(b)(iii), 139(3), 146(5).

(3) Constitutional law – Criminal proceedings – Prosecutorial power – Delegation – Attorney General – DPP – DPP having power to delegate authority to prosecute to ‘subordinate officers’ – DPP delegating authority to Attorney General – Whether properly authorised to do so – Whether Attorney General ‘subordinate’ to DPP – Constitution of the Kingdom of Swaziland Act 2005, ss 77, 162(5).

In 2009 the second respondent wrote an article published by the first respondent in *The Nation* entitled ‘Will the judiciary come

to the party?’ and sub-titled ‘Chief Justice Richard Banda needs to rally his troops behind the Constitution of 2005’ which, inter alia, contemplated judicial consideration of cases concerning fundamental rights and multi-party democracy in Swaziland. A second article published by the first respondent was entitled ‘Speaking My Mind’ and, inter alia, described the Acting Chief Justice at an official event marking the opening of the legal calendar as ‘behaving like a high school punk’ and having beaten his chest, calling himself ‘Makhulu Baas’, a term described by the respondents as meaning ‘big boss’. The applicant, the Attorney General, acting under a delegation of authority to prosecute issued by the Director of Public Prosecutions under s 162(5) of the Constitution of Swaziland Act 2005, lodged applications with the High Court calling on the respondents to show cause why they should not be committed and punished for criminal contempt of court. The applicant contended that the first article sought to influence the judiciary’s consideration of fundamental rights cases and that it impugned the honour, dignity, authority, independence and impartiality of the judges of the Supreme Court and the High Court by ‘poisoning the fountain of justice’ and that the article was in contempt of court. The applicant contended that the second article demeaned the Acting Chief Justice and was in contempt of court. The application was opposed by the respondents who contended, inter alia, that the summary procedure was unlawful and unconstitutional, that the Attorney General lacked jurisdiction under s 77 of the Constitution to prosecute either in his own right or acting under delegated authority and that the two articles did not constitute contempt of court, as s 24 of the Constitution guaranteed the respondents’ freedom of expression and the opinions expressed in the articles fell within the bounds of legitimate comment and criticism.

HELD: Constitutionality of summary procedure and of delegation of prosecutorial power upheld. Respondents found guilty of contempt of court.

(1) The Crown had discretion to prosecute the offence of contempt of court either summarily or under the ordinary criminal procedure. Section 139(3) of the Constitution provided that the superior courts were courts of record and had the power to commit for contempt of themselves and all such powers as were vested in a superior court of record immediately before the commencement of the Constitution. That subsection did not prescribe the

under 24(3)(b)(iii) of the Constitution was limited to the extent that was reasonably required for the purpose of ‘maintaining the authority and independence of the courts’ and the court had power to interfere only when the bounds of moderation and fair and legitimate criticism had been exceeded. Contempt of court was a public remedy and it was not intended to vindicate the reputation of an individual judge. It was intended to maintain public confidence in the administration of justice and to ensure that it was not undermined. The protection and maintenance of the rule of law and the rights and freedoms guaranteed by the Constitution depended on the public confidence in the administration of justice. In the instant case, the first article had a tendency to bring the administration of justice into disrepute. Concerning the article’s criticism of a particular Supreme Court decision, s 146(5) of the Constitution provided that the Supreme Court was not bound to follow the decisions of other courts and that it might depart from its own decisions if they were wrongly decided. It was accordingly open to the litigants in that case to approach the court to review the decision. The attack on the Supreme Court was therefore unnecessary and was not justified in law. Furthermore, there was a limit beyond which the courts, in their liberal interpretation of the Constitution, could influence multi-party democracy in the face of s 79 of the Constitution, which expressly provided that ‘the system of government for Swaziland is a democratic, participatory, tinkhundla-based system which emphasises devolution of State power from the Central government to tinkhundla areas and individual merit as a basis for election or appointment to public office’. The remedy for proponents of multipartism did not lie with the courts but with the nation as a whole by constitutional amendment. The second article was a scurrilous attack on the then Acting Chief Justice as a judge. The article unlawfully and intentionally violated and impugned his dignity and authority and it was calculated to lower his authority and interfere with the administration of justice. It followed that the first and second respondents were guilty of contempt of court ... Dicta of Kotze CJ in *Re Dormer* (1891) 4 SAR 64 at 73, 83, 88–90, of Murphy J in *Gallagher v Durack* [1985] LRC (Crim) 706 at 710, of Gubbay CJ in *Re Chinamasa* [2001] 3 LRC 373 at 384, 386, 394, *Ambard v A-G for Trinidad and Tobago* [1936] 1 All ER 704 and *Ahnee v DPP* [1999] 2 LRC 676 considered. *State v Mamabolo (ETV, Business Day and the Freedom of Expression Institute intervening)* [2002] 1 LRC 32 not followed.

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(3) Under s 77 of the Constitution of the Kingdom of Swaziland Act 2005, the Attorney General was the principal legal adviser to the government, an ex-officio member of Cabinet, an adviser to the King on any matter of law, provided guidance in legal matters to Parliament; assisted ministers in piloting Bills in Parliament drafted and signed all government Bills to be presented in Parliament, drew or perused agreements, contracts, treaties, Conventions and documents in which the government had an interest and represented the government in courts or in any legal proceedings to which the government was a party, as well as consulting with the Director of Public Prosecutions in matters of national security. Section 162(5) of the Constitution provided, inter alia, that the powers of the Director of Public Prosecutions to institute criminal proceedings against any person before any court in respect of any offence might be exercised by the Director in person or by subordinate officers acting in accordance with the general or special instructions of the Director. Prima facie the Attorney General was not a subordinate officer of the Director; however, when he acted by virtue of delegated authority, he was in law subordinate to the Director on the basis that he prosecuted in accordance with the special instructions of the Director. Moreover, in the absence of a specific constitutional provision allowing the Attorney General to prosecute the instant matter, such power was implied, inherent and was a constitutional prerogative by virtue of his position as the principal legal adviser to the government. It followed that the Attorney General was entitled to institute proceedings against the respondents ...

[2012] 2 LRC 439

Yong Vui Kong v Attorney General

[2011] SGCA 9

SINGAPORE

Court of Appeal

Chan Sek Keong CJ, Andrew Phang Boon Leong
and V K Rajah JJA

17 January, 4 April 2011

(1) Constitutional law – Executive – President – Clemency power – Exercise – Justiciability – Appellant under sentence of death – President acting on advice of Cabinet declining to grant clemency – Appellant applying for judicial review of decision – Whether exercise of clemency power subject to judicial review – Relevant considerations – Comparative Commonwealth jurisprudence – Constitution of the Republic of Singapore, arts 9(1), 22P(2).

(2) Constitutional law – Executive – President – Clemency power – Exercise – Advice of Cabinet – Judicial review – Grounds – Ultra vires – Appellant under sentence of death – President acting on advice of Cabinet declining to grant clemency – Appellant applying for judicial review of decision – Appellant submitting that President entitled to act in his own discretion – Whether decision taken on advice of Cabinet properly taken – Whether ultra vires – Constitution of the Republic of Singapore, arts 21, 22P.

(3) Administrative law – Judicial review – Grounds – Natural justice – Apparent bias – President – Clemency power – Exercise – Appellant under sentence of death – President acting on advice of Cabinet declining to grant clemency – Appellant applying for judicial review of decision – Appellant claiming decision tainted by apparent bias – Statements by Law Minister regarding death penalty – Whether indicating apparent bias – Whether amounting to denial of natural justice – Constitution of the Republic of Singapore, art 22P.

(4) Administrative law – Judicial review – Grounds – Legitimate expectation – President – Clemency power – Exercise – Appellant under sentence of death – President acting on advice of Cabinet declining to grant clemency – Appellant applying for judicial review of decision – Appellant claiming legitimate expectation

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that President would act in his own discretion in making clemency decision – Whether such legitimate expectation established – Constitution of the Republic of Singapore, art 22P(1).

(5) Administrative law – Judicial review – Grounds – Disclosure – President – Clemency power – Exercise – Disclosure of reports – Appellant under sentence of death – President acting on advice of Cabinet declining to grant clemency – Constitution requiring submission of reports by judges with opinion of Attorney General to Cabinet – Appellant applying for disclosure of such materials to facilitate representations to President – Whether appellant entitled to such disclosure – Constitution of the Republic of Singapore, art 22P – American Convention on Human Rights 1969, art 4(6).

(6) Administrative law – Judicial review – Remedies – Declaratory order – Appellant under sentence of death – President on advice of Cabinet declining to grant clemency – Appellant applying for judicial review of decision – Appropriate remedy – Whether declaratory relief available – Rules of Court, Ord 53.

(7) Judiciary – Judge – Recusal – Bias – Apparent bias – Prejudgment – Appellant under sentence of death – President on advice of Cabinet declining to grant clemency – Appellant applying for judicial review of decision – Appellant submitting that President entitled to act in his own discretion – Appeal – Chief Justice presiding over appeal court – Appellant applying for Chief Justice to recuse himself from hearing appeal – Appellant submitting that Chief Justice as former Attorney General would have advised President to act only on advice – Appellant submitting that such advice amounting to apparent bias in form of prejudgment of issue arising on appeal – Whether ground for recusal established.

In 2008 Yong Vui Kong, the appellant, was convicted under the Misuse of Drugs Act (Cap 185, 2001 Rev Ed) of trafficking in 47.27g of diamorphine and the mandatory death sentence was imposed upon him. On 20 November 2009 the President, acting on the advice of the Cabinet, declined to grant clemency under art 22P of the Constitution of Singapore. The appellant was subsequently given leave to proceed with an appeal against his conviction and sentence which he had previously withdrawn; the appeal was dismissed by the Court of Appeal on 14 May 2010: [2010] SGCA 20, [2011] 1 LRC 642. On 21 July 2010 the appellant commenced proceedings under the Rules of Court,

Ord 53, against the Attorney General, seeking judicial review of the clemency decision on various grounds. These included: (i) that the President was authorised by the Constitution to exercise his own discretion in making clemency decisions; (ii) that certain remarks reportedly made by the Law Minister on 9 May 2010 raised an apprehension that the advice given by the Cabinet to the President would have been tainted by bias and predetermined and (iii) that natural justice required that the appellant was entitled to see all the materials, including reports by judges and advice of the Attorney General, required by art 22P of the Constitution to be submitted to the Cabinet, to enable the appellant to make written representations before a decision was made. The High Court judge dismissed the application, holding that the clemency process was not justiciable on the grounds pursued by the appellant, who appealed to the Court of Appeal. When the hearing commenced before the appeal court, counsel for the appellant made a surprise application for the Chief Justice to recuse himself from presiding over the appeal on the ground that, as the former Attorney General, he must have advised the President to act only on the advice of the Cabinet in exercising the clemency power and that that amounted to apparent bias in the form of prejudgment. In oral argument counsel for the appellant also introduced a new submission, that the appellant had a legitimate expectation that the President would act in his discretion in exercising the clemency power, which the court allowed him to present because of the grave personal and constitutional implications of the appeal.

HELD: Appeal dismissed.

(1) Although the exercise of the clemency power, as a constitutional power vested exclusively in the executive, was not justiciable on the merits of a decision, on the basis of the separation of powers and established administrative law principles, that did not entail that the power was 'extra-legal' in the sense of being beyond any legal constraints. No constitutional or legal power was beyond the reach of the supervisory jurisdiction of the court if it was exercised mala fide or ultra vires. All legal powers had legal limits and the notion of a subjective or unfettered discretion was contrary to the rule of law. The courts had the power to review the exercise of the clemency power under art 22P to ensure that such exercise was in good faith and for the intended purpose, not an extraneous purpose, and did not contravene constitutional protections and

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rights. Furthermore, the specific procedural safeguards provided by art 22P(2) in death sentence cases only, requiring reports by the judges and the opinion of the Attorney General thereon to be sent to the Cabinet before it advised the President, necessarily implied a constitutional duty on the Cabinet to consider those materials impartially and in good faith before advising the President. If there was evidence that the Cabinet had acted in breach of those procedural requirements, unless the court could intervene the rule of law would be rendered nugatory. In Singapore, as in many common law jurisdictions which had elevated the clemency power from a common law prerogative power to a constitutional power under a written Constitution, the making of a clemency decision was not a private act of grace from an individual happening to possess power but part of a constitutional scheme. Moreover, that the clemency power was subject to judicial review was a corollary of the right to life and personal liberty guaranteed by art 9(1) of the Constitution ... Dicta of Lord Goff of Chieveley in *Reckley v Minister of Public Safety (No 2)* [1996] 1 LRC 401 at 411, *Chng Suan Tze v Minister for Home Affairs* [1988] 2 SLR (R) 525, *Maru Ram v Union of India* (1981) 1 SCC 107, *Epuru Sudhakar v Government of AP* (2006) 8 SCC 161 and *Law Society of Singapore v Tan Guat Neo Phyllis* [2008] 2 SLR (R) 239 applied.

Per curiam. Per Chan Sek Keong CJ. A comparative survey shows that the High Court of the United Kingdom has held that the prerogative of mercy would be subject to judicial review if it was exercised on the basis of an error of law or on arbitrary or extraneous considerations, although the merits of a decision could not be reviewed. In Commonwealth states in the Caribbean the Privy Council has held that the clemency power is subject to judicial review, although the merits of a clemency decision remain non-justiciable. In Canada it appears that the clemency power is reviewable on both procedural and substantive grounds, with the courts being prepared to review a decision on the merits in an appropriate case. It appears that in Australia and New Zealand the law on whether the clemency power is reviewable by the courts is not settled. In India, the clemency power is subject to judicial review. In Hong Kong the High Court has held that, while the merits of any clemency decision are not subject to judicial review, the lawfulness of the process by which such a decision was made is justiciable. In Malaysia the courts have consistently held that neither a clemency decision nor the process by which it was made can be questioned by the courts ...

(2) Per Chan Sek Keong CJ. The fundamental principle of constitutional law set out in art 21 of the Constitution, that the President must act on the advice of the Cabinet in all matters in the discharge of his functions, except where discretion was expressly conferred on him, had been part of the constitutional order since Singapore attained internal self-government in 1959. Article 22P did not expressly confer discretionary powers on the President and the argument for the appellant, that the President could exercise the clemency power in his own discretion, was fundamentally flawed and completely unsustainable ...

Per Andrew Phang Boon Leong and V K Rajah JJA. It was elementary constitutional law that, under a Constitution based on the Westminster model, like that of Singapore, the President was a constitutional head of state who had to act on the advice of the Cabinet in exercising his executive powers, except for those that, by express constitutional authority, he might exercise acting on his discretion. The terms of art 22P could not be clearer in requiring the President to act on the advice of the Cabinet in exercising the clemency power, especially when read in the light of art 21(1). Contrary to the argument for the appellant, the word 'may' in the phrase 'may, on the advice of the Cabinet' in art 22P did not connote a personal discretion allowing the President to reject the advice of the Cabinet as to the exercise of the clemency power. The conclusion that the President had no discretion in exercising the clemency power was incontrovertibly supported by the legislative history of the clemency power embodied in art 22P ... Dicta of Chandrachud CJ, Bhagwati and Krishna Iyer JJ in *Maru Ram v Union of India* (1981) 1 SCC 107 at [61] and of Pathak CJ in *Kehar Singh v Union of India* AIR 1989 SC 653 at [7] applied.

Per curiam. Per Andrew Phang Boon Leong and V K Rajah JJA. While counsel has unfettered licence to raise all arguable points of law in support of a client's case, it is improper for counsel to make an obviously hopeless argument (i.e.: an argument which any reasonable lawyer would know is bound to fail), especially if he advances the argument for an extraneous purpose. Such conduct may (depending on the facts in question) amount to a serious abuse of process, even if it occurs in a situation where counsel is acting for a client in a case of the utmost gravity, as in the present case ...

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(3)(i) The administrative law rule against bias applied to the clemency process, but the hearing rule did not apply. Although the grant of clemency was a matter of executive grace, not of legal right, there was no reason why the administrative law rules of natural justice – the rule against bias and the hearing rule – should not apply to the clemency process, provided that the application of those rules was not inconsistent with the terms of art 22P of the Constitution. However, there was a conceptual difference between those rules and the fundamental rules of natural justice which operated at the constitutional level in relation to the validity of legislation and, having been incorporated into the meaning of the term ‘law’ in relevant provisions of the Constitution, formed part of the law to which citizens could have recourse to protect their fundamental liberties assured by the Constitution. The administrative law rule against bias applied to the ultimate authority in the clemency regime but that did not raise any conflict of interest for the Attorney General who under art 22P(2) advised the Cabinet on the grant of clemency after, as Public Prosecutor, having initiated the criminal proceedings against the offender. However, as a factual assertion, an allegation of bias or conflict of interest on the part of the ultimate authority would be accepted only if proved to the satisfaction of the court. In contrast, the administrative law hearing rule had never applied to the clemency process when it was a prerogative power and did not apply after it became a constitutional power. There was no provision for an offender to be heard during the clemency process under art 22P, which did not even provide a right for the offender in a death sentence case to file a clemency petition, although it was established procedure to invite him to do so; any petition filed did not form part of the materials which art 22P(2) required the Cabinet to consider, although no doubt it would be so considered ... Dicta of Lord Diplock in *Ong Ah Chuan v Public Prosecutor* [1981] AC 648 at 670–671 and in *Haw Tua Tau v Public Prosecutor* [1981] 3 All ER 14 at 16–17 considered.

Per curiam. Per Andrew Phang Boon Leong and V K Rajah JJA. Given the nature of the clemency power, the Cabinet, when advising the President on the exercise of the power, cannot be held to the same standard of impartiality and objectivity as that applicable to a court of law or tribunal exercising a quasi-judicial function. All that is required is that the Cabinet abide by the process set out in art 22P and consider the matter fairly and objectively, having regard to the purpose of the clemency power.

The grant of clemency being an act of grace, the Cabinet is entitled to take into account the public policy considerations concerning the nature of the offence in question and the legislative policy underlying the imposition of the prescribed punishment for that offence. Giving effect to such considerations by advising the President not to grant clemency cannot, without more, amount to bias, actual or apparent ...

(ii) There was no merit in the submission for the appellant that the clemency process vis-à-vis the appellant had been tainted by a 'reasonable suspicion of bias by reason of predetermination' as a result of statements by the Law Minister. Those statements were nothing more than an articulation of the government's policy of adopting a tough approach to serious drug trafficking offences by imposing a mandatory death penalty as punishment. Where a minister made a public statement on government policy on any issue, the rule against bias should not be applied to him as though he were a judicial or quasi-judicial officer, should he later be required to exercise his discretion on a matter relating to that policy. Otherwise, no minister would be able to speak on any governmental policy in public lest his statement be construed as a predetermination of any matter which he might subsequently have to decide in connection with that policy. The duty of fairness which the rule against bias imposed on a minister had to be less onerous than the corresponding duty of fairness incumbent on a judge or tribunal exercising a quasi-judicial function. Furthermore, the appellant's submission failed to explain how, even if the Law Minister's statements complained of evinced his predetermination not to grant clemency to the appellant, such predetermination could be attributed to the other 20 Cabinet ministers or to establish that he was speaking on their behalf. Moreover, if the appellant's submission was accepted, the logical consequence would be that any articulation by a minister of the government's policy on the death penalty would result in the entire Cabinet being disqualified from advising the President under art 22P(2). The result would be, as contended for the appellant, that no death sentences could be carried out but all would have to be commuted, meaning the abrogation or suspension of the death penalty, a consequence too absurd to contemplate ... Dicta of Gleeson CJ and Gummow J in *Minister for Immigration and Multicultural Affairs v Jia Legeng* (2001) 205 CLR 507 at [102] and *Hot Holdings Pty Ltd v Creasy* (2002) 210 CLR 438 applied.

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(4) The submission that the appellant had a legitimate expectation that the President would exercise the clemency power in his discretion was absolutely without merit, on both the facts and the law. The appellant relied on a number of newspaper reports that the President had granted clemency to various offenders but none of those reports conveyed a representation or promise of any kind, whether by the President or the Cabinet, other than a representation of fact that an offender had been granted clemency. Furthermore, for an alleged legitimate expectation to give rise to enforceable legal rights, it was not enough that the alleged expectation existed: it also had to be legitimate. An expectation was legitimate only if it was founded upon a promise or practice by a public authority that could be said to be bound to fulfil the expectation. Clear statutory words overrode any expectation and it was clear from the words ‘on the advice of the Cabinet’ in art 22P(1) that the President could not possibly make any promise to an offender that he would act in his own discretion in deciding whether or not to grant clemency ... Dicta of Lord Steyn in *R v DPP, ex p Kebilene* [2000] 3 LRC 377 at 419 applied.

Per curiam. Per Andrew Phang Boon Leong and V K Rajah JJA. The lack of even a scintilla of legal substance in the submissions on the expectation issue, as well as on the discretion issue, coupled with the manner in which the submissions were made, bordered on an abuse of process ...

(5) The appellant had no right to the disclosure of the art 22P(2) materials relating to his case to enable him to make adequate representations to the President on any fresh clemency petition which he might file. Those materials consisted of the reports by the trial judge and by the Chief Justice who had presided over the appeal, with the opinion of the Attorney General thereon. The existence of a right to disclosure of those materials was premised on the offender having a right to petition for clemency and/or a right to be heard during the clemency process but art 22P did not give the offender any such rights. Counsel for the appellant relied strongly and solely on the majority judgment of the Privy Council in *Lewis v A-G* [2000] 5 LRC 253, which departed from two previous decisions in which the Privy Council had held that the offender in a death sentence case was not entitled to disclosure of the materials placed before an advisory committee for consideration in advising the ultimate authority on the exercise of the prerogative of mercy. The key reason for the majority decision

in *Lewis* was art 4 of the American Convention on Human Rights 1969, under which Jamaica allowed offenders under sentence of death to present clemency petitions to international human rights bodies whose recommendations were then considered by the Jamaica Privy Council which advised the Governor-General on the exercise of the clemency power. In that context it was unsurprising that the majority held that the applicants had a right to make representations to the Jamaica Privy Council and to disclosure of the materials required to be placed before it, including the reports of those international human rights bodies. In a powerful dissent in *Lewis*, Lord Hoffmann held that the disclosure decision was mistaken, there being no reason to depart from the legal position laid down in the previous decisions. In the instant case, the trial judge had correctly rejected the disclosure holding in *Lewis*. The legal position in Singapore was absolutely clear: there was no Convention binding Singapore to give an offender a right of hearing during the clemency process. Moreover, the disclosure holding in *Lewis* was flawed in so far as it was influenced by considerations such as the possibility that false or incorrect materials might be placed before the advisory body or the possibility that the advisory committee's members might be unconsciously biased against the offender or might decide the matter in an arbitrary or perverse way. Those considerations were irrelevant to the question of disclosure of materials to an offender who had no right to present a petition or to be heard during the clemency process. More importantly, the risks highlighted by the majority in *Lewis* had no bearing on the clemency process under art 22P(2), where the persons directly involved held high constitutional offices: no court was justified in hypothesising that they might be unconsciously prejudiced or might fail to give the case full and fair consideration. The courts, instead of proceeding on such fanciful hypotheses, should proceed on the basis of presumptive legality, encapsulated in the maxim 'omnia praesumuntur rite esse acta' ... Dicta of Lord Goff in *Reckley v Minister of Public Safety (No 2)* [1996] 1 LRC 401 at 413 and *de Freitas v Benny* [1976] AC 239 applied. *Lewis v A-G* [2000] 5 LRC 253 not followed.

(6) The court had no power to grant declaratory relief in proceedings commenced under Ord 53 of the Rules of Court, existing case law clearly establishing that such relief was not a remedy provided for under Ord 53 ... *Re Application by Dow*

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Jones (Asia) Inc [1987] SLR(R) 627 and *Chan Hiang Leng Colin v Minister for Information* [1997] 1 LRC 107 followed.

(7) The surprise late application by counsel for the appellant for the Chief Justice to recuse himself from presiding over the appeal was patently without merit. Neither of the two premises on which it was based was tenable. The first was the submission that, when formerly the Attorney General from 1992–2006, the Chief Justice had to have given the President advice concerning the discretion issue; no evidence was offered to support that assertion. The second was that, if such advice had been that the President had no discretion in exercising the power of clemency, that advice was wrong; however, the legal argument underlying that premise was fundamentally flawed, postulating a completely unsustainable argument that contradicted constitutional history, the text of arts 21 and 22P and existing case law ...

Per curiam. Per Andrew Phang Boon Leong and V K Rajah JJA. The basic rule is that a judge is automatically disqualified from hearing a case if he has a personal interest in its outcome. Although it is of the utmost importance that judges adhere scrupulously to this rule, any attempt to recuse a judge from hearing a case on the ground of conflict of interest must be based on credible grounds and must not be motivated by any extraneous purpose; otherwise, the rule could become a charter for abuse by manipulative advocates. In the instant appeal the disqualification application was frivolous as it was based on the most tenuous of grounds and was calculated to diminish the judicial process and disrupt the hearing of the appeal ... *Grand Junction Canal v Dimes* (1852) 3 HL Cas 759, *R v Bow Street Metropolitan Stipendiary Magistrate, ex p Pinochet Ugarte (No 2)* [1999] 1 LRC 1 and *Locabail (UK) Ltd v Bayfield Properties Ltd* [2000] 3 LRC 482 considered.

[2012] 1 LRC 66

**Justice Alliance of South Africa and
Others v President of the Republic of
South Africa and Others**

(See The Three Branches of Government)

Oversight of Government

[2013] 5 LRC 493

**State v Citizens' Constitutional Forum Ltd and
Another, ex p Attorney General**

[2013] FJHC 220

FIJI ISLANDS

High Court

Calanchini J

3 May 2013

(1) Judiciary – Judge – Bias – Recusal – Allegation of bias – Contempt of court – Application for order of committal of respondents for contempt by scandalising the court – Respondents seeking recusal of judge assigned to hear application – Appropriate test to determine whether judge should disqualify himself on account of allegation of bias.

(2) Contempt of court – Scandalising the court – Respondents publishing newsletter purporting to summarise report critical of independence of judiciary – Whether words printed and published by respondents lowering authority of judiciary and court – Whether offence of contempt by scandalising the court established against respondents – Relevant considerations.

In November 2011 the Chairman of the Law Society Charity (the LSC) made a private visit to Fiji. The LSC was established by the Law Society of England and Wales and promoted law and justice issues with particular emphasis on legal education and human rights. The LSC decided to take advantage of the visit to evaluate the position in Fiji and to publish a report. The report was based on limited consultation. The first respondent was the proprietor and publisher of a quarterly newsletter. About 2,000 copies of

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each issue of the newsletter were printed. The second respondent, its editor, personally approved each article for publication in the newsletter. Following publication of the LSC's report there appeared in the respondents' newsletter an item with the heading 'Fiji: The Rule of Law Lost'. The newsletter purported to summarise the LSC report and contained the phrases: 'The Law Society Charity ... in its report ... provides a stark and extremely worrying summary as to the state of law and justice in Fiji', 'The report highlights a number of fundamental failings of the current judiciary and legal structure in Fiji, particularly in relation to the independence of the judiciary' and 'the independence of the judiciary cannot be relied on'. The Attorney General commenced proceedings alleging that the words printed and published by the respondents constituted criminal contempt scandalising the court on the basis that they were a scurrilous attack on the judiciary and lowered the authority of the judiciary and the court. The respondents submitted that, in a case such as the instant one, where the words appeared in a specialised publication that had a limited readership, those words were unlikely to create a real risk of undermining public confidence in the administration of justice. The respondents also sought the recusal of C, the judge to whom the hearing of the substantive application for the order of committal against the respondents was assigned. They alleged that C had a personal interest in the proceedings and that objectively it could be said that there was animosity towards the respondents. The respondents relied, inter alia, on the M petition, a lengthy document written by a former resident Justice of Appeal who was not a citizen of Fiji. The document, which made reference to C and was critical of the independence of the judiciary, was published shortly after M's appointment had come to an end and after he had left Fiji. The respondents contended that the document showed that a resident Justice of Appeal felt that the exercise of his functions had been interfered with, that he had made the nature of his complaints known and that those concerns included assertions that fellow appeal judges were concerned about their security of tenure if they concurred with his judgments towards the end of his period in office. C was a former military lawyer and, in their earlier publications, the respondents had classified his appointment as a military judge and contended that he lacked impartiality and independence. They sought to rely on those attacks as grounds for fearing that C might demonstrate animosity towards them in the instant proceedings.

HELD: Recusal application refused. Committal application granted.

(1)(i) The applicable test to determine whether a judge should disqualify himself on account of bias was twofold. The first stage involved establishing the actual circumstances which had a direct bearing on a suggestion that the judge was or could be seen to be biased. That factual inquiry should be rigorous, in the sense that complainants could not lightly throw the 'bias' ball in the air. The second stage was to determine whether those circumstances as established might lead a fair-minded lay observer reasonably to apprehend that the judge might not bring an impartial mind to the resolution of the case. That involved an objective determination, in the sense that it required an inquiry as to how others would view the judge's position. In the instant case the two grounds relied upon by the respondents had to be considered in the light of that two-stage test ... *Koya v State* [1998] FJSC 2 considered. *R v Gough* [1993] 3 LRC 612, *Porter v Magill* [2002] 1 All ER 465 and *Citizens' Constitutional Forum v President* [2001] 2 FLR 127 applied.

(ii) The first ground was the claim that C had a personal interest in the proceedings. The respondents' publication was said to have used words that constituted criminal contempt scandalising the court. The gist of the words used was that the independence of the judiciary could not be relied on. It was apparent that as a judge and hence a member of the judiciary C had an interest in the proceedings as did all the judges of the court as members of the judiciary. In proceedings where the nature of the contempt was criminal contempt scandalising the court it was inevitable that the judge to whom the application was assigned would have an interest, which could be described as personal, in the proceedings. The contents of the petition did not enhance the degree to which C's interest might be more personal than that of any other member of the judiciary. The principal thrust of the petition was the independence or lack thereof of the judiciary. That C might have been the subject of disparaging comments in the petition did not render C's interest in the present proceedings sufficiently personal to warrant his recusal ...

(iii) Applicants such as the respondents should not be allowed easily to have a judge changed based on public vilification of the judge even when the vilification had been published by a third party. In cases such as the instant case, the respondents' right

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to a fair hearing based on the principles of natural justice were safeguarded by the prescribed procedural requirements. Thus the allegation of personal interest constituting bias had not been established ... *Citizens' Constitutional Forum v President* [2001] 2 FLR 127 applied.

(iv) The respondents could not rely on their earlier public attacks on C as a basis for seeking his recusal in subsequent proceedings. Otherwise it would be open to any litigant publicly to attack any members of the judiciary so as to ensure that none of them could be assigned proceedings in which the litigant was a party. Judges were, by training and experience, quite capable of exercising a high degree of personal and emotional detachment from the cases that they were called upon to determine. Accordingly, the allegation relating to a perception of animosity had not been established ... *Citizens' Constitutional Forum v President* [2001] 2 FLR 127 applied.

(2)(i) Contempt proceedings were concerned with the maintenance of public confidence in the courts of law (and the judiciary) established and maintained by the state for the administration of justice. The ability of the judiciary and courts of law effectively to administer justice was dependent on, among other things, the authority of those courts and the judiciary. That in turn depended on whether the courts and the judiciary commanded the confidence of citizens to administer justice without fear or favour. The mischief that was targeted by contempt proceedings such as those in the instant case was the risk to the administration of justice by lowering the authority and reputation of the courts and the judiciary by questioning their independence and hence their impartiality. In the instant case, whether the published words rendered the respondents liable for contempt scandalising the court depended upon whether the court formed the view that the publication overstepped the fine line between the tolerable and the intolerable. In determining whether that line had been crossed it was appropriate to consider the publication, the readership of the publication and the nature of the jurisdiction in which the words were published. The newsletter did not fit the description of a specialised publication, nor was it read by or available to only a few: it was available in hardcopy form in the library at the University of the South Pacific and past issues had been published on the first respondent's official website. Thus the newsletter's level of publication and circulation was sufficient for the court to inquire whether the publication

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on limited and selective consultation and could not be said to be balanced or fair. Under those circumstances the part of the report that dealt with the judiciary could not be said to amount to fair comment. Consequently the repetition of those conclusions in the article that purported to be an analysis of the LSC report could not be said to be fair comment. Moreover, the decision to publish the offending material rested entirely with the respondents and once publication had actually occurred then contempt by publication had been committed. That others had published similar material on the same subject matter did not exonerate the respondents and did not render the contemptuous words fair comment. Moreover, any criticism of the judicial institution couched in language that appeared to be mere criticism but ultimately resulted in undermining the dignity of the courts could not be permitted. Furthermore, when words went deeper than mere criticism they could not be regarded as having been made in good faith, nor could they constitute fair comment. The words ‘the independence of the judiciary cannot be relied on’, when considered objectively by a fair-minded and reasonable person, meant that there was a real risk of not having his dispute determined by an independent and hence impartial member of the judiciary. Such a conclusion clearly risked undermining the public’s confidence in the administration of justice. That was a serious contempt that was intolerable and had crossed the limits ... *Re Roy* [2002] 3 SCC 343 considered.

Civil Society

[2002] 5 LRC 216

Minister of Health and Others v Treatment Action Campaign and Others

SOUTH AFRICA

CCT 8/02

Constitutional Court

Chaskalson CJ, Langa DCJ, Ackermann, Goldstone,

Kriegler, Madala, Ngcobo, O'Regan and Sachs JJ,

Du Plessis and Skweyiya Ag JJ

2–3, 6 May, 5 July 2002

(1) *Constitutional law – Fundamental rights – Socio-economic rights – Enforcement – Health care services – Right of access to services provided by state – Scope – Access to right on progressive basis – Constitution of the Republic of South Africa 1996, s 27(1), (2).*

(2) *Constitutional law – Fundamental rights – Right of access to health care services – HIV epidemic – Mother-to-child transmission of HIV – Pregnant women with HIV giving birth in public health facilities – Appropriate treatment for prevention of mother-to-child transmission of HIV – Available resources – Whether obligation on state health authorities to make appropriate drug available – Government health care policy – Whether satisfying constitutional requirements – Appropriate order – Constitution of the Republic of South Africa 1996, s 27(1), (2).*

(3) *Constitutional law – Fundamental rights – Breach – Remedies – Injunctive relief – Separation of powers – Jurisdiction of courts – Scope – Jurisdiction extending to granting 'appropriate relief' and making of 'just and equitable' orders – Whether such relief available against organ of state – Whether courts limited to granting declaratory relief in such circumstances – Constitution of the Republic of South Africa 1996, ss 38, 172.*

The government, as part of a formidable array of responses to the HIV/AIDS pandemic, devised a programme to deal with mother-to-child transmission of HIV at birth, identifying Nevirapine as its drug of choice for that purpose. However, the programme imposed restrictions on the availability of Nevirapine in the public

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health sector, the drug being available only at two research sites per province. A number of associations and members of civil society concerned with the treatment of people with HIV/AIDS and with the prevention of new infections claimed that the measures adopted by the government were deficient in two material respects – first, because they prohibited the administration of Nevirapine at public hospitals and clinics outside the research and training sites and, second, because they failed to implement a comprehensive programme for the prevention of mother-to-child transmission of HIV – and applied to the High Court for declaratory relief, relying on (i) s 27 of the Constitution, which provided, *inter alia*, that everyone had the right to have access to health care services and that the state had to take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of such right and (ii) s 28, which provided, *inter alia*, that every child had the right to basic health care services. The Minister of Health and the respective members of the executive councils responsible for health in various provinces opposed the application. The cost of Nevirapine for preventing mother-to-child transmission was not an issue in the proceedings as it was admittedly within the resources of the state. The High Court declared that the government had not reasonably addressed the need to reduce the risk of HIV-positive mothers transmitting HIV to their babies at birth and had acted unreasonably in refusing to make the anti-retroviral drug Nevirapine available to pregnant women with HIV who gave birth in the public health sector in the public health facilities to which the respondents' programme for the prevention of mother-to-child transmission of HIV had not yet been extended, where the attending doctor considered it medically indicated. The High Court also declared that the respondents were under a duty to plan an effective comprehensive national programme to prevent or reduce the mother-to-child transmission of HIV, including the provision of voluntary counselling and testing and, where appropriate, Nevirapine or other appropriate medicine. The government appealed to the Constitutional Court.

HELD: Orders made by High Court set aside. New orders substituted ...

(1) Although socio-economic rights were clearly justiciable, that did not mean that they should be construed as entitling everyone to demand that the minimum core of a particular right be provided. All that could be expected of the state was that it

act reasonably to provide access to the socio-economic rights identified in the Constitution on a progressive basis. Therefore, s 27(1) of the Constitution did not give rise to a self-standing and independent positive right to health care services enforceable irrespective of the considerations mentioned in s 27(2). Sections 27(1) and 27(2) had to be read together as defining the scope of the positive rights that everyone had and the corresponding obligations on the state to 'respect, protect, promote and fulfil' such rights. The right conferred by s 27(1) was to have 'access' to the health care services that the state was obliged to provide in terms of sub-s (2) ... *Ex p Chairperson of the Constitutional Assembly: Re Certification of the Constitution of the Republic of South Africa* 1996 1996 (4) SA 744 (CC), *Soobramoney v Minister of Health, KwaZulu-Natal* [1998] 2 LRC 524 and *Government of the Republic of South Africa v Grootboom* [2001] 3 LRC 209 applied.

(2) It was clear from the evidence that the provision of Nevirapine would save the lives of a significant number of infants even if it was administered without the full package and support services available at the research and training sites. Section 27(1) and (2) of the Constitution required the government to devise and implement within its available resources a comprehensive and co-ordinated programme to realise progressively the rights of pregnant women and their new-born children to have access to health services to combat mother-to-child transmission of HIV. The programme had to include reasonable measures for testing pregnant women for HIV, counselling HIV-positive pregnant women on the options open to them in order to reduce the risk of mother-to-child transmission of HIV and making appropriate treatment available to them for such purposes. The policy for reducing the risk of mother-to-child transmission of HIV as previously formulated and implemented by the government was too rigid and fell short of compliance with those requirements in that (i) doctors at public hospitals and clinics other than the research and training sites were not enabled to prescribe Nevirapine to reduce the risk of mother-to-child transmission of HIV, even where it was medically indicated and where adequate facilities existed for the testing and counselling of the pregnant women concerned, and (ii) the policy failed to make provision for counsellors at hospitals and clinics other than at research and training sites to be trained in counselling for the use of Nevirapine as a means of reducing the risk of mother-to-child

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OVERSIGHT MECHANISMS

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And other online Legal Information Institutes
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<http://www.commonlii.org/>

Commonwealth Local Government Forum

Email: info@clgf.org.uk

Website: <http://www.clgf.org.uk>

Commonwealth Press Union Media Trust

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This Facilitator's Guide is intended for those with professional knowledge and experience as members of the Executive, Legislature or Judiciary, to promote processes of dialogue, mediation and consensus building.

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