

The Commonwealth Latimer House Principles

Practitioner's Handbook



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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Publications Section
Commonwealth Secretariat
Marlborough House
Pall Mall
London SW1Y 5HX
United Kingdom
Tel: +44 (0) 20 7747 6500
Fax: +44 (0) 20 7839 9081
Email: publications@commonwealth.int
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The Commonwealth Latimer House Principles

Practitioner's Handbook

'Each Commonwealth country's Parliament, Executive and Judiciary are the guarantors in their respective spheres of the rule of law, the promotion and protection of fundamental human rights and the entrenchment of good governance based on the highest standards of honesty, probity and accountability ...'

Principle I: The Three Branches of Government

Foreword

This Practitioner's Handbook is designed as a manual to deepen understanding of the principles of good governance among government officials, members of parliament and judges, and to be used by them to build capacity and promote application of Commonwealth best practice in their respective spheres.

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 Handbook 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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Preparation: items needed in order to proceed with section



Reference: a full version can be found in the Resources section at the back of the book



Information: key information that is essential for this section



Questions: review questions about the understanding of the section



Time: the amount of time allowed to complete that particular section

1. Introduction

1.1 Toolkit Format

The Latimer House Principles set out the relationship between the three main branches of government in democratic societies – the Executive, Parliament and the Judiciary. The Principles emphasise the importance of the separation of powers in entrenching democracy and good governance. Each of these institutions must exercise power in its own constitutional sphere while maintaining mutual respect for the corresponding legitimacy of the others.

Violation of this doctrine, whether deliberate or unintentional, has resulted in political and governance challenges in many Commonwealth countries. This Toolkit provides the means for bringing together stakeholders to find ways of resolving existing tensions and disputes within and between the branches of power. It 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.
- This *Practitioner's Handbook* is central to the Toolkit. It presents the concept behind each of the 10 Principles, poses questions, and gives examples of law and policy to prompt discussion of the challenges. These tools enable practitioners to identify best practice and devise appropriate recommendations. Resources include background papers, a bibliography, case law headnotes and useful contacts.
- The *Facilitator's Guide* is used in conjunction with the Handbook. It provides easy-to-follow instructions on organising and managing 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 and to promote dialogue and understanding.

1.2 Objectives

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

- 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 that work to ensure democratic principles are upheld (law, media, civil society);
- Addresses existing gaps in the implementation of the Commonwealth's core values and standards;
- Establishes best practices in countries across the Commonwealth.

1.3 Anticipated Outcomes

- An understanding of the Principles in their current form 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;
- How to identify and resolve, in a timely manner, potential difficulties between the arms of government;
- Country specific recommendations to enhance implementation of the Principles in the jurisdiction.

1.4 Target Audience

- Members of the Executive: ministers and senior/mid-level civil servants;
- Members of the Legislature/Parliament: Members of Parliament (MPs), including opposition members and relevant staff;
- Members of the Judiciary: judges and magistrates at all levels and court personnel;

- Members of the legal profession (government and private practice);
- Representatives of oversight institutions, the media and civil society.

Box 1.1.**Prepare to Participate**

Read the following Manual sections in advance of the First Session:

- Context and development of the Latimer House Principles (Section One);
- Related guidelines and plans of action (Section Three);
- Instructions on preparing Session Notes will be given at the end of each day.

Box 1.2.**Your Feedback is Important**

This Dialogue Programme contains a set of working documents that will develop and grow over time. Your feedback on its content and usage is crucial in this process. Did the programme content meet its objectives and your expectations? What are the areas for possible improvements?

At the end of your activity, please take a moment before leaving the venue to complete the evaluation form that will be distributed to all practitioners. The Commonwealth Secretariat will use your feedback to improve the content and form of future Dialogue Programmes across the Commonwealth.

Section One

1

Context and Background of the Latimer House Principles

- Commonwealth Standards and Values
- How the Principles were Developed 1998–2013

2. Context and Background of the Latimer House Principles

Notes

2.1 Commonwealth Standards and Values

The Commonwealth is a voluntary association of 53 member countries that support each other and work together within an agreed set of standards and principles (Box 2.1). These standards and principles are set out in the Commonwealth Charter (2013), which consolidates previous Commonwealth Declarations and other instruments, including the Latimer House Principles.

Box 2.1.

List of Commonwealth Standards and Values



- **Democracy**, the right of the individual to participate in shaping the society, the role of political parties and civil society in upholding democracy, and the part played by representative national and local governments in the exercise of democratic governance;
- **Human rights** and **equal rights** for all citizens and respect for civil, political, economic, social and cultural rights without discrimination on any grounds;
- **International peace and security**, economic growth and development, and the rule of law as essential to the progress and prosperity of all;
- **Tolerance, respect and understanding** to strengthen democracy and development recognising that the dignity of all human beings is critical to promoting peace and prosperity;
- **Freedom of expression**, the free flow of information and a vibrant professional media;

Notes

- The **separation of powers** and the integrity of the individual roles of the Executive, Legislature and Judiciary;
- The **rule of law**, access to justice, an independent Judiciary and effective, transparent, ethical and accountable governance;
- **Good governance** based on transparency and accountability;
- **Sustainable development**, including economic and social transformation to alleviate poverty and eliminate disparities and unequal living standards;
- **Protecting the environment** especially conserving natural ecosystems and the importance of multi-lateral co-operation, commitment, and collective action;
- **Access to health and education** as human rights and for poverty alleviation and sustainable development;
- **Gender equality**, the empowerment of women and advancement of women's rights, and the importance of **young people**;
- Recognition of the **needs of small states and vulnerable states**; and
- **The role of civil** society in promoting Commonwealth values and the interests of the peoples of the Commonwealth.

Box 2.2.**Declarations and Other Instruments on Commonwealth Values**

- 1971 Singapore Declaration of Commonwealth Principles – Heads of Government statement of core beliefs
- 1991 Harare Commonwealth Declaration
- 1995 Millbrook Commonwealth Action Programme on the Harare Declaration (sometimes called 'Millbrook') – designed for effective implementation of Harare commitments
- 2003 Commonwealth (Latimer House) Principles on the Three Branches of Government
- 2009 Trinidad and Tobago Affirmation of Commonwealth Values and Principles
- 2013 Commonwealth Charter

**2.2 How the Principles Developed 1998-2013**

'[The Latimer House Principles] recognise the complex and interlocking network of the relations between the Legislature, the Executive and the Judiciary ... [They] are designed to help the business of fair, efficient, transparent, responsive government ... for the people. The confidence, belief and trust that people have in their government is the ultimate litmus test.'

Kamalesh Sharma, Commonwealth Secretary-General, 2008 Edinburgh Colloquium

The people of the Commonwealth have a specific and important role in promoting democracy and protecting human rights. There is a wide network of professional, non-governmental and civil society organisations working within the Commonwealth to advance high standards and best practice.

Notes

The following timeline on the development of the Latimer House Principles attests to the role these organisations can play in partnership with government:

Box 2.3.



June 1998 – Parliamentarians, judges, lawyers and legal academics drafted the *Latimer House Guidelines on Parliamentary Supremacy and Judicial Independence (The Guidelines)* at the *Colloquium on Parliamentary Sovereignty and Judicial Independence within the Commonwealth*. The Latimer House Working Group (see Box 2.2) sponsored the event at Latimer House in Buckinghamshire, UK.

May 1999 – The Guidelines are presented to the *Commonwealth Law Ministers* meeting in Port of Spain, Trinidad and Tobago. The meeting directs senior officials to study and refine them.

November 2002 – *Commonwealth Law Ministers*, meeting in St Vincent and the Grenadines, *endorse the refined Guidelines*. A small group of Law Ministers works with the Commonwealth Secretariat to develop the Guidelines into Principles, for submission to Heads of Government.

November 2003 – *Commonwealth Law Ministers* approve the resulting text, *The Principles on the Relationship Between the Three Branches of Government (The Principles)*, which provides Commonwealth countries with a set of minimum standards for democracy and good governance.

December 2003 – The *Commonwealth Heads of Government* endorse *The Principles* at their meeting in Abuja, Nigeria.

November 2005 – The *Commonwealth Heads of Government Meeting*, held in Valletta, Malta, recognises the Principles as 'an integral part of the Commonwealth fundamental political values as set out in the Harare Declaration'.

March 2013 – The first Commonwealth Charter adopted by *Commonwealth Heads of Government* validates the Latimer House Principles on maintaining integrity of the three branches of government (article VI) and the importance of an independent Judiciary (article VII).

Box 2.4.**The Latimer House Working Group**

The group comprises representatives of:

- Commonwealth Lawyers' Association (CLA)
- Commonwealth Legal Education Association (CLEA)
- Commonwealth Magistrates' and Judges' Association (CMJA)
- Commonwealth Parliamentary Association (CPA)

Supporting institutions include the Commonwealth Secretariat, Commonwealth Foundation and UK Foreign and Commonwealth Office.

**Box 2.5.****Regional Activities of the Latimer House Working Group**

The Working Group continues to promote and advance the Latimer House Principles. This work has included the development of regional action plans on implementation of the Principles:

April 2005 – At a Pan African Forum organised by the Group in Nairobi, Kenya, representatives of Executives, Legislatures and Judiciaries in 18 Commonwealth African countries agreed *The Plan of Action for Africa on the Implementation of the Principles (Nairobi Plan of Action)*.

July 2008 – A Colloquium that the Group organised in Edinburgh produced *The Edinburgh Plan of Action on the Development and Implementation of the Principles (Edinburgh Plan of Action)*.

The Commonwealth Secretariat Legal and Constitutional Affairs Division supported both events.



Notes

Box 2.6.
The Latimer House Principles Dialogue

In 2012, the Good Offices Section (GOS) of the Commonwealth Secretariat Political Affairs Division (POL) proposed that the Working Group develop a Latimer House Principles Dialogue Programme to advance understanding and implementation of the separation of powers and to promote better dialogue and working relations between the three branches of government. This Toolkit is the outcome of the GOS proposal. To implement the Latimer House Principles Dialogue Programme, the Good Offices Section commissioned the Latimer House Principles Working Group to help develop a toolkit comprising the Facilitator's Guide, the Practitioner's Handbook and the Pocket Principles.

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**, which 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.

3. The Separation of Powers in a Democratic Country

Notes

3.1 Background Commentary

Every society needs rules that set out the legal rights and duties of all and the mechanisms to fairly enforce those rules. The term 'rule of law' is applicable when both the rules and enforcing mechanisms are in place and binding on all persons and authorities.

In most countries, rights are guaranteed through a written Constitution, the supreme law of the land that sets out the rights of citizens and the powers of the Legislature, Executive and Judiciary. All the country's laws must be in line with the Constitution. Although Parliaments can amend the laws, as they deem necessary, the Constitution can usually only be amended by the vote of a high percentage of Members of Parliament or by a referendum of the people.

In order for a democracy to work, the three branches of power must exercise their power within the limits prescribed by law.

- The **Parliament** (or **Legislature**) has one (unicameral) or two (bicameral) legislative houses. In the unicameral system most, if not all, members are elected on the principle of 'one person, one vote'. The franchise varies widely. In the bicameral system (common in federal states where power is defused between the central organs of government and those of the states or provinces) members of the upper house may be nominated, indirectly elected by members of the lower house or elected in equal numbers to represent the population of each federal unit. 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 Members of Parliament.

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This is not so under a Presidential system such as that in Nigeria. (The rigid system of separation embodied in the Constitution of the United States of America is not usually found in Commonwealth jurisdictions. Nigeria is such an exception.)

- Members of the **Judiciary** are magistrates and judges appointed by an independent process to enforce the law. Magistrates and judges settle disputes between citizens and between citizens and the government in civil trials. They also preside over criminal trials and determine punishment in accordance with the law. By the power of judicial review, the courts may invalidate actions of the Executive that exceed the powers conferred by law. In most Commonwealth jurisdictions, the courts have the power to invalidate laws made by Parliament that are found to be inconsistent with the Constitution.

The separation of powers doctrine protects the liberty of the citizen by preventing the concentration of power in, and the pursuant abuse of power by, any one branch. The separation doctrine as embodied in the Latimer House Principles requires each branch of government to restrain the exercise of authority to its own sphere to avoid encroaching on the legitimate discharge of constitutional functions by the other branches.

This means, for example:

- The Executive should not make law or administer justice.
- 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 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.

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4. Principle I: The Three Branches of Government

Each Commonwealth country's Parliament, Executive and Judiciary are the guarantors in their respective spheres of the rule of law, the promotion and protection of fundamental human rights and the entrenchment of good governance based on the highest standards of honesty, probity and accountability.

4.1 Background Commentary

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

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

Within the concept of 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 one branch of government should affect the operations of another. At the same time each branch must also be functional – while not encroaching on, it must respect, the power of the other.

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 the institutional and the functional are not mutually exclusive options; 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.

The proper functioning of a Constitution based on the separation of powers doctrine depends on the effective exercise of lawful power by each branch of government. In other words, the Executive does not attempt to undermine the independence of the Judiciary, Parliament and the Judiciary carry out their prescribed role as a check on excessive Executive power, and judges, while preserving and asserting their independence, do not attempt to meddle in policy matters (Box 4.1).

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Box 4.1. The Exercise of Power



Ultimate responsibility for policing the boundaries of each branch in its exercise of power lies with the Judiciary, as demonstrated in the following case law examples:

- *'The Judiciary is constituted as the ultimate interpreter of the Constitution and to it is assigned the delicate task of determining what is the extent and scope of the power conferred on each branch of government, what are the limits on the exercise of such power under the Constitution and whether any action of any branch transgresses such limits' [Naz Foundation v Delhi [2009] 4 LRC 838 at [125] (India)].*
- Judges should not abdicate this responsibility even when Executive or Legislative powers have been usurped in circumstances of constitutional breakdown [Qarase v Bainimarama [2009] 3 LRC 614 (Fiji)] and [Khan v Pakistan [2012] 2 LRC 144- (Pakistan)].

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Abuse of power can occur as a result of disregard for constitutional provisions or merely lack of will in respecting them. The 1998 Preamble to the Latimer House Guidelines on Parliamentary Supremacy and Judicial Independence emphasises the need for the three branches to commit themselves to *'the essential principles of good governance, fundamental human rights and the rule of law'* in order to meet *'the legitimate aspirations of all the peoples of the Commonwealth ...'*

It further 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.'

In order to limit any such encroachment, it is essential that all stakeholders understand the role of each institution. Discourse and communication between the branches is encouraged, but this should not compromise their functioning or institutional independence.

4.2 Law and Policy Considerations

Bear in mind the following judgements when devising strategies and recommendations on the three branches of government (case law references in square brackets):

- The Executive should not seek to usurp the judicial power of the courts, for example, in regard to sentencing powers or ‘ouster’ clauses [*Zuniga v A-G* [2013] 1 LRC 426 (Belize)].
- The Executive should not seek to exercise legislative functions, which are the proper sphere of the Legislature [e.g., *Justice Alliance of South Africa v President* [2012] 1 LRC 66 (South Africa)].
- The Executive should not encroach on the privileges of Parliament nor purport to exercise powers beyond those conferred by Parliament.
- The Judiciary should not encroach on the powers of the Executive, for example, regarding the conduct of foreign affairs [e.g., *Fuller v AG* [2012] 2 LRC 110 (Belize)], but where a challenge to the exercise of Executive power is based on abuse of process, this is a matter for the courts and not the Executive [for

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public policy questions, see *Centre for Health Human Rights and Development v A-G* [2013] 1 LRC 627 (Uganda)].

- The Judiciary should not seek to usurp the function of Parliament by ‘judicial legislation’ seeking to change the law, which is the function of the people’s elected representatives, or by questioning legislation, other than on the basis that it is in conflict with express provisions of the Constitution. A principle known as the ‘basic structure doctrine’ seeks to assert a judicial power to limit the exercise by Parliament of the power of constitutional amendment [e.g., *A-G v Mtikila* [2012] 1 LRC 647 (Tanzania)].
- Parliament should not seek to encroach on the exercise of the judicial power reserved for the courts, for example, by the statutory imposition of a mandatory sentence [e.g., *Ponoo v A-G* [2012] 5 LRC 305 (Seychelles) [*Mohammed Faizal bin Sabtu v PP* [2013] 2 LRC 470].

Note: For further details see case law headnotes in Section Three.

Box 4.2. Questions to Reflect On

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?

5. Principle II: Parliament and the Judiciary

(a) Relations between Parliament and the Judiciary should be governed by respect for Parliament's primary responsibility for law making on the one hand and for the Judiciary's responsibility for the interpretation and application of the law on the other hand.

(b) Judiciaries and Parliaments should fulfil their respective but critical roles in the promotion of the rule of law in a complementary and constructive manner.

5.1 Background Commentary

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.

In most Commonwealth jurisdictions, the Westminster tradition of parliamentary supremacy has been overlaid by the doctrine of constitutional supremacy, which gives judges an arbitral role through the constitutional review of legislation.

The Judiciary therefore 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 courts can set a time limit when it requires Parliament to amend any offending provisions;
- 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).

5.2 Law and Policy Considerations

Bear in mind the following judgements when devising strategies and recommendations on the relationship between Parliament and the Judiciary (case law references in square brackets):

- Judges should not question the validity of legislation except on the basis of inconsistency with the express provisions of the Constitution [*Johnson v Republic* [2012] 1 LRC 343 (Ghana)].
- In interpreting Acts of Parliament, judges should seek to establish the intention of Parliament [*Pepper v Hart* [1993] 2 LRC 153 (UK)].
- In order to protect the human rights of the citizen, judges should adopt a 'purposive approach' to constitutional interpretation [*Dow v A-G* [192] LRC (Const) 623 (Botswana) and *Naz Foundation v Delhi* [2009] 4 LRC 838 (India)].
- Parliament should not seek to use parliamentary privilege as a shield from proper judicial scrutiny [*Constitutional Reference No 1 of 2008* [2009] 1 LRC 453 (Nauru) and *SCR No 3 of 2011* [2012] 4 LRC 490 (Papua New Guinea)].

Note: For further details see case law headnotes in Section Three.

Notes

Box 5.1.
Questions to Reflect On**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.

6. Principle III: Independence of Parliamentarians

Notes

(a) Parliamentarians must be able to carry out their legislative and constitutional functions in accordance with the Constitution, free from unlawful interference.

(b) Criminal and defamation laws should not be used to restrict legitimate criticism of Parliament; the offence of contempt of Parliament should be narrowly drawn and reporting of the proceedings of Parliament should not be unduly restricted by narrow application of the defence of qualified privilege.

6.1 Background Commentary

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 Constitutions. 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.

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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.

Political parties represent diverse interests and concerns. Party organisation within Parliament should be seen as an important pillar of effective oversight, accountability and vibrant parliamentary democracy.

6.2 Law and Policy Considerations

Bear in mind the following pointers when devising strategies and recommendations that support the independence of parliamentarians (case law references in square brackets):

- Integrity of the electoral process, which must be fair and free from fear.
- Security of MPs during their parliamentary term.
- Establishment of accountability measures (e.g., providing information about parliamentary activities; a law of recall).
- Anti floor-crossing measures (including expulsion of a member who leaves the political party under which he/she was elected) [*A-G v Kasonde [1994] 3 LRC 144 (Zambia)*; *Supreme Court Reference No 11 of 2010*] 5 LRC 1(*Papua New Guinea*)].
- Restrictions on the formation and registration of political parties (e.g., measures to exclude ethnic based political activity).
- The right to be elected and to sit as an independent member [*A-G v Mtikila [2012] 1 LRC 647 (Tanzania)*].
- Establishment of an independent process to determine remuneration packages.
- Budgetary and staffing autonomy for the Legislature.

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- Access to parliamentary resources for opposition and independent MPs.
- Participation of opposition and independent members in the law-making process.
- Effectiveness of committee systems (see under Principles VII and VIII).
- Jurisdiction of the courts over the personal behaviour of MPs, for example, in relation to allegations of corrupt practices [*R v Chaytor* [2011] 3 LRC 1(UK)] [*P V Narasimha Rao v State* 1998 SC 626 (India)], the conduct of parliamentary business [*Leigh v AG* [2011] 4 LRC 109 (New Zealand)] and disqualification of members [*Siddique v Federation of Pakistan* [2013] 1 LRC 274 (Pakistan)].
- Privileged freedom of speech before Parliament for parliamentarians and witnesses [*Prebble v Television New Zealand* [1994] 1 LRC 122 (New Zealand)].
- Freedom and duty of the press to report on Parliament without fear of contempt proceedings [*M'membe v Speaker* [1996] 1 LRC 584 (Zambia)].

Note: For further details see case law headnotes in Section Three.

Box 6.1.

Questions to Reflect On

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?



7. Principle IV: Independence of the Judiciary

An independent, impartial, honest and competent Judiciary is integral to upholding the rule of law, engendering public confidence and dispensing justice. The function of the Judiciary is to interpret and apply national Constitutions and legislation, consistent with international human rights conventions and international law, to the extent permitted by the domestic law of each Commonwealth country.

To secure these aims:

(a) Judicial appointments should be made on the basis of clearly defined criteria and by a publicly declared process. The process should ensure:

- Equality of opportunity for all who are eligible for judicial office;*
- Appointment on merit; and*
- That appropriate consideration is given to the need for the progressive attainment of gender equity and the removal of other historic factors of discrimination.*

(b) Arrangements for appropriate security of tenure and protection of levels of remuneration must be in place.

(c) Adequate resources should be provided for the judicial system to operate effectively without any undue constraints, which may hamper the independence sought.

(d) Interaction, if any, between the Executive and the Judiciary should not compromise judicial independence.

Judges should be subject to suspension or removal only for reasons of incapacity or misbehaviour that clearly renders them unfit to discharge their duties.

Court proceedings should, unless the law or overriding public interest otherwise dictates, be open to the public. Superior Court decisions should be published and accessible to the public and be provided in a timely manner.

An independent, effective and competent legal profession is fundamental to the upholding of the rule of law and the independence of the Judiciary.

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7.1 Background Commentary

This Principle, that judicial independence must be guaranteed in a modern democracy governed by the rule of law, is widely accepted. In 1994, the then United Nations Commission on Human Rights (now UN Human Rights Council) recorded the basic requirement that:

‘... An independent and impartial Judiciary and an independent legal profession are essential prerequisites for the protection of human rights and for ensuring that there is no discrimination in the administration of justice.’

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 is responsible for making these weighty decisions. To do so with confidence, she/he must be independent of pressures from the Executive (as well as from litigants, lobbyists and the media).

Independence can be affected by the terms and conditions of service. Following appointment, the judicial officer must be assured that his/her personal security, both physical and financial, is protected.

Security of tenure protects against unjustified or arbitrary removal from judicial office. Contract appointments of judicial officers should be avoided (where these do exist renewal should only be refused on the grounds of retirement, inability to discharge the functions of office or misbehaviour).

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Disciplinary action (including removal if appropriate) should be applied in accordance with the Principle and the right of every individual to a fair hearing.

Continuing education and training and keeping up with changes in substantive laws and international norms, are essential to judicial independence.

The main difficulties for judges and magistrates in the administration of the law and Constitution (other than those created by personal behaviour) relate to the management of the courts themselves. 'Management' here applies to the 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 process is likely to become more fraught depending on the nature of the judicial position to be filled, for instance if the vacancy is for a Chief Justice or senior judge as opposed to that of a junior magistrate.

The degree to which members of the Judiciary may be involved in the administration of the courts (and of their budgets) will also vary depending on which other constitutional principles are 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.

7.2 The Legal Profession

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.

Over the last 50 years, codes of conduct have been developed that set out basic principles of accepted behaviour for lawyers. The International Bar Association's Code of Ethics for Lawyers, which

applies to the relationship between lawyers working in different jurisdictions, is relevant and applicable at both domestic and international levels.

Rule 2 of the Code stipulates that: *'Lawyers shall at all times maintain the honour and dignity of their profession. They shall, in practice as well as in private life, abstain from any behaviour which may lead to discrediting the profession of which they are a member'*, and Rule 6 states: *'Lawyers shall always maintain due respect towards the court.'*

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 relating to ethics and human rights.

Legal assistance must be carried out independently if it is to be effective. The United Nations Basic Principles on the Role of Lawyers (1990) states: *'Adequate protection of the human rights and fundamental freedoms to which all persons are entitled ... requires that all persons have effective access to legal services provided by an independent legal profession.'*

The UN Basic Principles calls on governments to ensure that lawyers: *'(a) are able to perform all of their professional functions without intimidation, hindrance, harassment or improper interference; (b) are able to travel and to consult with their clients freely both within their own country and abroad; and (c) shall not suffer, or be threatened with, prosecution or administrative, economic or other sanctions for any action taken in accordance with recognized professional duties, standards and ethics.'*

7.3 Law and Policy Considerations

Bear in mind the following issues and judgements when devising strategies and recommendations on the independence of the

Notes

Judiciary and legal professionals (case law references in square brackets):

- An open, transparent process for the appointment of judges and magistrates (this is best achieved through the effective functioning of an independent judicial appointments commission) [*Sindh v Rizvi* [2013] 1 LRC 262 (India)].
- The principle that judges or magistrates should be subject to suspension only for reasons of incapacity or misbehaviour requires a determination by appropriate judicial process of what constitutes such incapacity or misbehaviour [*Re the Chief Justice of Gibraltar* [2010] 2 LRC 450 – (Judicial Committee of the UK Privy Council)] and [*Bandaranayake v Rajapakse* [2013] 2 LRC 126 (Sri Lanka)].
- Adequate resources for salaries, pensions and other benefits (such as further education and training and access to Law Reports, to ensure the high quality of judicial decision-making).
- Ways in which judicial officers can be held accountable for their judicial performance (outside the appeals system), and the pressures of accountability that could interfere with their judicial independence.
- Public transparency and openness with respect to the work of the judicial officer (except in exceptional circumstances).
- Fair and open systems of designating judicial itineraries and of judicial ‘ticketing’ of work, under the supervision of the senior members of the Judiciary.
- Confidence among judges and magistrates that advocates appearing before the court, and upon whom the court relies in the presentation of fact and law, are independent, effective and competent.
- The question of whether the Judiciary should be prepared to chair commissions of enquiry and similar bodies that may have a political dimension and impinge on perceptions of judicial independence [*Muhwzi v AG* [2010] 5 LRC 136 (Uganda)].

- The role of the legal profession in advancing human rights in the society and in supporting the independence of the Judiciary.
- The potential for allegations of bias against the Judiciary, particularly in small jurisdictions, owing to acquaintanceship with parties who appear before them [*Tikoniyaroi v State* 2012 2LRC 280].

Note: For further details see case law headnotes in Section Three.

Notes

Box 7.1. Questions to Reflect On 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?



Notes

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?

8. Principle V: Public Office Holders

Notes

(a) Merit and proven integrity should be the criteria of eligibility for appointment to public office;

(b) Subject to (a), measures may be taken, where possible and appropriate, to ensure that the holders of all public offices generally reflect the composition of the community in terms of gender, ethnicity, social and religious groups as well as regional balance.

8.1 Background Commentary

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 it 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; and
- 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

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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 8.1).

To encourage women's participation, practical measures are put in place to create a supportive environment. Such measures include:

- Flexible working hours, available child care services and job share;
- Equal pay and conditions of service;
- Elimination of discrimination and sexual harassment of women in public office;
- Access to mentoring or training opportunities to support them in leadership roles.

Box 8.1.

Commonwealth Heads of Government endorse targets for more women in public office and commit to non-discrimination

The Fifth Commonwealth Women's Affairs Ministers Meeting, held in Trinidad and Tobago in 1979, recommended that Commonwealth governments should achieve a target of 30 per cent or more in decision-making in the political, public and private sectors by 2005.

This target, endorsed by the 1997 Commonwealth Heads of Government Meeting, in Edinburgh, UK, has not yet been attained, but efforts continue across the public sector.

The Lusaka Declaration on Race and Racial Prejudice. adopted by Commonwealth Heads of Government at their 1979 meeting in Zambia, reaffirmed the Commonwealth's commitment to the standard of the whole community being reflected in public office stating that:

'There should be no discrimination based on race, colour, sex, descent or national or ethnic origin in the acquisition or exercise of the right to vote; in the field of civil rights or access to citizenship; or in the economic, social or cultural fields, particularly education, health, employment, occupation, housing, social security and cultural life.'



8.2 Law and Policy Considerations

Notes

Bear in mind the following action proposals when devising strategies and recommendations to encourage diversity in public office (case law references in square brackets):

- Encourage women and persons from diverse backgrounds to apply for judicial appointments through public information programmes that advertise judicial vacancies widely and by adapting judicial working conditions where appropriate.
- Disseminate higher quality information about the role of parliamentarians and develop practices that encourage women to stand for Parliament and to become candidates for leadership roles in Parliament.
- Encourage political parties to select candidates of merit and integrity for elections.
- Adopt measures that prevent public office holders from using their influence to obtain the appointment of a relative and/or colleague [*Peipul v The Leadership Tribunal* [2002] PGSC 1; SC706 (24 May 2002)].
- Establish a legislative framework to underpin equality and ensure that domestic legislation reflects international agreements ratified by the country.
- Adopt measures to ensure the Legislature is representative of society as a whole. For example, measures to improve gender balance would include a quota system in the selection process or nomination of members to represent societal interests.
- Be proactive in regard to representation of diverse communities on publicly appointed bodies.
- Adopt codes of conduct to regulate the behaviour of all those working in the public sector.
- Work with civil society organisations to encourage gender balance and diversity at all levels.

Note: For further details see case law headnotes in Section Three.

Notes

Box 8.2. Questions to Reflect On



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?

9. Principle VI: Ethical Governance

Notes

Ministers, Members of Parliament, judicial officers and public office holders in each jurisdiction should respectively develop, adopt and periodically review appropriate guidelines for ethical conduct. These should address the issue of conflict of interest, whether actual or perceived, with a view to enhancing transparency, accountability and public confidence.

9.1 Background Commentary

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 fundamental standard to be followed, although many may seek to attain a higher standard.

Box 9.1. Principles of Standards in Public Life



- Selflessness
- Integrity
- Objectivity
- Accountability
- Openness
- Honesty
- Leadership

Source: Report of UK Committee on Standards in Public Life, 1995

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 (Box 9.1). The report concluded that there was still a need for codes of conduct and systems for monitoring them.

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?
- What steps have been taken for the development and enforcement of a code of conduct in your jurisdiction that you would recommend for implementation in other areas of public life?



10. Principle VII: Accountability Mechanisms

(a) Executive Accountability to Parliament

Parliaments and governments should maintain high standards of accountability, transparency and responsibility in the conduct of all public business.

Parliamentary procedures should provide adequate mechanisms to enforce the accountability of the Executive to Parliament.

(b) Judicial Accountability

Judges are accountable to the Constitution and to the law, which they must apply honestly, independently and with integrity. The principles of judicial accountability and independence underpin public confidence in the judicial system and the importance of the Judiciary as one of the three pillars upon which a responsible government relies.

In addition to providing proper procedures for the removal of judges on grounds of incapacity or misbehaviour that are required to support the principle of independence of the Judiciary, any disciplinary procedures should be fairly and objectively administered. Disciplinary proceedings that might lead to the removal of a judicial officer should include appropriate safeguards to ensure fairness.

The criminal law and contempt proceedings should not be used to restrict legitimate criticism of the performance of judicial functions.

(c) Judicial Review

Best democratic principles require that the actions of governments are open to scrutiny by the courts to ensure that decisions taken comply with the Constitution, with relevant statutes and other law, including the law relating to the principles of natural justice.

10.1 Background Commentary

The Latimer House Principles require each of the three branches of governments 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.
- In all but highly exceptional cases, the operation of the courts should be open to the public and the basis on which judges reach their decisions should be available for public scrutiny.

10.2 Law and Policy Considerations

Bear in mind the following propositions when devising strategies and recommendations on accountability mechanisms (case law references in square brackets):

- When seeking to strengthen local level systems, local governments should consider implementing

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the Aberdeen Agenda: Commonwealth Principles on Good Practice for Local Democracy and Good Governance, adopted by the Commonwealth Local Government Forum in March 2005.

- There is a vital role for the courts in holding the Executive to account through the development of judicial review of administrative decisions, to ensure that such decisions are not made arbitrarily [*Yong Vii Kong v A-G* [2012] 2 LRC 439 (Singapore)] and [*Justice Alliance v President* [2012] 1 LRC 66 (South Africa)].
- Issues of access to the courts (for instance the extent of available legal aid or whether capping costs affects the ability of interested parties to pursue judicial review) should be examined. Issues of *locus standi* (the right to bring an action, to be heard in court or to address the court), may also require scrutiny.
- Judges and magistrates should be subject to open codes of conduct with a fair and transparent method of enforcement and means of addressing judicial complaints. As far as possible, this mechanism should be independent of administrative control.

Note: For further details see case law headnotes in Section Three.

Box 10.1. Questions to Reflect On



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?

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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?

11. Principle VIII: The Law-Making Process

In order to enhance the effectiveness of law-making as an essential element of the good governance agenda:

There should be adequate parliamentary examination of proposed legislation;

Where appropriate, opportunity should be given for public input into the legislative process;

Parliaments should, where relevant, be given the opportunity to consider international instruments or regional conventions agreed to by governments.

11.1 Background Commentary

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; and
- 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 by the Executive (except where budgetary constraints are dictated by national circumstances).

11.2 Law and Policy Considerations

The following actions can be applied to test the efficacy of the law-making process:

- Design standing orders that can protect the role of all members in the legislative process.
- Publish draft bills for public consultation to begin the legislative process in an open and transparent manner.
- Use standing orders to allow time for wide consultation between the introduction of the bill and the debate.
- Refer major legislation to a select committee to allow for detailed examination by parliamentarians and to take evidence from expert witnesses and the general public.
- Vet draft legislation to ensure conformity with the Constitution and, in particular, the Bill of Rights.
- Train new parliamentarians in the legislative process and on relevant international instruments such as the International Covenant on Civil and Political Rights, the Commonwealth Charter and the Latimer House Principles.
- Provide parliamentarians, particularly opposition and independent members, with adequate office space and library and research facilities to enable them to access objective and independent information.
- Ensure that the Legislature is required to approve all legislation except in extenuating circumstances.

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Executive power to take legislative measures independently should be strictly limited to national emergencies and subject to timely ratification by Parliament.

- Provide adequate opportunity for scrutiny of draft legislation before enactment. Attempts by the Legislature to accelerate procedures should be strictly limited.
- Use standing orders to provide opportunities for the introduction and consideration of bills other than those proposed by the government.

Box 11.1.

Questions to Reflect On



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?

12. Principle IX: Oversight of Government

Notes

The promotion of zero tolerance for corruption is vital to good governance. A transparent and accountable government, together with freedom of expression, encourages the full participation of its citizens in the democratic process. Steps which may be taken to encourage public sector accountability include:

(a) The establishment of scrutiny bodies and mechanisms to oversee government enhances public confidence in the integrity and acceptability of government's activities. Independent bodies such as Public Accounts Committees, Ombudsmen, Human Rights Commissions, Auditors-General, Anti-corruption commissions, Information Commissioners and similar oversight institutions can play a key role in enhancing public awareness of good governance and rule of law issues. Governments are encouraged to establish or enhance appropriate oversight bodies in accordance with national circumstances,

(b) Government's transparency and accountability is promoted by an independent and vibrant media which is responsible, objective and impartial and which is protected by law in its freedom to report and comment upon public affairs.

12.1 Background Commentary

Oversight bodies

Promoting zero tolerance for corruption is an essential element of good governance. Without it there can be no public confidence in the integrity of the three branches of power.

Over the last 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 and government bodies, and all other areas of government involving expenditure and/or receipt of funds. The PACs assess how efficiently and

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effectively these functions have been carried out and submit periodic reports to Parliament on their findings.

The modern role and office of *ombudsman* or *ombudswoman* originated in Scandinavia, but Commonwealth countries have been quick to integrate this office into their legal systems. A 1974 resolution of the International Bar Association states that the Office of the Ombudsman is ...

‘... provided for by the Constitution or by action of the Legislature or Parliament and headed by an independent high-level public official who is responsible to the Legislature or Parliament, who receives complaints from aggrieved persons against government agencies, officials and employees or who acts on his/her own motion, and who has the power to investigate, recommend corrective action and issue reports.’

If a complaint is found to be valid, the Ombudsman/Ombudswoman can issue a report with recommendations, which may or may not be binding. In a number of countries, multiple offices of ombudsmen and ombudswomen have been established to examine issues arising from decisions made by the Executive or Parliament. Some are known under different titles but their role and level of authority are similar in nature.

In the Harare Declaration of 1991, Commonwealth Heads of Government pledged to protect and promote fundamental political values, particularly democracy and democratic institutions. One of the most visible signs of this commitment is the creation of *human rights commissions*, most of which serve to protect and promote human rights as guaranteed under the Constitution. Some of them have specific responsibilities for encouraging the implementation of international human rights standards.

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. Other requirements include:

- A transparent and open system of appointing commissioners and recruiting staff;
- Limited involvement of the Executive in the appointment of these institutions; and

- The provision of adequate resources from Parliament to ensure their actions and effectiveness are not limited.

Independence does not mean that these institutions operate without accountability. They are usually expected to send annual or periodic reports about 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.

The Affirmation of the Commonwealth Principles and Values, adopted by Heads of Government at their meeting in Port of Spain, Trinidad and Tobago, in 2009, emphasises that ‘... *that peaceful, open dialogue and the free flow of information, including through a free, vibrant and professional media, enhance democratic traditions and strengthen democratic process.*’

It is important that regulations do not restrict the media in fulfilling this role. 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, inequitable and contrary to international human rights legislation.

Various media operate in different ways and the operating rules differ from country to country but one issue remains constant – the question of what constitutes a fair balance between the media’s basic role of providing information and that of commenting on political or judicial issues.

This Principle’s main focus is on traditional print and broadcast. Since the Principles were drafted, social media (e.g., Facebook and Twitter) have taken off in a big way via the internet, and they are changing the face of democracy globally.

Information is now available to the public faster and cheaper, and it is more influential than other forms of communication. Citizens from all walks of life in every country of the world have become social media journalists, spreading information, on everything, across the globe in the blink of an eye. Nowadays, the results of trials are tweeted from courts even before the Judge has finished reading the judgement.

These new media encourage greater accountability and transparency, and strengthen democracy. But they are also open

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to manipulation and can be misleading and misinformed in ways that could undermine democracy.

12.2 Law and Policy Considerations

Bear in mind the following actions when devising strategies to strengthen oversight mechanisms:

- Constitute public accounts committees into standing committees of Parliament ensuring membership is as diverse as possible, and free from domination by the majority party and interference from other political parties.
- Include oversight mechanisms in strategies that allow them to operate in a clear, strong and effective legal framework.
- Guard against weakening the effectiveness of oversight mechanisms by imposing limitations on their powers, or inviting corruption by allowing Executive influence in the appointment of commissioners.
- Abide by Commonwealth principles on freedom of information by introducing appropriate enabling legislation where this is absent and providing adequate resources and systems to make information accessible.
- Encourage Heads of the Judiciary to liaise with the media on judicial functions and the principles of judicial independence, to raise awareness and foster understanding of what can or cannot be reported.

Box 12.1. Questions to Reflect On



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?

Notes

- 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 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 any such restrictions appropriate? What steps could be taken to remove the restrictions?

Notes

13. Principle X: Civil Society

Parliaments and governments should recognise the role that civil society plays in the implementation of the Commonwealth's fundamental values and should strive for a constructive relationship with civil society to ensure that there is broader opportunity for lawful participation in the democratic process.

13.1 Background Commentary

The Commonwealth Foundation defines civil society organisations (CSOs) as registered entities working within the law, but outside the state or the market (Box 13.1).

Box 13.1. Civil Society Organisations



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 for human rights and fight against corruption.

Notes

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.

13.2 Law and Policy Considerations

Bear in mind the following factors when devising strategies and recommendations on civil society:

- Whilst civil society has a role to play in protecting and promoting democratic values, its independence should not be compromised by political activity and/or influence.
- Civil society organisations can provide invaluable support in promoting democratic values and related public policy through educational outreach.
- They build solidarity in bringing together people from different backgrounds (be they religious, ethnic or gender-based) to put forward points of common interest.
- CSOs can provide resources and expertise such as broad community networks, grassroots knowledge and professional insights, which are invaluable when the Executive or the Legislature are developing policies or drafting legislation.

Notes

Box 13.2.

Questions to Reflect On



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?

Section Three

3

Resources

- References and Background Papers
- Quoted Case Law

14. Parliamentary Supremacy, Judicial Independence: Latimer House Guidelines For The Commonwealth, 19 June 1998

Guidelines on good practice governing relations between the Executive, Parliament and the Judiciary in the promotion of good governance, the rule of law and human rights to ensure the effective implementation of the Harare Principles.

PREAMBLE

RECALLING the renewed commitment at the 1997 Commonwealth Heads of Government Meeting at Edinburgh to the Harare Principles and the Millbrook Commonwealth Action Programme and, in particular, the pledge in paragraph 9 of the Harare Declaration to work for the protection and promotion of the fundamental political values of the Commonwealth:

- Democracy;
- Democratic processes and institutions which reflect national circumstances, the rule of law and the independence of the judiciary;
- Just and honest government;
- Fundamental human rights, including equal rights and opportunities for all citizens regardless of race, colour, creed or political belief;
- Equality for women, so that they may exercise their full and equal rights.

Representatives of the Commonwealth Parliamentary Association, the Commonwealth Magistrates' and Judges' Association, the Commonwealth Lawyers' Association and the Commonwealth Legal Education Association meeting at Latimer House in the United Kingdom from 15 to 19 June 1998.

Notes

HAVE RESOLVED to adopt the following Principles and Guidelines and propose them for consideration by the Commonwealth Heads of Government Meeting and for effective implementation by member countries of the Commonwealth.

PRINCIPLES

The successful implementation of these Guidelines calls for a commitment, made in the utmost good faith, of the relevant national institutions, in particular the executive, parliament and the judiciary, to the essential principles of good governance, fundamental human rights and the rule of law, including the independence of the judiciary, so that the legitimate aspirations of all the peoples of the Commonwealth should be met.

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.

It is recognised that the special circumstances of small and/or under-resourced jurisdictions may require adaptation of these Guidelines.

It is recognised that redress of gender imbalance is essential to accomplish full and equal rights in society and to achieve true human rights.¹ Merit and the capacity to perform public office regardless of disability should be the criteria of eligibility for appointment or election.

GUIDELINES

I PARLIAMENT AND THE JUDICIARY

1. The legislative function is the primary responsibility of parliament as the elected body representing the people. Judges

¹ The final paragraph does not refer expressly to other forms of discrimination, e.g. on ethnic or religious grounds. There are a number of approaches to the redress of existing imbalances, such as selection based on “merit with bias”, i.e. where, for example, if two applicants are of equal merit, the bias should be to appoint a woman where there exists gender imbalance.

may² be constructive and purposive in the interpretation of legislation, but must not usurp Parliament's legislative function. Courts should have the power to declare legislation to be unconstitutional and of no legal effect. However, there may be circumstances where the appropriate remedy would be for the court to declare the incompatibility of a statute with the Constitution, leaving it to the Legislature to take remedial legislative measures.

2. Commonwealth parliaments should take speedy and effective steps to implement their countries' international human rights obligations by enacting appropriate human rights legislation. Special legislation (such as equal opportunity laws) is required to extend the protection of fundamental rights to the private sphere. Where domestic incorporation has not occurred, international instruments should be applied to aid interpretation.

3. Judges should adopt a generous and purposive approach in interpreting a Bill of Rights. This is particularly important in countries which are in the process of building democratic traditions. Judges have a vital part to play in developing and maintaining a vibrant human rights environment throughout the Commonwealth.

4. International law and, in particular, human rights jurisprudence can greatly assist domestic courts in interpreting a Bill of Rights. It also can help expand the scope of a Bill of Rights making it more meaningful and effective.

5. While dialogue between the judiciary and the government may be desirable or appropriate, in no circumstances should such dialogue compromise judicial independence.

6. People should have easy and unhindered access to courts, particularly to enforce their fundamental rights. Any existing procedural obstacles to access to justice should be removed.

7. People should also be made aware of, and have access to, other important foras for human rights dispute resolution, particularly Human Rights Commissions, Offices of the Ombudsman and mechanisms for alternative dispute resolution.

8. Everyone, especially judges, parliamentarians and lawyers, should have access to human rights education.

2 It has been suggested that judges "shall" have a duty to adopt a constructive and purposive approach to the interpretation of legislation, particularly in a human rights context, as indicated in paragraph 3.

Notes

II PRESERVING JUDICIAL INDEPENDENCE

1. Judicial appointments

Jurisdictions should have an appropriate independent process in place for judicial appointments. Where no independent system already exists, appointments should be made by a judicial services commission (established by the Constitution or by statute) or by an appropriate officer of state acting on the recommendation of such a commission.³

The appointment process, whether or not involving an appropriately constituted and representative judicial services commission, should be designed to guarantee the quality and independence of mind of those selected for appointment at all levels of the judiciary.

Judicial appointments to all levels of the judiciary should be made on merit with appropriate provision for the progressive removal of gender imbalance and of other historic factors of discrimination.

Judicial appointments should normally be permanent; whilst in some jurisdictions, contract appointments may be inevitable, such appointments should be subject to appropriate security of tenure.⁴

Judicial vacancies should be advertised.

2. Funding

Sufficient and sustainable funding should be provided to enable the judiciary to perform its functions to the highest standards. Such funds, once voted for the judiciary by the Legislature, should be protected from alienation or misuse. The allocation or withholding of funding should not be

3 The Guidelines clearly recognise that, in certain jurisdictions, appropriate mechanisms for judicial appointments not involving a judicial service commission are in place. However, such commissions exist in many jurisdictions, though their composition differs. There are arguments for and against a majority of senior judges and in favour of strong representation of other branches of the legal profession, members of parliament and of civil society in general.

4 The making of non-permanent judicial appointments by the executive without security of tenure remains controversial in a number of jurisdictions.

used as a means of exercising improper control over the judiciary.⁵

Appropriate salaries and benefits, supporting staff, resources and equipment are essential to the proper functioning of the judiciary.

As a matter of principle, judicial salaries and benefits should be set by an independent body and their value should be maintained.

3. Training⁶

A culture of judicial education should be developed.

Training should be organised, systematic and ongoing and under the control of an adequately funded judicial body.

Judicial training should include the teaching of the law, judicial skills and the social context including ethnic and gender issues.

The curriculum should be controlled by judicial officers who should have the assistance of lay specialists.

For jurisdictions without adequate training facilities, access to facilities in other jurisdictions should be provided.

Courses in judicial education should be offered to practising lawyers as part of their ongoing professional development training.⁷

⁵ The provision of adequate funding for the judiciary must be a very high priority in order to uphold the rule of law, to ensure that good governance and democracy are sustained and to provide for the effective and efficient administration of justice. However, it is acknowledged that a shortfall in anticipated national income might lead to budgetary constraints.

Finance ministries are urged to engage in appropriate consultations in order to set realistic and sustainable budgets which parliaments should approve to ensure adequate funds are available

⁶ This is an area where the sponsoring associations can play a cost-effective role in co-operation with the Commonwealth Secretariat. Resources need to be provided in order to support the judiciary in the promotion of the rule of law and good governance.

⁷ The drafters of the Guidelines did not wish by this provision to impinge on either the independence of the judiciary or the independence of the legal profession. However, in many jurisdictions throughout the Commonwealth magistrates and judges are given no formal training on commencement of their duties. It was felt that appointees to the bench would benefit from some training prior to appointment in order to make them more aware of the duties and obligations of judicial officers and would aid their passage to the bench.

Notes

III PRESERVING THE INDEPENDENCE OF PARLIAMENTARIANS⁸

1. Article 9 of the Bill of Rights 1688 is re-affirmed. This article provides:

That the Freedom of Speech and Debates or Proceedings in Parlyement ought not to be impeached or questioned in any court or place out of Parlyement.

2. Security of members during their parliamentary term is fundamental to parliamentary independence and therefore:

(a) the expulsion of members from parliament as a penalty for leaving their parties (floor-crossing) should be viewed as a possible infringement of members' independence; anti-defection measures may be necessary in some jurisdictions to deal with corrupt practices;⁹

(b) laws allowing for the recall of members during their elected term should be viewed with caution, as a potential threat to the independence of members;

(c) the cessation of membership of a political party of itself should not lead to the loss of a member's seat.

3. In the discharge of their functions, members should be free from improper pressures and accordingly:

(a) the criminal law and the use of defamation proceedings are not appropriate mechanisms for restricting legitimate criticism of the government or the parliament;

(b) the defence of qualified privilege with respect to reports of parliamentary proceedings should be drawn as broadly as possible to permit full public reporting and discussion of public affairs;

(c) the offence of contempt of parliament should be drawn as narrowly as possible.

8 It has been observed that the Guidelines are silent about the elected composition of the popular chamber. In a number of jurisdictions nominated members may have a decisive influence on the outcome of a vote. If properly used, however, the power of nomination may be used to redress for example gender imbalance and to ensure representation of ethnic or religious minorities. The role of non-elected senates or upper chambers must also be considered in this context.

9 There remains controversy about the balance to be struck between anti-floor crossing measures as a barrier against corruption and the potential threat to the independence of MPs.

IV WOMEN IN PARLIAMENT¹⁰**Notes**

1. To improve the numbers of women members in Commonwealth parliaments, the role of women within political parties should be enhanced, including the appointment of more women to executive roles within political parties.
2. Pro-active searches for potential candidates should be undertaken by political parties.
3. Political parties in nations with proportional representation should be required to ensure an adequate gender balance on their respective lists of candidates for election. Women, where relevant, should be included in the top part of the candidates lists of political parties. Parties should be called upon publicly to declare the degree of representation of women on their lists and to defend any failure to maintain adequate representation.
4. Where there is no proportional representation, candidate search and/or selection committees of political parties should be gender balanced as should representation at political conventions and this should be facilitated by political parties by way of amendment to party Constitutions; women should be put forward for safe seats.
5. Women should be elected to parliament through regular electoral processes. The provision of reservations for women in national Constitutions whilst useful, tends to be insufficient for securing adequate and long term representation by women.
6. Men should work in partnership with women to redress constraints on women entering parliament. True gender balance requires the oppositional element of the inclusion of men in the process of dialogue and remedial action to address the necessary inclusion of both genders in all aspects of public life.

¹⁰ The emphasis on gender balance is not intended to imply that there are no other issues of equity in representation which need to be considered. Parliament should reflect the composition of the community which it represents in terms of ethnicity, social and religious groups and regional balance. Some countries have experimented with regulation of national political parties to ensure, for example, that their support is not confined to one regional or ethnic group, a notion which would be profoundly hostile to the political culture in other jurisdictions.

Notes

V JUDICIAL AND PARLIAMENTARY ETHICS

1. Judicial Ethics

- (a) A Code of Ethics and Conduct should be developed and adopted by each judiciary as a means of ensuring the accountability of judges;
- (b) the Commonwealth Magistrates' and Judges' Association should be encouraged to complete its Model Code of Judicial Conduct now in development;¹¹
- (c) the Association should also serve as a repository of codes of judicial conduct developed by Commonwealth judiciaries, which will serve as a resource for other jurisdictions.

2. Parliamentary Ethics

- (a) Conflict of interest guidelines and Codes of Conduct should require full disclosure by ministers and members of their financial and business interests;
- (b) members of parliament should have privileged access to advice from statutorily-established Ethics Advisors;
- (c) whilst responsive to the needs of society and recognising minority views in society, members of parliament should avoid excessive influence of lobbyists and special interest groups.

VI ACCOUNTABILITY MECHANISMS

1. Judicial Accountability

- (a) Discipline:
- (i) In cases where a judge is at risk of removal, the judge must have the right to be fully informed of the charges, to be represented at a hearing, to make a full defence, and to be judged by an independent

11 Following discussion of the Guidelines it has been accepted by the Working Group that a “uniform” Model Code of Judicial Conduct is inappropriate. Judicial Officers in each country should develop, adopt and periodically review codes of Ethics and Conduct appropriate to their jurisdiction. The CMJA will promote that process in its programmes and will serve as a repository for such codes when adopted.

and impartial tribunal. Grounds for removal of a judge should be limited to:

- (A) inability to perform judicial duties; and
- (B) serious misconduct.

- (ii) In all other matters, the process should be conducted by the chief judge of the courts;
- (iii) Disciplinary procedures should not include the public admonition of judges. Any admonitions should be delivered in private, by the chief judge.

(b) Public Criticism:¹²

- (i) Legitimate public criticism of judicial performance is a means of ensuring accountability;
- (ii) The criminal law and contempt proceedings are not appropriate mechanisms for restricting legitimate criticism of the courts.

2. Executive Accountability

(a) Accountability of the Executive to Parliament:

Parliamentary procedures should provide adequate mechanisms to enforce the accountability of the Executive to parliament. These should include:

- (i) a committee structure appropriate to the size of Parliament, adequately resourced and with the power to summon witnesses, including ministers. Governments should be required to announce publicly, within a defined time period, their responses to committee reports;
- (ii) standing orders should provide appropriate opportunities for members to question ministers and full debate on legislative proposals;
- (iii) the Public Accounts should be independently audited by the Auditor General who is responsible to and must report directly to parliament;
- (iv) the chair of the Public Accounts Committee should normally be an opposition member;

¹² In certain jurisdictions, the corruption of the judiciary is acknowledged as a real problem. The recommendations contained in the Guidelines are entirely consistent with the Framework for Commonwealth Principles in Promoting Good Governance and Combating Corruption approved by CHOGM in Durban in 1999. There is some support for the creation of a Judicial Ombudsman who may receive complaints from the public regarding the conduct of judges.

Notes

- (v) offices of the Ombudsman, Human Rights Commissions and Access to Information Commissioners should report regularly to parliament.
- (b) Judicial Review
Commonwealth governments should endorse and implement the principles of judicial review enshrined in the Lusaka Statement on Government under the Law.

VII THE LAW-MAKING PROCESS

1. Women should be involved in the work of national law commissions in the law-making process. On-going assessment of legislation is essential so as to create a more gender-balanced society. Gender-neutral language should be used in the drafting and use of legislation.
2. Procedures for the preliminary examination of issues in proposed legislation should be adopted and published so that:
 - (a) there is public exposure of issues, papers and consultation on major reforms including, where possible, a draft bill;
 - (b) standing orders provide a delay of some days between introduction and debate to enable public comment unless suspended by consent or a significantly high percentage vote of the chamber; and
 - (c) major legislation can be referred to a select committee allowing for the detailed examination of such legislation and the taking of evidence from members of the public.
3. Model standing orders protecting members' rights and privileges and permitting the incorporation of variations, to take local circumstances into account, should be drafted and published.
4. Parliament should be serviced by a professional staff independent of the regular public service.
5. Adequate resources to government and non-government back benchers should be provided to improve parliamentary input and should include provision for:
 - (a) training of new members;
 - (b) secretarial, office, library and research facilities;
 - (c) drafting assistance including private members bills.

6. An all-party committee of members of parliament should review and administer parliament's budget which should not be subject to amendment by the Executive.
7. Appropriate legislation should incorporate international human rights instruments to assist in interpretation and to ensure that ministers certify compliance with such instruments, on introduction of the legislation.
8. It is recommended that "sunset" legislation (for the expiry of all subordinate legislation not renewed) should be enacted subject to power to extend the life of such legislation.

VIII THE ROLE OF NON-JUDICIAL AND NON-PARLIAMENTARY INSTITUTIONS

1. The Commonwealth Statement on Freedom of Expression¹³ provides essential guarantees to which all Commonwealth countries should subscribe.
2. The Executive must refrain from all measures directed at inhibiting the freedom of the press, including indirect methods such as the misuse of official advertising.
3. An independent, organised legal profession is an essential component in the protection of the rule of law.
4. Adequate legal aid schemes should be provided for poor and disadvantaged litigants, including public interest advocates.
5. Legal professional organisations should assist in the provision, through pro bono schemes, of access to justice for the impecunious.
6. The executive must refrain from obstructing the functioning of an independent legal profession by such means as withholding licensing of professional bodies.
7. Human Rights Commissions, Offices of the Ombudsman and Access to Information Commissioners can play a key role in enhancing public awareness of good governance and rule

¹³ Since the Guidelines were drafted, the draft Statement on Freedom of Expression has been subject to further consideration and the reference should take account of the new developments. The Commonwealth Heads of Government, in the Coolum Declaration of 5 March 2002 included a commitment to freedom of expression: "We stand united in: our commitment to democracy, the rule of law, good governance, freedom of expression and the protection of human rights..."

Notes

of law issues and adequate funding and resources should be made available to enable them to discharge these functions. Parliament should accept responsibility in this regard.

Such institutions should be empowered to provide access to alternative dispute resolution mechanisms.

IX MEASURES FOR IMPLEMENTATION AND MONITORING COMPLIANCE

These guidelines should be forwarded to the Commonwealth Secretariat for consideration by Law Ministers and Heads of Government.¹⁴

If these Guidelines are adopted, an effective *monitoring procedure*, which might include a Standing Committee, should be devised under which all Commonwealth jurisdictions accept an obligation to report on their compliance with these Guidelines.

Consideration of these reports should form a regular part of the Meetings of Law Ministers and of Heads of Government.

14 Under active consideration is the creation of a monitoring procedure outside official Commonwealth processes. This initially may involve an “annual report” on the implementation of the Guidelines in all Commonwealth jurisdictions, noting “good” and “bad” practice.

15. Plan of Action for Africa on the Commonwealth (Latimer House) Principles on the Accountability of and the Relationship Between the Three Branches of Government, Nairobi, Kenya, April 2005

1. INTRODUCTION

In June 1998, a group of distinguished Parliamentarians, judges, lawyers and legal academics joined together at Latimer House, Buckinghamshire, United Kingdom, at a Colloquium on Parliamentary Sovereignty and Judicial Independence within the Commonwealth. The Colloquium was sponsored by the Commonwealth Lawyers' Association, The Commonwealth Legal Education Association, The Commonwealth Parliamentary Association and The Commonwealth Magistrates' and Judges' Association with the support of the Commonwealth Foundation, the Commonwealth Secretariat and the United Kingdom Foreign and Commonwealth Office. The product of the Colloquium, The Latimer House Guidelines on Parliamentary and Judicial Independence were initially placed before Commonwealth Law Ministers at their meeting in Port of Spain in May 1999 and again at their meeting in St Vincent and the Grenadines in November 2002.

In November 2002, Law Ministers gave detailed consideration to the Guidelines which had been refined by a working group consisting of the sponsoring associations and the Commonwealth Secretariat and invited the Commonwealth Secretary-General to convene a small group of Law Ministers to work with the Commonwealth Secretariat in order to refine and develop principles based on the Guidelines for submission to Heads of Government.

The resulting text was approved by Law Ministers and subsequently endorsed by Commonwealth Heads of Government at their meeting in Abuja, Nigeria in December 2003.

Notes

Leaders from the Executive, the Judiciary, the Legislature, Commonwealth partner organizations and representatives of civil society from all the 18 Commonwealth countries in Africa met in Nairobi from 4-6 April 2005. The Forum was organized by the Commonwealth Secretariat and hosted by the Government of Kenya. The Forum was convened to consider ways and means of promoting and advancing the Principles, following their adoption by Commonwealth Heads of Government in Abuja in December 2003. This document represents a draft blue print prepared by the Commonwealth Secretariat and the Partner organisations for such action plan.

2. PLAN OF ACTION

2.1 Relationship between the three branches of Government

Historically the concentration of powers has rested in the hands of the executive arm of government. The Principles specify that 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 power vested constitutionally on the other institutions. It was affirmed that Commonwealth Africa needed to pay particular attention to processes of democratisation that meet the needs of Africa's historical, cultural and economic peculiarities and in a manner which is consistent with the Principles.

2.1.1 Interaction between the Judiciary and the Executive

It was affirmed that Commonwealth Africa should devote more attention to establishing and maintaining processes of democratisation that meet the needs of Africa's historical, cultural and economic realities but always in accordance with the letter and spirit of the Principles. This relationship should be governed by the principle of cooperative governance, with each branch fulfilling their respective critical role in a Constitutional, complementary and constructive manner.

Proposed actions

Governments and Judiciaries are encouraged to:

- establish effective mechanisms of communication between the Executive and the Judiciary so as to strengthen mutual understanding of their respective functions.

2.1.2 Independence of Parliamentarians

Parliamentarians should be able to carry out their legislative and Constitutional duties in accordance with the Constitution free from unlawful interference.

Proposed actions

Governments are encouraged to:

- ensure that members of Parliaments are free from undue pressure or interference;

Parliaments should:

- attempt to clarify the issue of floor crossing with some degree of certainty in their jurisdictions;

Political parties should:

- ensure an adequate gender balance in their nominations of candidates for elections;

The Commonwealth Secretariat and the Commonwealth Parliamentary Association should:

- continue to provide support through capacity building through the Political Affairs Division.

2.1.3 Legislative role of Parliament

The capacity of national Legislatures should be enhanced to enable them adequately to scrutinize legislation, international instruments and other proposed measures.

Proposed actions

Parliaments and Governments are encouraged to:

- provide necessary resources to members of parliament to enable them fulfil their functions;
- engage civil society as partners in order that they play a more proactive role in legislative processes.

2.1.4 The role of Gender in Governance

In the past decade, women's visibility and representation in governance has improved. Mainstreaming gender as an institutional and cultural process will facilitate the elimination of gender biases in development. Bearing in mind that Commonwealth target requiring that by 2005 at least 30 per cent of those in political and decision-making positions should be women has not been achieved, the three branches of governments should treat women in public positions on an equal footing with men in all circumstances to help avoid tokenism that is prevailing at the moment.

Notes

Proposed actions

Governments are encouraged to:

- involve women in governance at all levels including local government level and to undertake reforms of their electoral system as a mechanism for increasing representation of women in governance at all levels;
- to implement the Commonwealth Gender and Equality Plan of Action;

The Commonwealth Secretariat to:

- continue its work on assisting governments, National Women's Ministries, political parties, civil society and other partners achieve the target of 30 per cent of women's representation in the political, public and private sectors;
- support legislative reviews, policies and programmes including women-specific measures that guarantee equal opportunities and treatment to women and men in all sectors and at all levels;
- continue to provide support and assistance in accordance with the Commonwealth Plan of Action for Gender Equality 2005-2015.

2.2 Good Governance and Accountability

The Principles require that the three branches of government should maintain high standards of accountability, transparency and responsibility in the conduct of all public business.

2.2.1 Parliamentary oversight and the role of Public Accounts Committees

Public Accounts Committees (PACs) in Commonwealth Africa need to strengthen their role as oversight bodies and Parliaments should improve the functioning of these committees to make them more effective.

Proposed actions

Parliaments are encouraged to:

- reinforce the role of PACs by constituting them into Standing Committees of Parliament and to ensure that membership of the PACs are as diverse as possible free from party interference and not be dominated by the majority party;

- *provide adequate and efficient staffing for the Offices of the Auditor-General and the PAC;*

The Commonwealth Secretariat and the Commonwealth Parliamentary Association should:

- *encourage and facilitate the drafting of model rules on the functioning, powers and procedures of PACs to be adopted by Commonwealth Parliaments.*

2.2.2 Judicial accountability and confidence building

The independence of the Judiciary is a vital guarantee of a democratic society, and is built on the foundation of public confidence. As such, it was essential that there be adequate observance of principles of accountability in its processes, professional ethics and conduct among the judicial officers as well as court officials. The institution of peer review mechanisms by members of the profession, appropriate criticism through the media, legislative reversal of judicial precedent and case law should be considered. For accountability to be effective there must be judicial independence and security of tenure. The Judiciary should be well resourced and there must be an effective system for the dissemination and evaluation of judicial decisions. There is a particular need to provide security of tenure for judicial officers serving in the lower courts as provided for in the Principles in order to build public confidence in the judicial system.

Proposed actions

Judiciaries are encouraged to:

- *adopt Codes of Ethics and Conduct for judicial officers;*
- *embark on judicial outreach programmes to communicate to the general public the role and functions of the Judiciary.*

2.2.3 Accountability, Transparency and Procurement Guidelines

To achieve transparency in public procurement, government procurement officials must comply with international standards and best practices in procurement matters.

Proposed actions

Governments are encouraged to:

- *publicly advertise tenders and business opportunities in an adequate and timely fashion, and where possible, on the websites of the procuring entities;*

Notes

- ensure that procurement opportunities are made available publicly and consistently and the evaluation criteria for any particular procurement should clearly identify the relative importance of all relevant factors and provide a sound basis for a procurement decision;

The Commonwealth Secretariat to:

- *build on existing work being undertaken and provide support and information on suitable procurement guidelines.*

2.3 Mechanisms for safeguarding Ethical Governance and Accountability

Each branch of government should, in accordance with its Constitutional role and responsibilities, strive to ensure that effective laws, mechanisms, methods, systems and rules of checks and balances are in place to strengthen the observance, promotion and protection of Human Rights including the rights of the disadvantaged to prevent the abuse of power.

2.3.1 National Institutions and Civil Society

In ensuring that principles of good governance under the rule of law are properly and effectively addressed, effective mechanisms should be put in place. These should include the development of effective methods and systems of oversight, accountability, confidence building and for the inculcation of a culture of transparency, openness and judicious use of public resources in African member states.

The diminishing role of the State in the provision of public services is a concern. The increasing role of civil society organizations is enhancing processes of democracy and development. Accordingly governments should embrace the new role of civil society in advancing the principles.

Proposed actions

Governments are encouraged to:

- establish, if they do not already exist, independent oversight institutions such as offices of Human Rights Commissions, the Ombudsman, Public Accounts Committees, Auditors-General Offices, Anti-Corruption Commissions, and Access to Information Commissions and ensure that appointments to these bodies are done through a transparent process.

The Commonwealth Secretariat to:

- *continue to strengthen its technical assistance in sustaining oversight institutions.*

2.3.2 Mechanisms for ethical conduct for the Administration of Justice

The vital importance of adequate training of judicial officers and other relevant group of actors in ethical conduct was emphasised. It was essential that judicial officers had a sense of ownership of codes which regulate their conduct. Such codes should take into account the provisions of the Limassol Conclusions. The issue of ethical conduct had to be seen in the context of the provision of adequate conditions of service and funding, the need for a holistic approach, regardless of the status of a particular judicial officer and appropriate mechanisms for dealing with complaints by the public which do not prejudice the independence of the judiciary.

*Proposed actions**Judiciaries are encouraged to:*

- *adopt, if not in place, codes of conduct for judicial officers and judicial personnel and review these codes regularly;*

The Commonwealth Secretariat and the Commonwealth Magistrates and Judges Association:

- *provide guidance on codes of conduct for judicial officers and court personnel;*
- *should continue, with other relevant institutions, to further develop training programmes within a structure whereby judicial officers can strengthen ethical standards, revisit codes of conduct and exchange information.*

2.3.3 Maintaining an independent Judiciary: Judicial training

The need for judiciary-driven training should target not only judicial officers but also all personnel of the judicial and para-judicial staff. The objective should be to sensitise them more particularly on the issues of court service to the community, citizens' rights and how the legal system should be used and improved in pursuit of these rights.

*Proposed action**Governments to:*

- *recognise the importance of judicial-driven training and education in maintaining the independence of the*

Notes

judiciary and to make judicial continuing education an integral part of the administration of justice and provide adequate funding for this;

Judiciaries are encouraged to:

- identify and prioritise areas for judicial training;
- form a core group of judicial officers to become trainers to ensure that judicial training programmes can be sustained;

The Commonwealth Secretariat and the Commonwealth Magistrates and Judges Association to:

- continue to develop with the creation of opportunities for trainers to be trained;
- facilitate judicial training programmes.

2.3.4 An independent legal profession

The legal profession is a key partner in the promotion of democracy and that governments should see them in that role. The legal profession was called upon to maintain and promote the highest standards of excellence and integrity; support the Legislature by providing advice; support the judiciary by pressing for entrenched independence of the courts; speak out again administrative action and inaction; and help to create public awareness of legal issues, particularly relating to ethics and human rights. In all these matters, the profession should have regard to its social responsibility and avoid being used as an instrument of party politics.

Proposed actions

The Commonwealth Secretariat, the Commonwealth Lawyers' Association and the Commonwealth Legal Education Association and any other relevant institution should:

- *provide support to legal professional associations and may have regard to the Basic Principles on the Role of Lawyers adopted by the United Nations Congress 1990;*

Law Societies and Bar Associations are encouraged to:

- *establish programmes for continuing legal education and to seek where appropriate the assistance and advice of the Commonwealth Lawyers' Association in partnership with the Commonwealth Legal Education Association;*
- *develop appropriate codes of ethics for legal practitioners;*

Governments are encouraged to:

- provide a suitable legal framework for enable law societies and bar associations to carry out their functions independently.

2.3.5 Role of the Media

The media plays a vital role in promoting the Principles. In particular, the media should contribute to democratic and accountable governance through accurate and responsible reporting. There is a need for the media to work effectively within systems of regulation that are in accordance with democratic principles and practices.

Proposed actions

Governments are encouraged to:

- enable the media to function in accordance with democratic principles and practises and to ensure that the media functions in the public interest and is not used for propaganda broadcasting;

The Commonwealth Secretariat to:

- encourage the existing cooperation between Commonwealth partner organisations namely; The Commonwealth Broadcasting Association, The Commonwealth Press Union and the Commonwealth Journalists Association in the promotion of the Principles.

2.3.6 Freedom of Information

Freedom of information is recognized as a human right which is guaranteed under international, regional and national laws. There is a trend in Commonwealth Africa towards the adoption of freedom of information laws and the call to adhere to the key elements of the Commonwealth Freedom of Information guidelines was supported. Hope was expressed that the emergence of new regional governance structures such as NEPAD and the African Peer Review Mechanism would enhance freedom of information legislation and its implementation in Africa as a whole.

Proposed actions

Governments are encouraged to:

- enact legislation to provide access to information;
- adopt the declaration of Principles of Freedom of Expression of the African Union;

The Commonwealth Secretariat to:

- continue with existing programmes in providing technical assistance to develop policy, best practice, codes of conduct or draft freedom of information legislation for member states;

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- cooperate with the Commonwealth Parliamentary Association/Commonwealth Human Rights Initiative and other relevant institutions working on Freedom of Information.

2.3.7 Access to Justice

The formal structures of justice, high costs, and the culture of delays, and physical distances from courts limit the effective participation of the people, especially the poor in accessing justice. In the context of the need for alternatives to formal procedures, Commonwealth Africa needs to construct new ways of pursuing a human rights vision of justice due to the failure of the old formal approach to guarantee effective access to justice. There was a need to incorporate procedures and institutions into the mainstream judicial system that guarantee better access to justice.

Proposed actions

Governments are encouraged to:

- *provide legal aid to enhance access to justice;*
- *strengthen the formal and traditional court system to improve justice;*

Governments and the Commonwealth Secretariat should:

- support the establishment of alternative mechanisms for dispute resolution which avail the speedy delivery of justice.

2.4 Combating Corruption

Corruption, which undermines development, is generally an outcome and a symptom of poor governance. In accordance with the Framework for Commonwealth Principles on Promoting Good Governance and Combating corruption, a policy of “zero tolerance” must permeate national political cultures, governance, legal systems and administration. Legislators should therefore enact more effective laws to fight corruption decisively.

2.4.1 Proper Exercise of Executive Power

In many Commonwealth African countries, the proper exercise of executive power means a radical departure from prevailing attitudes, whether official or unofficial, which appear to condone abuse of power and reward corruption in public administration. It was recognized that there was the need to tackle issues of corruption in the political context. It was also recognized that the media and the oversight institutions can play an important role in the exercise of executive power. The Executive is called

upon to exercise its powers in accordance with the rule of law and Constitution at all times.

Notes

Proposed actions

Governments are encouraged to:

- establish codes of conduct for holders of public office;
- establish offices such as an Inspector General to investigate, report and even prosecute on corruption;
- provide support to institutions such as independent anti-corruption commissions, public accounts committees, human rights commissions, freedom of information commissions, offices of the ombudsman and other oversight institutions;

The Commonwealth Secretariat:

- to provide assistance in the drafting of codes of conduct for holders of public office.

2.4.2 Combating Corruption in the Judiciary

Corruption is common and can be found in almost all jurisdictions throughout the Commonwealth. The fight against corruption in the judiciary should be spearheaded by Chief Justices and an adopted plan premised on the following actions: better conditions of service and security of tenure, strengthening the independence of the judiciary and upholding the dignity of the judiciary.

Proposed actions

Governments are encouraged to:

- set in place clearly defined criteria and a publicly declared process for judicial appointments;
- review and establish adequate terms and conditions of service for the Judiciaries to minimise their vulnerability to corrupt influences;

Heads of Judiciaries are encouraged to:

- spearhead the fight against corruption in the Judiciary;
- ensure that court operations are transparent, and open to the public through awareness programmes;
- engage in appropriate interaction with the media;
- prepare annual reports on the work of the courts and the Judiciary;
- support Chief Justices in Commonwealth Africa to network and meet regularly for the purpose of exchanging experiences, learning from one another,

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promoting best practices and developing strategies to improve relationships with other arms of government;

- where Constitutional provisions are silent to put in place internal investigative mechanisms in the form of integrity, ethics or peer committees charged with the responsibility for investigating all complaints against judicial officers.

2.4.3 Combating Corruption in Parliament

Parliaments play a prominent role in fighting corruption since Parliament establishes democratic accountability and transparency and instills public confidence in government.

Proposed actions

Governments and Parliaments should:

- enact legislation to punish corruption and ensure the recovery of embezzled funds and forfeiture of assets;
- ensure that penal codes should allow the prosecution for wealth and earnings in excess of known sources of income;
- to pass financial disclosure laws and codes of conduct requiring declaration of income, assets and liabilities;
- disqualify Parliamentarians who have been convicted of criminal (except civil and traffic) and electoral offences from contesting elections for an appropriate period;

The Commonwealth Secretariat and the Commonwealth Parliamentary Association:

- *to cooperate in providing technical assistance in the fight against corruption;*
- *to provide assistance in the drafting of codes of conduct for parliamentarians and officials.*

2.4.4 Tracing, Recovery and Repatriation of Illegally Acquired Wealth

Corruption contributes significantly to underdevelopment and economic stagnation by depleting national resources. It is important that plundered assets be returned to their countries of origin.

Proposed actions

Governments are encouraged to:

- enact appropriate domestic legislation against money laundering and organized crime;
- sign, ratify and, where appropriate, domesticate the UN Convention Against Corruption;

- *take immediate actions to incorporate relevant international and regional conventions, such as the AU Convention on Preventing and Combating Corruption and the SADC Protocol Against Corruption in legislation;*
- *introduce civil and criminal forfeiture mechanisms into domestic legislation;*
- *ensure that the waiver of immunity from prosecution, currently enjoyed by some members of the executive arm, be withdrawn when dealing with cases of corruption;*
- *support the extension of the jurisdiction of the International Criminal Court to include cases of grand corruption;*

The Commonwealth Secretariat should:

- *provide relevant technical assistance in developing model legislation on the recovery of illegally acquired wealth.*

2.4.5 Human Rights Education

Human rights provisions are entrenched in Constitutions. To enhance awareness, there is a need for main streaming human rights education at the secondary and tertiary level. There is also a need for effective implementation of international human rights norms to which all the three branches of governments should be sensitised.

Proposed action

The Commonwealth Secretariat should:

- *continue its regional programme of human rights training;*

The Commonwealth Secretariat and the Commonwealth Legal Education Association to:

- *develop and disseminate a model Human Rights curriculum for secondary and tertiary education institutions.*

3 IMPLEMENTING THE PLAN OF ACTION

- 3.1** This Plan of Action should provide the framework for the three branches of governments to devise and develop strategies to implement the Principles.

Notes

- 3.2 Governments are urged to establish mechanisms to monitor and evaluate the implementation of the Plan of Action in their respective jurisdictions.
- 3.3 Governments should accept the responsibility to provide the resources required to enable Parliaments, Judiciaries and oversight institutions and bodies to properly discharge their functions.
- 3.4 The Secretariat is committed to coordinate and streamline the implementation of the Plan of Action.
- 3.5 The Secretariat, together with Governments and partner organisations will facilitate monitoring of the implementation of the Plan of Action.
- 3.6 The Secretariat will continue to facilitate capacity building programmes and to develop and integrate the Principles into its programmes.
- 3.7 The Secretary-General of the Commonwealth Secretariat will report on the implementation of the Plan of Action to Heads of Governments, appropriate Ministers, and to meetings of senior officials.

16. The Edinburgh Plan of Action for the Commonwealth

For the Development, Promotion, and Implementation of the Principles of the Accountability of and relationship between the Three Branches of Government, Edinburgh, Scotland, 7 July 2008

PREAMBLE

REAFFIRMING the Principles endorsed by Commonwealth Heads of Government at Abuja in 2003, and

REAFFIRMING the importance of implementation of the Plan of Action for Africa adopted at Nairobi in 2005 not only in Africa but in the wider Commonwealth and recognising the special circumstances of smaller and under resourced jurisdictions,

NOTING that,

- (1) while good practice in implementation of the Principles has developed in several jurisdictions, there have been a number of cases of the violation of the fundamental principle that:

‘Each Commonwealth Country’s Parliaments, Executives and Judiciaries are the guarantors in their respective spheres of the rule of law, the promotion and protection of fundamental human rights and the entrenchment of good governance based on the highest standards of honesty, probity and accountability’ (CLHP15- I);

- (2) it has not proved possible to establish, either within or outside official Commonwealth channels, an effective and systematic procedure for assessing both good and bad practice in terms of compliance with the Principles;

15 CLHP = Principles on the Accountability of and Relationship Between the Three Branches of Governments.

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- (3) while the Principles have been widely circulated and discussed at numerous Commonwealth gatherings there remains ignorance of their importance among government officers, parliamentarians, lawyers, judicial officers and members of civil society;
- (4) each new generation of government officers, parliamentarians, lawyers, judicial officers and members of civil society has to be alert to the imperatives of, and balance between, the independence and accountability of the judiciary, parliament and the executive;
- (5) there is a need to make better provision for the continuing implementation and assessment of the Principles across the Commonwealth.

Representatives of the Commonwealth Lawyers' Association (CLA), Commonwealth Legal Education Association (CLEA), the Commonwealth Magistrates' and Judges' Association (CMJA) and the Commonwealth Parliamentary Association (CPA) and Law Officers, meeting at the Scottish Parliament in Edinburgh on 6 & 7 July 2008:

HAVE RESOLVED TO ADOPT the following provisions for implementation and assessment of the Principles:

1 RELATIONSHIP BETWEEN THE THREE BRANCHES OF GOVERNMENT

1.1 General

The Principles specify that “Each Commonwealth Country’s Parliaments, Executives and Judiciaries are the guarantors in their respective spheres of the rule of law, the promotion and protection of fundamental human rights and the entrenchment of good governance based on the highest standards of honesty, probity and accountability.” (CLHP - I)

ACTION:

The partner organisations (CLA, CLEA, CMJA and CPA) should assist the Commonwealth Secretariat by the establishment of a Standing Committee for the purpose of gathering relevant information, reporting on implementation of the Principles, best practice and areas of concern to inform the deliberations of the Commonwealth Ministerial Action Group. Other civil

society organisations should be encouraged to assist the Standing Committee in gathering relevant information.

Governments should be encouraged to provide reports on the implementation of the Principles in their jurisdictions at each Heads of Government Meeting, with particular emphasis on best practice and challenges faced, as part of the rule of law mandate of the Commonwealth.

The Commonwealth Secretariat should:

- collate information on the implementation of the Principles on an ongoing basis;
- provide regular reports to Commonwealth Law Ministers, Senior Officials, Heads of Judiciary and Speakers of Parliament; and
- promote peer review of compliance with the Principles on a regional basis.

All parliamentarians, judicial officers and public servants, on election or appointment, should be given awareness training on basic Constitutional principles and their primary roles in the Constitutional process.

Meetings between representatives of the three branches of government should be organised on a regular basis, in their respective jurisdictions, in order to promote better understanding of each other's roles.

The Commonwealth Secretariat should assist in facilitating these exchanges.

The CPA should continue its seminars for newly elected parliamentarians.

The CMJA should expand its existing programmes to newly appointed judicial officers with specific emphasis on the Principles.

The Commonwealth Secretariat should assist in facilitating similar programmes for the public service.

1.2 Independence of Parliamentarians

“Parliamentarians must be able to carry out their legislative and Constitutional functions in accordance with the Constitution, free from unlawful interference” (CLHP - III)

respective branches of government should strive to improve the representation and participation of women and increase diversity in the public sphere in line with Commonwealth standards on gender and diversity. In particular:

1. Those responsible for recommending judicial appointments, should, through public information programmes, broad advertising of judicial vacancies, and by adapting judicial working conditions where, appropriate, encourage women and those from diverse backgrounds to apply for judicial appointments;
2. Parliaments should engage in disseminating better quality information about the role of parliamentarians and should develop practices that encourage women to stand for Parliament and to become candidates for leadership roles in Parliament;
3. Parliaments should adopt codes of conduct and standing orders which outline clearly the importance of the respect for the dignity of all parliamentarians and regulate the behaviour of parliamentarians towards each other. Speakers should provide clear rulings as to acceptable behaviour in the legislature;
4. Governments should work with civil society to encourage gender balance and diversity at all levels.

2. GOOD GOVERNANCE AND ACCOUNTABILITY

The Principles state that “Parliaments and governments should maintain high standards of accountability, transparency and responsibility in the conduct of all public business.” (CLHP - VII.a)

ACTION:

2.1 Elections

Bearing in mind the importance of the proper conduct of the electoral process to the realisation of the Principles:

All branches of government have responsibility for lawful and timely conduct of that process.

The Executive must ensure that there is an independent and autonomous electoral commission with powers and security of tenure guaranteed by statute. All Commissioners should

Notes

be fully conversant with the Commonwealth's fundamental values, including the Principles. In observing elections, the Commonwealth Secretariat should continue to ensure that the members of the Observer Missions are fully aware of the Principles and actively apply them in their observations.

All candidates for election should be fully aware of the Principles.

Judicial processes should be given appropriate expedition when hearing and determining cases relating to elections in order to guarantee the legitimacy of the election process. Determinations should be scrupulously respected.

2.2 Parliamentary Oversight and the Role of the Public Accounts Committees ("PACs")

ACTION:

PACs need to strengthen their role as oversight bodies and Parliaments should improve the effective functioning of these committees.

The role of PACs should be reinforced by constituting them into Standing Committees of Parliament, where this is not already the case. Membership of the PACs should be as diverse as possible, free from party interference and, where possible, not dominated by any party. Adequate and appropriate material and human resources should be provided to them.

Model rules on the functioning, powers and procedures of PACs should be developed by the Commonwealth Secretariat and the CPA for use by Commonwealth parliaments.

2.3 Judicial accountability and confidence building

“Judges are accountable to the Constitution and to the law which they must apply honestly, independently and with integrity.”
(CLHP - VII.b)

ACTION:

The Heads of the Judiciary should submit regular reviews to Parliaments on the financing and administration of the courts.

The judiciary should continue to develop and review their codes of conduct/ethics on a regular basis.

Information on the complaints and disciplinary procedures in relation to judicial misconduct should be publicly available.

2.4 Civil Society

“Parliaments and governments should recognise the role that civil society plays in the implementation of the Commonwealth’s fundamental values and should strive for a constructive relationship with civil society to ensure that there is broader opportunity for lawful participation in the democratic process.” (CLHP - X)

ACTION:

Bearing in mind that mutual trust is an essential ingredient if meaningful engagement of civil society in governance is to be realised:

1. positive steps should be taken to ensure the involvement of civil society in informing decision-making processes at community, national, regional and international level;
2. civil society organisations should be engaged to proactively promote the Principles;
3. governments should not inhibit civil society organisations’ ability to access funding both nationally and internationally.

2.5 An Independent Legal Profession

“An independent, effective and competent legal profession is fundamental to the upholding of the rule of law and the independence of the judiciary.” (CLHP – IV.d)

ACTION:

Bearing in mind that the legal profession is a key partner in the promotion of democracy and governments should see them in that role, the legal profession should:

1. maintain and promote the highest standards of excellence and integrity;
2. support the Legislature by participating fully in consultative processes;
3. promote and assert the independence of the courts;
4. speak out against improper administrative action or lack of action; and
5. help to create public awareness of legal issues, particularly relating to ethics and human rights.

Notes

In all these matters, the profession should have regard to its social responsibility and avoid being used as a tool of partisan politics.

The CLA should facilitate programmes for the legal profession designed to enhance awareness of the Principles.

2.6 Role of the Media

“Government’s transparency and accountability is promoted by an independent and vibrant media which is responsible, objective and impartial and which is protected by law in its freedom to report and comment upon public affairs.” (CLHP – IX.b)

ACTION:**Notes****3.1 Proper Exercise of Executive Power**

Governments should be encouraged to establish independent anti-corruption processes for all aspects of public administration and facilitate their independent and effective operation.

3.2 Combating Corruption in the Judiciary

“An independent, impartial, honest and competent judiciary is integral to the upholding the rule of law, engendering public confidence and dispensing justice.” (CLHP - IV)

The Commonwealth Secretariat is encouraged to re-issue and actively promote the Conclusions of the Commonwealth Judicial Colloquium on Combating Corruption within the Judiciary (“Limassol Conclusions”) in conjunction with the CMJA.

3.3 Combating Corruption in Parliament

Parliaments should enact financial disclosure legislation and develop and implement codes of conduct requiring declaration of income, assets and liabilities.

4. PROMOTION OF THE PRINCIPLES**ACTION:**

A study of the Commonwealth’s fundamental values should be included in civic education courses in schools. The Commonwealth Secretariat, in conjunction with the partner organisations, should sponsor the production of a version of the Principles which is accessible to the young.

Universities and law schools should be encouraged to include the study of the Commonwealth’s fundamental values, and in particular the Principles, in their curricula for political and legal studies. The CLEA should assist universities and law schools in devising appropriate curricula.

The four partner organisations should ensure the wide dissemination throughout the Commonwealth of the Principles, the Guidelines, the Nairobi Plan of Action, and this document in user-friendly formats.

Notes

5. IMPLEMENTATION OF THE PLAN

The Nairobi Plan of Action for Africa states:

“Governments are urged to establish mechanisms to monitor and evaluate the implementation of the Plan of Action in their respective jurisdictions.

Governments should accept the responsibility to provide the resources required to enable Parliaments, Judiciaries and oversight institutions and bodies to properly discharge their functions.

The Secretariat is committed to coordinate and streamline the implementation of the Plan of Action.

The Secretariat, together with Governments and partner organisations will facilitate monitoring of the implementation of the Plan of Action.

The Secretariat will continue to facilitate capacity building programmes and to develop and integrate the Principles into its programmes.

The Secretary-General of the Commonwealth Secretariat will report on the implementation of the Plan of Action to Heads of Governments, appropriate Ministers, and to meetings of senior officials.”

ACTION:

These commitments should be extended to the rest of the Commonwealth pursuant to the proposals contained in Section 1.1 of this document.

17. CPA Recommended Benchmarks For Democratic Legislatures

Notes

These benchmarks are the outcome of a Study Group hosted by the Legislature of Bermuda on behalf of the Commonwealth Parliamentary Association and the World Bank Institute with support from the United Nations Development Programme, the European Parliament and the National Democratic Institute for International Affairs

I. GENERAL

1. GENERAL

1.1 Elections

1.1.1 Members of the popularly elected or only house shall be elected by direct universal and equal suffrage in a free and secret ballot.

1.1.2 Legislative elections shall meet international standards for genuine and transparent elections.

1.1.3 Term lengths for members of the popular house shall reflect the need for accountability through regular and periodic legislative elections.

1.2 Candidate Eligibility

1.2.1 Restrictions on candidate eligibility shall not be based on religion, gender, ethnicity, race or disability.

1.2.2 Special measures to encourage the political participation of marginalized groups shall be narrowly drawn to accomplish precisely defined, and time-limited, objectives.

1.3 Incompatibility of Office

1.3.1 No elected member shall be required to take a religious oath against his or her conscience in order to take his or her seat in the Legislature.

1.3.2 In a bicameral Legislature, a legislator may not be a member of both houses.

Notes

1.3.3 A legislator may not simultaneously serve in the judicial branch or as a civil servant of the executive branch.

1.4 Immunity

1.4.1 Legislators shall have immunity for anything said in the course of the proceedings of Legislature.

1.4.2 Parliamentary immunity shall not extend beyond the term of office; but a former legislator shall continue to enjoy protection for his or her term of office.

1.4.3 The executive branch shall have no right or power to lift the immunity of a legislator.

1.4.4 Legislators must be able to carry out their legislative and Constitutional functions in accordance with the Constitution, free from interference.

1.5 Remuneration and Benefits

1.5.1 The Legislature shall provide proper remuneration and reimbursement of parliamentary expenses to legislators for their service, and all forms of compensation shall be allocated on a nonpartisan basis.

1.6 Resignation

1.6.1 Legislators shall have the right to resign their seats.

1.7 Infrastructure

1.7.1 The Legislature shall have adequate physical infrastructure to enable members and staff to fulfil their responsibilities.

II. ORGANIZATION OF THE LEGISLATURE

2. PROCEDURE AND SESSIONS

2.1 Rules of Procedure

2.1.1 Only the Legislature may adopt and amend its rules of procedure.

2.2 Presiding Officers

2.2.1 The Legislature shall select or elect presiding officers pursuant to criteria and procedures clearly defined in the rules of procedure.

2.3 Convening Sessions

Notes

2.3.1 The Legislature shall meet regularly, at intervals sufficient to fulfil its responsibilities.

2.3.2 The Legislature shall have procedures for calling itself into regular session.

2.3.3 The Legislature shall have procedures for calling itself into extraordinary or special session.

2.3.4 Provisions for the executive branch to convene a special session of the Legislature shall be clearly specified.

2.4 Agenda

2.4.1 Legislators shall have the right to vote to amend the proposed agenda for debate.

2.4.2 Legislators in the lower or only house shall have the right to initiate legislation and to offer amendments to proposed legislation.

2.4.3 The Legislature shall give legislators adequate advance notice of session meetings and the agenda for the meeting.

2.5 Debate

2.5.1 The Legislature shall establish and follow clear procedures for structuring debate and determining the order of precedence of motions tabled by members.

2.5.2 The Legislature shall provide adequate opportunity for legislators to debate bills prior to a vote.

2.6 Voting

2.6.1 Plenary votes in the Legislature shall be public.

2.6.2 Members in a minority on a vote shall be able to demand a recorded vote.

2.6.3 Only legislators may vote on issues before the Legislature.

2.7 Records

2.7.1 The Legislature shall maintain and publish readily accessible records of its proceedings.

Notes

3.1 Organization

3.1.1 The Legislature shall have the right to form permanent and temporary committees.

3.1.2 The Legislature's assignment of committee members on each committee shall include both majority and minority party members and reflect the political composition of the Legislature.

3.1.3 The Legislature shall establish and follow a transparent method for selecting or electing the chairs of committees.

3.1.4 Committee hearings shall be in public. Any exceptions shall be clearly defined and provided for in the rules of procedure.

3.1.5 Votes of committee shall be in public. Any exceptions shall be clearly defined and provided for in the rules of procedure.

3.2 Powers

3.2.1 There shall be a presumption that the Legislature will refer legislation to a committee, and any exceptions must be transparent, narrowly-defined, and extraordinary in nature.

3.2.2 Committees shall scrutinize legislation referred to them and have the power to recommend amendments or amend the legislation.

3.2.3 Committees shall have the right to consult and/or employ experts.

3.2.4 Committees shall have the power to summon persons, papers and records, and this power shall extend to witnesses and evidence from the executive branch, including officials.

The Study Group noted that one possible exception to this may be the election of officers.

3.2.5 Only legislators appointed to the committee, or authorised substitutes, shall have the right to vote in committee.

3.2.6 Legislation shall protect informants and witnesses presenting relevant information to commissions of inquiry about corruption or unlawful activity.

4. POLITICAL PARTIES, PARTY GROUPS AND CROSS PARTY GROUPS

Notes

4.1 Political Parties

4.1.1 The right of freedom of association shall exist for legislators, as for all people.

4.1.2 Any restrictions on the legality of political parties shall be narrowly drawn in law and shall be consistent with the International Covenant on Civil and Political Rights.

4.2 Party Groups

4.2.1 Criteria for the formation of parliamentary party groups, and their rights and responsibilities in the Legislature, shall be clearly stated in the Rules.

4.2.2 The Legislature shall provide adequate resources and facilities for party groups pursuant to a clear and transparent formula that does not unduly advantage the majority party.

4.3 Cross Party Groups

4.3.1 Legislators shall have the right to form interest caucuses around issues of common concern.

5. PARLIAMENTARY STAFF

5.1. General

5.1.1 The Legislature shall have an adequate non-partisan professional staff to support its operations including the operations of its committees.

5.1.2 The Legislature, rather than the executive branch, shall control the parliamentary service and determine the terms of employment.

5.1.3 The Legislature shall draw and maintain a clear distinction between partisan and non-partisan staff.

5.1.4 Members and staff of the Legislature shall have access to sufficient research, library, and ICT facilities.

5.2 Recruitment

5.2.1 The Legislature shall have adequate resources to recruit staff sufficient to fulfil its responsibilities. The rates of pay shall be broadly comparable to those in the public service.

Notes

5.2.2 The Legislature shall not discriminate in its recruitment of staff on the basis of race, ethnicity, religion, gender, disability, or, in the case of non-partisan staff, party affiliation.

The Study Group considered it best practice for Legislatures to provide party groups with funding allocations and allow each party group to make their own decisions on the types of facilities they require. The Study Group recognized the special circumstances of small and/or under-resourced jurisdictions.

5.3 Promotion

5.3.1 Recruitment and promotion of non-partisan staff shall be on the basis of merit and equal opportunity.

5.4 Organization and Management

5.4.1 The head of the parliamentary service shall have a form of protected status to prevent undue political pressure.

5.4.2 Legislatures should, either by legislation or resolution, establish corporate bodies responsible for providing services and funding entitlements for parliamentary purposes and providing for governance of the parliamentary service.

5.4.3 All staff shall be subject to a code of conduct.

III. FUNCTIONS OF THE LEGISLATURE

6. LEGISLATIVE FUNCTION

6.1 General

6.1.1 The approval of the Legislature is required for the passage of all legislation, including budgets.

6.1.2 Only the Legislature shall be empowered to determine and approve the budget of the Legislature.

6.1.3 The Legislature shall have the power to enact resolutions or other non-binding expressions of its will.

6.1.4 In bicameral systems, only a popularly elected house shall have the power to bring down government.

6.1.5 A chamber where a majority of members are not directly or indirectly elected may not indefinitely deny or reject a money bill.

6.2 Legislative Procedure

Notes

6.2.1 In a bicameral Legislature there shall be clearly defined roles for each chamber in the passage of legislation.

6.2.2 The Legislature shall have the right to override an executive veto.

6.3 The Public and Legislation

6.3.1. Opportunities shall be given for public input into the legislative process.

Rather than banning political activity by non-partisan staff, the Study Group recommended that all staff be subject to a code of conduct and that staff are assessed on their conduct annually. A code of conduct should make clear what is acceptable staff behaviour and serve to prevent staff from using their position to influence the functioning of the Legislature in a political manner.

This benchmark was taken directly from the recommendations of the previous CPA's Study Group on 'The Financing and Administration of Parliament', held in Zanzibar, Tanzania on May 25-29, 2005.

6.3.2 Information shall be provided to the public in a timely manner regarding matters under consideration by the Legislature.

7. OVERSIGHT FUNCTION

7.1 General

7.1.1 The Legislature shall have mechanisms to obtain information from the executive branch sufficient to exercise its oversight function in a meaningful way.

7.1.2 The oversight authority of the Legislature shall include meaningful oversight of the military security and intelligence services.

7.1.3 The oversight authority of the Legislature shall include meaningful oversight of state owned enterprises.

7.2 Financial and Budget Oversight

7.2.1 The Legislature shall have a reasonable period of time in which to review the proposed national budget.

Notes

7.2.2 Oversight committees shall provide meaningful opportunities for minority or opposition parties to engage in effective oversight of government expenditures. Typically, the public accounts committee will be chaired by a member of the opposition party.

7.2.3 Oversight committees shall have access to records of executive branch accounts and related documentation sufficient to be able to meaningfully review the accuracy of executive branch reporting on its revenues and expenditures.

7.2.4 There shall be an independent, non-partisan supreme or national audit office whose reports are tabled in the Legislature in a timely manner.

7.2.5 The supreme or national audit office shall be provided with adequate resources and legal authority to conduct audits in a timely manner.

7.3 No Confidence and Impeachment

7.3.1 The Legislature shall have mechanisms to impeach or censure officials of the executive branch, or express no-confidence in the government.

7.3.2 If the Legislature expresses no confidence in the government the government is obliged to offer its resignation. If the head of state agrees that no other alternative government can be formed, a general election should be held.

8. REPRESENTATIONAL FUNCTION

8.1 Constituent Relations

8.1.1 The Legislature shall provide all legislators with adequate and appropriate resources to enable the legislators to fulfil their constituency responsibilities.

The Study Group made reference to the OECD best practice guidelines which suggest presentation of the draft budget to the Legislature no less than three months prior to the start of the fiscal year (OECD Best Practices for Budget Transparency, 2001).

8.2 Parliamentary Networking and Diplomacy

8.2.1 The Legislature shall have the right to receive development assistance to strengthen the institution of parliament.

8.2.2 Members and staff of parliament shall have the right to receive technical and advisory assistance, as well as to network and exchange experience with individuals from other Legislatures.

Notes

IV. VALUES OF THE LEGISLATURE

9. ACCESSIBILITY

9.1 Citizens and the Press

9.1.1 The Legislature shall be accessible and open to citizens and the media, subject only to demonstrable public safety and work requirements.

9.1.2 The Legislature should ensure that the media are given appropriate access to the proceedings of the Legislature without compromising the proper functioning of the Legislature and its rules of procedure.

9.1.3 The Legislature shall have a non-partisan media relations facility.

9.1.4 The Legislature shall promote the public's understanding of the work of the Legislature.

9.2 Languages

9.2.1 Where the Constitution or parliamentary rules provide for the use of multiple working languages, the Legislature shall make every reasonable effort to provide for simultaneous interpretation of debates and translation of records.

10. ETHICAL GOVERNANCE

10.1 Transparency and Integrity

10.1.1 Legislators should maintain high standards of accountability, transparency and responsibility in the conduct of all public and parliamentary matters.

10.1.2 The Legislature shall approve and enforce a code of conduct, including rules on conflicts of interest and the acceptance of gifts.

10.1.3 Legislatures shall require legislators to fully and publicly disclose their financial assets and business interests.

10.1.4 There shall be mechanisms to prevent, detect, and bring to justice legislators and staff engaged in corrupt practices.

Provision should be made in constitutional and legislative provisions to ensure that the magistracy is treated as an integral part of the judiciary and receives such protections as are required to ensure independence.

The Head of the Judiciary should ensure that the magistracy is seen to be an integral part of the judiciary by fully involving it (through the Chief Magistrate and others) in decisions relating to court procedures, sentencing guidelines, and other mechanisms to ensure the smooth running of the courts and the good administration of justice.

ADJUDICATORY OR DECISIONAL INDEPENDENCE

*In order to discharge their judicial functions and duties and in order to adjudicate with impartiality in accordance with the law, magistrates (including the Chief Magistrates) must be free from any actual or apparent duress, pressure or influence. They must also be seen to be free from such pressure or interference from any persons or institutions. In order to ensure the good administration of justice and the smooth running of their courts, the executive and legislative branches of government must respect that the independence of the judicial function of the magistrate.*¹⁷

Judicial Conduct (Second Edition 2007) published for the Council of Chief Justices of Australia by the Australasian Institute of Judicial Administration at 2.2.1; *Fingelton v Ivanoff Pty Ltd* (1976) 14 SASR 530; *The Queen v Moss; Ex parte Mancini* (1982) 29 SASR 385; *Mackeigan v Hickman* [1989] 2 SCR 796; Campbell and Lee *The Australian Judiciary* Cambridge University Press 2001.

- 17 This guideline is concerned with the individual independence of magistrates in the discharge of their judicial functions and duties. See the *Montreal Declaration* 1983; *The Beijing Statement of Principles on the Independence of the Judiciary in the law Asia Region* 1995; Sir Guy Green “The Rationale and Some Aspects of Judicial Independence” (1985) 59 ALJ 135; Church and Sallman “Governing Australia’s Courts” Australian Institute of Judicial Administration 1991. It should be noted that the *Beijing Principles* confine the principle of judicial independence to the decision-making process. The problem with that is that it presupposes a consensus as to what is comprehended by decision-making. Does it include administrative aspects such as case management and procedural aspects such as rulings on evidence, as well as substantive decision making, as suggested by Shetreet and Deschenes in *Judicial Independence: The Contemporary Debate* Martinus Nijhoff Publishers 1985. Furthermore, there seems to be no reason why the principle of judicial independence should not extend all to facets of the judicial function, some of which fall outside the adjudicative function. It is for those reasons that the proposed guideline has been expressed in the above terms. However, for the purpose of ready reference – and given that

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ADMINISTRATIVE INDEPENDENCE

The control of the administration of justice should be under the jurisdiction of the Head of the Judiciary (a judicial officer) and adequate funding and resources should be allocated for the smooth running of the courts.

In order to ensure the institutional independence of the magistracy and the adjudicatory¹⁸ independence of magistrates:¹⁹

- 1) the assignment of cases and other work to a magistrate must be treated as a matter of internal judicial administration over which the Chief Magistrate or Chief Justice has absolute control;
- 2) the magistracy needs to be provided with the means and resources, financial or otherwise, necessary for the proper fulfilment of its judicial functions and duties such as to allow for the due administration of justice;

the guideline is centrally concerned with impartial decision making – the guideline has been headed “Adjudicatory or Decisional Independence”. An alternative heading might be “Functional Independence”.

18 Or perhaps “Functional” in lieu of “Adjudicatory”.

19 This guideline, which is concerned with the autonomy of the magistracy in managing its courts, seeks to establish the direct link between institutional/individual independence and administrative independence – without the latter the former is put at risk. The guideline is derived from a number of sources: Church and Sallman, n 2; the *Fitzgerald Commission of Inquiry* 1989; the Hon Justice McGarvie “Judicial Responsibility for the Operation of the Court System” 63 ALJ 79; *Ell v Alberta* [2003] 1 SCR 857; *Valente v The Queen* [1985] 2 SCR 673; the Hon Justice Len King “Minimum Standards of Judicial Independence” (1984) 58 ALJ 340; the Hon Justice David Malcolm “The Independence of the Judiciary in the Asia Pacific Area”, 10th Conference of Chief Justices of Asia and the Pacific, 2003; Articles 8 and 24 of the *Syracuse Principles on the Independence of the Judiciary* 1981; Principle 14 of the *United Nations Basic Principles on the Independence of the Judiciary* 1985; Clauses 10 and 13 of the *International Bar Association Code of Judicial Independence (New Delhi Standards “Jerusalem Approved Standards”* 1982; *Draft Declaration on the Independence and Impartiality of the Judiciary*, United Nations 1987; Articles 4.2.3 and 4.2.6 of the *Independence of the Judiciary: A Statement by the Australian Bar Association* 1991; Articles 35,36,37,41 and Art 42 of the *Beijing Statement of Principles of the Independence of the Judiciary in the Law-Asia Region* 1995; Procedure 5 of the *Procedures for the Effective Implementation of the Basic Principles on the Independence of the Judiciary* 1989; Clauses 26 and 27 of the *Australian Bar Association “Charter of Judicial Independence”* 2004; *Latimer House Principles*, Guidelines (11) Preserving Judicial Independence 2 Funding; *Edinburgh Plan of Action for the Commonwealth for the Development, Promotion and Implementation of the Latimer House Principles* 1.3 Independence of the Judiciary – Proposed Action.

3) the magistracy must be given as much autonomy as possible in the internal management of the administration of the courts over which magistrates preside; and at a bare minimum:

- the necessary resources provided to the magistracy for the administration and operation of its court(s) should be under the control of those courts;
- the court staff should be appointed in line with criteria and qualification requirements set out by the Chief magistrate or Chief Justice);
- the court staff should be responsible to the court(s) and not to the executive branch of government in relation to all matters pertaining to the business of the court(s);
- the control of court buildings and facilities should be vested exclusively in the judiciary, with the right to exclusive possession of those buildings and facilities together with the power to exercise control over ingress and egress, to and from those buildings and facilities, and to determine the purposes to which various parts of the buildings and facilities are to be put;
- the magistracy should have the right to maintain and make alterations to court buildings.

INTERNAL JUDICIAL INDEPENDENCE

In the discharge of their judicial functions and duties – in particular the adjudicatory function – all magistrates must be independent from one another and must be, and seen to be, free from any actual or apparent form of duress, pressure or influence from, or interference by, a fellow magistrate. The reference to “magistrates” or “magistrate” includes the “Chief Magistrate”.

Furthermore, any hierarchical organisation of the magistracy and any difference in grade or rank shall in no way interfere with the right of a magistrate to freely and properly discharge his or her adjudicatory function and other judicial functions and duties.²⁰

²⁰ Internal judicial independence, which recognises the independence of judicial officers from one another, is a key mechanism in the rule of law. The proposed guideline is based on a number of sources: Principle 2.03

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PREREQUISITES FOR SECURING AND SAFEGUARDING JUDICIAL INDEPENDENCE

Judicial Appointments on Merit

In order to secure an independent, impartial, honest and competent magistracy appointments to the magistracy should be made in accordance with an appropriate independent process or by a judicial services commission (established by the Constitution or by statute) or by an appropriate officer of State acting on the recommendation of such a commission. In either case, the process and criteria for appointment should be independent, open and transparent and be made public and in accordance with clearly defined and published criteria. The process should be designed to guarantee the competence integrity independence and impartiality of those selected for appointment and should ensure:

- equality of opportunity for all who are eligible for judicial office;
- appointment on merit;
- that appropriate consideration is given to the need for progressive attainment of gender equity and the removal of other historic factors of discrimination such as race, culture or ethnicity. This does not preclude the use of quotas or positive discrimination in favour of one group as the goal of these measures is to achieve equality.

Appointments to the magistracy should normally be permanent; whilst in some jurisdictions, contract appointments may be inevitable, such appointments should be subject to appropriate security of tenure.

of the *Universal Declaration on the Independence of Justice (The Montreal Declaration)* 1983; Mack and Anleu “The Security of Tenure of Australian Magistrates” (2006) 30 Melbourne University Law Review 370; Malleson “Judicial Training and Performance Appraisal: The Problem of Judicial Independence” (1997) 60 Modern Law Review 655; Shetreet “The Limits of Judicial Accountability: A Hard Look at the Judicial Officers Act” (1987) 10 University of New South Wales Law Journal 4; Colbran “Judicial Performance Evaluation: Accountability Without Compliance” (2002) 76 ALJ 235; Douglas “Towards a More Compliant Judiciary Part” (2001) 75 ALJ 304; Mack and Anleu “The Administrative Authority of Chief Judicial Officers in Australia” (2004) 8 Newcastle Law Review 1; *Re Colina; Ex parte Torney* (1999) 20 CLR 386.

Judicial vacancies should be advertised.²¹

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Promotion

Promotion of magistrates, wherever such a system exists, should be based on objective factors, such as merit, independence, integrity and experience so as to guard against appointments

21 The proposed guideline is almost exclusively based on the *Latimer House Principles and Guidelines*. Like those principles and guidelines, it acknowledges that, in certain jurisdictions, appropriate mechanisms for judicial appointments not involving a judicial services commission are in place. However, such commissions exist in many jurisdictions, though their composition differs. There are arguments for and against a majority of senior judges and in favour of strong representation of other branches of the legal profession, members of parliament and of civil society in general. Also in line with the *Latimer House Principles and Guidelines*, the proposed guideline recognises that the making of non-permanent judicial appointments by the executive without security of tenure remains controversial in a number of jurisdictions. Apart from matters of syntax and semantics, one substantive difference between the proposed guideline and the *Latimer House Principles* is that the former gives greater emphasis to the need for the appointment process (however constituted) to be open and transparent. Another substantive difference is that the proposed guideline also gives expression to the important relationship between the appointment process and the impartiality of appointees: see Article 6 of the *Syracuse Principles on the Independence of the Judiciary* 1981. Independence and impartiality are not necessarily synonymous. Impartiality refers to the state of mind of a judicial officer while the concept of judicial independence connotes more than the notion of impartiality and embraces the notion of institutional independence. They are perhaps best viewed as reflecting different aspects of the principle of judicial independence: see the Hon Justice R.D. Thomas Nicholson “Judicial Independence and Accountability – Can They Co-Exist?” (1993) 67 ALJ 404. There is a crucial link between judicial impartiality and the principles of judicial independence, as noted in the *Declaration of Principles on Judicial Independence Issued by the Chief Justices of the Australian States and Territories* 1997. The twin minimum requirements for a court to be both independent and impartial was affirmed by the High Court in *Naalis v Bradley* [2004] 218 CLR 146. Furthermore, the openness and transparency of the appointment process encourages public confidence in the impartiality of those selected for judicial office: see the Hon Justice David Malcolm ACA former Chief Justice of the Supreme Court of Western Australia “The Independence of the Judiciary in the Asia-Pacific Region” – 10th Conference of Chief Justices of Asia and the Pacific 2003.

The proposed guideline, consistent with the approach embraced by the *Tokyo Principles* 1982 (Principle 10(a)), does not prescribe any single mode of judicial appointment. Not only is there a leeway of choice between an independent process of appointment and a judicial services commission, but there are various methods of appointment that may qualify as an independent appointment process as envisaged by the *Latimer House Principles and Guidelines*.

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to higher courts on the basis of personal or political affiliation with the executive branch of government and to ensure the independence of the judiciary as a whole.²²

Security of Tenure

Magistrates must have security of tenure, and a magistrate's tenure must not be altered to his or her detriment or disadvantage during their term of office.

Security of tenure requires that magistrates:

- have guaranteed tenure (by the Constitution or statute) until a mandatory retirement age or the expiry of their term of office, where a magistrate has been appointed for a fixed term;
- be constitutionally or legislatively protected against unjustified or arbitrary suspension, transfer or removal from judicial office prior to the mandatory retirement age or expiry of their term of office; and
- only be subject to suspension or removal from office on the grounds of incapacity or conduct that renders him or her unfit to perform their judicial functions and duties.

There must be appropriate constitutional or legislative procedures and standards for the suspension, transfer and removal of magistrates from office and these procedures should be followed in all cases. Such standards and procedures must not undermine, or be perceived to undermine, the independence of the magistracy.

A magistrate shall not be removed from office or transferred by the actions of the executive branch of government alone.

There should be clearly defined criteria for the removal of a magistrate. “Incapacity” should refer to a judicial officer’s mental or physical fitness to discharge the duties of judicial office.

22 The proposed guideline is based on Principle 13 of the *Basic Principles on the Independence of the Judiciary*. As noted by Mack and Anleu “The Security of Tenure of Australian Magistrates” n.5 above “promotion to a higher judicial office has been regarded as inconsistent with the principles of judicial independence as they have developed in the Anglo-Australian Legal system”. However, the guideline acknowledges that promotion is an accepted feature of the judicial system of some Commonwealth countries and is, in fact, an international norm as recognised by the *Basic Principles on the Independence of the Judiciary*. The guideline has been drafted with a view to minimising the risks to judicial independence posed by a system of promotion within the judiciary. [Mack and Anleu is now at note 20]

“Misbehaviour”, on the other hand, should be concerned with matters such as a conviction for a serious offence, incompetence or serious neglect of the duties of judicial office, or other unlawful or improper conduct in the performance of duties or conduct unbecoming of a judicial officer.

Where there is a charge or complaint that a magistrate is incapable of performing his or her judicial functions and duties or has behaved in a way that renders him or her unfit to perform his or her functions and duties, an independent investigation should be carried by a judicial commission, investigating committee or the chief judicial officer of a superior court. In the event of a finding of incapacity or misbehaviour a magistrate should only be removed by the executive (the Governor, Administrator, Governor General or other appropriate authority) by an Address from Parliament, based on that finding.

Similarly, a magistrate shall not be suspended from office by the executive unless an independent investigatory body of the type described has formed the opinion that, having regard to the charge or complaint, grounds may exist to justify removal from office.

A charge or complaint made against a magistrate shall be dealt with expeditiously and fairly under an appropriate procedure. The magistrate shall have the right to a fair hearing, including the right to representation during any investigation. The investigation of the charge or complaint in its initial stages shall be kept confidential, unless otherwise requested by the magistrate.

All suspension or removal proceedings shall be determined in accordance with established standards of judicial conduct.²³

²³ The proposed guideline recognises that security of tenure is essential to the independence and impartiality of the judiciary, of which the magistracy is an integral part. The guideline is derived from a number of sources: *Ell v Alberta* [2003] 1 SCR 857; *Valente v The Queen* (1985) 2 SCR 673; Article 12 of the *Syracuse Principles*; Principles 12 and 17-19 of the *United Nations Basic Principles on the Independence of the Judiciary* 1985; Principles 16, 26, 27, 28 and 30 of the *Draft Declaration on the Independence and Impartiality of the Judiciary*, *United Nations* 1987; Articles 18, 20, 21, 22, 23, 25, 26 and 27 of the *Beijing Principles*; Mack and Anleu “The Security of Tenure of Australian Magistrates”, n 5 above.

The guideline purports to only lay down some broad principles governing the removal and suspension of magistrates from office. Within the framework of those principles member nations are given a discretion as to the processes they adopt.

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Entitlement Following the Abolition or Reconstruction of a Court

A magistrate who held an abolished judicial office is entitled (without loss of remuneration) to be appointed to and to hold another judicial office in the same court or in a court of equivalent or higher status.

The right remains operative for the period during which the magistrate was entitled to hold the abolished office, subject to suspension and removal in accordance with law. The right lapses if the magistrate declines appointment to the other office or resigns from it.

The right arises whether the judicial office was abolished directly or whether it was abolished indirectly by the abolition or reconstruction of a court or part of a court.

Magistrates for whom no alternative office can be found must be fully compensated.²⁴

Financial Security

“The provision of adequate funding for the judiciary must be a very high priority in order to uphold the rule of law, to ensure that good governance and democracy are sustained and to provide for the effective and efficient administration of justice. However, it is acknowledged that a shortfall in anticipated national income might lead to budgetary constraints. Finance ministers are encouraged to engage in appropriate consultations in order to set realistic and sustainable budgets

It is acknowledged that the guideline, insofar as it relates to the removal and suspension of magistrates, may have to be modified in the case of countries where there is not a tradition of a process of parliamentary removal of a judicial officer. Perhaps something along the lines of Articles 23-23 of the *Beijing Principles*.

24 As noted by Mack and Anleu “The Security of Tenure of Australian Magistrates” n 5 above “One possible way for the executive to end the tenure of a judicial officer might be to abolish the court itself”. The purpose of the proposed guideline is to provide an appropriate formal legal mechanism for the protection of security of tenure in the event of the abolition or reconstruction of a court resulting in the abolition of a judicial office.

The guideline is based on s 56 of the *Constitution Act* 1902 (NSW) and s 87AAJ of the *Constitution Act* 1975 (Vic). It is derived from Article 29 of the *Beijing Principles* and Principle 31 of the *Draft Declaration on the Independence and Impartiality of the Judiciary* United Nations 1987.

which parliaments should approve to ensure adequate funds are available.”²⁵

In order to ensure the independence of the magistracy, the salaries, benefits and terms and conditions of magistrates shall be:

- (a) adequate, commensurate with the status, dignity and responsibility of judicial office and at such a level as to attract candidates of the highest quality to serve as magistrates and to minimise the reasonable likelihood that magistrates once appointed will be affected by improper, extraneous considerations;
- (b) secured by law and not be diminished during the continuance of their term;
- (c) periodically reviewed by the independent body referred to in (d) below, to overcome or minimise the effect of inflation and so as to avoid the remuneration of magistrates declining against wages and salaries generally or in particular against the most nearly comparable salaries;
- (d) set by a body independent of the executive branch of government (such as an independent remuneration tribunal) whose decisions shall be binding on both the executive and legislative branches of government.²⁶

Physical Security

The magistracy must rely upon the executive to provide the security and protection which is necessary for the free and effective discharge of their functions, but the control of security

²⁵ Footnote V to the Commonwealth Latimer House Guidelines 1998.

²⁶ The proposed guideline acknowledges the centrality of arrangements for judicial remuneration to the preservation of judicial independence. The guideline is derived from a number of sources: Article 26 of the *Syracuse Principles*; Principles 14 and 15 of the *New Delhi Principles*; Principle 11 of the *Basic Principles on the Independence of the Judiciary*; Principle 18 of the *Draft Declaration on the Independence and Impartiality of the Judiciary*; Article 21 of the *Australian Bar Association Charter of Judicial Independence* 2004; *Valente v The Queen* (1985) 2 SCR 673; *Naalas v Bradley* [2004] 218 CLR 146; Mack and Anleu, n 7 above. [Mack and Anleu is now at note 20]

In relation to guideline (d) it should be noted that in some Australian jurisdictions the recommendations of an independent remuneration tribunal may be disallowed by the legislature. Therefore, query whether the guideline goes too far in making the decisions of a remuneration tribunal binding on the legislature.

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measures in and around the courtroom and building should be firmly under the control of the judiciary”.

It is the responsibility of the judiciary and not the executive to determine whether there is a justification for the presence of armed police or other security officers in and around the courts or whether or not screening, identification or searching of visitors to the courts is required.

It is also the responsibility of the Chief Magistrate or the Chief Justice to determine whether individual magistrates require police protection outside the courts and the nature and extent of this protection. Where security measures are necessary, they must be firmly under the control of the judicial officer using a particular court. Such a determination involves a delicate balancing of competing interests which the judges alone can perform properly.²⁷

Immunity from Suit

Magistrates shall enjoy personal immunity from civil suits for monetary damages in respect of any act done or omission made in the execution of his or her duty, or any act done or omission made in good faith in the purported execution of that duty.²⁸

Magistrates shall enjoy personal immunity from suits for any judgement made in the execution of his or her duty and from disingenuous suits brought by any parties on the basis of “bringing the profession into disrepute”.

Welfare

Whilst maintaining internal independence, the responsibility for the welfare of a magistrate should be vested in the Head of

27 Measures of this kind have such a potential for interference with the independence of the judicial process that they must be vested in the judiciary. See: The Hon Justice Len King “Minimum Standards of Judicial Independence” (1984) 58 ALJ 340 at 343.

28 The rationale for the guideline is that without immunity from suit, judicial officers would be less able to perform their functions independently and without fear or favour. The proposed guideline is broadly based on Principle 16 of the *Basic Principles on the Independence of the Judiciary*. Note that sometimes the immunity from suit is expressed in wider terms to cover criminal proceedings. In the Australian context the immunity of magistrates is occasionally expressed as being the same as that enjoyed by a Justice of the Supreme Court.

the Judiciary or any other judicial officer appointed by the Chief Justice to undertake this function.

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Professional Judicial Training and Development

With a view to preserving and enhancing the independence of the magistracy:

- (a) a culture of judicial education should be developed;
- (b) training should be organised, systematic and ongoing and under the control of an adequately funded judicial body and the allocation of training resources should be under the control of the judiciary;
- (c) judicial training should include the teaching of the law, judicial skills and the social context including ethnic and gender issues;
- (d) the curriculum should be controlled by judicial officers who should have the assistance of lay specialists;
- (e) where appropriate, and in order to enhance the good administration of justice, judicial training should also be holistic in nature and include judicial officers at different levels;
- (f) for jurisdictions without adequate training facilities, access to facilities in other jurisdictions should be provided;
- (g) courses in judicial education should be offered to practising lawyers as part of their ongoing professional development training;²⁹
- (h) Judicial training should incorporate training on judicial independence and ethical behaviour in order to ensure integrity;
- (i) Magistrates like all judicial officers should abide by a code of conduct or set of guidelines which should form the basis for any disciplinary actions by the Head of the Judiciary or any organisation created to deal

²⁹ This guideline, which is a full adoption of the *Latimer House Guidelines*, recognises the importance of judicial training and development as a key mechanism for ensuring the independence of the judiciary. Far from impinging upon the independence of the judiciary, it in fact enhances its independence.

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with complaints against judicial officers, such as a judicial commission.

Judicial Associations

Consistent with their fundamental rights, members of the judiciary shall be free to form and join associations or other organisations to:

1. ensure the maintenance of a strong and independent judiciary within a democratic society that adheres to the rule of law;
2. promote and encourage continuing legal, judicial and cross cultural study and learning by members of the judiciary;
3. promote and encourage the exchange of legal (or judicial) educational practical or professional information on best practice between members of the judiciary and other persons or bodies”;
4. promote a better public understanding and appreciation of the proper role of the judiciary in the administration of justice and the importance of a strong and independent judiciary in protecting fundamental human rights and entrenching good governance and to do likewise within the Executive and Legislative branches of government;
5. seek improvements in the administration of justice and the accessibility of the judicial system; and
6. undertake supporting research that will further the achievement of these aims.

Commonwealth Magistrates' and Judges' Association

19. Commonwealth Judicial Colloquium on Combatting Corruption within the Judiciary, 2002

Notes

LIMASSOL CONCLUSIONS

1. Commonwealth Judicial Officers, including heads of judiciary, judges from a range of courts and magistrates, met in Limassol, Cyprus from 25-27 June 2002 to consider how best the judiciary could contribute to the goals of eliminating corruption and promoting high ethical standards in the court system. They represented 23 Commonwealth countries and jurisdictions. Their number was supplemented by judicial educators and experts in the area of combating corruption and by government officers whose responsibilities include the investigation of acts of judicial corruption.
2. The Judicial Officers accepted, as a common philosophical and practical starting point, the Commonwealth Harare Declaration that commits all member countries to the fundamental values of democracy, rule of law, independence of the judiciary and the promotion and protection of fundamental human rights.
3. They acknowledged that a judicial system free from corruption was an essential component of a truly democratic country and is critical to national development and the eradication of poverty. A court system that is free from corruption was recognised as one of the essential features of a country able to attract investment and thus develop in a way that would enhance the welfare of its people.
4. The colloquium welcomed the 1999 commitment of Commonwealth Heads of Government to the Framework for Commonwealth Principles on Promoting Good Governance and Combating Corruption (the Framework). They acknowledged, in particular, the commitment of Heads of Government to the concept that all Commonwealth

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countries should develop national strategies to promote good governance and eliminate corruption and recognised that judicial action to complement and supplement governmental action was both necessary and desirable.

5. Judicial Officers re-affirmed the statement of Heads of Government in the Framework that

“An independent and competent judiciary, which is impartial, efficient and reliable is of paramount importance. This requires objective criteria for the selection and removal of judges, adequate remuneration, security of tenure and independence from the executive and legislative branches of government.

However, judicial independence does not imply a lack of accountability. Judges should act properly in accordance with their office and should be subject to the ordinary criminal laws of the land. There should be procedures to discipline or dismiss them if they act improperly or otherwise fail in the performance of their duties to society. These procedures should be transparent and administered by institutions which are themselves independent and impartial”.

6. In their deliberations, judicial officers sought to identify strategies, best practices and actions that would achieve the objective of securing independence, integrity and accountability of judicial officers and a judicial system free from corruption.
7. The Colloquium conclusions combine recommendations for consideration, and where necessary and appropriate in national circumstances, implementation by the judiciary itself, by government and by the legal profession. Some of the recommendations may commend themselves for consideration by international organisations, both intergovernmental and non-governmental. The Colloquium trusts that its deliberations will assist in informing the thinking of, and action by, the appropriate national and international bodies that are seeking to achieve the Commonwealth's goal of zero tolerance of corruption.
8. The Colloquium conclusions and recommendations cover a number of subjects and areas. Those considered by the Colloquium to be of paramount importance are the following: –

7. The Colloquium conclusions combine recommendations for consideration, and where necessary and appropriate in national circumstances, implementation by the judiciary itself, by government and by the legal profession. Some of the recommendations may commend themselves for consideration by international organisations, both intergovernmental and non-governmental. The Colloquium trusts that its deliberations will assist in informing the thinking of, and action by, the appropriate national and international bodies that are seeking to achieve the Commonwealth's goal of zero tolerance of corruption.

8. The Colloquium conclusions and recommendations cover a number of subjects and areas. Those considered by the Colloquium to be of paramount importance are the following: –

The Colloquium -

- i. recommends the adoption of guidelines on judicial ethics as a means of underpinning the integrity of the judiciary and

- promoting better public awareness of the requisite ethical standards. Such guidelines should be formulated by judicial officers and kept under constant review by them. Judicial officers should take responsibility for ensuring compliance with those guidelines.
- ii. urges all national and international legal professional organisations within the Commonwealth to promote anti-corruption programmes for the legal profession;
 - iii. encourages the formulation of national strategies aimed at eliminating conflicts of interest and corrupt practices within the judiciary;
 - iv. recognising that transparency assists in combating corruption, encourages judicial officers and their court staff to foster greater public awareness of the court's operations, role and function;
 - v. places on record its support in principle for the Latimer House Guidelines and their footnotes as they relate to the judiciary; and
 - vi. notes that traditional or customary courts and other tribunals recognised in some national Constitutions make a positive contribution to the administration of justice. The public that is served by such bodies should continue to expect and receive fair and just resolution of their disputes.
9. In considering action within the courts, the Colloquium expresses the view that –
- vii. judicial training programmes should be available and should include training on ethical and corruption issues. For newly appointed judicial officers the practice of mentoring should be encouraged; and
 - viii. there should be greater interaction between judicial officers at all levels nationally, regionally and internationally in order to promote the best judicial practice.
10. The Colloquium recommends for consideration by law ministers and governments the following: -
- ix. recognising the interdependence of an efficient, impartial and accessible machinery of justice and the process of good governance and development, that governments should allocate sufficient resources to the courts to ensure their ability to provide that efficient, impartial and accessible service;

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- xvi. recommends that judicial officers should ensure that their judgments are well reasoned and delivered within a reasonable time; and
 - xvii. notes that a pro-active leadership role of Heads of Judiciary is essential in promoting an impartial and independent, competent, efficient and effective judiciary.
13. The Colloquium considered the issue of judicial education and training. Its recommendations on this subject are set out in Annex A to this report.
 14. The Colloquium requests the Commonwealth Secretariat to convey its conclusions to national heads of judiciary, Law Ministers and each of the Commonwealth legal professional associations. It also requests the Secretariat to continue to work with the Commonwealth Magistrates and Judges Association, as well as with national judiciaries, to advance programmes that will assist in the entrenchment of principles of independence, integrity and accountability of the judiciary at all levels.

Appreciation

15. The Colloquium expresses its appreciation to the Government of Cyprus for its hospitality and to the Honourable Justice Georghios Pikis, President of the Supreme Court of Cyprus, for his chairmanship of their deliberations. The assistance provided by the Lord Chancellors Department of the United Kingdom was welcomed by the Colloquium as a positive contribution towards the achievement of Commonwealth objectives relating to the independence of the judiciary and the elimination of corruption in court systems.

Limassol, CYPRUS

27 June 2002

- xii. awareness of the disguised nature of corrupt approaches and the broader effect of corrupt activity both on the judiciary as a body and upon society generally;
 - xiii. where they exist, an awareness of agreed procedures for reporting corrupt approaches and information relating to corrupt activities, together the disciplinary consequences of a failure to follow those procedures.
3. The planning and running of such judicial training programmes should be the responsibility of judicial officers under the direction of a senior judge and should include contributions from judicial officers of all levels.
4. Time should be made available for preparation for and attendance of judicial officers at training programmes.
5. For the promotion of collegiality amongst members of the Bench, it is considered best practice for such training to be carried out in groups of judicial officers of differing ranks.
6. It is the recommendation of the Colloquium that training programmes in this area comprise a significant element of group discussion of practical problems.

Notes

20. Framework for Commonwealth Principles on Promoting Good Governance and Combating Corruption

PREAMBLE

1. Good governance is not a luxury but a basic requirement for development. Corruption, which undermines development, is generally an outcome and a symptom of poor governance. It has reached global proportions and needs to be attacked directly and explicitly.

2. Corruption is always a two-way transaction with a supply and a demand side. It occurs in poor, emerging, and developed nations, regardless of the level of social and economic development and in countries with varying forms of government ranging from dictatorships to established democracies.

3. Corruption, which is multi-dimensional, generally occurs at the nexus between the public and private sectors, with actors in the private sector interacting with holders of offices of trust³⁰ in the public sector. Some aspects of corruption such as fraud and the misappropriation of assets or funds can occur entirely within the private or public sectors. However, with increasing privatisation of public utilities and services, the distinction between the public and private sectors is becoming less relevant in some areas.

4. Corruption is generally defined as the abuse of public office for private gain. As the scope of corruption has widened, this definition has been enlarged to cover the abuse of all offices of trust for private gain. There are many types and levels of corruption including “grand corruption”, which involves huge sums paid by major businesses to high-level politicians and/or government

30 The term “holders of offices of trust”, that is used hereafter in this document, covers the following: politicians (elected and appointed), public/civil servants, judges, officers of the armed forces, officials of bodies providing services (including privatised services) for or on behalf of the government and executive officers of private corporations.

officials; widespread systemic corruption which may take the form of substantial bribes to public officials to obtain, for example, licences/permits or to by-pass regulations; and petty corruption which involves modest but recurring payments to avoid delays, jump queues or to obtain goods in controlled markets.

All forms of corruption entail high economic and social costs: transaction costs are increased; public revenues are reduced; resource allocation is distorted; investment and economic growth is retarded; and the rule of law is weakened.

5. The Commonwealth should firmly commit itself to the policy of “zero tolerance” of all types of corruption. This policy must permeate national political cultures, governance, legal systems and administration. Where corruption is ingrained and pervasive, especially at the highest political levels, its eradication may require a sustained effort over a protracted period of time. However, the policy of “zero tolerance” should be adopted from the outset, demonstrating a serious commitment to pursue the fight against corruption. The Commonwealth should remain firm in its determination that the high standards and goals enunciated in the 1991 Harare Declaration are upheld and enhanced. Creating an environment which is corruption-free will require vigorous actions at the national and international levels, and within the Commonwealth itself. These actions should encompass the prevention of corruption, the enforcement of laws against it and the mobilisation of public support for anti-corruption strategies.

NATIONAL ACTIONS

6. All Commonwealth countries which have not done so should develop their own national strategies to promote good governance and eliminate corruption. These strategies will require strong political will at the highest levels of government if they are to succeed. Furthermore, they cannot be externally imposed: they must be internally driven and domestically owned, based on the specific concerns and circumstances in each country.

National strategies need to be comprehensive in engendering transparency and accountability in all sectors, and in covering all the active and passive actors involved in corruption. To be effective, they should be implemented in a timely manner and include principles from the five inter-related platforms described below.

Notes

A. Ethics and Integrity in the Public and Private Sectors

(i) High-level Corruption

7. Corruption at the highest level poses perhaps the greatest threat to the stability and well-being of societies. Its elimination must therefore be given the highest priority in the implementation of effective anti-corruption strategies. Failure to root out high-level political corruption undermines anti-corruption measures at other levels. It perpetuates double standards inimical to the development of an anti-corruption culture.

(ii) Funding of Political Parties

8. The funding of political parties has the potential to become a major source of corruption as well as a vehicle for hiding corruption. Clear links can be drawn between inappropriate or inadequate controls on such funding and the prevalence of corruption. Among those countries which have sought to address the issue of transparency in political funding and the maintenance of the integrity of the political system, there is divergence and the different approaches adopted are largely the result of prevailing political and societal norms. Several factors are relevant in tackling the problems associated with money and politics. They include:

- whether or not there are established political parties;
- the capacity of the state to finance political parties and/or election campaigns, and levels of expenditure on political campaigns;
- limits on financial contributions and the integrity of their sources;
- the role of national and international companies in providing funds to political parties; and
- the national interest in ensuring that foreign interests do not influence domestic political priorities and decisions.

9. Although rules on funding for political parties will vary depending upon national circumstances, in general, it is important that these rules should serve to:

- prevent conflicts of interest and the exercise of improper influence;
- preserve the integrity of democratic political structures and processes;

- proscribe the use of funds acquired through illegal and corrupt practices to finance political parties; and
- enshrine the concept of transparency in the funding of political parties by requiring the declaration of donations exceeding a specified limit.

B. Economic and Fiscal Policies

10. Opportunities for seeking economic rents are a major cause of corruption. These opportunities are greater when there is a lack of transparency and undue administrative discretion. Policy reforms that can help to maximise transparency and certainty and minimise administrative discretion will reduce rent-seeking as well as eliminate incentives which generate corrupt practices. They will help to improve foreign investors' perceptions of the investment environment in many countries. Such policy reforms include:

- Liberalising trade regimes through the progressive removal of inefficient quantitative restrictions and import/export licences, as well as high tariffs that shield industries from competition and create artificial monopolies.
- Reducing foreign exchange controls and increasing transparency in foreign exchange allocation processes.
- Eliminating price controls and poorly targeted subsidies which, by lowering the price of goods below their market values, create artificial scarcities and parallel markets.
- Simplifying regulations in order to reduce the scope for bureaucratic discretion (e.g. in customs administration).
- Increasing transparency in the allocation of land-use permits and in the zoning of land.
- Reducing excessive levels of taxation where they create incentives for tax evasion and fraud and eliminating the use of discretionary authority in tax administration and enforcement which encourages corrupt practices.
- Ensuring that fiscal and tax rules do not permit bribes or other illicit payments to be treated as deductible expenses for tax purposes.

Notes

C. Management of Services Provided in the Public Interest

11. Improving the management, efficiency and delivery of public services should be an essential element of any national strategy to enhance governance and reduce corruption. When services are provided in an efficient manner, fewer opportunities for corruption arise as citizens are no longer required to compete, often by way of paying bribes, for scarce and inefficient services. In view of the increasing trend towards contracting out and/or privatising services previously provided by the State, measures to improve management and efficiency should encompass all those who have responsibilities for providing goods and services in the public interest.

The main areas to be covered are:

The Public Service and Providers of Public Services

12. A merit-based, professional and non-partisan civil service which is appropriately sized and well-motivated is of critical importance. Over-sized public administration systems, with bloated and poorly paid bureaucracies, engender corruption. Down-sizing alone is not enough but should be complemented with merit-based recruitment and promotion, career growth policies and incentives to retain the better performers within the civil service. Civil servants need to be adequately paid if they are to maintain the probity, professionalism and integrity that should be required of the public service. They should also be free from political interference.

13. The rule of law should apply to all those involved in the administration and provision of services in the public interest, as it does to the whole of civil society. Those holding offices of trust need to be bound by well publicised Codes of Conduct with appropriate sanctions for breaches that are enforced consistently and vigorously.

These Codes should, *inter alia*, cover: standards of integrity, potential conflicts of interest, acceptance of gifts, misuse of information for personal gain, and disclosure of assets and financial interests. Ethical standards should be promoted – through education and training where necessary – which instil pride in the virtues of integrity, professionalism, efficiency, transparency and impartiality in the public service.

Financial Management**Notes**

14. Sound financial management systems are essential tools of good governance, which enable governments to set macroeconomic targets, to allocate resources and to implement programmes and projects efficiently. Processes for budget preparation, execution and monitoring need to be open and transparent. Clear procedures and criteria should be used for developing public investment programmes and projects, including those by public enterprises, and for allocating recurrent expenditure budgets. There should be rigorous accounting, financial reporting and auditing systems covering all public programmes and investments. Public accounts should be subject to scrutiny by appropriate bodies such as parliamentary committees and Auditors-General. Timely compliance with auditing requirements is important to ensure the legitimacy of public expenditures. Where audits indicate deficiencies or are themselves unsatisfactory, prompt remedial action should be taken. Auditors-General, or other supreme auditing authorities, should be sufficiently independent to allow open criticism of government finances. Countries should be encouraged to adopt codes of fiscal transparency based on the model provided by the “The Code of Good practices on Fiscal Transparency - Declaration of Principles”, adopted by the IMF’s Interim Committee in April 1998.

15. It is also important for countries to have effective regulations for their financial sectors (including private financial institutions and parastatals), that reduce opportunities for corrupt practices. The key aspects of a sound financial system include transparency of the financial system; competent management; effective risk control systems; adequate capital requirements; prudential regulation; supervisory authorities with sufficient autonomy, authority and capacity; and effective supervision of cross-border banking, which is also important in combating money laundering.

Public Procurement

16. Transparency in government procurement practices is not an established norm in many countries. Corruption is widespread, both in the award of contracts and during their implementation. Governments should be encouraged to review their procurement practices and to develop comprehensive guidelines of their own, with transparent processes to cover contracts for goods, civil works and services, and criteria for using all types of procedures ranging from prudent shopping to national and international

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competitive bidding. In order to increase efficiency, probity and economy in public procurement, governments should adopt standard bidding documents, establish processes for public bid opening, set objective criteria for bid evaluation, and institute a system for the review of awards. The collection and dissemination of data on public procurement prices of goods and services of similar specifications, which are procured by different agencies regularly in large quantities, can have substantial and prompt effects in reducing corruption. An accountable and reviewable process for the black-listing of contractors guilty of resorting to corrupt practices can be a particularly effective anti-corruption weapon.

D. The Judiciary and the Legal System

17. Countries need effective institutional arrangements to resolve disputes between citizens, corporations and governments; to clarify ambiguities in laws and regulations; and to enforce compliance. The rule of law in a country is of vital importance for economic, social and political development. Inherent in the concept of the rule of law are the notions of impartiality, fairness and equality. Strengthening the rule of law will, inter alia, require the following actions:

The Judiciary

(i) Entrenching an Independent Judiciary

18. An independent and competent judiciary, which is impartial, efficient and reliable, is of paramount importance. This requires objective criteria for the selection and removal of judges, adequate remuneration, security of tenure, and independence from the executive and legislative branches of government.

19. However, judicial independence does not imply a lack of accountability. Judges should act properly in accordance with their office and should be subject to the ordinary criminal laws of the land. There should be procedures to discipline or dismiss them if they act improperly or otherwise fail in the performance of their duties to society. These procedures should be transparent and administered by institutions which are themselves independent and impartial.

Strengthening the Legal System

(ii) Compliance

20. Vigorous application and enforcement of existing laws and prosecution of offenders is essential if the rule of law is to be

respected. Although most countries have at their disposal a wide range of laws which can be used to combat corruption, these laws are often under-utilised and, at times, even ignored. Governments should seek to make effective use of existing criminal and civil laws to obtain the appropriate remedy in each case.

21. Investigative, policing and prosecutorial services which remain weak in many countries, need to be enhanced to ensure compliance with the law. Independent anti-corruption agencies such as ombudsman offices, inspectors-general, and anti-corruption commissions can be effective if they are genuinely free from being influenced by the executive branch of government and where there is a strong judiciary in place.

(iii) Enforcing Criminal Law

22. As the nature and prevalence of corruption has grown, laws against corruption may need to be strengthened to provide a meaningful deterrent, and complemented in several ways:

- (a) Both active and passive corruption should be made criminal offences, comprehensively covering the holders of all offices of trust.
- (b) Criminal law should provide for the seizure and forfeiture of the proceeds of corruption.
- (c) There should be legal provisions to protect witnesses and whistle-blowers in cases involving corruption.
- (d) Statutes which permit investigators and prosecutors to base criminal proceedings on the discovery of significant increases in the assets of the holder of an office of trust, which cannot be reasonably attributed to lawful sources of income, can be of great assistance.
- (e) The laundering of the proceeds of corruption must be criminalised and laws which provide for the granting of assistance (either extradition or mutual assistance in criminal matters) to other countries investigating or prosecuting money laundering offences must be available to ensure effective international co-operation to combat money laundering.

(iv) Civil, Administrative and Regulatory Laws

- (a) The civil law is the source of many remedies which can be used to combat corruption. For example,

in the public domain. A free and competent press is essential in this process, and is critical to the success of anti-corruption strategies. Freedom of the press and media calls for access to information; the absence of government controls or censorship (except where national security issues are involved); the liberty to express views; and sufficient financial independence to resist control of editorial policy and news coverage. Civil society should promote genuine competition in the media market-place to ensure diversity of ownership, so that alternative outlets can provide a broad range of views on public policy issues. In situations where the media itself may be corrupt or susceptible to corruption, adherence to high standards of integrity in journalism should be promoted, along with the development of professional well-informed media, through self-regulation and training.

- Information technology: advances in information technology help to increase civil society's access to new sources of information and channels of communication, including foreign publications and broadcasts.
- Research and analysis: The development by civil society of independent public policy research institutes and think-tanks can provide increased domestic capacity to analyse deficiencies in the system of governance. Such bodies can help to study the particular types of corruption in a country, and identify country-specific remedial options.

INTERNATIONAL ACTIONS

24. With the increasing globalisation of corruption, several international fora and agencies including the UN General Assembly, the OECD, the IMF, the World Bank, the OAS, the European Union, the Council of Europe and the International Chamber of Commerce, have mounted initiatives to improve governance and combat corruption. These include conventions to limit corruption in transnational business and stronger anti-corruption programmes by international financial institutions and aid agencies. These efforts are important and have the potential to lead to significant results. There are, however, gaps

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in their coverage, and continuing weaknesses in policies and practices, which need to be addressed. In addition there are some special areas that require further international action.

A. International Initiatives Against Corruption

25. At present, there are three international legally binding conventions against corruption: (i) The 1996 Inter-American Convention Against Corruption, a regional OAS initiative that covers active and passive corruption as well as illicit enrichment. (ii) The 1997 OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, which focuses on active bribery of foreign public officials. (iii) The 1999 Council of Europe's Criminal Law Convention on Corruption, which covers active and passive bribery of domestic and foreign public and private sector officials, as well as judges and members of public assemblies.

26. Except for the OAS Convention, these initiatives have been promoted by the major developed countries and do not correspond fully to the needs of developing countries. The battle against cross-border corruption should be joined by all nations, both developed and developing, from all parts of the world. This calls for the mobilisation of international support for a global compact against corruption, negotiated under the auspices of the United Nations with universal participation, which builds on the positive elements of existing conventions and other regional and international initiatives.

B. Programmes of International Financial Institutions and Aid Agencies

27. The IMF, the World Bank, the regional development banks and bilateral aid agencies have for many years been aiding countries in improving governance through policy advice, technical assistance, institutional reform and capacity building. As corruption has become increasingly a part of the debate on aid effectiveness, aid agencies have taken on stronger anti-corruption programmes. The World Bank has adopted new anti-fraud/corruption procurement guidelines, and improved disbursement and financial auditing procedures. The IMF is taking a more pro-active stance and has adopted guidelines for promoting good governance (A Guidance Note on The Role of the IMF in

Governance Issues was approved by the IMF's Executive Board in July 1998). Both the Bretton Woods institutions are beginning to take corruption explicitly into account in defining their country assistance programmes. Several bilateral donors are designing programmes to assist nations in their anti-corruption efforts. Areas in development assistance that need added scrutiny and further action include greater transparency and accountability, conditionality, procurement, and bilateral aid practices.

Notes

(i) Transparency and Accountability

- International financial institutions need to be more transparent in their operations, objectives and decision-making processes. There has been greater openness in the past few years and the recent discussions on a new international financial architecture may lead to further progress. To increase national ownership and public participation in reform programmes, key documents such as Policy Framework Papers, Letters of Development Policy and Letters of Intent should be more systematically released by borrowing countries and widely disseminated via the Bretton Woods institutions, unless there are valid reasons for non-disclosure.
- There should be a more open acknowledgement by donors and international financial institutions of their share in the responsibility for the outcomes of the country programmes they help design and for the policy advice they give. When these outcomes are not satisfactory because of flaws in programme design and policy advice, these deficiencies should be rectified and additional financial assistance should be provided.
- The staff of lending agencies should be subjected to greater scrutiny and internal accountability.

(ii) Conditionality

- Domestic ownership and political will to implement measures to improve governance and reduce corruption are paramount. Measures imposed externally as conditions of financial assistance are rarely effective. However, the availability of external funding (both project and non-project related) has the potential to encourage corrupt practices. Hence,

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the levels of corruption in recipient countries should be taken into account in determining the quantum and direction of external funding/assistance. Where it is necessary for international financial institutions to take up issues related to governance and corruption in their policy dialogue with countries and in the development of country assistance strategies, this should be done in a manner that is consistent with their mandates. Reforms agreed with the IMF and the World Bank to improve governance and reduce corruption should take account of a country's capacity to implement them within realistic time-frames.

- “Floating Tranches”, which have been adopted recently in several World Bank structural adjustment loans, should be used more widely to enable governments to sequence reform measures in the light of local circumstances without holding up entire programmes.
- To promote local ownership of reforms, foreign donors should agree with governments on the objectives to be achieved, identify alternative paths for meeting these ends, but leave the route to be selected to the government concerned.
- The IMF should be even-handed by raising issues related to transparency, governance and corruption in developed countries when exercising its surveillance function, as it does in developing countries when it is financing programmes.

(iii) Procurement

All international financial institutions, multilateral development banks and multilateral agencies providing development assistance should be encouraged to strengthen their procurement guidelines along the lines of the anti-fraud/corruption provisions of the World Bank's 1996 guidelines on procurement. These provide strong sanctions against borrowing countries and firms that engage in corrupt practices, including rejection of contract awards or cancellation of loan funds, and making corporations judged to have engaged in fraudulent or corrupt practices ineligible for future Bank-financed projects (i.e. blacklisting). They also require bidders to disclose commissions made to agents.

(iv) Practices of Agencies Providing Bilateral Development Assistance

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- Bilateral development assistance agencies should be encouraged to adopt the anti-fraud/corruption provisions of the World Bank's 1996 procurement guidelines and to utilise similar standard bidding documents.
- Since the tying of aid to procurement from a donor country reduces the scope for competitive bidding and increases the incentives for corrupt practices, tied aid should be reduced.
- Supplier credits should be carefully monitored as they often involve projects with little equity by the promoters, which increases the scope for corrupt payments.
- As part of the negotiations on the OECD Convention, a separate resolution was adopted in 1996 calling on member countries which allow the tax deductibility of bribes to foreign public officials to re-examine their tax laws with a view to denying this deductibility. All donor countries that have not already done so should amend their tax laws accordingly.

C. Special Areas Requiring Further Action

(i) Monitoring of Corruption

28. The monitoring of corruption and the ranking of countries based on perceptions of levels of corruption prevailing in them by some NGOs (e.g. Transparency International), has raised awareness of the problem of corruption globally. However, it is important to improve the methodological basis for such quantitative assessments. Moreover, bearing in mind the 'supply/demand' dimension of corruption in international business transactions, it would be useful to rank multinational corporations and their subsidiaries in terms of their track records on corruption, thus providing exposure of those known to be engaging in corrupt practices.

(ii) The Arms Trade

29. It is difficult to determine how the arms trade is financed, e.g. through military aid, debt creation, compensatory trade offsets,

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COMMONWEALTH ACTIONS**Notes**

31. In addition to actions taken at national levels, the Commonwealth can also act collectively to improve governance and combat corruption in several ways:

- (i) The Commonwealth's commitment to promote good governance and fight corruption should be credible, tangible and visible. As a first step, Heads of Government should consider adopting a Declaration that commits the Commonwealth to specific principles, standards and goals. In order to ensure that the momentum of such a high-level political initiative is maintained, the Declaration could provide for the establishment of a mechanism/process to facilitate its implementation as well as periodic reviews of progress (say, biennially, coinciding with CHOGMs).
- (ii) At the same time, the Commonwealth should also support the development of a truly global compact against corruption that would fill gaps in existing instruments and be universal in its scope, thus creating a level playing field for all countries. For this purpose, in consultation with other interested parties, it could work for the initiation, under the auspices of the United Nations General Assembly, of time-bound negotiations for a universal, legally binding inter-governmental convention against corruption. Such a convention would require all signatories to abide with minimum standards and rules (in the case of non-state actors these would apply through legislative and other measures adopted by governments) to foster good governance and fight corruption. These standards and rules should be general enough to accommodate diversity in political, economic, socio-cultural and legal systems, but without compromising the basic policy objective of zero-tolerance for all types of corruption. Pending the adoption of a global convention, countries should be encouraged to become parties to existing anti-corruption conventions that are appropriate to their needs and circumstances.
- (iii) The Commonwealth should ensure that maximum use is made by member countries of its existing

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and proposed Schemes of Co-operation in the Administration of Justice, and that these Schemes are kept under active review in order to meet the needs of countries seeking to combat corrupt practices.

- (iv) The Commonwealth should work with other international agencies to develop effective standards to ensure that all off-shore financial centres in all parts of the world are not used to launder the proceeds of corrupt practices.
- (v) Given the economic, social, and political benefits to be gained through Commonwealth co-operation, the Commonwealth Secretariat should be given additional resources to enable it to:
- assist member countries, when requested, with policy advice and technical support to design their own anti-corruption strategies; and
 - compile and disseminate information on emerging good practice in combating corruption and improving governance in key areas such as the funding of political parties, economic reforms and judicial reforms.

21. The Abuja Guidelines on the Relationship between Parliaments, Parliamentarians and Commonwealth National Human Rights Institutions (NHRIs), 23–26 March 2004

Notes

INTRODUCTION

- Representatives of Commonwealth national human rights institutions and Commonwealth parliaments meeting in Abuja, Nigeria have discussed ways to develop a constructive relationship between their respective institutions.
- It was recognised that both NHRIs and parliaments can make an invaluable contribution to the promotion and protection of human rights.
- It was agreed that parliaments should develop a special working relationship with NHRIs.
- It was recognised that parliaments and parliamentarians have a significant role to play in support of the work of NHRIs.
- It was further recognised that NHRIs have a significant role to play in support of the work of parliaments and parliamentarians.
- Representatives also noted the need to publicise the following Guidelines as widely as possible.
- It was agreed that the following Guidelines (the Abuja Guidelines) can form a suitable basis for developing an effective relationship between parliaments, parliamentarians and NHRIs for the promotion and protection of human rights.

Notes

THE ABUJA GUIDELINES

What Parliaments and Parliamentarians can do to support the work of a national human rights institution

1. Parliaments should produce an appropriate legislative framework for the establishment of national human rights institutions in accordance with the Paris Principles and the Commonwealth Best Practice Principles.
2. Parliamentarians should have a sound knowledge of international human rights and international human rights instruments as well as the work of NHRIs.
3. NHRIs should organise periodic meetings to create awareness amongst parliamentarians of both human rights and the work of NHRIs.
4. Parliaments and NHRIs should evolve an effective working relationship to better promote and protect human rights.
5. Each jurisdiction should develop an appropriate role for parliamentarians in the appointment and removal of human rights commissioners.
6. The proposed budget of a NHRI should be submitted directly to parliament for vetting and approval.
7. Parliament should ensure that adequate resources and facilities are provided to a NHRI to enable it to perform its functions effectively. Parliament should also ensure that resources are in fact made available to the NHRI.
8. The annual report of a NHRI should be sent to parliament promptly.
9. The annual report and other reports of NHRIs should be debated in parliament promptly. Government's response to the report should also be tabled in parliament promptly.
10. An all-party parliamentary committee should have specific responsibility for overseeing and supporting the work of a NHRI. In smaller states, this function might be undertaken by an existing parliamentary standing committee.
11. Human rights commissioners should be invited to appear regularly before the appropriate parliamentary committees to discuss the annual report and its other reports.
12. Parliamentarians should invite human rights commissioners to meet with them regularly to discuss matters of mutual interest.

13. Parliamentarians should ensure that sufficient time is given to a consideration of the work of NHRIs.

14. Parliamentarians should ensure that their constituents are made aware of the work of NHRIs.

15. Parliamentarians should scrutinise carefully any government proposals that might adversely affect the work of a NHRI and seek the views of the commissioners thereon.

16. Parliamentarians should ensure that part of the mandate of a NHRI is to advise parliament on the conformity or otherwise of any legislation that may affect the enjoyment of human rights in the country.

17. Parliamentarians should consider revising their Standing Orders in order to enable them to develop a more effective relationship with a NHRI.

18. Parliamentarians should ensure that recommendations for action from NHRIs are followed-up and implemented.

What a national human rights commission can do to support the work of parliament and parliamentarians

1. Human Rights Commissioners should obtain a thorough knowledge of the role, functions and constraints of parliament and parliamentarians.

2. Human Rights Commissioners should brief parliamentarians on human rights issues regularly and on their own particular area(s) of responsibility. Parliament should meet with the NHRI to discuss and agree on the timing of these briefings

3. Human Rights Commissioners should provide parliamentarians with regular expert, independent advice on national, regional and international human rights issues, instruments and mechanisms.

4. A NHRI should be under a statutory obligation to submit annual reports both on its work and on the state of human rights in the country.

5. There should be a statutory obligation on a NHRI to submit a special report on any human rights violations in the country that require urgent attention from parliament. Such reports must be tabled and debated in parliament and government should respond within a stipulated period.

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- 6. A NHRI should provide on-going training for parliamentarians on human rights principles.
- 7. A NHRI should advise parliamentarians on the human rights implications of all proposed legislation and Constitutional amendments as well as existing laws.
- 8. Human Rights Commissioners should inform parliamentarians on the research into human rights issues being undertaken by NHRIs.
- 9. NHRIs should hold regular human rights seminars and conferences with parliamentarians.
- 10. Human Rights Commissioners should keep parliamentarians informed of the compliance or non-compliance of the State with its international and regional treaty obligations.
- 11. A NHRI should make recommendations to parliament regarding efforts required to achieve State compliance with regional and international human rights treaty obligations.
- 12. A NHRI should advise parliaments on the creation of human rights committees in parliament and co-operate with such committees.
- 13. Where appropriate, NHRIs can involve parliamentarians in public events organised by them.
- 14. Where appropriate, NHRIs can encourage parliamentarians to contribute articles in their publications.
- 15. NHRIs should establish mechanisms to liaise with parliamentarians.

22. Case Law Quoted

Notes

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*

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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

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.

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(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

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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

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]

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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.

(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

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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

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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

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

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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

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

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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

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

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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

reflected the fact that they might be called upon to liaise and interact with the executive and Parliament on behalf of the judiciary. However, once appointed, the Chief Justice and Deputy Chief Justice took their place alongside nine other judges in constituting the membership of the Constitutional Court. Their views counted and their voices were heard equally with the respect and authority accorded every member of the court. When it came to the functioning of the highest court in constitutional matters, there was no distinction among the Chief Justice, the Deputy Chief Justice and the nine other judges. A signal feature of s 176(1) was that no mention was made of the Chief Justice or Deputy Chief Justice. The power to extend was afforded indifferently in relation to 'a Constitutional Court judge'. That description embraced each and every Constitutional Court judge, and singled out none of them. Incumbency of the office of Chief Justice or Deputy Chief Justice made no difference and conferred no special entitlement to extension. In exercising the power to extend the term of office of a Constitutional Court judge, Parliament should not single out the Chief Justice. The provision did not allow any member of the category of Constitutional Court judge to be singled out, whether on the basis of individual characteristic, idiosyncratic feature or the incumbency of office ... *Marbury v Madison* (1803) 5 US 137, *Leblanc v R* 2011 CMAC 2 and *Glenister v President of the Republic of South Africa* [2011] ZACC 6, 2011 (3) SA 347 (CC) applied.

(3) When deciding a constitutional matter, a court had to declare any law or conduct inconsistent with the Constitution invalid to the extent of its inconsistency and might also make any order that was just and equitable, including one that limited the retrospective effect of a declaration of invalidity or suspended the declaration of invalidity to allow the competent authority to correct the defect. The precise circumstances of each case had to be considered in order to determine how best the values of the Constitution could be promoted by an order that was just and equitable. A suspension order usually came into play when the past implementation of invalid law or conduct had already led to practical consequences. Even in those cases, the Constitutional Court had emphasised that the rule of law must never be relinquished, but that the circumstances of each case had to be examined in order to determine whether factual certainty required some amelioration of rigid legality. The judicial work of the Constitutional Court would not be affected by the temporary absence of a Chief Justice appointed in terms of the Constitution. The important advances pioneered by the

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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*

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

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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 Khoiratty* [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

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 ...

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[2013] 1 LRC 627

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

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

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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).*

(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

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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

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

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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.

[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.*

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

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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.

(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

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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

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

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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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the sentence, tuned to the circumstances of the offender. The question of the constitutionality of a mandatory provision in an Act of Parliament occurred at three levels: (a) the gravity of the sentence in the text of the law itself, (b) the manner in which the court dealt with it and (c) the right afforded to the citizen to challenge the mandatory sentence in the particular circumstances of his case. Not every mandatory minimum penalty prescribed by legislation breached the constitutional principle of the separation of powers as an encroachment by the legislature on judicial power. The court had to address the predicament of the appellant in his given situation. He came to court for his case to be determined by due process. The court found him guilty. But, at the moment of sentencing, the court relegated his sentencing to the legislature. The court thereby abandoned an intrinsic judicial power which went with a sentencing process. His right was a right of fair hearing under art 19(1) of the Constitution, which included a just sentence decided by an independent and impartial court established by law and not decided by the legislature. The legislature could only prescribe sentences as a general principle. It was the responsibility of the court to take into account the particular facts of the case and the offender's circumstances, adhering to the principle of proportionality which underlay due process. A law which denied an accused party the opportunity to seek to avoid the imposition of a substantial term of imprisonment which he might not deserve would be incompatible with the concept of a fair hearing enshrined in art 19(1) of the Constitution. A substantial sentence of penal servitude, as in the instant case, could not be imposed without giving the accused an adequate opportunity to show why such sentence should not be mitigated in the light of the detailed facts and circumstances surrounding the commission of the particular offence or after taking into consideration the personal history and circumstances of the offender or where the imposition of the sentence might be wholly disproportionate to the accused's degree of criminal culpability. Fair hearing included fair sentencing under the law, which included individualisation and proportionality. The unconstitutionality in the instant case arose not out of the mandatory minimum penalty of five years imposed by the legislature but by the acknowledged constraint felt by the court, which saw itself bound by the legislative provision and the court's inability in the circumstances to afford the appellant a fair trial, which included an appropriate sentence in his personal circumstances. The appellant's right to both proportionality in sentencing and the individualisation of his sentence with proper regard to the mitigating factors in his

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 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

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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 ...

(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 –*

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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

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

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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 EHHR 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

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*

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[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*

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

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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

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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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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 ... *Gairy 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.

The plaintiffs appealed to the Court of Appeal.

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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.

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(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

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.

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(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 ...

(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

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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 he 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*

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

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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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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

and an instrument for running the affairs of the country, which governed the rights and obligations of citizens. Self-evidently, the Constitution did not allow a military person to diverge into politics and take over power contrary to his commitment to protect and preserve the Constitution. It was abundantly clear that the Chief of Army Staff had no authority to hold the Constitution in abeyance and, in the absence of any validation, indemnification or legitimisation of his unconstitutional actions by Parliament, everything done by him during the period of the purported Proclamation of Emergency from 3 November 2007 to 15 December 2007 was unconstitutional and illegal. The superior courts had no jurisdiction or authority to legitimise or validate any action based on extra-constitutional steps and neither the Supreme Court nor the High Courts had lawful jurisdiction to validate, condone or legitimise the unconstitutional acts, actions, omissions and commissions of any functionary who acted contrary to the Constitution. Members of the judiciary were not ordinary persons and were supposed to know the consequences of deviations from the Constitution and that a constitutional deviation by a dictator or usurper could not be rectified or legitimised by a judgment of the court, but only by Parliament making an amendment to the Constitution ... *Sindh High Court Bar Association v Federation of Pakistan* [2010] 2 LRC 319 applied. *Wajihuddin Ahmed (Justice Rtd) v Chief Election Comr* PLD 2008 SC 25 and *Khan v Musharraf* [2008] 4 LRC 157 considered.

(ii) The appellants, instead of showing allegiance to Pakistan and to preserving and protecting the Constitution in terms of their oath of office, had opted to be obedient to rule by one man, essentially without any constitutional authority. There was a marked distinction between the judicial oath under the Constitution and the oath under the Provisional Constitution Order and Judges Oath Order; in the former case the oath was to perform functions in accordance with the Constitution, whereas in the latter case the oath was to abide by orders made from time to time by the person issuing the Provisional Constitution Order and Judges Oath Order. If the practice of obedience to one-man rule was followed or permitted there would be no end to constitutional deviations and instead of the rule of law there would be the rule of martial law. Those persons holding the highest posts in the superior judiciary who had taken the oath of office in full knowledge of the Constitution and laws could have refused to have taken the new oath under the Judges Oath

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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.

(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,*

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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)

(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

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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

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

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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 ... *Yirenkyi 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 ...

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[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

lose full fees which would otherwise have been paid by members of the public for the places so occupied. The education 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

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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,

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 ...

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[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

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 Amissah, 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

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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 Mwainghi* 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 Bizo 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.

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

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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.*

(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

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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

Fisher JJA in *Teangana v Tong* [2005] 3 LRC 588 at [26]–[27], *Constitutional Reference No 1 of 2003*, Nauru SC, applied. *Harris v Secretary for Justice* (Civil Action 13/1997, unreported), Nauru SC not followed. MacSporran *The Constitution* (2007) approved.

(2) Article 45 of the Constitution, which required that for the valid transaction of business there had to be at least one-half of the members present as well as the presiding officer, was mandatory. There was no rule for consideration of the spirit and intention of art 45, the wording of which was plain. On the facts, besides the Speaker, 'less than one-half of the total number of members of Parliament' were present. It followed that the business purported to be done at the resumed sitting of Parliament when a quorum was not present was a nullity ... *Harris v Secretary for Justice* (Civil Action 13/1997, unreported), Nauru SC not followed.

(3) There was no bar in art 30 of the Constitution either to the election of a person as a member of Parliament or to his (or her) sitting because of dual citizenship. It followed from the absence of that bar in the Constitution that Parliament could not enact one. Under art 36 it was for the court alone, not for the Speaker or Parliament, to determine 'the powers, privileges and immunities', ie 'membership', of a member of Parliament ...

(4) Under art 40 of the Constitution, the Speaker could appoint the place and date of sittings of Parliament only in accordance with the advice of the President. He could not do so on his own initiative but had to have the advice of the President first ...

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[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

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.

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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

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

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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 ...

(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

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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

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 ...

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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 ...

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

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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

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

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Legislation referred to in judgement

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 Parties
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

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,

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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 intervener 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 intervener 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;

(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 intervener 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 intervener'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

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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

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.

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(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 facie* 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

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

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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).

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

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

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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

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

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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.

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[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.

(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

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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

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

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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.

[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

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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

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

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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,

appointment and accountability of the superior judiciary, (ii) cases involving the election, qualification or disqualification of members, and the legislative powers, of the legislature and (iii) cases pertaining to the employment, powers and accountability of members of the executive and key executive officials, including ministers, senior bureaucrats and heads of regulatory bodies and statutory corporations ...

(2)(i) When performing her function under art 63(2) of the Constitution of deciding whether a member of Parliament had become disqualified from being a member the Speaker was acting in an administrative or quasi-judicial capacity which did not relate to the internal processes, conduct of business or the maintenance of order in Parliament and her actions were reviewable under the original jurisdiction of the Supreme Court, like those of any other functionary performing administrative or quasi-judicial functions. Moreover, a ruling under art 63(2) did not fall within the category of decisions 'regulating procedure or the conduct of business, or for maintaining order' in Parliament which were immune from review by the court under art 69. When a conviction of a member of Parliament by a court of competent jurisdiction of an offence under art 63(1)(a), (g) and (h), which provided for disqualification pursuant to convictions or findings by the courts, was placed before her the Speaker was not entitled, under the guise of exercising power under art 63(2), to act as an appellate authority or to exercise a review jurisdiction by looking into the merits of the judgment, nor did she have power to set aside or overrule the conviction. Accordingly, the Speaker was not empowered and was not required to take upon herself to decide whether a question of disqualification of the respondent had arisen, since a concluded judgment convicting the respondent had been pronounced by the Supreme Court, which was the highest court of the land, and the nature or kind of conviction that entailed disqualification of a member of Parliament was not in issue. While the Speaker was not merely a post office, her role in the disqualification process was very limited and was reduced merely to establishing whether as a matter of fact a conviction existed. It followed that the Speaker, by interfering in a concluded judgment on contempt of court, had gone beyond the jurisdiction available to her under art 63(2) of the Constitution ... Dicta of Nasir-Ul-Mulk J in *Federation of Pakistan v Gilani* [2013] 1 LRC 223 at [68], [72], *A K Fazalul Quadir Chowdhry v Shah Nawaz* PLD 1966 SC 105, *Muhammad Anwar Durrani v*

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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 Liaqat 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

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 Mairya* 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

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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

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

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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,

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)

Notes

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 judgement

1 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.*

(4) Constitutional law – Parliament – Privilege – Comment on parliamentary proceedings – Whether comment on speech in Parliament constituting breach of parliamentary privilege.

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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.

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HELD: *Application granted; release of applicants ordered.*

(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,

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 ...

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[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

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

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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

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

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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

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

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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

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

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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

Sriskandarajah, 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.

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.

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[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,

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 ...

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(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 ...

(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 ...

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[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

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 (Chitasiri 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

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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 ...

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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.paclii.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

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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.

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.

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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

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.

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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.

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HELD: (de la Bastide P and Saunders J dissenting) Appeal dismissed.

(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

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

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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

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.

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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

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 ...

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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

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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

procedure for committal for contempt and the procedure applicable prior to the coming into force of the Constitution was still applicable. The Constitution did not abolish the common law summary procedure but reaffirmed it. The summary procedure did not offend against the presumption of innocence provided by s 21 of the Constitution nor did it erode the usual safeguards accorded to accused persons. The founding affidavit in summary contempt proceedings set out the basis of the application and the particulars of the charge against the respondent in sufficient detail to enable him to plead. The court merely issued a rule nisi calling upon the respondent to show cause why he should not be committed for contempt. The respondent was given an opportunity to respond to the allegations and was entitled to file a notice to raise points of law if the allegations did not disclose an offence. It was a principle of the law that no person should be punished for contempt of court unless the offence charged against him was distinctly stated with sufficient particularity to enable him to respond to the allegations; in addition, he was given an opportunity to file an answering affidavit. The respondent was allowed a reasonable opportunity to place before the court any explanation of his evidence as well as submissions of fact or law. Unlike the ordinary criminal procedure, the personal liberty of the respondent was not interfered with. He was not arrested by the police and compelled to institute bail proceedings to regain his liberty prior to the trial. Prior to issuing the rule nisi the court had to be satisfied that a prima case against the accused had been made; that requirement was in accordance with the presumption of innocence. The onus of proof in summary proceedings rested with the applicant and did not shift to the respondents. The applicant had to bear the onus of proving the commission of the offence beyond reasonable doubt. The respondents were entitled to legal representation before and during the hearing. They were entitled to call witnesses and file supporting and confirmatory affidavits in terms of court rules and could appeal against the decision of the court to the Supreme Court. It followed that the procedure was not unlawful or unconstitutional ... Dicta of Dickson CJ in *R v Oakes* [1987] LRC (Const) 477 at 499–501, *Re Pollard* (1868) 16 ER 457, *Safcor Forwarding (Johannesburg) (Pty) Ltd v National Transport Commission* 1982 (3) SA 654 and *Coward v Stapleton* (1953) 90 CLR 573 considered.

(2) The court had to balance freedom of expression with protection of the administration of justice. The right to freedom of expression

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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.

(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 ...

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[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

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,

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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

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 ...

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(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 ...

(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.

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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.

(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

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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*

Jones (Asia) Inc [1987] SLR(R) 627 and *Chan Hiang Leng Colin v Minister for Information* [1997] 1 LRC 107 followed.

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(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.

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[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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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

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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crossed the fine line between the tolerable and intolerable. The scope of publication in the instant case was clearly sufficient to support contempt proceedings. The first respondent's reputation as a respected organisation indicated that its newsletter was influential and regarded as a serious and reliable publication. The notoriety and reputation of the first respondent and its newsletter lent credence to the allegations in the words that were published in the newsletter. Furthermore, the recent constitutional history of Fiji and its constitutional history since independence meant that at various times the administration of justice had been vulnerable. It was also the case that the need for the offence of scandalising the court in Fiji as a developing island state (albeit of more than 300 islands) was greater than in a developed state such as the United Kingdom. The mischief that was targeted by commencing proceedings seeking committal for contempt scandalising the court was the real risk that the publication would undermine public confidence in the administration of justice. If that was established, then the publication became intolerable. A fair-minded and reasonable person reading the newsletter would understand the words in the context of the published article to mean that the independence (used in its ordinary non-technical meaning) of the judiciary in Fiji could not be relied on. The words published in the respondents' newsletter and thus understood by a fair-minded and reasonable reader represented a real risk of undermining public confidence in the administration of justice. They had the effect of raising doubts in the minds of the public that their disputes would not be resolved by impartial and independent judges. As a result the authority and integrity of the judiciary in Fiji was undermined. Accordingly the offence of contempt scandalising the court was established against the first respondent. At common law, liability attached to an editor for material appearing in a publication which the court held to be contempt scandalising the court. Thus the offence of contempt scandalising the court was also established against the second respondent ... *Parmanandan v A-G* [1972] FJCA 3, (1972) 18 FLR 90 applied. *Chaudhry v A-G of Fiji* (1999) 45 FLR 87, *Ex p A-G, Re Goodwin* (1970) 91 WN (NSW) 29 and *Ahnee v DPP* [1999] 2 LRC 676 considered.

(ii) Neither the defence of fair comment nor that of justification was available to the respondents for the use of the contemptuous words that appeared in their newsletter and which purported to be a summary of the report of the LSC. That report was based

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.

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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

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

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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

transmission of HIV. Implicit in such finding was that a policy of waiting for a protracted period before taking a decision on the use of Nevirapine beyond the research and training sites was also not reasonable within the meaning of s 27(2). Therefore, the government – without delay – had to (a) remove the restrictions preventing Nevirapine from being made available for the purpose of reducing the risk of mother-to-child transmission of HIV at public hospitals and clinics that were not research and training sites, (b) permit and facilitate the use of Nevirapine for the purpose of reducing the risk of mother-to-child transmission of HIV, making it available for that purpose at hospitals and clinics when, in the judgment of the attending medical practitioner acting in consultation with the medical superintendent of the facility concerned, that was medically indicated, which would, if necessary, include the condition that the mother concerned had been appropriately tested and counselled, (c) make provision, if necessary, for counsellors based at public hospitals and clinics other than the research and training sites to be trained for the counselling necessary for the use of Nevirapine to reduce the risk of mother-to-child transmission of HIV and (d) take reasonable measures to extend the testing and counselling facilities at hospitals and clinics throughout the public health sector in order to facilitate and expedite the use of Nevirapine for the purpose of reducing the risk of mother-to-child transmission of HIV. However, the orders in question would not preclude the government from adapting its policy in a manner consistent with the Constitution if equally appropriate or better methods became available to it for the prevention of mother-to-child transmission of HIV ... *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.

(3) The granting of injunctive relief did not breach the separation of powers principle. That was accepted in various foreign jurisdictions surveyed, where such relief was granted, especially when the obligations of the state were not performed diligently and without delay. The jurisdiction of the court was not confined to issuing a declaratory order: it was also within their power to make a mandatory order against an organ of state when granting ‘appropriate relief’ or making ‘any order that is just and equitable’ under ss 38 and 172 respectively of the Constitution ... *Fose v Minister of Safety and Security* 1997 (3) SA 786 (CC), *Pretoria City Council v Walker* [1998] 4 LRC 203, *Sanderson v A-G, Eastern*

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Cape [1998] 2 LRC 543, *New National Party of South Africa v Government of the Republic of South Africa* 1999 (3) SA 191 (CC), *Government of the Republic of South Africa v Grootboom* [2001] 3 LRC 209, *Dawood v Minister of Home Affairs*; *Shalabi v Minister of Home Affairs*; *Thomas v Minister of Home Affairs* [2000] 5 LRC 147 and *Mohamed v President of the Republic of South Africa (Society for the Abolition of the Death Penalty in South Africa intervening)* [2001] 5 LRC 636 applied. *Brown v Board of Education of Topeka* (1954) 347 US 483, *Brown v Board of Education of Topeka* (1955) 349 US 294, *Bverf GE* 88, 208 (*Second Abortion Case*), *Reference re Manitoba Language Rights* (1985) 19 DLR (4th) 1, *Marchand v Simcoe County Board of Education* (1986) 29 DLR (4th) 596, *Eldridge v British Columbia (A-G)* [1998] 1 LRC 351 and *Doucet-Boudreau v Nova Scotia (Department of Education)* (2001) 203 DLR (4th) 128 considered.

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88 Kingsway
London WC2B 6AA
Tel: +44 207 841 1075
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C/o Commonwealth Secretariat
Marlborough House, Pall Mall
London SW1Y 5HX
Tel: +44 207 747 6415
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Commonwealth Magistrates' and Judges' Association

Uganda House,
58-59 Trafalgar Square
London WC2N 5DX
United Kingdom
Tel: + 44 207 976 1007
Fax: + 44 207 976 2394
Email: info@cmja.org
Website: www.cmja.org

Commonwealth Parliamentary Association

Suite 700, Westminster House
7 Millbank,
London SW1P 3JA
Tel: +44 207 799 1460
Fax: +44 207 222 6073
Email: hq.sec@cpahq.org
Website: www.cpahq.org

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United Kingdom
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COMMONWEALTH SECRETARIAT

Marlborough House

Pall Mall

London SW1Y 5HX

Tel: 44 (0) 207 7747 6500

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