

IN THE SUPREME COURT OF FIJI

(Civil Jurisdiction)

Civil Action No. 178 of 1981

000349

68

IN THE MATTER of the Constitution of Fiji, sections 76(1), 82, 85 and 97(1)

IN THE MATTER of an Order purportedly made pursuant to the Constitution of Fiji, section 76(1) (Fiji Royal Gazette, Friday, 6th February, 1981)

AND IN THE MATTER of an application by the Director of Public Prosecutions pursuant to section 97(1) of the Constitution of Fiji

Between:

THE DIRECTOR OF PUBLIC PROSECUTIONS

Plaintiff

and

THE ATTORNEY-GENERAL

Defendant

*TUNAGRA CJ*

Mr. R. Lindsay with Mr. V. Maharaj for the Plaintiff.

Sir John N. Falvey Q.C. with Mr. G. Grimmett for the Defendant.

JUDGMENT

In their respective judgments which they have just delivered Mishra and Williams JJ. have expressed different conclusions on the constitutional issue raised in the motion of the Director of Public Prosecutions.

Mishra J. does not regard the recent assignment to the Attorney-General of responsibility for the administration of the Office of the Director of Public Prosecutions as unconstitutional and for his part he is not disposed to accede to the motion for a declaration.

Williams J. on the other hand thinks there are ample

grounds for holding that the said assignment is unconstitutional and that relief by way of declaration as sought in the motion should be granted to the plaintiff.

Both Judges have set out in full the reasons which have prompted them in reaching their respective conclusions in this matter. I must confess that the constitutional question which we have had to consider and adjudicate upon was far from easy, largely because of its novelty, there being no similar case before our Courts in the last ten years when Fiji became independent and also because of the conspicuous lack of a definition of the word "department" in the Constitution.

With great respect and much diffidence I am constrained to say that after giving the most careful and anxious consideration to all the matters raised in this case I find myself in agreement with Williams J. on the conclusions he has reached and substantially for the reasons he has given.

However, I feel I should add some observations of my own in deference to the differences of opinion that have emerged.

I shall for convenience refer to the Attorney-General as the "A-G" and the Director of Public Prosecutions as the "DPP".

In my opinion there is a further and to my mind important ground upon which the purported assignment under section 76(1) to the A-G of the responsibility for the administration of the Office of the DPP should be declared unconstitutional.

On 6th February, 1981 a notice of an Order purporting to relate to the Office of the DPP as well as other

organs of Government appeared in the Fiji Royal Gazette at page 80. The terms of the Order state as follows:-

" FIJI INDEPENDENCE ORDER, 1970

ASSIGNMENT OF MINISTERIAL  
RESPONSIBILITIES

IN exercise of the powers conferred upon him by subsection (1) of section 76 of the Constitution, and acting in accordance with the advice of the Prime Minister, the Governor-General has, by directions in writing, assigned to -

The Attorney-General

responsibility for the conduct of the business of the Government specified in Column 1 of the Schedule and responsibility for the administration of the Ministry and departments of the Government specified in Column 2 of the Schedule.

Dated the 28th day of January 1981.

By Command

I.Q. Lasaqa  
Secretary to the Cabinet

SCHEDULE

Column 1 (Business of the Government)	Column 2 (Ministry and departments of the Government)
(a) Courts (legislation governing); Criminal law and procedure; Commission on the Prerogative of Mercy; Civil Law, practice and procedure; Inquests; Evidence Law reform and revision; Property law (including land transfer); Bankruptcy; Marriage; Matrimonial causes (legislation); Wills and succession etc.	Ministry of the Attorney-General, together with - Crown Law Office; Office of the Administrator-General; Office of the Registrar-General; Office of the Registrar of Titles; Office of the Commissioner of Stamp Duties; Office of the Director of Public Prosecutions (subject to section 85 of the Constitution); The Judicial Department (subject to Chapter VII of the Constitution).

section 76(1) reads:-

"76.--(1) The Governor-General, acting in accordance with the advice of the Prime Minister, may, by directions in writing, assign to the Prime Minister or any other Minister responsibility for the conduct (subject to the provisions of this Constitution and any other law) of any business of the Government, including responsibility for the administration of any department of the Government."

The assignment of ministerial responsibility envisaged in section 76(1) presupposes a situation in which there would be a Permanent Secretary or a supervising officer in the department of the Government concerned over whom the Minister is required to exercise general direction and control. This follows from the provisions of section 82 which reads:-

"82. Where any Minister has been charged with responsibility for the administration of any department of the Government, he shall exercise general direction and control over that department and, subject to such direction and control, any department in the charge of a Minister (including the office of the Prime Minister or any other Minister) shall be under the supervision of a Permanent Secretary or of some other supervising officer whose office shall be a public office:"

By virtue of the above provisions the Minister is given power to exercise general direction and control over the department assigned to him and the supervision of the department concerned is left to a Secretary or a supervising officer. The powers to appoint a Permanent Secretary or supervising officer are vested in the Public Service Commission by section 105(1) which reads:-

"105.--(1) Subject to the provisions of this Constitution, power to make appointments to public offices (including power to confirm appointments) and to remove and to exercise disciplinary control over persons holding or acting in such offices shall vest in the Public Service Commission."

These powers are not applicable to those officers whose appointment falls outside the jurisdiction of the Public Service Commission such as the DPP, the Solicitor-General or the Chief Registrar of the Supreme Court. This is the effect of section 105(3)(d) which reads:-

"105.-(3) The provisions of this section shall not apply in relation to -

..

(d) any office appointments to which are within the functions of the Judicial and Legal Services Commission; "

The appointment of a Permanent Secretary or supervising officer is subject to the concurrence of the Prime Minister. This is provided under section 105(5) of the Constitution which reads:-

"105.-(5) The Public Service Commission shall not make any appointment to hold or act in the office of Secretary to the Cabinet or of a Permanent Secretary or of any other supervising officer within the meaning of section 82 of this Constitution unless the Prime Minister concurs in the appointment."

The appointment of Permanent Secretaries and supervising officers for the purpose of section 82 is thus controlled by the Executive. It seems clear from all this that the powers to appoint a Permanent Secretary or supervising officer are not intended to operate other than in relation to a department of the Government within the meaning of section 76(1) or in relation to a Ministry of the Government created under powers conferred by sections 73(1) and 75(1). It is a matter of common knowledge that the Office of the DPP does not have a Permanent Secretary or a supervising officer within the meaning of section 82 nor has the constitutional process for making such an appointment been used with respect to the Office of the DPP since 1970 when the present Constitution came into force. This omission which has continued for more than ten years

strongly suggests that the Office of the DPP was never intended to be classified or construed as a department of the Government for the purpose of section 76(1).

Be that as it may, the purported assignment in question has in fact created an impossible position for the DPP because of the conflict inherent in the operation of the powers conferred on the A-G by section 82 and the powers under section 85(7) guaranteeing independence to the DPP in regard to the exercise of his functions. Section 82 requires the A-G to exercise general direction and control over the Office of the DPP while section 85(7) provides in no uncertain terms that in exercise of the powers conferred on him by the Constitution the DPP shall not be subject to the direction or control of any person or authority.

It has been argued on behalf of the defendant that no conflict can in fact exist between the powers of the A-G and those of the DPP as a result of the purported assignment in question because their respective powers are concurrent and do not overlap even though they operate within the same sphere of activity. In my view the contention would be tenable only if there was in the Office of the DPP a Permanent Secretary or supervising officer as envisaged by section 82 for such a Permanent Secretary would help to serve as buffer between the A-G and the DPP thereby removing any prospect of conflict between them in the exercise of their respective powers. But as we have seen there is no Permanent Secretary or supervising officer in the Office of the DPP which means that the A-G under the purported assignment in question has a direct and unencumbered control over the Office of the DPP that would otherwise have been possible. This is the first time in the history of Fiji that direct political control has been brought to roost in the Office of the DPP with its corroding effect upon the independence of the DPP. The powers of the A-G to exercise general direction and control

over the Office of the DPP pursuant to section 82 are too vague and loose in nature that there is no guarantee that they will not be used in a manner inimical to the proper discharge by the DPP of his functions. The situation that has arisen recalls to mind the words of de Smith in his book "The New Commonwealth and its Constitutions" where at page 144 he said:-

"In devising the constitution of a new state it is surely better to aim at a simpler and clearer definition of the Attorney-General's functions, and at the same time to safeguard the stream of criminal justice from being polluted by the inflow of noxious political contamination."

The framers of the Constitutions no doubt had those considerations in mind when they decided to separate the Office of the DPP from that of the A-G who became a political appointee under the Constitution.

In the absence of a Permanent Secretary or supervising officer to serve as buffer to the A-G in relation to the Office of the DPP it follows that, though I have no doubt this was not intended, the A-G now in terms of section 82 not only has power to exercise general direction and control over the Office of the DPP but also power to directly supervise and control the DPP and his Office. As I see it, this is the most serious constitutional implication resulting from the purported assignment in question.

The problem that has arisen in relation to the Office of the DPP stems from the fact that a distinction which ought to have been drawn was not drawn as regards those departments of Government which fall logically and naturally within the ambit of section 76(1) and those offices or organs of Government which have been specially created by the Constitution and which by their very nature are intended to be insulated from direct political control and interference. The .

fact that the powers under section 76(1) has been exercised in relation to the Office of the DPP without there being any concurrent appointment of a Permanent Secretary or supervising officer gives the A-G a large and unprecedented measure of direct control not only over the Office of the DPP but over the DPP himself by virtue of his de facto position as administrative head of his establishment.

It has been said that the administrative activity of the Office of the DPP is a matter within the proper purview of the A-G who is responsible to Cabinet and to Parliament under the purported assignment in question. The statement relates to the supervision of expenditure of public funds allocated to the Office of the DPP and provision of office accommodation and equipment such as tables, chairs, typewriters and stationery. These are practical administrative matters upon which the DPP would need governmental assistance to enable him to exercise his powers and carry out his functions properly. However, the need for such assistance affords no reason for overlooking the special status of the DPP under the Constitution. As will be indicated in a moment some arrangement other than under section 76(1) could have been made for the Office of the DPP without offending the concept of ministerial responsibility.

A further problem which has arisen, again stems from the fact that the use of powers under section 76(1) presupposes in the case of a department of Government within the meaning of section 76(1) an appointment of a Permanent Secretary or supervising officer to that department and in the case of a Ministry of the Government, the appointment of a Permanent Secretary to that Ministry. It is common knowledge that the Ministry of the A-G has had no Permanent Secretary appointed to it by the Public Service Commission with the concurrence of the Prime Minister since Fiji attained Independence in 1970. This constitutional lacuna raises the important question



whether the Ministry of the A-G was at the time the notice of 6th February, 1981 was published constitutionally competent to have assigned to it the responsibility for the administration of the Office of the DPP? The answer seems to me to be rather obvious. In these circumstances it is difficult to resist the conclusion that the powers vested in section 76(1) were never intended to be applied to the Office of the DPP and in my opinion the fact that they have been so applied is clearly repugnant and contrary to the intention of the Constitution.

Some concern has been expressed about the absence of accountability to Parliament by a Minister in regard to the administrative affairs of the Office of the DPP. Accountability to Parliament can be provided without resort to section 76(1). It can be done by the use of parliamentary convention which has hitherto served the Office of the DPP quite well over the past ten years or through the powers vested in the Prime Minister by sections 73(1) and 75(1) of the Constitution. These powers enable a Ministry of the Government to be created and a Minister to be appointed thereto. Such a Minister if it is so desired could also be designated as the Minister responsible to Cabinet and Parliament for the Office of the DPP. These arrangements obviate the kind of constitutional problems associated with the indiscriminate use of powers conferred by section 76(1) and, as we have seen, under which the A-G is given direct oversight and control of the Office of the DPP. This power of control over the Office of the DPP is unspecified in scope and uncertain in operation that it seems to me hardly likely that the framers of the Constitution intended the powers under section 76(1) to be used in such a way as to bring about so unsatisfactory a result in an area of high constitutional importance.

In approaching the problem of construction arising from the use of powers under section 76(1) in relation to the

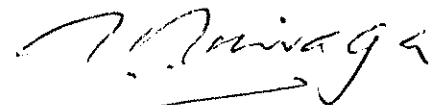
Office of the DPP I have derived some assistance in the approach adopted in several recent leading cases on the construction of constitutions based on the Westminster model as Fiji's Constitution is, in common with those of many other Commonwealth countries. I need only refer to two of these cases. In Hinds v. The Queen (1976) 2 W.L.R. 366 at page 371 Lord Diplock stated

"A written Constitution, like any other written instrument affecting legal rights or obligations, falls to be construed in the light of its subject matter and of the surrounding circumstances with reference to which it was made."

In Ong Ah Chuan v. Public Prosecutor (1980) 3 W.L.R. 855 at 864 Lord Diplock said:-

"... Their Lordships would repeat what this Board has said on many previous occasions and most recently through Lord Wilberforce in Minister of Home Affairs v. Fisher (1980) A.C. 319, 329: that the way to interpret a constitution on the Westminster model is to treat it not as if it were an Act of Parliament but 'as sui generis, calling for principles of interpretation of its own, suitable to its character ... without necessary acceptance of all the presumptions that are relevant to legislation of private law.' As in that case ... their Lordships would give to Part IV of the Constitution of the Republic of Singapore 'a generous interpretation avoiding what has been called the austerity of tabulated legalism.'"

For the reasons I have given I am satisfied that the use of powers under section 76(1) of the Constitution in relation to the Office of the DPP was unconstitutional. I therefore agree with Williams J. that the plaintiff is entitled to a declaration on the ground that the purported assignment in question is unconstitutional.



(T.U. Tuivaga)  
Chief Justice

Suva,

10th April 1981