REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

Cv. #. 2012/04052

BETWEEN

STEVE FERGUSON CLAIMANT

AND

THE ATTORNEY GENERAL OF TRINIDAD AND TOBAGO

THE DIRECTOR OF PUBLIC PROSECUTIONS

DEFENDANTS

BEFORE THE HONOURABLE MADAME JUSTICE M. DEAN-ARMORER
APPEARANCES

Mr. E. Fitzgerald, Q.C., Mr. F. Hosein, S.C. , Ms. A. Mamchan, Mr. Rishi Dass instructed by Mr. R. Otway appeared on behalf of Steve Ferguson.

Mr. M. Beloff, Q.C., Ms. N. Singh, Ms C. Huggins instructed by Mr. R. Otway appeared on behalf of Maritime Life Caribbean Ltd.

Ms. S. Chote, S.C., Mr. V. Deonarine instructed by Ms. N. Abiraj appeared on behalf of Ameer Edoo.

Lord Pannick, Q.C., Mr. G. Ramdeen appeared on behalf of the Attorney General.

Solicitor General Ms. E. Honeywell, S.C., Mr. A Newman, Q.C., Mr. S. Parsad, Ms. N. Nabbie, Mr. C. Chaitoo instructed by Ms. Z. Haynes and Ms. A. Ramsook appeared on behalf of the Attorney General.

Mr. I. Benjamin, Mr. S. Wong instructed by Ms. N. Jagnarine appeared on behalf of the DPP.

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JUDGMENT

INTRODUCTION

1. This claim has popularly been referred to as "*the section 34 matter"*. It would, however, be more appropriately labeled *"the repeal of section 34"* since it is against the repeal of section 34 of the ***Administration of Justice (Indictable Proceedings) Act No. 20 of 2011*** ("the Act"), that the claimant has instituted these proceedings.

2. By this claim, under Part 56 of the ***Civil Proceedings Rules***[1] (***CPR***) the claimant, Steve Ferguson, alleges that the rights guaranteed to him by section 4 (a) and (b) of the ***Constitution of Trinidad and Tobago*** ("the Constitution") have been contravened.

3. In December 2011 the ***Administration of Justice (Indictable Proceedings) Act***[2] (***The Act***) was enacted by both Houses of Parliament and received the assent of His Excellency the President on the 16th of December 2011. The ***Act***[3] which contained a provision that it would enter into force upon Presidential Proclamation provided for substantial changes to the criminal justice system in Trinidad and Tobago. Included in the ***Act*** was section 34 which prescribed a limitation period of 10 years in respect of all offences with the exception of those listed in Schedule 6 to the ***Act***[4].

[1] Civil Proceedings Rules 1998, The Republic of Trinidad and Tobago
[2] Administration of Justice Act (*Indictable Proceedings*) Act No. 20 of 2011
[3] Ibid.
[4] Administration of Justice Act (*Indictable Proceedings*) Act No. 20 of 2011

4. In August, 2012, the then Minister of Justice approached Cabinet seeking the early proclamation of a few sections of the ***Act***[5], among them was section 34. Following the approval of Cabinet section 34 was proclaimed on 28th August, 2012 and became law on 31st August, 2012.

5. Then were the flood gates thrown open with applications seeking declarations of innocence and dismissal of criminal charges. Among them was the claimant's application together with those of persons accused in the historic Piarco corruption cases.

6. The Director of Public Prosecutions was alarmed at the effect of section 34. He drew his concerns to the attention of the Attorney General. In early September 2012, there was a hurried return to Parliament. The ***Administration of Justice (Indictable Proceedings) Amendment Act***[6] ***(the Amendment Act)*** was enacted with a special 3/5th Parliamentary majority. The ***Amendment Act*** which repealed Section 34 with retroactive effect , provided that all pending proceedings be void and that "*no rights , privileges, obligations or liabilities…"* should be deemed to have accrued under the repealed section 34.

7. With equal dispatch the claimant, with all the host of section 34 applicants approached the High Court pursuant to section 14 of the ***Constitution*** claiming that their rights had been infringed.

[5] Administration of Justice Act (*Indictable Proceedings*) Act No. 20 of 2011
[6] Administration of Justice (*Indictable Proceedings*) Amendment Act No. 15 of 2012 see Appendix II

8. By October, 2012, some 42 applications had been filed under the now repealed section 34. Linked to each of these applications, were claims pursuant to section 14 of the ***Constitution.*** Each claimant sought principally a declaration that the repeal of section 34 was unconstitutional null and void.

9. It was agreed by learned attorneys for all parties that three claims should be selected for hearing and that all others should abide their hearing and determination.

10. The selected claims were those of Steve Ferguson, the claimant herein, Ameer Edoo, and the joint claim of three companies Maritime Life (Caribbean) Limited, Maritime General Insurance Company Limited, and Fidelity Finance and Leasing Company Limited.

11. In the course of the hearing and determination of their claim, the court considered the significance of the doctrine of separation of powers in the context of the Westminster type Constitutions and the type of legislation which would constitute a breach of the doctrine.

12. The court considered as well the circumstances in which it would be appropriate to find the existence of a substantive legitimate expectation as well as the factors which will entitle a claimant to the enforcement of such expectations.

13. The court considered the meaning of constitutional due process as well as the role and function of the Director of Public Prosecution (the Director) and whether his actions constituted an interference with pending proceedings.

14. In adjudicating on all those issues, the court was assisted by the submissions of erudite Queens Counsel and Senior Counsel.

PROCEDURAL HISTORY

15. On 3rd October, 2012 the claimant, Steve Ferguson, commenced proceedings pursuant to Part 56:7 of the ***CPR***. He sought the following items of relief:

"1. A declaration that the provisions of the Administration of Justice (Indictable Proceedings) (Amendment) Act, 2012 violates the doctrine of the separation of powers, and is contrary to the rule of law, and is thus unconstitutional and void.

2. Further or in the alternative a declaration that the provisions of the Amendment Act abridges and infringes sections 4 (a) and (b) of the Constitution and is null and void and of no effect.

3. A declaration that "no trial shall commence" of the Applicant in respect of the conduct alleged in the prosecutions colloquially known as Piarco No. 1 and Piarco No. 2.

4. A declaration that the applicant is entitled to be discharged and to not guilty verdicts relative to all the charges in the prosecutions known as Piarco No. 1 and Piarco No. 2 such as he was entitled to under the original provisions of section 34 (3) of the Administration of Justice (Indictable Proceedings) Act 2011.

5. Alternatively a declaration that the continuation of the criminal proceedings relative to the conduct alleged in the prosecutions known as

Piarco No. 1 and Piarco No. 2 would constitute an abuse of process of the court and would abridge, infringe and violate the due process provisions of section 4 (a) of the constitution and as well as the applicant's right to "the protection of the law" under section 4 (b) of the Constitution.

6. *Further or in the alternative an order that the prosecutions known as Piarco No. 1 and Piarco No. 2 be stayed indefinitely*

7. *Such further and/or other relief, orders or directions as the Court may in exercise of its jurisdiction under section 14 of the Constitution and under its inherent jurisdiction consider appropriate for the purpose of enforcing and protecting or securing the enforcement and protection of the claimant's said rights."*

16. On 19th November, 2012, in the course of a pre-trial review, the Court heard the application of the Director of Public Prosecutions ("the Director") to be joined as an interested party to the proceedings. The application was granted by consent.

17. On 19th November, 2012, the Court also heard the claimants' application for a stay of pending criminal proceedings. The Director did not consent to the stay, but agreed to seek an adjournment of pending criminal proceedings to 1st February, 2013 by which time it was anticipated that hearing of the constitutional motions would have been completed. The Director agreed to seek a further adjournment to 12th April, 2013 pending the Court's decision in the constitutional motion.

18. The parties agreed that the constitutional motions by Steve Ferguson, Maritime Life (Caribbean) Limited, Maritime General Insurance Company Limited, Fidelity Finance and Leasing Company Limited and Ameer Edoo should be heard together and that all related matters be adjourned pending the hearing and determination of those claims. This was done on 19th November, 2013 and the Court gave directions for the filing and service of further affidavits and of written submissions.

19. The Court received written submissions from all parties. These were supplemented by oral submissions commencing 28th January, 2013. On 1st February, 2013, the Court reserved its decision to a date to be fixed by Notice.

THE EVIDENCE

20. The evidence before the Court consisted of affidavit evidence only. There was no cross-examination and the facts were largely undisputed, with differences arising only as to the proper inferences to be drawn from undisputed facts. The parties relied on the following affidavits:

- First affidavit of Steve Ferguson filed on 3rd October, 2012 (the supporting affidavit).
- Second affidavit of Steve Ferguson filed on 9th November, 2012 (filed in support of an application for a stay of criminal proceedings).
- Third affidavit of Steve Ferguson filed on 23rd November, 2012.
- Fourth affidavit of Steve Ferguson filed on 20th December, 2012 (in reply to the affidavit of the Attorney General).

- Fifth affidavit of Steve Ferguson filed on 20th December, 2012 (in reply to the affidavit of the Director).
- Sixth affidavit of Steve Ferguson filed on the 9th January, 2013 (for the purpose of annexing the transcript proceedings in the Magistrate's Court).
- Seventh affidavit of Steve Ferguson filed on 25th January, 2013.
- Affidavit of Roger Gaspard (the Director) filed on 12th December, 2012.
- Affidavit of Roger Gaspard (the Director) filed on 18th January, 2013.
- Affidavit of Keino Swamber filed on the 9th January, 2013.
- Affidavit of the Attorney General Mr. Anand Ramlogan filed on 18th December, 2012.
- Affidavit by Permanent Secretary, Reynold Cooper. This affidavit exhibited a statement of the Honourable Prime Minister Mrs. Bissessar. The affidavit was regarded as containing inadmissible hearsay and was struck out by consent.
- Affidavit of Kerri-Ann Olivierre of the Chief State Solicitor's Department, filed on 21st February, 2013 on behalf of the Defendant/Attorney General for the purpose of annexing a list prepared by the Registrar of the Supreme Court. The list shows all section 34 applications which had been filed before the repeal Act.

FACTS

The Administration of Justice (Indictable Proceedings) Act, 2011 ("the Act").

21. On 18th November, 2011 the ***Administration of Justice (Indictable Proceedings) Bill*** "the Bill" was read and passed in the House of Representatives. The Bill was read and

passed in the Senate on 29th November, 2011. On 9th December, 2011 the House of Representatives agreed to the Senate Amendments and the Bill became law when it received the assent of His Excellency the President on 16th December, 2011. By section 1(1), the ***Act*** would come into force on a date fixed by the President by proclamation.

22. The ***Act*** was intended to engender reforms to the criminal justice system by addressing endemic backlogs of criminal cases in the Magistrate's Court. One of the methods prescribed by the Act for achieving this goal was by the abolition of preliminary enquiries[7].

23. Section 34 of the ***Act*** introduced a limitation period for criminal matters. The full text of section 34 is set out in Appendix I of this judgment. The portion of section 34 which was relevant to these proceedings conferred on an accused person the right to apply to the court for the dismissal of criminal charges against him where ten (10) years had elapsed since the offence was alleged to have been committed.

24. Section 34 was not however unrestricted. The facility of approaching the Court under section 34 was not available where the accused had evaded the process or where the offence in question was listed in Schedule 6 to the ***Act***. The offences listed in Schedule 6 included sexual crimes such as rape, incest and buggery, crimes of violence and drug related crimes. White collar crimes and crimes of fraud and corruption were not listed in Schedule 6. Persons accused of white collar crimes were therefore entitled to seek

[7] See the affidavit sworn by Anand Ramlogan filed on 18th December 2012 at paragraph 22.

verdicts of not guilty under section 34, if ten (10) years had passed from the date of the alleged offence.

25. On 6th August, 2012, the then Minister of Justice presented a Note for Cabinet informing Cabinet that after consultation with the Honourable Chief Justice, it had been agreed that the Act should come into force in its entirety on 2nd January, 2013[8].

26. The then Minister of Justice recommended the early proclamation of certain sections of the Act including section 34. The recommendation of the Minister of Justice was later embroiled in controversy and led ultimately to the dismissal of the Honourable Herbert Volney as Minister of Justice. The net result was, however, that by Presidential proclamation on 28th August, 2011 section 34 became law with effect from 31st August, 2012.

Piarco 1 and 2.

27. The claimant was an accused person caught by section 34. At the time of the proclamation of section 34, he was among persons facing charges with various acts of corruption allegedly committed to obtain contract packages for the Piarco Airport Development Project. The cases were and continue to be referred to as Piarco 1 and Piarco 2. The Piarco 1 cases involved some eight persons, natural and corporate, who were allegedly receiving corrupt payments in exchange for the award of contract packages. In January 2008, the claimant had been committed to stand trial for Piarco 1

[8] Note for Cabinet dated 6th August, 2011 exhibited as A.R. 4.

offences. These offences were alleged to have been committed between March 1997 and December 2000.

28. Piarco 2 cases related to charges of overall conspiracy to defraud the Airports Authority of Trinidad and Tobago, NIPDEC and the Government of Trinidad and Tobago by the fraudulent manipulation of the bid process for Piarco Airport Construction Packages. These charges were initially laid in 2004. The relevant offences were alleged to have been committed between 1st January, 1995 and 31st December, 2001.

29. In 2006, the Government of the United States sought the extradition of the claimant and of his co-accused Ishwar Galbaransingh in connection with alleged offences of money laundering and fraud. The Attorney General exercised the power of surrender under the ***Extradition Act*** Ch. 12:04.

30. The claimant and Mr. Galbaransingh successfully challenged the decision of the Attorney General. The Honourable Justice Boodoosingh granted an order quashing the decision and declaring the appropriate forum to try the claimant for the Piarco offences to be Trinidad and Tobago[9].

31. The claimant alleged without contradiction that he viewed the Parliamentary debates which led to the enactment of the ***Act***. He testified further that he believed that once the

[9] Cv. 2010/4144 Ferguson & Galbaransingh v Attorney General.

legislation was proclaimed he would be entitled to make an application to a judge of the High Court to seek verdicts of not guilty in respect of both sets of proceedings[10].

32. The claimant relied as well on the article by Express journalist Keino Swamber. The article was published in the Daily Express of 5th September, 2012 under the caption *"Scrapping Preliminary Enquiries. Volney: Only Deadwood cases to go".* This article was exhibited both by the claimant as *S.F.7* and by Keino Swamber to an affidavit filed on 9th January, 2013. The claimant relied on the article for the statement of Minister Volney that the state *"has ten years to prosecute someone (if after that time) you cannot prosecute that person you will never succeed on that indictment".* Mr. Swamber deposed that he asked Minister Volney whether section 34 would be applicable to white collar crimes and that Minister Volney answered in the affirmative.[11]

33. On 10th September, 2012 the claimant, through his attorneys, filed an application seeking a verdict of not guilty pursuant to section 34 of the ***Act***.

34. While the claimant's application was still pending, the Honourable Attorney General piloted a Bill for the repeal of section 34. On 12th September, 2012, the ***Administration of Justice (Indictable Proceedings) Amendment Act***[12] (***the Amendment Act***) was passed in the House of Representatives. It was passed in the Senate on the following day and received the assent of His Excellency the President on 14th September, 2012. It is the

[10] Supporting affidavit of Steve Ferguson filed 3rd October, 2012 at paragraph 13.
[11] Affidavit of Keino Swamber filed on 9th January, 2013
[12] Administration of Justice (Indictable Proceedings) Amendment Act No. 15 of 2012

repeal statute which is challenged in these proceeding as being unconstitutional. The salient provisions are set out below:

> *"2. This Act is deemed to have come into force on 16th December, 2011…*
>
> *4. This Act shall have effect even though inconsistent with sections 4 and 5 of the Constitution.*
>
> *5. Section 34 is repealed and deemed not to have come into effect.*
>
> *6. Notwithstanding any law to the contrary all proceedings under the repealed section 34 which were pending before any court immediately before the date of assent … shall, on coming into force of this Act, be void…*
>
> *7. Notwithstanding any law to the contrary, no rights, privileges, obligations, liabilities or expectations shall be deemed to have been acquired, accrued, incurred or created under the repealed section 34…"*

Complaint of Ad Hominem

35. The claimant contended that the enactment of the repeal statute[13] was directed at him, at Mr. Ishwar Galbaransingh and at the other persons who were facing charges in Piarco 1and Piarco 2.

36. In support of his contention the claimant exhibited and relied on extracts from newspaper articles as well as reports from Parliamentary debates. There was no formal objection to the use of either newspaper articles or Hansard Reports. There was also no application to have exhibits of newspaper articles or Hansard Reports struck out as inadmissible.

[13] The Administration of Justice (Indictable Proceedings) (Amendment) Act 15 of 2012.

Learned Queens Counsel, Lord Pannick however underscored the need for the Court to be careful in relying on both kinds of documents.

37. The weight which the Court will place on these exhibits will be determined later in this judgment. Full reference will however be made to them at this stage, when the facts are being set out.

Newspaper Reports

38. The print media shone the spotlight on the claimant and Mr. Galbaransingh. In early September, 2012 following the proclamation of section 34 the Sunday Guardian published an article under the heading *"Ish and Steve to walk free …"* [14]

39. Similarly, the enactment of the repeal statute was portrayed by the newspaper as being concerned exclusively with the claimant and Mr. Galbaransingh. Thus, on 13th September, 2013 Newsday reported the repeal of section 34 under the heading *"Ish, Steve cut down …"*[15].

40. In my view, the danger of relying on a newspaper report is obvious. As long ago as the mid-1980s, the Court of Appeal of Trinidad and Tobago regarded the use of newspaper reports as inadmissible hearsay (see: ***Attorney General v K.C. Confectionery***[16]). The journalistic emphasis on *"Steve and Ish"* clearly has no bearing on the legislative intention of Parliament and in fact achieves little more than identifying the issue to which

[14] Exhibit S.F. 8 to the supporting affidavit of the claimant, Steve Ferguson.
[15] Exhibit S.F. 13 to the affidavit filed on behalf of the claimant on 3rd October, 2012
[16] Attorney General v K.C. Confectionery Limited (1985) WIR 387

the journalist wishes to focus public attention. The Court will, therefore, disregard newspaper reports in so far as they have been presented as supporting the contention that the legislation was *ad hominem*.

Hansard Reports

41. At paragraph 22 of his supporting affidavit[17], the claimant referred to the Parliamentary Debate on 12th September, 2012. He alleged that it was clear from the Parliamentary debates that the object of the amendment was to remove the rights of all who had applied for relief under section 34. The Hansard Report in respect of the debate of 12th September, 2012 was exhibited to the claimant's second affidavit and marked *"S.F.22*[18]*"*. Learned Queen Counsel for the claimant, Mr. Fitzgerald, made extensive reference to this extract on the first day of his address.

42. It has not been disputed that on 12th September, 2012 the Honourable Prime Minister convened an emergency sitting of Parliament. The emergency sitting was convened in the wake of a letter from the Director of Public Prosecutions to the Honourable Attorney General on 11th September, 2012 and a pre-dawn conference between the Honourable Prime Minister and the Attorney General the following day. The details of the involvement of the Director will be considered later.

43. In the course of his address to Parliament the Honourable Attorney General alluded to his decision in the previous year to forego an appeal against the decision of the Honourable

[17] Affidavit sworn by Steve Ferguson and filed on 3rd October, 2012.
[18] S.F. 22 exhibited to the affidavit of Steve Ferguson filed on 9th November, 2012.

Justice Boodoosingh in ***Steve Ferguson & Ishwar Galbaransingh v The Attorney General***[19].

44. The Attorney General had this to say:

> *"...my decision not to appeal was influenced in no small measure and indeed was predicated on the fact that the accused can be tried in Trinidad and Tobago before our courts ...*
>
> *"And if the effect of that provision was to deny or prevent that trial from taking place then the premise on which my decision was based would have been pulled out ..."*[20].

45. Later in his address, Senator Ramlogan said:

> *"... what we are seeking to do is to correct what was a clear oversight by the entire Parliament ..."*[21].

46. Learned Queens Counsel, Mr. Fitzgerald, drew the Court's attention to page 28 of the Parliamentary Report where the Honourable Attorney General recounted his discussion with the Director, his approach to the Prime Minister and the later decision to convene Parliament.

[19] Cv. 2010/4144 Ferguson & Galbaransingh v The Attorney General.
[20] *S.F. 22* Report of the Debate in the House of Representatives on 12th September, 2012, page 21.
[21] *S.F. 22* Report of the Debate in the House of Representatives on 12th September, 2012, page 25.

47. Mr. Ramlogan explained his view on the impact of the then extant section 34. Saying that Government could not support a bad law, the Honourable Attorney General alluded to other matters such as:

> *"…the collapse and financial fiasco of CLICO and the Hindu Credit Union …"*[22]

48. In the course of the same debate, Senator Prescott decried the proposed legislation saying:

> *"It is clear that this Parliament is being asked to say to those who have filed actions … we are coming after you."*[23]

49. The authorities which restrict the Court's reliance on Hansard Reports will be considered later in this judgment. At this stage, it is, in my view, adequate to point to ***The Attorney General of Mauritius v Khoyratty*** [2007] 1 AC 80, a decision of the Judicial Committee of the Privy Council, where Lord Steyn quoted extensively from Hansard in considering the overriding purpose of the statute. I was of the view that this Court could not fall into error by following the example of Lord Steyn.

The Attorney General's Defence

50. The Honourable Attorney General Mr. Ramlogan placed before the Court an affidavit[24] which constituted his personal testimony. In his affidavit, the Attorney-General admitted

[22] Affidavit of Anand Ramlogan filed on 18th December, 2012, Para. 49.
[23] *S.F. 22* Report of the Debate in the House of Representatives on 12th September, 2012, page 63
[24] Affidavit of The Attorney General, Mr. Anand Ramlogan filed on 18th December, 2012

that he could not speak for Parliament's objective in enacting the repeal statute. He set out, however, to explain government's intention in introducing the Bill.

51. The Attorney General, in the said affidavit[25] deposed that the Amendment Act became necessary because the original Act had far-reaching and unintended consequences which had escaped the attention of Parliament.

52. The Attorney General continued:

> *"It was never intended by the Government that this limitation period should apply to preclude prosecutions for historic corruption or other serious offences".*

53. It was the Attorney General's evidence that the enactment of section 34 was *"an unfortunate error and oversight on the part of the entire legislature …".*

54. The Attorney General deposed that Government never intended that the criminal limitation provision contained in the original section 34 should be applicable to persons charged with serious criminal offences.

55. The Attorney General referred to the early proclamation of section 34 under the stewardship of the Honourable Justice Volney who at the material time had been the Minister of Justice.

[25] Ibid, Para. 48

56. The Attorney-General deposed that Minister Volney had approached the Cabinet with a recommendation for proclamation of the entire ***Act*** by January, 2013 and early proclamation of select sections including section 34.

57. The Attorney General referred to the allegation that the Minister of Justice had misled Cabinet and to the eventual revocation of his appointment by the President on the advice of the Honourable Prime Minister.

58. The Attorney General exhibited the Note which he presented to Cabinet. The Note for Cabinet dated 11th September, 2012 provides the following reason for the repeal Act:

> *"Cabinet is advised that the early proclamation of the said section 34 can possibly attract widespread criticism in view of the potential consequences for high profile cases …"*[26]

59. The Attorney General referred to allegations of corruption in State enterprises such as CL Financial and Hindu Credit Union. The Attorney General also deposed that the Government realized that the original section 34 could jeopardize other credible prosecutions.

60. The Attorney-General also identified corruption probes under investigation such as *"Petrotrin World GTL", "UdeCott", "Evolving Technologies", "University of the West Indies"* and *"Trinidad and Tobago Electricity Commission"*. He deposed that those investigations dated back to 2002.

[26]Exhibit to the Affidavit of The Attorney General, Mr. Anand Ramlogan marked A.R. 7

61. In respect of State Agencies under investigation, the Attorney General stated:

> *"In the light of the dates involved … it became clear to me that there was a real possibility that if criminal prosecutions were in due course commenced in relation to any of those matters they would be affected by the application of section 34 …"*[27]

62. The Attorney General alluded to the public concern that the claimant and Mr. Galbaransingh might be released:

> *"… without trial, was a cause of great public concern in early September 2012"*[28]

63. However, the Attorney General made this distinction:

> *"That was the public's concern …"*[29]

He then proceeded to emphasize:

> *"…as Attorney-General I was also particularly concerned in relation to the impact of section 34 on a number of on-going inquiries into historical corruption …"*[30]

64. The Attorney General stoutly denied that the repeal statute was targeted at any individual case. He deposed:

[27] Affidavit of The Attorney General, Mr. Anand Ramlogan filed on 18th December, 2012 at paragraph 50.
[28] Ibid at paragraph 51
[29] Ibid
[30] Ibid

"On the contrary, we recognized the importance of approaching the mischief caused by section 34 … in a global manner …"[31]

Involvement of the Director

65. Roger Gaspard was at all material times the Director of Public Prosecutions duly appointed by the Judicial and Legal Service Commission to hold that office pursuant to section 90 of the ***Constitution***.

66. On 2nd March, 2011 he received a written invitation from the then Minister of Justice to comment on the ***Bill***. The Director provided his comments on 6th May, 2011, but deposed that he was never invited to comment on clause 34 of the ***Bill***.

67. In February 2012, the Permanent Secretary in the Ministry of Justice requested information as to the number of matters which would be caught by section 34 when proclaimed. The Director directed Mr. George Busby, Assistant Director to provide the information sought. Mr. Busby in his letter dated the 26th March, 2012 cited the provisions of clause 34 and suggested that *"one will be unable to indicate generally the number of matters to which the said section 34(3) would apply*[32].

68. The Assistant Director then proceeded to indicate that it was possible to quantify the number of matters for which committal papers had been received in respect of non-schedule 6 offences.

[31] Affidavit of The Attorney General, Mr. Anand Ramlogan filed on 18th December, 2012 at paragraph 52
[32] Letter dated 26th March, 2012 and signed by George Busby. Exhibited as R.G. 7 to the affidavit of the Director filed 10th January, 2013.

69. The information was not supplied in the letter of 26th March, 2012. However, on 22nd May, 2012 the Assistant Director again wrote to the Permanent Secretary in the Ministry of Justice in order to provide this information:

> *"... permit me to indicate that we have now been able to quantify the number of matters for which committal papers have been received ... for offences not listed in Schedule 6 that were allegedly committed more than ten (10) years ago that number as of this date stands at 47 ...*[33]

70. On 24th July, 2012 the Director participated in a meeting of the Judiciary and Justice Sector Committee. The meeting was held in the Conference Room of the Chief Justice, with the Honourable Minister of Justice, Mr. Volney, the Director and at least fifteen other public officials.

71. The Director exhibited the Minutes of this meeting. The Minutes reflected the focus of the meeting as being the implementation process for the regime created by the ***Act***. The Honourable Chief Justice enquired as to the readiness of the Police Service, the Director, the Department of Forensics and of the Legal Aid and Advisory Authority. In that meeting the Honourable Chief Justice reportedly cautioned against early proclamation of section 34. The Honourable Chief Justice is recorded as warning that *"if the proclamation date is brought forward all*

[33] Letter dated 22nd May, 2012 from George Busby to the Permanent Secretary, Ministry of Justice, exhibited as R.G. 8 to the affidavit of Roger Gaspard of 10th January, 2012.

stakeholders will be placed in a position of trying to respond to a state of urgency…"[34]

72. At paragraph 18 of the Minutes, the Honourable Minister Volney is recorded as having conceded that *"a proclamation date in September or October was not feasible*[35]*".* At paragraph 34, the Honourable Minister Volney advised that *"the proclamation date will be revised to 2nd January, 2013".*

73. The Director testified that following the meeting of July, 2013, he had no indication of the possibility of early proclamation of section 34. In fact he knew of the early proclamation after the event on 31st August, 2013.

74. On 6th September, 2012 the Director received service of an application by Amrith Maharaj for relief under section 34. On the following day, on 7th September, 2012 the Piarco proceedings were listed before her Worship Ejenny Espinet. On this occasion, the Director requested an adjournment to consider how the Piarco 2 cases might progress in the light of section 34.

75. On 10th September, 2012 the Director wrote to the Attorney General principally for the purpose of providing information as to the Piarco 2 prosecutions. The Director ended his letter by inviting the Attorney General to consider either the retroactive repeal of section 34 or the proclamation of section 27(4) of the ***Act*** or the amendment of Schedule 6 to

[34] Exhibit R.G. 9 to the affidavit of Roger Gaspard filed 10th January, 2013.
[35] Ibid.

include the type of offences in Piarco 1 and 2. The Director suggested as well that Schedule 6 should be amended to include other serious offences of *"sedition terrorism piracy and Larceny and Forgery Act Offences" ...*[36]

76. The Director again wrote to the Attorney General on 11th September, 2011. In this letter he reminded the Attorney General of discussions which had taken place that day pertaining to the Attorney General's intention to repeal section 34. The Director expressed this view:

> *"...to be effective any such amendment or repeal should expressly declare that it is of retrospective effect ...*[37]*"*

77. The Director also issued a Press Release[38]. At paragraph 17 of his affidavit[39] he stated the purpose of the Press Release.

> *"To lay before the public the history of section 34 and my office's lack of input into this matter, I issued an eight (8) page Press Release ... in relation to the Piarco Airport Proceedings ...."*

78. In his Press Release the Director addressed the gravity of the Piarco matters and the effect of section 34 on the Piarco matters.

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[36] Letter 10th September, 2012 from the Director to the Attorney General exhibited as R.G. 10 to the affidavit of Roger Gaspard filed on 10th January, 2013.
[37] Letter dated 11th September, 2012 from the Director to the Attorney General exhibited as R.G. 11.
[38] The Press Release of the Director on 11th September, 2013 exhibited as R.G. 12.
[39] Affidavit of Roger Gaspard filed on 10th January, 2013

79. He sought to inform the public that he had not been consulted on section 34 and noted that offences such as sedition, terrorism, piracy and money laundering were not excluded from the operation of the section.

80. The Director informed the public of his approach to the Attorney General and to the Attorney General's stated intention to reconvene Parliament with a view to repealing the intended section. He expressed the view that the state of affairs which obtained under the section 34 regime *"could not be allowed to remain extant"*[40].

81. The Director ended his release by stating:

> *"Hopefully the situation can still be retrieved and the ramparts of the state's right to prosecute these matters remain intact as they properly should".*[41]

82. The Director set out his views on the draft bill in a letter[42] dated 13th September, 2013 and addressed to the Attorney General. The letter came to the Attorney General's attention after the repeal Bill had been passed.

83. The Director swore a second affidavit on 18th January, 2013 which was also filed on the same day. By this affidavit, the Director sought to answer queries made in an unexhibited letter from Mr. Robin Otway, learned instructing attorney for the claimant. In answer to

[40] The Press Release of the Director on 11th September, 2013 exhibited as R.G. 12.
[41] Ibid
[42] Letter dated 13th September, 2012 from the Director to the Attorney General exhibited as *R.G.* 14 to the Affidavit of Roger Gaspard filed on 10th January, 2013

these queries, the Director annexed a list in tabular form under the caption *"Matters affected by the Proclamation of section 34."* Eleven (11) matters appear in the first row of the table. These have been identified by the Director as pertaining to the Piarco prosecutions.

84. Additionally, there were thirty-five matters which were not related to the Piarco prosecutions.

SUBMISSIONS

Mr. Fitzgerald, Q.C.

85. Mr. Fitzgerald, learned Queen Counsel for the claimant, Steve Ferguson argued that the pre-repealed section 34 conferred on the claimant the right not to be put on trial. Mr. Fitzgerald submitted that the claimant's right crystallized and became vested in him upon proclamation by the President.

86. It was the argument of learned Q.C. Mr. Fitzgerald that the claimant had acquired a legitimate expectation that he would not be tried for historic offences. That legitimate expectation arose, in his submission, from the public and unequivocal terms in which the right not to be put on trial was created by the enactment and proclamation of section 34. In the Learned Q.C.'s submission, the legitimate expectation also arose by the public statements of the former Minister of Justice.

87. Mr. Fitzgerald argued that the legitimate expectation of the claimant was protected both under the Constitution and at common law. In making his submissions, he relied on the authorities of ***Paponette v Attorney General***[43] and ***R v. Secretary of State for Home Affairs ex parte Pierson***[44]. Mr. Fitzgerald argued that the ***Amendment Act*** was invalid by virtue of its breach of the doctrine of separation of powers. In his submission, section 5 of the repeal statute was invalid because it was retrospective, *ad hominem* and interfered with the exercise of judicial power.

88. Section 6 of the Amendment Act, in the submission of Mr. Fitzgerald was invalid because it targeted pending proceedings and impermissibly sought to dictate to the court how to deal with pending applications.

89. In respect of section 7, learned Queen Counsel contended that this section was invalid because it sought to remove vested rights and to oust the jurisdiction of the court to decide on the viability of accrued privileges and expectations.

90. Citing the decision of the Privy Council in ***Thomas and Baptiste v Attorney General***[45], Mr. Fitzgerald contended that it was contrary to the protection of the law for either the executive or the legislative to interfere in the judicial process.

91. Mr. Fitzgerald argued that as a matter of principle, the court will not permit the initiation or continuation of a prosecution in breach of a promise by a representative of the state.

[43] (2011) 2 WLR 219
[44] (1998) A.C.539
[45] [2000] 2 A.C. 1

92. Learned Q.C. argued that section 7 of the repeal statute was both wide and vague and relying on the case of ***Raymond v Honey***[46] learned Q.C. invited the court to adopt a narrow, interpretative approach to section 7 of the repeal statute.

The Honourable Michael Beloff , Q.C.

93. Learned Q.C. Mr. Fitzgerald adopted the submissions of learned Q.C. Mr. Beloff, who argued in support of the claim of the three companies, Maritime Life (Caribbean) Limited, Maritime General Insurance Company Limited and Fidelity Finance and Leasing Company Limited[47].

94. Mr. Beloff relied on the arguments advanced in the Skeleton Arguments filed on behalf of the three companies on 8th January, 2013 and Reply Skeleton Arguments filed on 21st January, 2013. These arguments were supplemented by the learned Queens Counsel's oral submissions before this Court.

95. Learned Queen's Counsel identified the following five (5) main arguments in support of his submission on behalf of the three companies that the Amendment Act is void:

(i) The Amendment Act violates the principle of separation of powers because (a) section 5 involves *ad hominem* and retrospective legislation that interferes with the exercise of judicial power and removes vested legal rights; (b) section 6 targets identifiable proceedings already before the courts, which were brought by

[46] [1983] 2 AC 1
[47] CV 2012-04206

identifiable persons and also improperly sought to direct the court as to how to treat such proceedings pending; and (c) section 7 removed vested rights and ousts the court's jurisdiction to decide for itself whether any rights, privileges or expectations have been accrued by virtue of the proclamation and the consequent coming into force of section 34.

(ii) The Amendment Act represents interference by the legislature with matters that were pending before the Court in respect of which the State is also a party.

(iii) The Amendment Act is unconstitutional and constitutes an abuse of process because its enactment resulted in a breach of an undertaking given by the statute as well as official statements, that the proceedings against the three companies would be terminated. In other words, Mr. Beloff's argument is that once a defendant has been expressly or implicitly told that the proceedings against him will not proceed to trial, it is contrary to principle for Parliament to legislate to reverse that legitimate expectation. This is particularly so, he contends, when as in the instant case, the expectation created has been acted upon.

Mr. Beloff disagreed with the AG's and the Director's submissions that the Claimant enjoyed nothing more than a temporary procedural right. It is inadequate, he contends, to describe what the companies expected to enjoy as merely a procedural right. In his submission, Immunity from trial is not merely procedural in nature because, for natural persons, their liberty, for legal persons

such as the three companies their property and for both, their reputations are all potentially threatened by exposure to trial.

(iv) The ***Amendment Act*** is unconstitutional and an impermissible response to popular pressure that the three companies and the other applicants, should stand trial.

(v) The repeal of section 34 is not reasonably justifiable in a society that has a proper respect for the rights and freedoms of the individual.

96. Mr. Beloff supplemented his written submissions by his address to the Court on 29th – 30th January, 2013. During the course of his address Mr. Beloff made extensive reference to the affidavits of the Honourable Attorney General and of the Director, in support of his contention that the repeal of section 34 was triggered by a public furore which followed the Presidential proclamation of the section on 28th August, 2012.

97. The learned Q.C. relied as well on the address of the Honourable Attorney General to Parliament on 12th September, 2012 to demonstrate that the Piarco cases were the focus of the ***Amendment Act***.

Ms. Chote, SC, who appeared for Ameer Edoo

98. Learned Queens Counsel, Mr. Fitzgerald relied as well on the arguments of Ms. Chote, learned Senior Counsel for the claimant, Ameer Edoo. Ms. Chote argued that even if the Court were to find that the ***Amendment Act*** was valid and constitutional, the criminal proceedings against the claimant ought to be stayed indefinitely on the ground that the claimant's continued prosecution would amount to an abuse of process at common law.

99. Ms. Chote contended that the Director lacked the power to step outside of the functions identified in ***Sharma v Browne Antoine and Others***[48] that is to say, those defined by section 90 of the ***Constitution*** as well as by the UK ***Code for Prosecutors***.

100. It was the submission of learned Senior Counsel that the actions of the Director effectively amounted to an interference with proceedings to which he was also a party. Citing the case of ***Connelly v The Director of Public Prosecutions***[49], learned Senior suggested that the prosecution manipulated or misused the process of the Court so as to deprive the defendant of a protection provided by the law or to take unfair advantage of a technicality.

101. According to Ms. Chote, the Director was well aware of the claimant's application under section 34 following its proclamation, but did nothing to suggest that the claimant was not entitled to the relief sought. Instead, he conducted "*behind the scenes*" communications with the Attorney General to change the law so that the claimant would be deprived of the relief which he became entitled to by virtue of section 34. For the reasons advanced, learned Senior contended that the proceedings against the claimants should be permanently stayed.

[48] (2006) UKPC 57
[49] [1964] AC 1254

Mr. Benjamin for the Director of Public Prosecutions

102. In addition to his carefully crafted written submissions in answer to the claimant's submissions on the main issues of separation of powers , legitimate expectation and due process, Mr. Benjamin devoted the greater part of his oral address to defending the actions of the Director.

103. In his *viva voce* submission on 31st January, 2013 learned Counsel referred to the decision on ***Sharma v. Antoine***[50] and formulated these seven (7) propositions against which the Court was invited to assess the conduct of the Director :

(i) The Director is required to exercise independent judgment unaffected by political pressure.

(ii) The Director is required to exercise independent judgment unswayed by public opinion.

(iii) The Director is required to maintain public confidence in the administration of criminal justice.

(iv) The Director is required and is empowered to exercise a wide discretion having regard to both public policy and the public interest in so far as they impact and impinge upon the administration of criminal justice.

(v) The Director as appointee of the Judicial and Legal Service Commission, occupying an independent office does not have any legislative, judicial or in the narrow sense executive functions. He is independent. He has no power over any arm of the three arms of Government. His proper constitutional role is to advise and counsel.

[50] [2007] 1 WLR 780

(vi) The Director has a discretion about the advice that he must carefully and independently consider as to content, fairness timing of any proposed changes to both procedural and substantive law which govern and impact upon the administration of criminal justice.

(vii) The Director has a discretion concerning the advice and the steps that either he takes personally or direct his subordinates to take in connection with the commencement, continuation or termination of criminal proceedings.

104. Learned Counsel submitted that there was no basis in law nor was there any evidential basis upon which the conduct of the Director, in relation to the Amendment Act, could be impugned. Accordingly he submitted that the Director's conduct was entirely proper and in accordance with the rule of law and his overriding obligation to support the proper administration of criminal justice.

105. Mr. Benjamin pointed out that the Court was not directed to any piece of evidence to support the claimant's submission that there was a direction from the Director to the legislature. None of the Director's actions, Mr. Benjamin strongly submitted, could sensibly be described as an interference with the legislative process or as a manipulation of the judicial process.

106. Mr. Benjamin went on further to submit, however, that even if the Court finds that the Director's actions amounted to an interference, it would not amount to an infringement of the Claimant's constitutional rights.

107. Mr. Benjamin maintained that the Director has a responsibility to consider and advise in relation to legislation as it affects and impacts upon the administration of justice. The Director's powers as contained in section 90 of the Constitution, Counsel submitted, cannot be a basis for disabling him from providing his advice and recommendation as and when they are asked for and as or when, *ex proprio motu,* he thinks it is appropriate to do so.

108. Learned Counsel, Mr. Benjamin made submissions as to the proper meaning of the concept of due process of law and drew the Court's attention to the judgment of the Honourable Justice of Appeal Kangaloo in ***Ferguson and Galbaransingh v Attorney General***[51]. In that decision, Justice of Appeal Kangaloo considered the competing interpretations of the concept of due process as expounded on the one hand by Lord Millett in ***Thomas and Another v Cipriani Baptiste and Others***[52] and on the other by Lord Hoffman in ***The State v Brad Boyce***[53]**.**

Lord Pannick for the Defendant Attorney General

109. Lord Pannick identified the following eight (8) issues as those arising for the Court's consideration in this claim:

(i) Separation of Powers

(ii) The Unwritten Principle of the Rule of Law

(iii) Constitutional Right to Due Process

(iv) Legitimate Expectations

[51] Civ. Appeal No. 185 of 2010
[52] [2000] 2 AC 1
[53] [2006] UKPC 1

(v) Populist Pressure

(vi) Parliamentary Process and the conduct of the Director

(vii) Abuse of Process

(viii) Relevance of the Hansard material and correspondence

110. Opening his submissions by reference to the presumption of constitutionality of parliamentary enactments Lord Pannick emphasized a second principle, that is to say, that Courts are "*not concerned with the propriety and the expediency of the Legislation, but only with its constitutionality*." This principle was enunciated by Lord Bingham in ***Suratt v Attorney General***[54]

111. In answer to submissions on the doctrine of the separation of powers, Lord Pannick accepted that an Act in breach of the principle of separation of powers could not be protected by a special parliamentary majority pursuant to section 13. It was, however, the argument of learned Queens Counsel that there was no breach of the principle of the separation of powers by the enactment of the ***Amendment Act***. Lord Pannick distinguished ***Liyanage v R***[55] and argued that there are four linked reasons why the Amendment Act does not violate the separation of powers principle :

(a) The Amendment Act is not *ad hominem* but applies generally to all cases. It is, he argued, general in terms and effect and not confined to the Piarco defendants. Learned Queens Counsel also relied on the cases of ***Nicholas v The Queen***[56],

[54] [2007] UKPC 55
[55] [1967] 1 AC 259
[56] (1998) 193 CLR 173

Ridgeway v R[57], ***Liyanage v R***[58], ***Zuniga and Ors. v The Attorney General of Belize***[59].

(b) Retrospective legislation is not of itself a breach of separation of powers. Lord Pannick submitted, relying on the ***Polyukhovich v The Commonwealth of Australia***[60] case, that so long as the legislature does not tell the court who is guilty or innocent retrospective criminal law is consistent with the separation of powers doctrine. See also ***British Columbia v Imperial Tobacco Canada Ltd***[61].

(c) There is no general principle that the separation of powers principle is breached by legislation that removes or affects rights in pending legal proceedings even if criminal.

(d) Whether legislation breaches the separation of powers principle by addressing or removing rights in pending proceedings depends on the circumstances. In fact in this circumstance the removal of section 34 facilitates the functioning of the court to adjudicate on the criminal cases. See ***Polyukovich***[62]***, Nicholas***[63]***, Australian Building Construction Employees' & Builders Labourers' Federation v Commonwealth***[64]***, Chu Kheng Lim v Minister for Immigration***[65]**.** Lord Pannick also submitted that the ***U.S. v Klein***[66] relied on by the claimants has been distinguished in more recent authorities. See for example ***Miller v French***[67]**.** In

[57] (1995) 184 CLR 19
[58] *Supra*
[59] Civil Appeal Nos. 7, 9 & 10 of 2011, 3 August 2012
[60] (1991) 172 CLR 501
[61] [2005] 2 SCR 473
[62] *Supra*
[63] *Supra*
[64] (1986) 161 CLR 88
[65] (1992) 176 CLR 1
[66] 80 US (13 Wall) 128
[67] 530 US 327 (2000)

addition the case of ***Buckley and Others v The Attorney General***[68] relied on by the claimant is a 1947 case, decided long before the more modern law on separation of powers.

112. Whereas Lord Pannick made extensive submissions in answer to the remaining issues, it was his submission that these were, in the final analysis, irrelevant. Should the Court accept that there had been a breach of the doctrine of separation of powers, the claimant would not need to rely on the remaining issues. Conversely, should the Court accept the defendant's submission on the issue of the separation of powers, any challenges as to the remaining issues would be resolved by the conjoint effect of section 13 of the ***Constitution*** and the majority with which the Amendment Act had been passed.

LAW

Presumption of Constitutionality

113. The presumption of constitutionality of Acts of Parliament is a cardinal principle, which has been applied by Courts of the highest authority. This principle, was re-affirmed by their Lordships at the Judicial Committee of the Privy Council in ***Surratt v Attorney General of Trinidad and Tobago***[69], where Baroness Hale of Richmond stated at paragraph 45 of her judgment:

> *"It is a strong thing indeed to rule that legislation passed by a democratic Parliament … is unconstitutional.*

[68] 1951 1 IRC 67
[69] [2007] UKPC 55

The constitutionality of a parliamentary enactment is presumed unless it is shown to be unconstitutional and the burden on a party seeking to prove invalidity is a heavy one …"

114. In stating the principle, Baroness Hale referred to ***Grant v R***[70] which was also a decision of the Judicial Committee, where their Lordships heard an appeal from the Court of Appeal of Jamaica. In the course of considering whether section 31 D of the ***Evidence Act*** was inconsistent with section 20 of the Jamaican Constitution, Lord Bingham stated the principle in this way:

"It is first of all clear that the constitutionality of a parliamentary enactment is presumed unless it is shown to be unconstitutional and the burden on a party seeking to prove invalidity is a heavy one: ***Mootoo v A.G. of Trinidad and Tobago [1979] 1WLR 1334"***[71]

115. See too paragraph 11 of ***Ferguson and Galbaransingh v. Attorney General***[72] where Justice of Appeal Kangaloo formulated the rule in this way:

"The starting point in all judicial deliberations of this nature is the fundamental principle that the constitutionality of a parliamentary enactment is to be presumed unless the contrary is shown."[73]

[70] [2007] 1 AC 1
[71] [2007] 1 AC 1 Page 12
[72] Civ. App. 185 of 2010
[73] Civ. App. 185 of 2010 at paragraph 11

116. Equally entrenched is the principle that the Court is the ultimate arbiter of the constitutionality of an Act of Parliament. This principle was confirmed by Justice of Appeal Kangaloo at paragraph 15 of ***Ferguson and Galbaransingh,*** in these words:

> "*Be that as it may it ultimately falls to the court to decide the challenged legislation infringes constitutional rights set out in sections 4 and 5. The courts are the guardians of the Constitution and the rule of law and cannot by virtue of the Constitution itself, yield this jurisdiction to any other arm of the State. It therefore follows in my view that where the section 13 procedure is used and an Act is passed with a special majority, it does not automatically mean that the legislation infringes constitutional rights. It is the view of Parliament that it does, however the courts must engage in their own deliberation on this issue. The court starts on the basis that Parliament was of the view that the provisions of the legislation were inconsistent with section 4 and 5 and therefore required a special majority. The Court can rationally come to the conclusion that the provisions did not so infringe and no special majority was necessary. This is hardly ever likely to happen in practice, but the point remains that it is always for the courts to determine whether the provisions of an Act are inconsistent with s.4 and s.5 to such an extent or degree or to use the words of Lord Diplock in Hinds "are of such a character," that the legislation is therefore declared unconstitutional."*[74]

[74] Civ. App. 185 of 2010 at paragraph 15

The Separation of Powers: General Principle

Don John Francis Liyanage v R[75]

117. Any discussion as to the separation of powers in the context of Westminster Model constitutions must begin with ***Liyanage***, the facts of which are set out below.

118. An abortive Coup d'etat took place in Ceylon on 27th January, 1962. The appellants were sentenced to ten years rigorous imprisonment and forfeiture of all their property. The appellants who had been convicted under the ***Criminal Law Special Provision Act No. 1 of 1962*** appealed their convictions sharing a common ground that the convictions should be quashed owing to the invalidity of the 1962 Act.

119. Prior to the enactment under consideration, a White Paper had been prepared by the Government of Ceylon. The White Paper set out the names of thirty alleged conspirators. The White Paper ended by observing that *"... a deterrent punishment of a severe character"* should be imposed.

120. On 16th March, 1962, the Parliament of Ceylon passed the ***Criminal Law (Special Provisions Act)*** No 1 of 1962. Lord Pearce in his judgment wrote:

> *"that it was directed towards participants in the coup is clear*[76]*"*

[75] [1967] 1 A.C. 259
[76] [1967] 1 A.C. 259 at 278

121. The Act of March 1962 was also given retrospective force, in that, it was deemed to come into force on 1st January, 1962. Section 19 of the March 1962 Act limited its application to the participants in the coup by providing:

> *"... the provisions of Part 1 ... shall be limited in its application to any offence against the state alleged to have been committed on or about 27th January, 1962 ...".*

122. Part I legalised the detention of the alleged perpetrators of the coup, while Part II of the March 1962 Act altered the mode of trial as specified in the Criminal Procedure Code. Under the March 1962 Act, the Minister was empowered to direct that persons be tried by three Judges without a jury, the three Judges to be nominated by the Minister[77]. This statute was considered by the very three Judges nominated by the Minister. They concluded that the power of nomination in the Minister was an interference with the judicial power of the State. They declared section 9 of the March 1962 Act to be *ultra vires.*

123. There was no appeal against the declaration of invalidity. Parliament however, passed an amendment Act No. 31 of 1962. The Amendment Act retrospectively allowed arrests without a warrant for the offence of waging war against the Queen[78] and altered the penalty for waging war against the Queen by inserting a minimum punishment of not less than ten years imprisonment.

[77] See [1967] 1 A.C. 259 at p279.
[78] [1967] 1 A.C. 259 at 279 E

124. The Amended Act provided retrospectively for the alteration of the penalty for conspiring to wage war against the Queen by inserting a minimum punishment of ten years imprisonment and forfeiture of all property. It also included a new offence ex post facto[79].

125. The appellants were tried by three judges nominated by the Chief Justice. In April, 1965, the appellants were convicted and sentenced. The appellants advanced three main arguments as to the unconstitutionality of the Act. The second and third arguments found favour with their Lordships. At page 287 D-E, Lord Pearce had this to say:

> *"The Constitution is significantly divided into parts: Part 2: The Governor General, Part 3: The Legislature … and Part 6 the Judicature …although no express mention is made of vesting in the judicature the judicial power which it already had … there is provision under Part 6 for the appointment of judges by a Judicial Service Commission …*

126. At page 287 G, Lord Pearce continued:

> *"These provisions manifest an intention to secure in the judiciary a freedom from political, legislative and executive control. They are wholly appropriate in a Constitution which intends that judicial power shall be vested only in the judicature …*
>
> *The constitution's silence as to the vesting of judicial power is consistent with its remaining where it had lain for more than a century in the hands of the*

[79] [1967] 1 A.C. 259 at 280 D

judicature … It is not consistent with any intention that henceforth it should pass to or be shared by the executive or the legislative …"

127. Lord Pearce considered whether the Act of 1962 usurped or infringed the judicial power and at page 289D-E, made the following observation:

"It goes without saying that the legislature may legislate for the generality of its subjects by the citation of crimes and penalties or by enacting the rules relating to evidence. But the Acts of 1962 had no such general intention. They were clearly aimed at particular known individuals who had been named in the White Paper and were in prison awaiting their fate[80].

128. At page 289 F, Lord Pearce considered the legislation before the Board and had this to say:

"That the alterations in the law were not intended for the generality of the citizens or designed as any improvement of the general law is shown by the fact that the effect of those alterations was to be limited to the participants in the January coup and that after these had been dealt with by the judges the law should revert to its normal state[81].

129. Lord Pearce then issued this caveat at page 289G:

" …their Lordships are not prepared to hold that very enactment in this field which can be described as ad hominem and ex post facto must inevitably

[80] [1967] A.C. 25G at 289E.
[81] [1967] A.C. 259 at 289G.

usurp or infringe the judicial power … nor do they find it necessary to attempt the impossible task of tracing where the line is to be drawn between what will and what will not constitute such an interference. Each case must be decided in the light of its own facts and circumstances including the true purpose of the legislation, the situation to which it was directed, the existence… of a common design and the extent to which the legislation affects, by way of direction or restriction, the discretion or judgment of the judiciary in specific proceedings."[82]

130. Lord Pearce then concluded:

"It is therefore necessary to consider more closely the nature of the legislation challenged in this appeal[83]*".*

131. At page 290E Lord Pearce endorsed the summary formulated by Mr. Gratiaen. Mr. Gratiaen's summary was outlined in this way:

"Mr. Gratiaen succinctly summarises his attack on the Acts in question as follows. The Act was wholly bad in that it was a special direction to the judiciary as to trial of particular prisoners who were identifiable (in view of the White Paper) and charged with particular offences on a particular occasion. The pith and substance of both Acts was a legislative plan ex post

[82] [1967] A.C. 259 at 290 A
[83] Ibid.

facto to secure the conviction and enhance the punishment of those individuals.[84]

132. Lord Pearce continued with the outline of Mr. Gratiens' summary:

"It legalized their imprisonment while they were awaiting trial. It made admissible their statements inadmissibly obtained. It altered the fundamental law of evidence so as to facilitate their conviction. And finally, it altered ex post facto the punishment to be imposed on them …[85]

133. Lord Pearce reiterated his earlier indications:

"… legislation ad hominem which is thus directed to the course of particular proceedings may not always amount to an interference with the functions of the judiciary"

134. Of the statute before the Board, Lord Pearce had this to say:

"But in the present case, their Lordships have no doubt that there was such interference; that it was not only the likely but the intended effect of the impugned enactments; and that it is fatal to their validity …"[86]

135. Of the impugned legislation Lord Pearce said:

"The true nature and purpose of these enactments are revealed by their conjoint impact on the specific proceedings in respect of which they were

[84] [1967] A.C. 259 at 290 C
[85] *Ibid* at 290D
[86] [1967] A.C. 259 at 290 E.

designed, and they take their colour, in particular, from the alterations they purported to make as their ultimate objective, the punishment of those convicted[87].

136. In conclusion, Lord Pearce envisioned the erosion of judicial power if the Acts before him were valid. He had this to say:

"If such Acts as these were valid, the judicial power could be wholly absorbed by the legislative and taken out of the hands of judges ... what is done once, if it be allowed, may be done again and in a lesser crisis and less serious circumstances. And thus judicial power may be eroded such an erosion is contrary to the clear intention of the Constitution[88].

Kenilorea v The Attorney General[89]

137. The case of ***Kenilorea*** was a decision of the Court of Appeal of the Solomon Islands in which the National Parliament had, in March 1982, passed the ***Price Control Act*** of 1982. Although the ***Price Control Act*** had never been brought into force, orders were made under the Act controlling the retail and wholesale price of butane gas. Companies which were affected by the Orders brought proceedings against the Attorney General seeking a declaration as to the invalidity of Orders made under the Act, on the ground that the Act had never been brought into force.

[87] Ibid at 291 D.
[88] [1967] A.C. 259 at 292A.
[89] [1984] SILR 179.

138. While proceedings were still pending, the National Parliament passed a second Act: the ***Price Control (Retrospective Operation and Validation) Act of 1983.*** The effect of the 1983 Act was to validate retrospectively Orders which had been made under the 1982 Act, prior to its entry into force. The impugned sections of the 1983 Act were sections 4 and 5.

139. The terms of sections 4 and 5 of the Price Control (Retrospective Operation & Validation) Act 1983 are set out below for the purpose of comparing the impugned sections with those that presently occupy the Court's attention.

140. Section 4 provided as follows:

> *"The principal Act is hereby amended by inserting immediately after section10 the following section as from 26th March, 1982-*
>
> *11. The validity or operation of an order made under sections 4 or 6 shall not be affected by non-compliance ... of provisions contained in section 3(2) or section 4(5) or section 10(3) nor the validity or operation of any such order shall be called in question by or before any court ... merely on the grounds of the non-compliance or inadequate compliance with any such provision ...*[90]*"*

141. The impugned section 5 was more extensive providing at section 5(C):

> "*No court shall entertain any legal proceedings-:*
>
> *(a) questioning the validity and continued operation of any action; or*

[90] [1984] SILR 179 at page 3 set out in the decision of Connolly J.A.

(b) claiming any compensation for loss … founded on any action, and its continued operation merely on the ground that when the action was taken the principal Act had not come into operation"[91]

142. Section 5(d) contained an express direction to the Court in the following terms:

"(d) where any impugned legal proceedings instituted on any such ground … be pending in any court … the court shall exercise its jurisdiction … by deciding that impugned legal proceedings …

a. by upholding the validity of the action and of its continued operation; or

b. by rejecting the claim for compensation founded on that action …

on the ground that the principal Act was validly and effectively in operation and continued to be in such operation on the date of the action on the ground that the non-compliance ... with any directory provision has not affected the validity or continued operation of the action"

143. Connolly J.A. at page 7 of the report referred to the decision of the Judicial Committee of the Privy Council in ***Liyanage v the Queen***[92]. Noting that the Constitution of Ceylon contains provisions similar to those of Solomon Islands, Connolly J.A. made the following statement of principle,

[91] [1984] SILR 179 at page 4.
[92] Supra

"*… the Constitution of Solomon Islands does indeed provide for a separation of powers and that the separate power in the judicature under the Constitution cannot be usurped or infringed either by the executive or the legislature. Under the Constitution as it stands the judicial power cannot be absorbed by " … the legislature and taken out of the hands of the judges. It is the duty of this court to ensure that there is not erosion of the judicial power without the machinery of the amendment of the Constitution being employed …"*

144. Connolly J.A. quoted the evergreen pronouncement of Lord Diplock in ***Hinds v R***[93]:

"The new constitutions … were evolutionary not revolutionary. They provided for continuity of government through successor institutions legislature, executive and judicial of which members were to be selected in a different way …"

145. Connolly J.A.'s quotation from ***Hinds***[94] continued:

"What however is implicit in the very structure of the constitution on the Westminster Model is that judicial power, however it is to be distributed from time to time between various courts is to continue to be vested in persons appointed to hold judicial office in the manner and on the terms laid down in the chapter dealing with the judicature even though this is not expressly stated in the constitution …"

[93] [1976] 1 All ER 353
[94] Ibid

146. In applying the principles enunciated by Lord Pearce in ***Liyanage***[95], Connolly J.A. restated the principle in this way:

> *"It is when the legislation ceases to be of a general character and is directed to a particular person and even more so when it is founded on past acts that the difficult question arises whether the line between the legislative and the judicial power has been transgressed.*[96]

147. Connolly J.A. issued this caveat:

> *"... it is not every enactment which can be described as ad hominem and ex post facto which will infringe and usurp the judicial power. Instances of legislation which is plainly beyond the power of the legislature are given by Lord Pearce and they include the passing of an Act of attainder against some person or legislation which instructs a Judge to bring a verdict of guilty against someone who is being tried ...*[97]

148. Connolly J.A. continued:

> "*What is clear however is that legislation which is not passed for the generality of the citizens but which is clearly aimed at known individuals, the alterations in the law not being intended for the generality of the citizens or designed as any improvement of general law... and directed at a particular*

[95] Supra
[96] [1984] SILR 179 at page 8
[97] Ibid

pending litigation and to have no effect once that litigation is terminated will amount to such transgression …"

149. Connolly J.A. concluded at length that each case must be decided in the light of its own facts and circumstances. By his judgment such circumstances included:

" the true purpose of the legislation the situation to which it was directed and the extent to which the legislation affects, by way of direction or restriction the discretion or judgment of the judiciary in specific proceedings …"[98]

150. Applying the stated principles to the impugned legislation Connolly J.A. held that paragraphs (d) and (e) of section 5 in terms direct the High Court as to the manner in which it should deal with pending litigation. Connolly J.A. observed as well that the impugned sections:

"…forbid the court to execute its own judgment"[99].

151. Then echoing the sentiments of Lord Pearce in ***Liyanage***, Connolly presaged:

"… if such provisions as these were valid the judicial power could be wholly absorbed by the legislature and taken out of the hands of Judges".

[98] Supra
[99] Supra at page 9.

152. In conclusion, Connolly J.A. granted a declaration that paragraphs (d) and (e) of section 5 of the ***Price Control (Retrospective Operation and Validation) Act*** were beyond the power of the National Parliament and therefore invalid.

153. The other two Justices of Appeal, Justices White and Pratt both agreed with the decision of Justice of Appeal Connolly. The judgment of Pratt J.A. was significant in his concluding paragraph where the learned Justice of Appeal had this to say at page 12:

> *"The legislature has deprived the Court entirely of discretion and has simply directed the Judge as if he were some clerk applying a rubber to some form of Court order ..."*

State of Mauritius v Khoyratty[100]

154. ***Khoyratty*** was a decision of the Judicial Committee of the Privy Council and was relied upon by the claimants in these proceedings as authority for the proposition that the term "*sovereign democratic state*" has substantive content and significance, which includes the doctrine of the separation of powers between the executive, the legislature and the judiciary.

155. The respondent, Abdool Rachid Khoyratty, had been charged with an offence listed under section 32 of the ***Dangerous Drugs Act, 2000*** as one in respect of which the accused would not be entitled to bail until the final determination of proceedings against them.

[100] The State of Mauritius v Khoyratty [2007] 1 AC 80

156. Having been denied bail, Khoyratty mounted a constitutional challenge not only against the ***Dangerous Drugs Act*** 2000 which identified the offences for which bail would be excluded, but also against the ***Constitution of Mauritius (Amendment) Act of 1994*** which paved the way for the Act of 2000.

157. The ***Constitution of Mauritius (Amendment) Act*** 1994 purported to amend constitutional provisions for bail at section 5 of the Constitution. The 1994 Act was passed with a three-quarters majority, which was the requisite majority for an amendment to section 5.

158. Notwithstanding the special majority with which section 5 was amended, the critical question, in the words of Lord Rodger of Earlsferry, was whether:

> *"…by purporting to insert section 5(3A)…into the Constitution, section 2 of the 1994 Act had in substance sought not only to amend section 5 … but also to alter the form of the democratic state guaranteed by section 1 of the Constitution …"*

159. This critical question was answered in the affirmative by their Lordships on whose judgment learned Queens Counsel for the claimant relied. Referring to learning in ***Ahnee v The Director of Public Prosecutions***[101] and ***Hinds v R***[102] Lord Steyn had this to say:

> *"While the judgment in **Ahnee's** case [1999]2 AC 294 does not afford the answer to the question under consideration it is relevant in emphasising:*

[101] Ahnee v DPP [1999] 2 AC 294
[102] Hinds v R [1977] AC 195

a. that Mauritius is a democratic state based on the rule of law.

b. that the principle of separation of powers is entrenched.

c. that one branch of government may not trespass on the province of any other in conflict with the principle of separation of powers"[103]

160. At paragraph 12 of his judgment, Lord Steyn identified a number of concepts involved in the idea of democracy. The learned Law Lord formulated them in this way:

"The first is that people should decide who should govern them. Secondly there is the principle that fundamental rights should be protected by an impartial and independent judiciary. Thirdly in order to achieve a reconciliation between the inevitable tensions between these ideas, a separation of powers between the executive the legislature and the judiciary is necessary ..."[104]

161. In the course of his judgment, Lord Steyn, quoted from his own judgment in ***R (Anderson) v Secretary of State for the Home Department***[105]:

"In R v Trade Practices Tribunal, Exp. Tasmanian Breweries Party Ltd (1970) 123 CLR Windeyer J explained the difficulty of defining the judicial function as follows: "The concept seems to me to defy perhaps it were better to say transcend purely ... abstract conceptual analysis. It inevitably attracts

[103] The State of Mauritius v Khoyratty [2007] 1 AC 80 at 91
[104] The State of Mauritius v Khoyratty [2007] 1 AC 80 at 91 H
[105] [2002] UKHL 46

consideration of predominant characteristics and also invites comparison with historic functions and processes of courts of law"[106]

162. In respect of the observation of Windeyer J Lord Steyn commented as follows:

"Nevertheless, it has long been settled in Australia that the power to determine responsibility for crime and punishment for its commission is a function which belongs exclusively to the courts. It has been said that the selection of punishment is an integral part of the administration of justice and as such cannot be committed to the hands of the executive …"[107]

163. Lord Steyn referred to and quoted Lord Bingham in ***A v Secretary of State for the Home Department***[108]:

"… the function of independent judges charged to interpret and apply the law is universally recognized as a cardinal feature of the modern democratic state, a cornerstone of the rule of law itself."[109]

164. Lord Steyn noted that the quoted decisions, while not conclusive of the issue before their Lordships:

"*gave important colour to the words of section 1 of the Constitution that Mauritius shall be a democratic state …"*[110]

[106] The State of Mauritius v Khoyratty [2007] 1 AC 80 at 92 D-F
[107] Ibid at 92 E
[108] [2005] 2 AC 68
[109] The State of Mauritius v Khoyratty [2007] 1 AC 80 at 92-93
[110] Ibid at 93 B

165. At paragraph 15 of his judgment, Lord Steyn underscored the importance of the provision that "*Mauritius shall be ... a democratic state*". His Lordship emphasized that this provision was more than a mere preamble or a guide to interpretation. Lord Steyn had this to say:

> *"In this respect it is to be distinguished from many other constitutional provisions. It is of first importance that the provision that Mauritius shall be a democratic state is an operative and binding provision. It's very subject matter and place at the very beginning of the Constitution underlies its importance ..."*[111]

166. Ultimately, their Lordships agreed that the ***Constitution of Mauritius Amendment Act, 1994*** which purported to amend Constitutional provisions relating to the grant of bail, in fact contravened the provision by which Mauritius was declared to be a sovereign democratic state.

167. Section 5(3A) of the Constitution as well as the ***Dangerous Drugs Act*** of 2000 were declared to be inconsistent with the Constitution and therefore void.

The Director of Public Prosecutions v Mollison[112]

168. The well-known facts of ***Mollison*** begin with the sixteen year old respondent, who had been convicted of murder and sentenced to be detained pursuant to section 29 of the ***Juveniles Act, 1951*** at the pleasure of the Governor General.

[111] The State of Mauritius v Khoyratty [2007] 1 AC 80 at 93 C
[112] [2003]2 AC 411

169. The Court of Appeal of Jamaica held that this sentence was unconstitutional. At the Judicial Committee of the Privy Council, their Lordships dismissed the appeal of the Director and held that section 29 of the Act of 1951 had infringed the principle of separation of powers by conferring on the Governor General, as an officer of the executive, the power to determine an offender's punishment.

170. Citing the decision of the House of Lords in ***R (Anderson) v Secretary of State***[113], Lord Bingham of Cornhill commented as follows on the exercise of determining the length of an offender's detention:

> *"It is clear that such determination is for all legal and practical purposes a sentencing exercise."*[114]

171. At page 422 of the Report, Lord Bingham noted the concession made by the Director that section 29(1) contravened rights to liberty and to trial by a fair and impartial tribunal as guaranteed by the Constitution at sections 15(1)(b) and 20(1) respectively and noted further that Mr. Fitzgerald QC for the Respondent based his primary attack not on incompatibility with specific rights but *"... on its incompatibility with the separation of judicial from executive power which was ... a fundamental principle on which the Constitution was built ..."*

172. Lord Bingham referred to ***Hinds v The Queen***[115], the water shed authority where Lord Diplock delivered the landmark exposition on the doctrine of the separation of powers and observed as follows:

[113] [2003] 1AC 837
[114] DPP v Mollison [2003] 2 AC 411 at 419 H

"It does indeed appear that the sentencing provisions under challenge in the Hinds case were lead to be unconstitutional not because of their repugnancy to any of the rights guaranteed by sections in Chapter III of the Constitution but because of their incompatibility with a principle on which the Constitution itself was held to be founded ... ."[116]

173. Lord Bingham of Cornhill then observed:

"Whatever overlap there may be under constitutions on the Westminster Model between the exercise of executive and executive powers, the separation between the exercise of judicial powers on the one hand and legislative and executive powers on the other is total or effectively so. Such separation, based on the rule of law, was recently described by Lord Steyn as "a characteristic feature of democracies .... In the opinion of the Board, Mr. Fitzgerald had made good his challenge to section 29 based on its incompatibility with the constitutional principle that judicial functions ... must be exercised by the judiciary and not by the executive."[117]

174. Lord Bingham then considered the submission of the Director that section 29 was saved as existing legislation. Quoting the learning of Lord Diplock in ***Hinds v The Queen***[118] Lord Bingham commented that the Board found this a *"puzzling passage"*.[119]

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[115] [1977] AC 195
[116] [2003] at AC 411 at 424
[117] See page 424C-D
[118] [1977] AC 195
[119] See page 425B

175. Finally holding that Lord Diplock's statement in ***Hinds v R*** at page 228 had been obiter, Lord Bingham ruled as follows:

> *"Nowhere in the Order or the Constitution is there to be found so comprehensive a saving provision which would indeed undermine the effect of section 2 of the Constitution…". (See* ***The Director of Public Prosecutions v Mollison*** *[2003] 2AC 411 at 425D). (Section 2 of the Constitution provides:*
>
> *"if any other law is inconsistent with this Constitution, this Constitution shall prevail and the other law shall, to the extent of the inconsistency be void …"*

176. The cases of ***DPP v Mollison***, ***Khoyratty v A.G***. and ***Hinds v R*** pay tribute to the principle of separation of powers and the fundamental position which it occupies in Constitutions based on the Westminster model. These authorities assert that any law which is incompatible with the principle is void even if it was existing law or if it had been enacted with a constitutionally prescribed special majority.

Ian Seepersad and Roodal Panchoo v A.G.[120]

177. The appellants, Seepersad and Roodal Panchoo, had been convicted in 1986 of the heinous murder of two elderly women. Because the appellants were minors when the crimes were committed, they were not sentenced to death, but were sentenced to be detained at the State's pleasure, pursuant to section 79 of the ***Children Act*** Ch. 46:01.

[120] [2012] UKPC 4

178. In 2003, the Appellants instituted proceedings under section 14 of the ***Constitution*** claiming that the sentences which had been imposed on them offended the constitutional principle of the separation of powers. They contended as well that the failure of the State to conduct periodic reviews of their detention infringed their fundamental rights under sections 4 and 5 of the ***Constitution***.

179. The Appellants were released from custody on 26th July, 2006. However, they continued to press their constitutional motions as well as their claims for compensation for the infringement of their constitutional rights.

180. Their claims for damages were eventually heard by their Lordships at the Judicial Committee of the Privy Council, and the unanimous decision of their Lordships was delivered by Lord Hope of Craighead.

181. In the course of his judgment, Lord Hope observed that sections 79 and 81 of the ***Children Act*** Ch. 46:01 had been considered by Mendonça J. (as he then was) in the case of ***Chuck Attin v A.G.*** (unreported H.C.A. No. 2175 of 2003. Lord Hope observed further that the judgment of Mendonça J. had followed the line of authorities commencing with ***Hinds v R.*** [1977] ***R v Secretary of State Exp. Venables*** [1998] Ac 407; ***Browne v R*** [2000] 1AC 45; ***The Director of Public Prosecutions v Mollison*** [2003] UKPC 6.

182. At paragraph 10 of his judgment, Lord Hope distilled the law which was established by the cases in this way:

> *"These cases establish the following propositions:*
>
> *1. ……..*
>
> *2. The separation of powers is a basic principle on which the Constitution of Trinidad and Tobago is founded. Parliament cannot consistently with that principle transfer from the judiciary to an executive body … a discretion to determine the severity of the punishment to be inflicted upon an offender. The system of public law under which the people for whom the Constitution was provided were already living when it took effect must be assumed to have evolved in accordance with that principle …*

183. Having considered the competing submissions, their Lordships restored the first instance decision that the appellants were entitled to damages.

***US v. Klein*[121]**

184. In the decision of the Supreme Court of the United States, the Court heard a motion by the Attorney General to remand an appeal from the Court of Claims. This was a court established in 1855 for the purpose of enabling claimants an avenue for examining and adjudicating upon their claims.

185. The facts which gave rise to this decision arose out of the American Civil War which took place between 1861 and 1865. Four Acts of Congress were passed between 1861

[121] US v Klein 80 US 128

and 1867. The Acts provided for the seizure and forfeiture of property passing between loyal and insurrectionary states (See Act of 13th July, 1861) as well as for the collection of abandoned and captured property (Act of March, 12th 1863).

186. The Act of 17th July, 1862 authorized the President to offer pardons on conditions that he saw fit on the condition that the beneficiary of the pardon took a prescribed oath. This was repealed in 1867.

187. The Supreme Court was, however, concerned with a proviso contained in the Appropriation Act of 1870. The proviso contained the following directions:

> *"No pardon or amnesty granted by the President shall be admissible in evidence on the part of any Claimant in the court of claims as evidence in support of any claim against the United Sates ...And in all cases where judgment shall have heretofore rendered in the Court of Claims in favor of any Claimant….this Court shall on appeal have no further jurisdiction of the cause and shall dismiss the same for want of jurisdiction."*[122]

188. The proviso also contained the following direction:

> *"...such pardon and acceptance shall be taken and deemed in such suit….conclusive evidence that such person did take part in and give aid and comfort to the late rebellion…….and on proof of such pardon…..the*

[122] US v Klein 80 US 128 at 129

jurisdiction of this court…..shall cease and the court shall forthwith dismiss the suit…."[123]

189. The general question was outlined by the learned Chief Justice in this way:

"*….whether or not the proviso…. contained in the appropriation act….debars the Defendant in error from recovering as administrator of V.F.Wilson (deceased) the proceeds of certain cotton….which came into the possession of agents of the Treasury Department as captured or abandoned property…..*"[124]

190. The learned Chief Justice concluded that proceeds of property which came to the possession of the government by capture or abandonment was not divested out of the original owner[125].

191. As to the effect of the proviso the learned Chief Justice had this to say:

"But the language of the proviso shows plainly that it does not intend to withhold appellate jurisdiction except as a means to an end. Its great and controlling purpose is to deny to pardons granted by the President the effect which this Court had adjudged them to have."[126]

192. The Chief Justice continued:

[123] US v Klein 80 US 128
[124] Ibid at page 136
[125] Ibid 142
[126] See page 145

"It (the proviso) provides that whenever it shall appear that any judgment of the court of claims shall have been founded on such pardons….the Supreme Court shall have no further jurisdiction of the case and shall dismiss the same for want of jurisdiction…."[127]

193. The learned Chief Justice analyzed the effect of the proviso in this way:

"The court has jurisdiction of the cause to a given point but when it ascertains that a certain state of things exist, its jurisdiction is to cease and it is required to dismiss the cause for want of jurisdiction."[128]

194. The learned Chief Justice commented as follows:

"In the case before us no new circumstances have been created by legislation. But the court is forbidden to give effect to the evidence which in its own judgment such evidence should have."[129]

195. Before emphasizing the vital importance of separating powers…the learned Chief Justice ruled finally:

"We must think that Congress has inadvertently passed the limit which separates the legislative from the judicial power…"[130]

[127] *Ibid*
[128] Page 146
[129] Page 147
[130] *Ibid*

Australian Authorities

196. Learned Queens Counsel for the claimant relied on a number of Australian authorities. These provide examples of judicial consideration of legislation, which were impugned as constituting legislative interference with the judicial process. They provide precedents of the manner in which the court will decide whether the impugned legislation has crossed the line, alluded to in ***Liyanage,*** between interference and non-interference. A summary of the cases follow.

Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs[131]

197. ***Chu Kheng Lim v Minister for Immigration***, also known as "*The Cambodian Boat People Case*" was a decision of the High Court of Australia. The plaintiffs were Cambodian Nationals who arrived in Australia in two groups: the first in November 1989 and the second in March 1990. None of the plaintiffs held valid entry permits.

198. They were detained in custody and made unsuccessful applications to the relevant Minister for refugee status. The plaintiffs sought reviews of the Minister's decision. The Federal Court of Australia set aside the ministerial decisions and remitted them for reconsideration.

199. While the applications for review were being heard, the Parliament of the Commonwealth passed the ***Migration Amendment Act 1992***. The Migration Amendment Act inserted a new Division which provided for the detraction of designated persons. Of relevance to the proceedings before this Court was section 54R which provided as follows:

[131] [1993] 2 LRC 190

"A court is not to order the release from custody of a designated person."

200. A majority of the High Court (Brennan J, Deene J and Dawson J) held that section 54R constituted a direction to the court; was manifestly in excess of the legislative power; and was therefore, invalid.

Nicholas v the Queen[132]

201. This was a decision of the High Court of Australia, which considered the validity of section 15X of the ***Crimes Act*** 1914 as amended by the ***Crimes Amendment Controlled Operations Act*** 1996.

202. The validity of section 15X was brought into issue by the applicant, David Michael Nicholas, who was charged with four narcotic drug offences two of which were contrary to section 233B of the ***Customs Act***. The offences involved drugs which were illegally imported into Australia by a law enforcement officer.

203. On the authority of an earlier decision, ***Ridgeway v the Queen***[133], the Court had granted a stay of the prosecution on the ground that the drugs had been illegally imported by an enforcement officer.

204. The ***Customs Act*** 1914 was then amended by the ***Crimes Amendment-Controlled Operations Act*** 1996. This amendment introduced a new part, Part 1 AB, which

[132] 193 CLR 173
[133] [1995] 184 CLR 19

provided for *"controlled operations",* namely operations carried out for the purpose of obtaining evidence that may lead to the prosecution of a person under section 233B of the Act.

205. When Part 1AB entered into force the prosecution applied to have the stay lifted. In the course of that application a question arose as to the validity of section 15X, which provides as follows:

> *"In determining, for the purposes of a prosecution for an offence against section 233B of the Custom Act 1901….whether evidence that narcotic goods were imported into Australia in contravention of the Custom Act 1901 should be admitted, the fact that a law enforcement officer committed an offence in importing the narcotic goods or in aiding, abetting, counseling, procuring or being an any way knowingly concerned in their importation, is to be disregarded…."*

206. The applicant launched his attack on section 15X on three grounds:

- The section invalidly purports to direct a court to exercise its discretionary power in a manner which is inconsistent with the essential character of a court or with the nature of judicial power.
- Secondly, that section 15X applies to identifiable cases and is directed specifically to the accused in those cases rather than to the public generally.

- The section constitutes an attempt to sterilize the Ridgeway discretion. It invalidly undermines the integrity of the court's process and public confidence in the administration of justice.

207. The majority of the High Court of Australia was unanimous in rejecting all three grounds holding that section15X was valid. In the course her judgment, Gaudron J referred to ***Chu Kheng Lim v Minister for Immigration***[134] which was also a decision of the High Court of Australia. In that case, it was said "*Parliament cannot make a law which requires or authorizes the courts…to exercise judicial power in a manner which is inconsistent with the essential character of a court or with the nature of judicial power…"*

208. At paragraph 74 of her judgment Gaudron J considered what constituted inconsistency with the essential character of a court. Gaudron J had this to say:

> *"…inconsistency with the essential character of a court and with the nature of judicial power necessitates that a court not be required or authorized to proceed in a manner that does not ensure equality before the law, impartiality and the appearance of impartiality, the right of a party to meet the case made against him or her, the independent determination of the matter in controversy and in the case of criminal proceedings, the determination of guilt or innocence by means of a fair trial according to law. It means moreover, that the court cannot be required or authorized to proceed in any manner which involves an abuse of process, which would*

[134] (1992) 176 CLR 1

render its proceedings inefficacious or which tends to bring the administration of justice into disrepute…"[135]

209. At paragraph 80 of her judgment, Gaudron J concluded:

"80. Properly construed s. 15X does no more than exclude the bare fact of illegality on the part of law enforcement officers…so construed, it is clear that it does not prevent independent determination of the question whether that evidence should be excluded or not…."[136]

210. It was significant that there were dissenting judgments by the following two judges Mc Hugh J and Kirby J.

211. Mc Hugh J at paragraph 112 of his judgment distinguished between the infringement and usurpations of judicial power in this way:

"…an infringement occurs when the legislature has interfered with the exercise of judicial power by the courts and a usurpation occurs when the legislature exercised judicial power on its own behalf…"

212. Mc Hugh J provided this example:

[135] See page 208
[136] See Para 80 page 210

"Legislation that removes from the courts their exclusive function of adjudgment and punishment of criminal guilt under a law of the Commonwealth will be invalidated as a usurpation of judicial power."[137]

213. Citing ***Chu Kheng Lim***, Mc Hugh referred to the decisions of Brennan J., Deene J. and Dawson J., as stating:

"A law of the Parliament which purports to direct in unqualified terms that no court…shall order the release from custody of a person whom the Executive …has imprisoned purports to derogate from that direct vesting of judicial power and to remove ultra vires acts of the Executive from the control of this court. Such a law manifestly exceed the legislative powers of the Commonwealth and is invalid…"[138]

214. This was a direction as to the "manner and outcome of the exercise of their discretion…." Mc Hugh J observed further that the legislature usurps judicial power when it brings down a legislative judgment as in ***Liyanage,*** against specific individuals.

215. At page 186 of his judgment, Chief Justice Brennan reaffirmed the power of Parliament to prescribe the jurisdiction to be conferred on a court in this way:

"*Subject to the constitution the Parliament can prescribe the jurisdiction to be conferred on a court but it cannot direct the court as to the judgment or order which it might make in exercise of a jurisdiction conferred upon it…"*

[137] Page 220
[138] See page 221

216. The Learned Chief Justice then quoted the following learning from the joint decision in ***Chu Kheng Lim*** :

> *"In terms, s.54R is a direction by the Parliament to the courts as to the manner in which they are to exercise their jurisdiction. It is one thing for the Parliament within the limits of the legislative power conferred on it by the constitution to grant or withhold jurisdiction. It is quite a different thing for the Parliament to purport to direct the courts as to the manner and outcome of the exercise of their jurisdiction. The former falls within the legislative power which the constitution…entrusts to the Parliament. The latter constitutes an impermissible intrusion into the judicial power which Chapter III vests exclusively in the courts…."*

217. CJ Brennan observed that one of the exclusively judicial functions of government is the adjudgment and punishment of criminal guilt. Later, at page 188, CJ Brennan again identified the situation in which a law would be constitutionally invalid. He said:

> *"A law that purports to direct the manner in which judicial power should be exercised is constitutionally invalid. However, a law which merely prescribes a court's practice or procedure does not direct the exercise of judicial power in finding facts applying law or exercising an available discretion…"*

218. On the premise of this reasoning, CJ Brennan decided that section 15X was not invalid. At paragraph 191 of his judgment, Brennan CJ considered whether section 15X was

invalid by virtue of being applicable only to identifiable cases. Referring to ***Liyanage*** he distilled the following principle:

> *"The principle to be derived from Liyanage applies only to legislation that can properly be seen to be directed ad hominem. It was so held by Mason CJ, Dawson and Mc Hugh JJ in* <u>*Leeth v Commonwealth:*</u>
>
> *"Legislation may amount to a usurpation of judicial power particularly in a criminal case if it prejudges an issue with respect to a particular individual and requires a court to exercise its functions accordingly (see Liyanage). It is upon this principle that bills of attainder may offend against the separation of judicial power…But a law of general application which seeks…to govern the exercise of jurisdiction which it confers does not trespass upon the judicial function…"*

219. Applying the ***Leeth*** principle, Brennan CJ observed:

> *"The cases to which s.15X applies are not only those in which prosecutions were pending when it came into force but any prosecution which thereafter required proof of illegal importation in an authorized controlled operation….."*

220. Brennan CJ concluded as follows:

> *"The provisions of Pt.1AB bear no resemblance to the provisions of the Acts which were held invalid in Liyanage…."*

Polyukhovich v the Commonwealth of Australia[139]

221. This was a decision of the High Court of Australia. The plaintiff, an Australian citizen was charged with having committed war crimes between, 1st September, 1942 and 31st May, 1943. The information was laid against him pursuant to the ***War Crimes Amendment Act of 1988***, which provided at section 9:

> "*A person who, (a) on or after 1st September, 1939 and on or before 8th May, 1945. ... committed a war crime ... is guilty of an indictable offence.*

222. The plaintiff launched his attack on two grounds, namely:

- The section was beyond the legislative powers conferred on Parliament with respect to defence and external affairs.
- The second ground and the one which is relevant to the instant proceedings alleged that the legislature had usurped judicial powers.

223. Mason C.J. summarized it in this way:

> *"The second is that the section, because it attempts to enact that past conduct shall constitute a criminal offence is an invalid attempt to usurp the judicial power of the Commonwealth that power being vested by the Constitution in the Ch. III courts."* [140]

224. The majority of the High Court of Australia held the view that the section was not invalidated. It is significant however that the Act was saved by a slim majority, with four

[139] (1991) 172 CLR 501
[140] See page 523

judges upholding the validity of the section and three holding that the section was invalid. It is for the reason, that it seemed necessary to consider the reasoning of all the esteemed Judges in this case.

Chief Justice Mason and Mc Hugh J agreed:

> *"A law though retrospective in operation which leaves it to the courts to determine whether the person charged has engaged in the conduct complained of and whether that conduct is an infringement of the prescribed rule does not intrude upon the exercise of judicial power …"*[141]

225. Having considered earlier Australian authorities, Chief Justice Mason referred to the prohibition in the United States Constitution against the bill of attainder or an ex post facto law. Chief Justice Mason defined the bill of attainder in this way:

> *"A bill of attainder is a legislative enactment which inflicts punishment … without a judicial trial …. An ex post facto law of which a bill of attainder was or might be an instance is a retrospective law which makes past conduct a criminal offence …"*[142]

226. Comparing the two genres of enactments Chief Justice Mason said:

> *"The distinctive characteristic of a bill of attainder marking it out from other ex post facto laws is that it is a legislative enactment adjudging a specific person or persons guilty of an offence constituted by past conduct and imposing punishment in respect of that offence. Other ex post … facto*

[141] See page 502
[142] See page 535

laws speak generally leaving it to the courts to try and punish specific individuals …"

227. Chief Justice Mason alluded to the United States decision of ***Calder v Bull*** (1798) 3 US 3890 and observed that the absence of a similar provision in the Australian Constitution dealt a fatal blow to the plaintiffs argument " … *except in so far as the separation of powers … imports a restraint on Parliament's power to enact such laws* …" (See: page 536). Chief Justice Mason then expressed the view that the doctrine of separation of powers was not applicable to the generality of other ex post facto laws. The learned Chief Justice issued the following guideline:

"The application of the doctrine depends on the legislature adjudging the guilt of specific individuals or imposing punishment on them. If for some reason an ex post facto law did not amount to a bill of attainder, yet adjudged persons guilty of a crime or imposed punishment on them it could amount to trial by legislature and a usurpation of judicial power …" (Ibid at 536).

228. Chief Justice Mason continued:

"But if the law, though retrospective in operation leaves it to the courts to determine whether the person charged has engaged in the conduct complained of and whether that conduct is an infringement of the rule prescribed there is no interference with the exercise of judicial power …"[143]

[143] See page 536

229. Justice Dawson, who also upheld the validity of the ***War Crimes Amendment Act 1988,*** expressed the view that the impugned Act did not amount to a bill of attainder. Dawson J. observed that the activities which are said by the Act to constitute war crimes are defined in *"general terms without any attempt to designate any person or group of persons as having engaged in any of those activities ..."*[144]

230. And later Dawson J formulated this guideline:

> *"It is when the legislature itself expressly or impliedly determines the guilt or innocence of an individual that there is an interference with the process of the court ..."*[145]

231. Dawson J then contrasted the Act before him with that in ***Liyanage*** and made the following observation of the decision in ***Liyanage.***

> *"The legislation was held to be invalid, not because of its ex post facto operation but because far from laying down any general rule of conduct, it was designed to secure the conviction of identifiable individuals. It was a therefore a legislative attempt to exercise judicial power ..."*[146]

232. Distinguishing the case before him from ***Liyanage,*** Dawson J held the view that the legislation before him was enacted *"for the generality of its subjects ..."* and accordingly held the impugned section to be valid.

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[144] See page 649
[145] See page 650
[146] See page 650

233. The dissenting judges were Brennan J., Deane J. and Gaudron J. Brennan J concentrated mainly on the issue of the first ground of attack against the statute that is, in respect of Parliament's competence with respect to defence and external affairs. Towards the end of his judgment however, Brennan J. said at page 593 of the report:

> *"The means which the Act adopts to secure future adherence to the laws and customs of war not only trample upon a principle which is of the highest importance in a free society, namely, that criminal laws should not operate retrospectively, but also select a specific group of persons from a time long past out of all those who have committed or are suspected to have committed war crimes …"*[147]

234. Gaudron J also held the view that the impugned section was invalid. The learned judge had this to say:

> *"Equally, it would be a travesty of the judicial process if in proceedings to determine whether a person had committed an act proscribed and punishable by law the law proscribing and providing for punishment … were a law invented to fit the facts after they had become known …"*

235. Gaudron J distinguished statutes which re-enacted an earlier law which applied when the acts were committed. The learned Judge also distinguished laws which operate retrospectively on civil rights, obligations and liabilities. Gaudron J. expressed the following opinion at page 705:

[147] See page 593

"The function of a court in civil proceedings is the determination of present rights obligations or liabilities. In that context a retrospective civil law is very much like a statutory fiction in that it is a convenient way of formulating laws which by their application to the facts in issue determine the nature and extent of those present rights."

Australian Building Construction Employees' BLF v Commonwealth[148]

236. This was a case in which the Builders Labourers Federation (BLF) challenged the declaration by Australian Conciliation and Arbitration Commission that BLF engaged in improper conduct which empowered the Minister to order its de-registration. The BLF applied to the High Court of Australia to have the decision quashed.

237. While proceedings were pending Parliament enacted the ***Builders Labourers Federation (Cancellation of Registration) Act.*** The legislation cancelled BLF's registration "*by force of this section".*

238. Relying on ***R v Humby ex p. Rooney*** (1973) 129 C.L.R. 321, the Court held that Parliament may legislate to alter rights in pending litigation without interfering with the exercise of judicial power in a way that is inconsistent with the constitution. It held further, that it was otherwise when the legislation interferes with the judicial process itself rather than with the substantive rights in issue.

[148] (1986) 161 CLR 88

BLF v Minister for Industrial Relations[149]

239. By contrast, in ***BLF v Minister for Industrial Relations***, the Minister had cancelled the registration of the State Branch of BLF. BLF appealed after having unsuccessfully challenged the Minister's decision. Pending the appeal, Parliament enacted the ***Builders Labourers Federation (Special Provisions) Act 1986*** which contained the following provisions:

a. The Union's registration shall for all purposes be taken to have been cancelled by the Ministerial declaration.

b. The Minister's certificate … shall be treated for all purposes as having been validly given.

c. This shall be so notwithstanding any decision in any court …

d. Costs in any proceedings should be borne by the party …

240. The Court of New South Wales refused to declare the law invalid. Chief Justice Street had this to say at page 385 F:

> *"The legislation may well have been a regrettable interference with the judicial process … but that standing alone does not take it beyond the wide limit of the legislative field open to Parliament.*

241. In ***BLF v Minister of Industrial Relations*** there was no entrenchment of the separation of powers doctrine in that particular state. Nonetheless, Street C.J. expressed the following view:

[149] (1986) 7 NSWLR 372

"Section 3(4) amounts in my view to a direct interference with the ordinary operation of the judicial process in litigation pending before the court. Like it … can be appropriately described as directive to the Court rather than as substantively legislative …" (1986) 7 NSWLR 372 at 378

242. Street CJ Continued:

"My conclusion … is that the 1986 Act amounted to an exercise by the New South Wales Parliament of judicial power. Parliament has directly intruded its power into the judicial process by directing the outcome of a specific case between particular litigants awaiting having at the time the legislation … was passed …"

Phillip Zuniga & Ors v The Attorney General of Belize and BCB Holdings and Ors. as Interested Parties[150]

243. This was a decision of the Court of Appeal of Belize. The sole judgment was delivered by Justice of Appeal Mendes in August, 2012 and concerned the constitution of the ***Supreme Court of Judicature Amendment Act 2010,*** by which the Parliament of Belize introduced section 106A, the impugned section.

244. The appellants challenged the constitutionality of the impugned section on a number of grounds, only the first of which is relevant to these proceedings. The grounds, which are set out at page 8 of the judgment, are as follows:

[150] Civil Appeal Nos. 7, 9 and 10 of 2011 (Court of Appeal of Belize)

"The entire section violates the separation of powers doctrine and was passed for an improper purpose in that it is ***ad hominem*** *legislation directed at the appellants, the interested and a company called Dunkeid …"*

245. Justice of Appeal Mendes carefully examined the wealth of authorities available internationally, all of which were cited in the instant case. Before doing so however, the learned Court of Appeal Judge provided a narrative of the facts which led ultimately to the enactment of s. 106A.

246. In relating the background facts, Justice of Appeal Mendes referred to the Accommodation Agreement between a former government of Belize and a company entitled Belize Telemedia Limited (BTL). The Accommodation Agreement was weighted in favour of the company and when the Government of the Honourable Dean Barrow assumed power, the Prime Minister flatly refused to honour the agreement.

247. Belize T Limited was successful in obtaining an arbitral award. Government responded by obtaining an ex parte injunction preventing Belize T Limited and a related company from continuing arbitration proceedings.

248. Justice of Appeal Mendes had no hesitation in quoting extensively from the acerbic remarks of the Prime Minister who launched his attack both in and out of Parliament including the Prime Minister's speech in piloting the Bill.

249. Justice Mendes considered whether the legislation was *ad hominem.* The learned Justice of Appeal cited *Liyanage,* and said of the case before him:

> *"61. The evidence does indicate quite clearly that in proposing the Amendment Bill to Parliament the Government of Belize had Dunkeld and the appellants within its sights".*[151]

250. At page 63, Mendes J.A. observed:

> *It might therefore be correct to characterize the Amendment Act as having been passed with the appellants and the interested parties in mind …".*

251. Then at paragraph 64:

> *"On the other hand, the Act is not expressed to apply to specific individuals or to specific arbitrators or to be applicable to any pending criminal or other proceedings. It is expressed in terms of general application …"*

Justice of Appeal Mendes then concluded:

> *"On the face of it therefore the new offence created applies to anyone and any order without restriction."*

252. As to the submission that the section contained a direction to the Court, Mendes J.A. said: (paragraph 66).

[151] See page 42

"Apart from mandating the sentence to be imposed on anyone found guilty of a section 106 A(1) offence, there is no direction to the judiciary as to how it should exercise the jurisdiction bestowed on it …"

253. At paragraph 77, Mendes J.A. rejected the contention that the Act infringes the separation of powers doctrine. The reasoning of the learned Justice of Appeal appears at paragraph 76 and 77:

"What the legislature cannot do is having vested jurisdiction in the judiciary … is to direct the judiciary as to the outcome of the exercise so granted.

254. Then at paragraph 77, Mendes J.A. said:

It is not sufficient that the conduct of certain individuals prompted the passage of the legislation or that the government intends to use the Act to target those persons …"

255. Mendes J.A. then quoted from Chief Justice Street in ***Building Construction Employees and Builders Labourer's Federation of NSW v Minister of Industrial Relations:***

"*It is … to the terms of the Act alone that reference is to be made in deciding whether it amounts to an exercise by Parliament of judicial as distinct from legislative power …"*

Professor Peter Gerangelos

256. Learned Q.C. for the claimant relied on the academic dissertations of Professor Peter Gerangelos firstly, in his treatise entitled the *"Separation of Powers and Legislative Interference in Judicial Process"*, as well as his publication in the Sydney Law Review entitled *"The separation of Powers and Legislative Interference in Pending Cases"*: [2008] 30 ***Sydney Law Review 60.***

257. In his treatise, Gerangelos identified two schools of thinking. In respect of the phenomenon of constitutional parliamentary intervention Gerangelos wrote:

> *"In both schools, it would certainly be accepted that a clear legislative direction to the judiciary, which does not constitute a substantive amendment to the law breaches the separation of powers …"*

258. Gerangelos identified three indicia of interference:

- Legislation that is clearly *ad hominem.*
- Legislation passed while relevant proceedings were pending.
- Government is a party to the pending proceedings.

259. Gerangelos expressed the view that where anyone of these indicia is present, more so if more than one is present, then this should immediately put the court on notice that constitutional legislative direction is a serious possibility.

260. If the three indicia are present, this should give rise to a presumption of unconstitutional direction. The presence of the indicia have the characteristic of removing legislation from its normal function:

> *" ... a prospective change in the law that is of general applicability, altering rights and obligations in the future ..."*

261. According to Gerangelos, the Court should consider whether the legislation interferes with a traditional judicial discretion. The Court should also consider the wording of the impugned enactment. It was the view of Gerangelos that the wording of the enactment, while not determinative of the issue, in fact constitutes an important indicator. Words which were, in the view of Gerangelos, clearly directive were:

> *" 'directs' or 'orders' or if it contains a deeming provision ...".*

262. In his article, Professor Gerangelos addressed the situation where Parliament sought to amend laws which were applicable in pending proceedings. This aspect of legislative interference was distinguished from parliamentary usurpation of judicial power, the prime example being the Bill of Attainder: (See ***Polyukhovich***) Gerangelos observed:

> *"This is an area of considerable complexity in that unlike legislative usurpations of judicial power such as a Bill of Attainder, legislative interferences are not always or indeed often regarded as unconstitutional see [2008] 30* ***Sydney Law Reports 60.***

263. Gerangelos identified three features of legislation which have been impugned as unconstitutional interferences. He wrote:

> *"they are often ad hominem; retrospective and tailored to address the very issues in the pending case …"*

264. However, Gerangelos warned of the importance of the competing concern that the legislative competence of Parliament is not unduly eroded merely because changes in laws have an effect on pending proceedings.

265. Gerangelos stated the direction principle at page 67 in this way:

> *"The changed Law Rule will not apply if the legislation is not in substance an amendment to the law, but rather a* ***direction*** *to the judicial branch which* ***interferes with it's independent adjudication in pending cases*** *or* ***directs the exercise of judicial discretion therein …"*** (Emphasis mine)

Gerangelos referred to the case of [***Chu Kheng Lim*** (1992) 176 CLR 1] as an example of an obvious case of direction.

Decisions of the European Court of Human Rights

Stran Greek Refineries and Stratis Andreadis v Greece[152]

266. The Stran Greek Refineries Company commenced arbitration proceedings against the Government of Greece in respect of the terms of a contract which had been concluded on 22nd July, 1972 with the State of Greece. An award was made in favour of the Company. The State appealed against the arbitration award. Before the appeal proceedings were

[152] (1994) 19 EHRR 293

completed the State passed legislation that rendered the award invalid. In particular , section 12 (4) of the Act provided :

> *"Any Court proceedings at whatever level pending at the time of the enactment of this statute …are declared void."*

267. The Company complained *inter alia* of a breach of Article 6(1) of the ***European Convention on Human Rights.*** The European Court of Human Rights held that the State infringed the Company's right under Article 6(1) of the Convention by intervening in a manner that ensured a favourable outcome of proceedings in which the State was a party to. The court stated:

> *"The principle of the rule of law and the notion of fair trial enshrined in Article 6 (art. 6) preclude any interference by the legislature with the administration of justice designed to influence the judicial determination of the dispute."*[153]

The National & Provincial Building Society, The Leeds Permanent Building Society and the Yorkshire Building Society v United Kingdom[154]

268. Transitional Regulations were put into place to cover a "gap period" that had been exposed after certain changes had been made to the taxation system. The applicants felt, however, that the transitional Regulations taxed interest that they had already paid. The Woolwich society challenged the regulations and the regulations were found to be invalid. The applicants commenced restitution and judicial review proceedings.

[153] Stran Greek Refineries and Stratis Andreadis v Greece (1994) 19 E.H.R.R. 293 at paragraph 49.

[154] (1997)25 EHRR 127

269. Section 53 of the ***Finance Act*** came into force and retrospectively validated the transitional Regulations to some extent. Section 64 of the ***Financial Act*** 1992 worked to extinguish the remaining proceedings instituted by the applicants. The applicants brought proceedings claiming violations of Article 1 Protocol 1 and Articles 6 and 14 of the Convention.

270. The court held that there had been no violation of Article 1 Protocol 1 and Articles 6 and 14 of the Convention. At paragraph 112 the court stated:

> *"the Court is especially mindful of the dangers inherent in the use of retrospective legislation which has the effect of influencing the judicial determination of a dispute to which the State is a party, including where the effect is to make pending litigation unwinnable. Respect for the rule of law and the notion of a fair trial require that any reasons adduced to justify such measures be treated with the greatest possible degree of circumspection (see the Stran Greek Refineries and Stratis Andreadis judgment cited above, p. 82, § 49)."*[155]

271. The court however distinguished the ***Stran Greek*** case and noted that the interference caused by section 64 of the 1992 ***Financial Act*** was much less than the interference in the ***Stran Greek*** case that led the court to find that article 6(1) of the Convention had been breached. The court noted that in this case:

[155] The National & Provincial Building Society, The Leeds Permanent Building Society and the Yorkshire Building Society v United Kingdom (1997) 25 EHRR 127 at paragraph 112.

"The judicial review proceedings launched by the applicant societies had not even reached the stage of an inter partes hearing. Furthermore, in adopting section 64 of the 1992 Act with retrospective effect the authorities in the instant case had even more compelling public-interest motives to make the applicant societies ' judicial review proceedings and the contingent restitution proceedings unwinnable than was the case with the enactment of section 53 of the 1991 Act."[156]

Scoppola v Italy (No. 2)[157]

272. The applicant had been charged *inter alia* for murder and attempted murder**.** After the preliminary inquiry the applicant opted to be tried under summary procedure. The Code of Criminal Procedure at that time provided that upon conviction under summary procedure, a life imprisonment sentence was to be converted to 30 years imprisonment. The applicant was convicted and sentenced to 30 years imprisonment.

273. On the same day of the applicant's conviction, however, a legislative decree entered into force which proclaimed that where trial was by summary procedure a life imprisonment sentence should be substituted for a sentence of life imprisonment with daytime isolation if there were cumulative offences.

[156] Ibid

[157] (2010) 51 EHHR 12

274. The prosecutor appealed against the applicant's sentence of 30 years imprisonment on the ground that it should have been a life imprisonment sentence in accordance with the legislative decree. The applicant also appealed on different grounds. The applicant's sentence was changed to life imprisonment. The applicant appealed against this decision. His appeal was dismissed.

275. The applicant then lodged another appeal on the ground of a factual error and that he had been convicted in breach of article 6 of the Convention[158], which guaranteed a fair trial. He also argued article 7 of the Convention had been breached in that the imposition of the life sentence had breached the prohibition of retrospective application of criminal law. The Court of Cassation however declared the applicant's extraordinary appeal inadmissible. The Grand Chamber Court however, further examined the case and held that both article 6 and 7 of the Convention had been breached.

276. The court noted that by virtue of the legislative framework in existence at the time the applicant requested to be tried by summary procedure, the applicant could have legitimately expected that the maximum sentence to which he was liable was 30 years. However the legislative decree frustrated that expectation. The court continued that an accused should be able to expect that the State would:

> *"act in good faith and take due account of the procedural choices made by the defence, using the possibilities made available by law. It is contrary to the principle of legal certainty and the protection of the*

[158] European Convention on Human Rights

legitimate trust of persons engaged in judicial proceedings for a State to be able to reduce unilaterally the advantages attached to the waiver of certain rights inherent in the concept of fair trial."[159]

277. The Court went on to hold that:

"the provisions of Legislative Decree no 341 after the end of the first-instance proceedings deprived the applicant of an essential advantage which was guaranteed by law and which had prompted his decision to elect to stand trial under the summary procedure. That is incompatible with the principles embodied in art 6 of the Convention."[160]

Legitimate Expectation

278. It was agreed by learned Queens Counsel for the Attorney General that the doctrine of legitimate expectation had evolved from being merely procedural in effect.

279. In the early stages of the Courts conceptualisation of the doctrine, it was linked to the right to be consulted. See for example the words of Lord Denning in ***Schmidt v Secretary of State for The Home Office*** [161], where Lord Denning stated at page 909:

"It all depends on whether he has some right or interest or I would say some legitimate expectation of which it would not be fair to deprive him without hearing what he has to say ..."

[159] Scoppola v Italy (No 2) at paragraph 139
[160] Ibid at paragraph 140
[161] [1969] 1 All ER 904

280. The early cases were considered in ***K.C. Confectionery v The Attorney General***[162], by Persaud J.A. who having conducted an extensive review of the early cases said at page 409:

> *"I have taken the trouble to deal at some length with the expression "legitimate expectation" ... if only to demonstrate that the concept is inextricably bound up with the rules of natural justice particularly the right of the citizen to be heard ..."*

281. In the wake of the decision in ***R v North and East Devon Health Authority Exp. Coughlan***[163], the existence of a legitimate expectation is now treated as conferring a substantive benefit on its holder in circumstances where the frustration of the expectation is so unfair that to take a new and different course will amount to an abuse of power.

282. The ***Coughlan*** perspective has been applied recently by their Lordships in ***Paponette and Others v The Attorney General of Trinidad and Tobago***[164], an authority cited and relied upon by both the claimant and the Attorney General.

283. In ***Paponette*** the applicants, who were members of an association who owned and operated maxi taxis, agreed to relocate their taxi stand to a new location at a transit centre owned by the PTSC. They did so in reliance on government assurances that they would not be under the control or management of the PTSC and that management of the centre would be handed over to them within three to six months. However, following the

[162] [1985] 34 WIR 387
[163] [2001] QB 213
[164] [2012] 1 AC 1

relocation, management of the transit centre was not handed over to the association but, by the introduction of the Port of Spain Transit Centre (Public Service Vehicle Station) by the Government, the PTSC was given responsibility for managing the centre and the power to charge for its use.

284. The Privy Council, in a majority decision, held that the government's representations which had been relied on by the applicants were clear, unambiguous and devoid of relevant qualification and that they had given rise to a legitimate expectation on the part of the applicants that on relocation they would not be under the control or management of the PTSC. Further, that unless the public authority provided evidence to explain why it had acted in breach of a representation or promise made to an applicant, it was unlikely to be able to establish any overriding public interest to defeat the applicant's legitimate expectation.

285. At paragraph 28, Lord Dyson JSC, who gave the judgment for the majority, quoted with approval from Lord Hoffman's opinion in ***R (on the application of Bancoult) v. Secretary of State for Foreign and Commonwealth Affairs (No.2)***[165], where Lord Hoffman summarised the applicable principles in a case where the legitimate expectation is based on a promise or representation:

> *"It is clear that in a case such as present, a claim to a legitimate expectation can be based upon a promise which is 'clear, unambiguous and devoid of relevant qualification': see Bingham LJ in R v Inland Revenue Comrs, Ex p MFK Underwriting Agents Ltd [1990] 1 WLR 1545, 1569. It is not essential that the*

[165] [2009] AC 453 at Para. 60

applicant should have relied upon the promise to his detriment, although this is a relevant consideration in deciding whether the adoption of a policy in conflict with the promise would be an abuse of power and such a change of policy may be justified in the public interest, particularly in the area of what Laws LJ called the 'macro-political field': see R v Secretary of State for Education and Employment, Ex p Begbie [2000] 1 WLR 1115, 1131."

286. At paragraph 30, Lord Dyson JSC said that the question whether a representation is "clear, unambiguous and devoid of relevant qualification" depends on how, on a fair reading of the promise, it would have been reasonably understood by those to whom it was made.

287. As to the circumstances in which a public authority is entitled to frustrate a substantive legitimate expectation Lord Dyson JSC (See Para. 34) referred, with approval, to the judgment of Lord Woolf MR in ***R v North and East Devon Health Authority, Ex p Coughlan***[166]. According to Lord Woolf the Court must decide whether to frustrate the expectation is so unfair that to take a new and different course will amount to an abuse of process. The Court's task is to weigh the requirements of fairness against any overriding interest relied upon for the change of policy.

288. At paragraph 37, Lord Dyson JSC said that in cases of frustration of legitimate expectation the initial burden lies on the applicant to prove the legitimacy of his expectation. He must prove that the representation was clear, unambiguous and devoid of

[166] [2001] QB 213, at Para 57

relevant qualification. If he wishes to reinforce his case by saying that he relied on the promise to his detriment, he must also prove that too. Once those elements have been proved by the applicant the onus then shifts to the public authority concerned to justify the frustration of the legitimate expectation.

289. Lord Dyson JSC then goes on in paragraph 38 to say that if the authority fails to place material before the court to justify its frustration of the expectation, it runs the risk that the Court will conclude that there is no sufficient pubic interest and that as a consequence, its conduct is so unfair as to amount to an abuse of process.

The Attorney General & Ors v Jeffrey Joseph and Lennox Ricardo Boyce[167]

290. Learned Queens Counsel for the claimant relied as well on ***The Attorney General & Ors v Jeffrey Joseph and Lennox Ricardo Boyce,***[168] where the respondents Jeffery Joseph and Lennox Boyce alongside two other men had been charged for the murder of a young man. The other two men plead guilty and were sentenced to 12 years imprisonment to the lesser charge of manslaughter. The respondents however, did not accept the offer to plead guilty of manslaughter but opted to stand trial. They were found guilty and sentenced to death.

291. The Court of Appeal and Privy Council both dismissed their appeals. Section 78 of the Barbados Constitution had been amended to add three new subsections 5, 6 and 7. Subsection 6 authorised the Governor General in accordance with the advice of the Privy

[167] [2006] CCJ 3
[168] Ibid

Council to direct time limits within which persons could apply to or consult bodies outside of Barbados in relation to an offence.

292. The respondents appealed to the Inter-American Commission of Human Rights. Before the completion of the Commission's review of the respondents' case, the Barbados Privy Council confirmed its decision not to recommend the commutation of the respondents' sentence. Death warrants were read to the respondents. They then filed proceedings before the Caribbean Court of Justice claiming *inter alia* that they held a legitimate expectation to be allowed a reasonable time to complete the process before the Inter-American Commission of Human Rights before the warrants were read to them.

293. The Crown conceded that in accordance with the *Pratt and Morgan* decision the respondents' death sentences could not be carried out since five years had already elapsed from the day of their sentencing. It was the view of the Caribbean Court of Justice however, that it was necessary to address the legal issues raised by the respondents and so handed down a judgment.

294. It was held that the condemned men had a legitimate expectation to have their petitions before the Inter-American Commission of Human Rights processed before they were executed. In addition, the court affirmed the Court of Appeal's decision to commute the sentence of death.

295. The Rt. Hon Mr. Justice de la Bastide, President of the CCJ and the Hon Mr. Justice Saunders in their joint judgment, noted the facts and circumstances that gave rise to a legitimate expectation in the respondents' case. They stated:

> *"Quite apart from the fact that Barbados had ratified the ACHR positive statements were made by representatives of the Executive authority evincing an intention or desire on the part of the Executive to abide by that treaty. Such statements were, for example, made in Parliament during the debate on the Constitution Amendment Act. Further, it appears that it was the practice of the Barbados Government to give an opportunity to condemned men to have their petitions to the international human rights body processed before proceeding to execution."*[169]

296. The honourable judges of the CCJ went on to consider the extent to which this legitimate expectation created a substantive as opposed to a procedural benefit. The honourable judges noted that:

> *"The court must weigh the competing interests of the individual, who has placed legitimate trust in the State consistently to adhere to its declared policy, and that of the public authority, which seeks to pursue its policy objectives through some new measure. The court must make an assessment of how to strike the balance or be prepared to review the fairness of any such assessment if it had been made previously by the public authority.* [170]

[169] The Attorney General & Ors v Jeffrey Joseph and Lennox Ricardo Boyce [2006] CCJ 3 (AJ) at paragraph 118
[170] Ibid at paragraph 124

297. In their joint judgment, the learned President and the Honourable Justice Saunders continued:

> *"In our view, to deny the substantive benefit promised by the creation of the legitimate expectation here would not be proportionate having regard to the distress and possible detriment that will be unfairly occasioned to men who hope to be allowed a reasonable time to pursue their petitions and receive a favourable report from the international body. The substantive benefit the condemned men legitimately expect is actually as to the procedure that should be followed before their sentences are executed.*[171]

298. In deciding whether it was appropriate for the Court of Appeal to commute the death sentences the learned President and the Honourable Justice Saunders relied on the reasoning in ***Matthew v The State***[172]**,** where it was held that it would have been unfair to execute the appellant after the decision in ***Roodal***[173]**.**

299. The honourable judges of the CCJ noted that the expectation of Boyce and Joseph would have first been shaped by the decision in ***Pratt v Morgan***[174] and then the ***Thomas v Baptiste***[175] ***and Lewis***[176]**.** These cases, the honorable Judges found, would have firmly established an expectation that the respondents would be allowed a reasonable time to complete proceedings before the Inter-American Commission of Human Rights.

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[171] The Attorney General & Ors v Jeffrey Joseph and Lennox Ricardo Boyce [2006] CCJ 3 AJ at paragraph 125
[172] [2005] 1 AC 433
[173] [2003] UKPC 78
[174] [1993] 4 All ER 769
[175] [2000] 2 AC 1
[176] [2001] 2 AC 50

Mathew v State of Trinidad and Tobago[177]

300. Learned Queen's Counsel for the claimant relied on the case of ***Matthew v State of Trinidad and Tobago***. In this case, the appellant had been convicted of murder. His appeal against the conviction to the Court of Appeal was dismissed and leave to appeal to the Judicial Committee of the Privy Council was refused. The appellant however, was granted special leave to appeal to the Privy Council on the grounds that the mandatory death sentence was unconstitutional.

301. The appellant challenged the constitutionality of the mandatory death penalty on the grounds that it violated his right to life under section 4 of the ***Constitution*** and the right not to be subjected to cruel and unusual punishment under section 5 of the ***Constitution***. In addition, the appellant argued that section 4 of the ***Offences Against the Person Act*** which states, "*Every person convicted of murder shall suffer death*" imposed a discretionary sentence.

302. Prior to the appellant's case, the Board had held in the ***Roodal***[178] case that the death penalty was in fact discretionary and not mandatory. Subsequently, however, in the case of ***Boyce v The Queen***[179] the correctness of the decision in ***Roodal*** was questioned.

303. The Board (Lord Bingham of Cornhill, Lord Nicholls of Birkenhead, Lord Steyn and Lord Walker of Gestingthorpe dissenting) held that section 4 of the ***Offences Against the***

[177] [2005] 1 AC 433
[178] Supra
[179] [2004] UKPC 32

Person's Act was preserved from constitutional challenge by virtue of the savings law clause in the constitution and therefore the mandatory death penalty was lawful and valid. The appellant's sentence however was commuted because the Board felt that it would be unfair to the appellant to deprive him of the benefit of the Board's earlier decision in the ***Roodal*** case.

304. Lord Hoffman delivering the judgment of the majority stated:

> *"The appellant in this appeal, Mr Matthew, was given to understand in consequence of Roodal's case that the question of whether he should be sentenced to death would now be considered by a judge ... But the effect of their Lordships' decision today is that a judge would have no discretion to change a death sentence which has already been imposed according to law. Such a resentencing cannot therefore take place.*
>
> *On the other hand, simply to leave the sentence to be carried out, subject to the decision of the President, appears to their Lordships unfair to Mr. Matthew. He has been given the expectation of a review of his sentence, additional to the possibility of presidential commutation, of which he is now deprived. Their Lordships think that it would be a cruel punishment for him to be executed when that possibility has been officially communicated to him and then been taken away."*

Behluli v Secretary of State for the Home Department[180]

305. In support of their submissions learned Queens Counsel for the Attorney General cited the case of ***Behluli v Secretary of State for the Home Department,*** in particular the statement of Beldam LJ at page 415: that a legitimate expectation is *"an expectation which, although not amounting to an enforceable legal right, is founded on a reasonable assumption which is capable of being protected in public law".*

306. The applicant in ***Behluli*** was a Kosovo Albanian who entered the United Kingdom via Italy. The Secretary of State, in accordance with a certificate issued under S. 2 of the ***Asylum and Immigration Act 1996***, decided to return the applicant to Italy, without having heard any submissions from him.

307. Sedley J. refused the applicant's application for leave to apply for judicial review of the Secretary of State's decision. The applicant renewed his application to the Court of Appeal arguing that (1) the fact that the UK had ratified the Dublin Convention on asylum seekers amounted to an affirmation that the government would act in accordance with it, and that, therefore, the applicant had a legitimate expectation that the Secretary of State would consider his application substantively according to the terms of the Convention and (2) certain statements made by the Home Office, suggesting that safe third country cases would be considered under the Convention, also gave rise to the legitimate expectation that the applicant's case would be heard substantively in line with it.

[180] (1998) Imm AR 407

308. In dismissing the appeal, the Court of Appeal held, applying ***R v Secretary of State for the Home Department, ex p Brind***[181] that the fact that the government had ratified the Convention did not amount to an affirmation that the Convention would be from then on applied in all relevant cases. The ratification, the Court found, could not give rise to a legitimate expectation of the type claimed by the applicant. Further, the statements made by the Home Office did not attain the degree of certainty or clarity sufficient to create a legitimate expectation on the applicant's part that the Convention, rather than the 1996 Act, would be applied to his case.

R v DPP, ex parte Kebilene[182]

309. The defendant also cited the House of Lords decision in ***R v DPP, ex parte Kebilene***. In this case, Mr. Kebilene and others were defendants to criminal proceedings brought against them under the ***Prevention of Terrorism (Temporary Provisions) Act***, 1989. They challenged the DPP's decision to prosecute under the ***Prevention of Terrorism (Temporary Provisions) Act*** 1989.

310. The defendants' challenge was based on two grounds: the first being that they had a legitimate expectation that the DPP would exercise his prosecutorial discretion in accordance with the Convention following the enactment of the HRA 1998 and in particular section 22 (4) of the Act and from public statements made by ministers since the passing of the Act.

[181] [1991] 1 AC 696
[182] [2000] 2 AC 326

311. At the time of the challenge the ***Human Rights Act*** (HRA) had been enacted but was not yet in force, having regard to the provision that it would enter into force on a date appointed by the secretary of State.

312. The second ground of challenge was based on the ***Prevention of Terrorism (Temporary Provisions) Act*** 1989 and the contention that the latter statute undermined the presumption of innocence and violated Article 6 (2) of the Convention because of the reverse burden placed on the defendants by section 16A (3) and 16B (1) of the 1989 Act.

313. The Divisional Court dismissed the case based on legitimate expectation but held that S. 16A by reversing the legal burden of proof was incompatible with article 16(2) and that in acting on a contrary view the DPP had proceeded unlawfully. The DPP appealed to the House of Lords. The House of Lords in allowing the appeal decided that the DPP's decision to consent to a prosecution would not be amenable to judicial review proceedings in the absence of dishonesty, bad faith or some other exceptional circumstance.

314. Their Lordships held further that the ***HRA*** 1998 did not give rise to any legitimate expectation, since it would be contrary to the legislative intent to treat the ***HRA*** as though it had immediate effect[183].

[183] ***R v DPP, ex parte Kebilene*** page 327A

315. Learned Queen's Counsel for the Attorney General highlighted the following statement at 355G, made by Laws LJ (in the Divisional Court), in relation to S. 22(4) of the ***Human Rights Act*** 1998:

> *"...section 22(4) .... cannot in my judgment give rise to an enforceable legitimate expectation of anything to be done or omitted before section 7(1)(b) has effect; and* ***when that happens, the rights of potential defendants will have nothing to do with legitimate expectation. They will be given the black letters of statute****."* (Emphasis Mine)

316. Lord Pannick relied as well on the following statement of Lord Bingham CJ in ***ex p Kebilene***[184]:

> *"I would, furthermore, be very hesitant to hold that a legitimate expectation could be founded on answers given in Parliament to often very general questions: to do so is to invest assertions by the executive with a quasi-legislative authority, which could involve an undesirable blurring of the distinct functions of the legislature and the executive."*

R (Westminster City Council) v National Asylum Support Service[185]

317. The Defendant also relied on the case of ***R (Westminster City Council) v National Asylum Support Service*** per Lord Steyn at paragraph 6F:

[184] (Supra) at 339F
[185] [2002] 1 WLR 2956

"If exceptionally there is found in Explanatory Notes a clear assurance by the executive Parliament about the meaning of a clause, or the circumstances in which a power will or will not be used, that assurance may in principle be admitted against the executive in proceedings in which the executive places a contrary intention before a court. This reflects the actual decision in Pepper v Hart [1993] AC 593. What is impermissible is to treat the wishes and desires of the Government about the scope of the statutory language as reflecting the will of Parliament. The aims of the Government in respect of the meaning of clauses as revealed in Explanatory Notes cannot be attributed to Parliament. The object is to see what is the intention expressed by the words enacted."

318. According to learned Queen's Counsel for the defendant journalistic commentary cannot give rise to a legitimate expectation against the Government or let alone against Parliament, because independent journalists do not speak with the authority of the State. The Court's attention was also directed to the case of ***South Buckinghamshire DC v Flanagan***[186], in particular the statement of Keen LJ at Para 18 to the effect that a legitimate expectation based on a representation allegedly made on behalf of a public body, can only arise if the person making the representation as to that body's future conduct has actual or ostensible authority to make it on its behalf.

319. Lord Pannick cited ***R (on the application of Anglian Water Services Ltd) v The Environment Agency***[187] case, per Laws LJ at paragraph 33 as authority for the

[186] [2002] 1 WLR 2601
[187] [2002] EWCA Civ 5

proposition that it is "misconceived" to rely upon a legitimate expectation contradicted by statute.

320. Learned Queen's Counsel referred as well to Keene J in ***R v Customs and Excise Commissioners, ex parte Kay and Co. Ltd***[188]:

> *"It is right that the commissioners' representations cannot be construed so as to override the will of Parliament. If Parliament were to legislate in such a way as to leave the commissioners no discretion but rather to oblige them to depart from their representations... then that expression of Parliament's will must prevail, subject to any challenge on the basis of Community law".*

R v Secretary of State for Education and Employment, ex parte Begbie[189]

321. The applicant in ***Begbie***, was offered and accepted a place for a period of four years at an independent school which participated in the Assisted Place Scheme (APS), a scheme introduced by the Education Act 1980. Under this scheme it was possible for some students to have their fees paid out of public funds. However, following a general election the new government enacted the Education (Schools) Act 1997, section 1 of which abolished the APS.

322. Section 2(2)(b) provided, however, that if the Secretary of State was satisfied that it was reasonable *'in view of any particular circumstances'* he could determine that a pupil

[188] [1996] STC 1500 at 1528 b – c
[189] [2000] 1 WLR 1115

should continue to hold an assisted place for a further period. The applicant applied for a discretionary extension, which was refused.

323. She applied for judicial review of that decision arguing that the exercise of discretion was inconsistent with statements made before and since the general election and that it was legally incumbent on the Secretary of State to keep both pre and post election promises as to how any discretion would be exercised, on the basis that they had given rise to a legitimate expectation.

324. The Court held the expectation to be unenforceable and dismissed the appeal on the basis that to give effect to the expectation would be contrary to the governing legislation. The Court found that section 2(2)(b) was intended to cater for the unexceptional case where, having regard to particular circumstances of a particular child, it was reasonable in the eyes of the Secretary of State to make an exception for the child. If he were to be held to the terms of his pre-election statements, it would mean that virtually all children receiving primary education at the type of school that the applicant attended would have to be allowed to keep their assisted place until the end of their secondary education, which result would plainly be outside the contemplation of the section. Any expectation, the Court held, had to yield to the terms of the statute under which the Secretary of State was required to act.

Section 13 cases

325. Section 13 of the ***Constitution*** provides as follows:

> ***"13.*** *(1) An Act to which this section applies may expressly declare that it shall have effect even though inconsistent with sections 4 and 5 and, if any such Act does so declare, it shall have effect accordingly unless the Act is shown not to be reasonably justifiable in a society that has a proper respect for the rights and freedoms of the individual.*
>
> *(2) An Act to which this section applies is one the Bill for which has been passed by both Houses of Parliament and at the final vote thereon in each House has been supported by the votes of not less than three-fifths of all the members of that House.*
>
> *(3) For the purposes of subsection (2) the number of members of the Senate shall, notwithstanding the appointment of temporary members in accordance with section 44, be deemed to be the number of members specified in section 40(1)."*

326. The leading authority on this subject is the decision of the Judicial Committee in ***De Freitas v Permanent Secretary of the Ministry of Agriculture, Fisheries, Lands and Housing and Others***[190], a decision on appeal from the Court of Appeal of Antigua and Barbuda.

De Freitas v Permanent Secretary of the Ministry of Agriculture, Fisheries, Lands and Housing and Others

327. The appellant, who was a civil servant, was interdicted from the exercise of the powers and functions of his office by the Permanent Secretary of the respondent ministry, after

[190] (1998) 53 WIR 131

he engaged in activities which fell within the prohibition in section 10(2)(a) of the ***Civil Service Act, 1984*** (Antigua and Barbuda). That section provided as follows:

> *"A civil servant may not – (a) in any public place or in any document or any other medium of communication whether within Antigua and Barbuda or not, publish any information or expressions of opinion on matters of national or international political controversy;"*

328. Section 12(1) of the ***Constitution of Antigua and Barbuda*** guarantees freedom of expression, and section 12(4), so far as material, provides that:

> *"Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this section to the extent that the law in question makes provision – ... (*b*) that imposes restrictions upon public officers that are reasonably required for the proper performance of their functions;*
>
> *'and except so far as that provision or, as the case may be, the thing done under the authority thereof is shown not to be reasonably justifiable in a democratic society."*

329. Section 13(1) of the Constitution of Antigua and Barbuda guarantees freedom of peaceful assembly and association, and section 13(2) contains a provision in the same terms as section 12(4) in relation to public officers.

330. The appellant sought redress for the breach of his constitutional rights. The Court of first instance held that S. 10(2)(a) was unconstitutional. This finding was reversed on appeal. On appeal to the Privy Council their Lordships held that the restrictions imposed by section 10(2)(a) of the Act did not satisfy the criterion of being reasonably required for the proper performance of a civil servant's function. Further, that even if section 10(2)(a) satisfied the criterion of being reasonably required for the proper performance of a civil servant's functions, it would not have satisfied the criterion of being reasonably justifiable in a democratic society.

331. Their Lordships considered the meaning of the phrase *"reasonably justifiable in a democratic society,* at page 143:

> *"Their lordships were referred to three cases in which that phrase has been considered. In Government of the Republic of South Africa v The Sunday Times Newspaper [1995] 1 LRC 168 Joffe J adopted from Canadian jurisprudence four criteria to be satisfied for a law to satisfy the provision in the Canadian Charter of Rights and Freedoms that it be 'demonstrably justified in a free and democratic society'. These were a sufficiently important objective for the restriction, a rational connection with the objective, the use of the least drastic means, and no disproportionately severe effect on those to whom the restriction applies. In two cases from Zimbabwe, Nyambirai v National Social Security Authority [1996] 1 LRC 64 and Retrofit (Pvt) Ltd v Posts and Telecommunications Corporation [1996] 4 LRC 489, a corresponding analysis*

was formulated by Gubbay CJ, drawing both on South African and on Canadian jurisprudence, and amalgamating the third and fourth of the criteria. In the former of the two cases (at page 75) he saw the quality of reasonableness in the expression 'reasonably justifiable in a democratic society' as depending upon the question whether the provision which is under challenge –

'arbitrarily or excessively invades the enjoyment of the guaranteed right according to the standards of a society that has a proper respect for the rights and freedoms of the individual.'

In determining whether a limitation is arbitrary or excessive he said that the court would ask itself –

'whether: (i) the legislative objective is sufficiently important to justify limiting a fundamental right; (ii) the measures designed to meet the legislative objective are rationally connected to it; and (iii) the means used to impair the right or freedom are no more than is necessary to accomplish the objective.'

Their lordships accept and adopt this threefold analysis of the relevant criteria."[191]

332. The Court of Appeal of Trinidad and Tobago *in* ***Attorney General of Trinidad and Tobago v Northern Construction Limited***[192] applied the threefold test which was adopted by their Lordships in ***de Freitas.***

[191] See page 80C-G
[192] Civ. Appeal No. 100 of 2002

The Attorney General of Trinidad and Tobago v Northern Construction Limited[193]

333. This appeal arose out of a finding by the trial Judge that a search warrant issued pursuant to section 33 of the ***Proceeds of Crime Act, 2000*** and executed at the respondent's premises was unlawful because the section was unconstitutional, it not being reasonably justifiable in a society that has 'proper respect' for the rights and freedoms of the individual.

334. The section was said to be defective because of the absence of any procedure for obtaining warrants or any standard of credibility, the absence of any definition of 'excluded material' and the lack of any provision for access to or copying of seized material.

335. In allowing the appeal, the Court of Appeal found, however, that none of the matters complained of had rendered the meaning or operation of S. 33 uncertain or arbitrary, nor that they individually or cumulatively constitute an erosion of or derogation from protected fundamental rights that was arbitrary, excessive or disproportionate.

336. At paragraph 21 - 23, Archie C.J. who delivered the Judgment on behalf of the Court made the following observations:

> *"21. There is no dispute in this case that, having regard to the fact that the Act was passed with the required special majority under the constitution, the onus was on the applicant/respondent to show that, to the extent that it derogates*

[193] supra

from protected fundamental rights, the impugned provision goes further than is reasonable necessary or is reasonably justifiable in a society that has a proper respect for the rights and freedoms of the individual.

22. It is a heavy burden because the responsibility for balancing the rights of the individual with the necessity, for the good of the society as a whole, to have effective means of combating crime lies in the first instance, with Parliament. Courts must not intervene merely on the basis that a judge or judges form the view that more appropriate means could have been devised. There is always room for a reasonable disagreement or what was described during the course of submissions as a 'margin of appreciation'.

23. The learned trial judge adopted the test articulated by Gubbay CJ in ***Nyambirai v National Social Security Authority*** *[1996] 1 LRC and subsequently endorsed by the privy Council in* ***de Freitas v Permanent Secretary of the Ministry of Agriculture*** *(1998) 53 WIR 131, It is to the effect that, in determining whether a statutory provision arbitrarily or excessively invades the enjoyment of a fundamental right, regard must be had to whether:*

- *The legislative objective is sufficiently important to justify limiting a fundamental right.*
- *The measures designed to meet the legislative objective are rationally connected to it; and*
- *The means used to impair the right or freedom are no more than is necessary to accomplish the objective."*

Due Process of Law

337. Mr. Fitzgerald, counsel for the claimant placed heavy reliance on the decision of their Lordships in ***Darrin Roger Thomas and Another v Cipriani Baptiste and Others***[194] in support of his contention that the ***Amendment Act*** contravened the claimant's right not to be deprived of his liberty except by due process of law.

338. The concept of constitutional due process was considered in ***Darrin Roger Thomas and Another v Cipriani Baptiste and Others***[195] where both applicants had been condemned to death. The Court of Appeal had dismissed their appeals and they had been denied special leave to apply to the Judicial Committee of the Privy Council. The American Convention of Human Rights had been ratified by the Government of Trinidad and Tobago in 1991. This Convention allowed individuals to petition the Inter-American Commission on Human rights in instances where the Convention had been violated. The Government of Trinidad and Tobago subsequently published time limits for applications to the Inter-American Commission on Human Rights. After the exhaustion of the time limit, the execution of a condemned man would not be further postponed. Both applicants lodged applications to the Inter-American Commission on Human Rights. The Commission did not act within the time prescribed. Therefore, after the Advisory Committee on the Power of Pardon had considered their pardons warrants of execution were read out to each applicant.

339. The applicants applied to the High Court for redress under section 14 (1) of the ***Constitution*** *inter alia* seeking a declaration that their execution would contravene their

[194] [2000] 2 A.C. 1
[195] ibid

right not to be deprived of life except by due process of law guaranteed to them by section 4(a) and would be cruel and unusual punishment contrary to section 5(2)(b) of the ***Constitution***.

340. The Honourable Justice Jamadar, as he then was, granted relief sought by the first applicant. The second applicant's motion was heard by the Honourable Justice Kangaloo, as he then was, and was dismissed. Both decisions were appealed. The Court of Appeal dismissed the appeal of the second applicant. In respect of the first applicant the Court of Appeal allowed the appeal of the Attorney General and reinstated a death sentence.

341. On appeal to the Judicial Committee of the Privy Council the Board[196] held *inter alia* that the applicants had a general common law right which was affirmed by section 4 (a) of the ***Constitution*** not to have pending appellate or analogous legal process that was capable of resulting in a reduction or commutation of their sentence rendered futile by executive action.[197] This was despite the fact that the American Convention on Human Rights had not been incorporated into domestic legislation. The judgment of the majority was delivered by Lord Millett. At page 22 , His Lordship formulated this definition of due process:

> *"In their Lordships' view "due process of law" is a compendious expression in which the word "law" does not refer to any particular law and is not a synonym for common law or statute. Rather it invokes the concept of the rule of law itself and the universally accepted standards of justice observed by*

[196] Lord Goff of Chiveley and Lord Hobhouse of Woodborough dissenting.
[197] Darrin Roger Thomas and Another v Cipriani Baptiste and Others[2000] 2 A.C. 1 at page 22

civilised nations which observe the rule of law… The clause thus gives constitutional protection to the concept of procedural fairness."[198]

342. Lord Millett went on to hold that, "*the right to be allowed to complete a current appellate or other legal process without having it rendered nugatory by executive action before it is completed is part of the fundamental concept of due process."*[199]

343. The pronouncement of Lord Millett was considered and applied by Lord Hoffman in ***The State v Brad Boyce***[200]. In an incident that drew much public attention, Brad Boyce had been engaged in an altercation with Jason Johnson outside a night club in St. James on 1st September, 1996. After having received a blow to the head, Jason Johnson fell to the ground and was taken to the San Fernando General Hospital where he underwent surgery, developed pneumonia and died. Brad Boyce was tried and eventually acquitted of the charge of manslaughter. The prosecution appealed a ruling of not guilty, pursuant to S. 65E of the ***Administration of Justice (Miscellaneous Provisions) Act 1996***. The DPP appealed on the grounds, *inter alia*, that the Judge erred in law in holding the evidence of the pathologist inadmissible and consequently in ruling that there was no evidence to go to the jury on the issue of causation.

344. The defence challenged the Court's jurisdiction on a number of grounds most important of which was that S. 65E was unconstitutional because it was inconsistent with the fundamental human right not to be deprived of liberty except by due process of law and

[198] supra
[199] supra at page 24
[200] P.C. Appeal No. 51 of 2004

the right to the protection of the law under Sections 4(a) and (b) respectively of the ***Constitution***.

345. In holding that S. 65E was unconstitutional, the Court of Appeal reasoned that under the common law rule as it existed at the time of the Constitution, a second trial of an accused who had been acquitted by a jury would have been a denial of due process of law. Therefore, it follows that immunity from the possibility of such a trial formed part of the right to due process which was entrenched by section 4 of the ***Constitution***.

346. On appeal to the Privy Council, their Lordships expressed the view that the Court of Appeal was wrong in holding S. 65E to be unconstitutional. According to their Lordships, the Court of Appeal's reasoning derived its plausibility only from an ambiguity in the term "due process". Lord Hoffman, who delivered the Judgment of the Board said:

> *"In one sense, to say that an accused person is entitled to due process of law means that he is entitled to be tried according to law. In this sense, the concept of due process incorporates observance of all the mandatory requirements of criminal procedure, whatever they may be.*[201]

347. However, due process, their Lordships went on to say, also has a narrower constitutional meaning, namely those fundamental principles which are necessary for a fair system of justice. At paragraph 14 Lord Hoffman said:

> *"Thus it is a fundamental principle that the accused should be heard in his own defence and be entitled to call witnesses. But that does not mean that*

[201] The State v Brad Boyce P.C. Appeal No. 51 of 2004 at paragraph 13

he should necessarily be entitled to raise an alibi defence or call alibi witnesses without having given prior notice to the prosecution. A change in the law which requires him to give such notice is a change in what would count as due process of law in the broader sense. ***It does not however mean that he has been deprived of his constitutional right to due process of law in the narrower sense....*** *"*[202] *[Emphasis mine]*

348. It was therefore not sufficient, their Lordships concluded, that the law at the time of the Constitution gave one a right to be immune from further proceedings after acquittal by a jury. According to their Lordships:

"Section 4 entrenched only "fundamental human rights and freedoms" and the question is therefore whether the old common law rule which prevented the prosecution from appealing against an acquittal formed part of due process in its narrower sense as a fundamental right or freedom. Their Lordships do not think that it did. They would accept that the broad principle that a person who has been finally convicted or acquitted in proceedings which have run their course should not be liable to be tried again for the same offence is a fundamental principle of fairness.... But they do not think that the principle is entirely without exceptions ... and they certainly do not think that it is infringed by the prosecution having the right to appeal against an acquittal."[203]

[202] The State v Brad Boyce P.C. Appeal No. 51 of 2004 at paragraph 14
[203] Ibid at paragraph 15

349. Their Lordships concluded that the Judge's rulings were erroneous in point of law but that given the length of time that had elapsed since the incident occurred there should not be a new trial. The appeal of the DPP was therefore dismissed.

350. In Steve ***Ferguson and Ishwar Galbaransingh v The Attorney General of Trinidad and Tobago***[204] Justice of Appeal Kangaloo reconciled the competing perspectives which emanated from ***Thomas v Baptiste*** on the one hand and ***Brad Boyce*** on the other. The facts of the ***Steve Ferguson and Ishwar Galbaransingh***[205] case concerned appellants who faced serious challenges under what has become known colloquially as the "Piarco Airport Corruption Scandal". This scandal crossed borders in that the appellants also faced charges in the United States. The Government of United States of America issued an extradition request to have the appellants sent back to the States to stand trial for the charges laid against them. The Attorney General acquiesced and issued an Authority to Proceed. The appellants then embarked upon a series of legal challenges to prevent their extradition to the United States. Approximately seven varied actions were filed over time to prevent extradition.

351. The appellants eventually challenged the constitutionality of the Extradition Act. The first challenge to the constitutionality of the Extradition Act was via proceedings before Kokaram J. The appellants argued that the Extradition Act violated sections 4 and 5 of the Constitution of Trinidad and Tobago and that section 4 of the Extradition Act violated the principle of separation of powers. Kokaram J dismissed their case and held that the

[204] Civ. App. 185 of 2010
[205] Ibid

Act was not unconstitutional and that the separation of powers argument was merely academic.

352. The appellants appealed the decision of Kokaram J maintaining that the Extradition Act violated sections 4 and 5 of the Constitution and that section 4 of the Extradition Act violated the principle of separation of powers. The appellants even sought to argue that extradition in of itself was unconstitutional. The matter came before learned Justices of Appeal Kangaloo JA, Mendonça JA and Weekes JA. Kangaloo JA and Mendonça JA both handed down written judgments in the matter. The learned Justices of Appeal held that the Extradition Act did not violate the right to life; the right to liberty and security of the person and not to be deprived thereof except by due process of law; as well as the freedom of movement guaranteed under section 4(g) of the Constitution; and the right to equality before the law and the protection of the law. The learned Justices of Appeal also held that section 4 of the Extradition Act did not violate the separation of powers doctrine.

353. Justice of Appeal Kangaloo cited both the pronouncement of Lord Millett in ***Darrin Roger Thomas and Another v Cipriani Baptiste and Others*** and that of Lord Hoffman in ***The State v Brad Boyce.*** Justice Kangaloo set out to reconcile what he saw as the *"varying formulations, observations and approaches…"* of the two Law Lords.[206]

[206] See paragraph 41 of Civ. App. 185 of 2010 Ferguson and Galbaransingh v. Attorney General.

354. Advancing the hypothesis that the breadth of the Millett formula had been motivated by the fact that the applicants were facing the penalty of death, Justice Kangaloo indicated his preference for the narrow formulation of Lord Hoffman.

355. Justice of Appeal Kangaloo began consideration of the concept of constitutional due process at paragraph 37 of his judgment. The words of the learned Justice of Appeal are seminal and bear repetition in full.

> "*The concept of due process is a foundational principle of constitutional law. Its common law roots can be traced back to clause 39 of the Magna Carta;33 that is the tap root which first expressed the constitutional principles that today are generally accepted as governing any civilized society committed to the rule of law. The exact parameters of the term "due process of law" presents somewhat of a legal enigma."*[207]

356. At paragraph 38 , the learned Justice of Appeal continued :

> "*Any analysis of the due process of law must take the case of Lasalle v Attorney General as its starting point. This case contains Phillips J.A.'s classic formulation of due process of law which is broadly described as the antithesis of arbitrary infringement of the right to personal liberty. Whilst the learned judge acknowledges the difficulty in attempting to ascribe a precise definition to the term, he notes that due process, in the*
>
> *context of the criminal law, would necessarily include fundamental principles such as the reasonableness and certainty in the definition of*

[207] Civ. App. 185 of 2010 Ferguson and Galbaransingh v. Attorney General at paragraph 37

criminal offences, a trial by an independent and impartial tribunal, and observance of the rules of natural justice. This formulation received the imprimatur of the Privy Council twenty years later in Thomas v Baptiste."[208]

357. Justice of Appeal Kangaloo set out the formulation of Lord Millett and continued at paragraph 40 :

"*More recently in The State v Brad Boyce Lord Hoffman adopts a different approach to the examination of the concept of due process. His analysis proceeds along the lines of a comparison of the due process rights which exist at common law with the guarantee of due process of law as expressed in the Constitution."*[209]

358. At paragraph 40 of his judgment , Justice Kangaloo summarized the pronouncement of Lord Hoffman in this way :

"*He observes that at common law the concept of due process is wide and embodies the right of the accused person to be tried according to law whether common law or statute law and in that sense due process of law is synonymous with such common law or statute law. However His Lordship posits that the due process clause in the Constitution bears a slightly different complexion which he succinctly describes as narrower and includes the fundamental principles which are necessary for a fair system of justice."* [210]

[208] Civ. App. 185 of 2010 Ferguson and Galbaransingh v. Attorney General at paragraph 38
[209] Ibid at paragraph 40
[210] Ibid

359. Justice Kangaloo hypothesized that a possible rationale for the difference in breadth between the Millett perspective and the Hoffman perspective was the fact that the former concerned a death penalty case. This distinction Justice Kangaloo found to have been unacceptable (See paragraph 40) deciding finally that "*the modern Brad Boyce formula and analysis"* were the better approach to the interpretation of the due process rights under the Constitution when dealing with section 4(a).

360. Justice Kangaloo cited the authority of ***De Freitas v Benny*** and referring to the classic statement of Lord Diplock that the due process clause was further and better particularised in section 5(2) of the Constitution, Justice Kangaloo continued:

> "*I readily concede that the catalogue of rights in section 5(2) are not to be interpreted as exhaustive, but these basic fundamental rights: the right to be heard, the right to be presumed innocent, the right to remain silent, the right to a fair and impartial hearing, where life, liberty and security of the person are at stake are really what I think Lord Hoffman had in mind in Brad Boyce and they do not readily lend themselves to a balancing exercise. Derogation from these rights is an infringement of the due process of law. Where these rights are engaged it would be extremely difficult for a court to hold that Parliament has achieved the right balance in enacting legislation which is inconsistent with these rights but only to such a degree as not to be unconstitutional.*[211]

[211] Civ. App. 185 of 2010 Ferguson and Galbaransingh v. Attorney General at paragraph 42

361. The learned Justice of Appeal contrasted the situation where the unqualified rights such as freedom of movement, freedom of the press and freedom of expression are engaged. In that situation, according to Justice of Appeal Kangaloo, the Court can "*more readily look to the aims and objectives of the legislation and come to a determination as to whether the proper balance has been struck, so as not to be unconstitutional"*[212]. Ultimately the learned Justice of Appeal decided :

> *"What due process does guarantee is a fair process having regard to the nature of the proceedings in issue…*"[213]

362. This Court finds the reasoning of Kangaloo JA to be impeccable and compelling. Moreover, I consider myself bound by the ruling of the learned Kangaloo JA that the modern ***Brad Boyce*** approach is to be preferred to that of Lord Millett in ***Thomas v Baptiste and Others***.

<u>Legality of responding to Populist Pressure</u>

363. It was Mr. Beloff's submission that the trigger for the enactment of the ***Amendment Act*** was a public furore spear-headed by the print media as to the prospect of the discharge of the claimant and Mr. Galbaransingh. Mr. Beloff relied on these authorities :

364. ***R v Secretary of State for the Home Department, ex parte Venables; R v Secretary of State for the Home Department, ex parte Thompson***[214] **-**

[212] See paragraph 43 of the judgment of Justice of Appeal Kangaloo in Ferguson and Galbaransingh v. Attorney General Civ. App. 185 of 2010 .
[213] Ibid
[214] [1997] 3 All ER 97

The applicants, while they were still children each aged 10 had murdered another child, who was two (2) years old. The murder caused much public uproar in the United Kingdom. The Secretary of State at the time held wide powers which allowed him to extend the penal element in sentencing from that which the trial judge had recommended. Exercising that power, the Secretary of State extended the period of time from the 10 years recommended by the Chief Justice to 15 years. This was in response to a public petition containing about 278,300 signatures, a campaign of over 20,000 coupons organised by a newspaper, and over 5,000 letters, requesting that the two young boys be detained for life.

365. The applicants applied for judicial review to quash the Home Secretary's decision. The Court of Appeal, upon an appeal by the Home Secretary from the Divisional Court, allowed the appeal in part holding that the Home Secretary was entitled to set a tariff but that he ought not to have taken public opinion into account. On appeal to the House of Lords, the majority held that the Home Secretary should not have taken into consideration public opinion in coming to his decision.

366. Lord Goff of Chieveley observed that the Secretary of State was exercising a judicial function closely analogous to a sentencing function and in so doing he is "*under a duty to act within the same constraints as a judge will act when exercising the same function*."[215] Lord Goff continued in this way :

> *"In particular, should he take into account public clamour directed towards the decision in the particular case which he has under consideration, he will*

[215] R v Secretary of State for the Home Department, ex parte Venables - [1997] 3 All ER 97 at page 115

be having regard to an irrelevant consideration which will render the exercise of his discretion unlawful."[216]

367. ***R v Secretary of State for Home Department exp Pierson***

The applicant murdered his parents when he was 21 years of age. The Secretary of State at the time had fixed a penal element of 20 years as the minimum period to satisfy the requirements of retribution and deterrence declining to adopt the 15 year period recommended by the trial judge and Chief Justice. The young man was successful in applying for judicial review of the decision of the Secretary of State. The Secretary of State appealed the decision which was upheld by the Court of Appeal. On appeal to the House of Lords, the House of Lords held that in accordance with the Secretary of State's 1987 policy the Secretary of State was only entitled to increase a sentence where there were exceptional circumstances and that there was no general power to increase a period of time that was fixed and had been communicated to a prisoner.

368. Lord Steyn, expounding on the principle of legality noted that the Home Secretary was bound by the very constraints placed upon a judge in the exercise of sentencing.[217] The Home Secretary ought to have acted in conformity with fundamental principles of law governing the imposition of criminal punishment.[218] Lord Steyn in explaining the principle referred to *Cross, Statutory Interpretation*, 1st ed. (1976), pp. 142-143 where the learned authors explain that the legislators do not enact legislation in a vacuum and

[216] ibid
[217] R v Secretary of State for Home Department exp Pierson [1998] AC 539 at page 588
[218] ibid

that much is left unsaid. The legislators expect that the courts will continue to act within established principles of law.[219]

369. Lord Steyn gave two examples of the operation of the principle of legality: ***Reg. v. Secretary of State for the Home Department, Ex parte Doody***[220] where the House of Lords held that the "*common law principles of procedural fairness required disclosure to a prisoner of the advice to the Home Secretary of the trial judge and of the Lord Chief Justice in order to enable the prisoner to make effective representations before the Home Secretary fixed the tariff."*[221] And in the case of, ***Ex parte Venables***[222], where the "*majority decided that in fixing a tariff the Home Secretary may not take into account public protests in aggravation of a particular tariff.*"[223] In those two cases the common law supplemented statute on the basis of the principle of legality.

Abuse of Process

370. Learned Senior Counsel Ms. Chote argued that there should be a stay of the criminal proceedings against the claimant on the ground that there had been an abuse of the court's process.

371. Courts may, in the exercise of their inherent power to protect their process from abuse, grant a stay to an indictment if it would be oppressive or unfair to the accused. See

[219] [1998] AC 539 at page 588
[220] [1994] 1 A.C. 531
[221] [1998] AC 539at page 588
[222] [1997] 3 All ER 97
[223] R v Secretary of State for Home Department exp Pierson [1998] AC 539at page 588/589

Connelly v The Director of Public Prosecutions[224], an authority cited and relied upon by learned Senior Counsel, Ms. Chote.

372. It was Ms. Chote's contention that the court's process had been abused by the action of the DPP. Section 90 of the ***Constitution*** prescribes the role of the Director.

373. Section 90 states:

> ***90.*** *(1) The provisions of this section shall, subject to section 76(2) have effect with respect to the conduct of prosecutions.*
>
> *(2) There shall be a Director of Public Prosecutions for Trinidad and Tobago whose office shall be a public office.*
>
> *(3) The Director of Public Prosecutions shall have power in any case in which he considers it proper to do so-*
>
> *(a) to institute and undertake criminal proceedings against any person before any court in respect of any offence against the law of Trinidad and Tobago;*
>
> *(b) to take over and continue any such criminal proceedings that may have been instituted by any other person or authority;*
>
> *(c) to discontinue at any stage before judgment is delivered any such criminal proceedings instituted or undertaken by himself or any other person or authority.*
>
> *(4) The powers conferred upon the Director of Public Prosecutions by subsection (3) (b) and (c) shall be vested in him to the exclusion of the*

[224] [1964] AC 1254 (HL)

person or authority who instituted or undertook the criminal proceedings, except that a person or authority that has instituted criminal proceedings may withdraw them at any stage before the person against whom the proceedings have been instituted has been charged before the Court.

(5) For the purposes of this section a reference to criminal proceedings includes an appeal from the determination of any court in criminal proceedings or a case stated or a question of law reserved in respect of those proceedings.

(6) The functions of the Director of Public Prosecutions under subsection (3) may be exercised by him in person or through other persons acting under and in accordance with his general or special instructions.

374. Section 76 (2) of the ***Constitution*** addresses the role of the Attorney General and is also relevant. It states:

(2) The Attorney General shall, subject to section 79, be responsible for the administration of legal affairs in Trinidad and Tobago and legal proceedings for and against the State shall be taken—

(a) in the case of civil proceedings, in the name of the Attorney General;

(b) in the case of criminal proceedings, in the name of the State.

375. In submitting that the Director had exceeded the limit of his constitutional powers Ms. Chote relied upon the following cases.

376. ***Sharma v Brown- Antoine***[225]

Sharma v Brown-Antoine provided invaluable learning as to the role and functions of the D.P.P. The appellant, who was at the time the Chief Justice of Trinidad and Tobago, appealed against a decision of the Court of Appeal of Trinidad and Tobago to set aside the grant of leave to seek judicial review of the Deputy Director's decision to prosecute him. The central issue in this case was whether the decision to prosecute the Chief Justice was susceptible to judicial review.

377. The Privy Council held that a decision to prosecute was in principle susceptible to judicial review on the ground of interference with the prosecutor's independent judgment but, that it was a highly exceptional remedy.

378. Their Lordships observed that the courts have given reasons for their extreme reluctance to grant leave to apply for judicial review of the Director's decision to prosecute. Their Lordships included a quotation from the ***Matalulu***[226] case, as identifying this factor as a reason for the court's reluctance to grant judicial review:

> "*the great width of the Director's discretion and the polycentric character of official decision making in such matters including policy and public interest considerations which are not susceptible of judicial review …"*[227]

Mr. Benjamin, learned Counsel for the Director relied on the foregoing quotation.

379. ***Dhanraj Singh v The Attorney General of Trinidad and Tobago and The Director***[228]

[225] [2007] 1 WLR 780
[226] [2003] 4 L.R.C. 712
[227] [2007] 1 WLR 780 at 788 E

Dhanraj Singh had been charged with numerous offences under the ***Prevention of Corruption Act No. 11 of 1987***. He was also charged with the offence of murder. In both cases the charges were laid by the Director after he reviewed, *inter alia*, statements from accomplices to the crimes. With respect to the murder charge one of the persons from whom a statement was taken was one Elliot Hypolite who was charged with the same offence. The Director, however, formally discontinued the charge against Mr. Hypolite and granted him immunity from prosecution. The Director also expressed an intention to grant immunity to Karamchand Rampersad whose statement the Director had considered in laying the corruption charges against Mr. Singh.

380. By a constitutional motion Mr. Singh challenged the power of the Director to grant immunity to Mr. Hypolite and Mr. Rampersad. He sought, *inter alia*, an order staying the murder proceedings on the ground of abuse of process. Justice Bereaux (as he then was) found no basis to the allegation of abuse of process.

381. At page 23 of his Judgment Justice Bereaux summarised the principles governing the court's inherent power to stay a prosecution on the ground of abuse of process:

> *"The court has inherent power to stay a prosecution on the ground of abuse of process. In Civil Appeal #131/86* ***Ramesh Maharaj v Her Worship Mrs. Eileen Clarke and Clebert Brooks, the Director of Public Prosecutions****, the Court of Appeal had to consider a similar question. In my judgment, the law therein stated still represents the state of the law today and the principles that I deduct from it are:*

[228] HCA No. S-395 of 2001

(1) The court will not allow its function as a court of law to be misused and will summarily prevent its machinery from being used as a means of vexation or oppression in the process of litigation (cited by Bernard J A in ***Rudyard Alexander v ASP Hubert Williams*** *Mag. App. #3 of 1984 from Master Jacob's article entitled "The Inherent Jurisdiction of the Court (1970) Current Legal Problems, Volume 23 at pages 40-41."*

(2) It is an abuse of process for the prosecution to manipulate the process of the Court so as to deprive the defendant of a protection provided by the law or to take unfair advantage of a technicality; or on a balance of probability, the defendant has been, or will be, prejudiced in the preparation or conduct of his defence by delay on the part of the prosecution which is unjustifiable. The ultimate objective of this discretionary power to stop a prosecution is to ensure that there should be a fair trial according to law, which involves fairness to both the defendant and the prosecution.

Per Sir Roger Ormrod in ***Reg v Derby Crown Court ex parte Brooks*** *(1984) 80 Cr App. R. 164 at 168-169.*

(3) The power of the court to stay a criminal proceeding on the ground of abuse of process should only be exercised in the most exceptional of circumstances – per Viscount Dilhorne in ***Director of Public Prosecution v Humphreys*** *[1977] A.C. 26.*

(4) The categories of abuses of process are not to be regarded as closed but are to be found on a case by case basis. The gravity of the matter alleged to

constitute the abuse is an important consideration, as is the duty of the court to balance the interest of the accused and the interest of the public."

382. Significantly, Bereaux J. also examined the relationship between the duties of the Director and that of the Attorney General under the Constitution. In particular he considered S.90(1) of the Constitution which renders the Director's powers subject to S. 76(2) which provides that:

> ***"****The Attorney General shall, subject to section 79, be responsible for the administration of legal affairs in Trinidad and Tobago and legal proceedings for and against the State shall be taken – (a) in the case of civil proceedings, in the name of the Attorney General; (b) in the case of criminal proceedings, in the name of the State".*

383. Bereaux J. made the following observations at page 70 –71:

> *"The scheme and structure of the Constitution are also consistent with the creation of an independent Director of Public Prosecutions. The absence of express words guaranteeing the independence of the office of the Director of Public Prosecutions does not make the office any less independent because of it. Section 90(3) gives the Director the right to exercise his powers "in any case in which he considers it proper to do so". Those powers are his and his alone, to be exercised in his discretion. To act on or by the direction of any person would be an improper exercise of them.*

Any such power of direction in the Attorney General must be expressly provided by the Constitution and the absence thereof is as significant as the absence of any protection clause.

Section 76(2) makes the Attorney General responsible for the administration of legal affairs. It makes him responsible for the overall management of legal affairs in Trinidad and Tobago and in so far as it affects the office of the Director of Public Prosecutions would include the financial responsibility of running that office, the provision of appropriate accommodation and facilities and other related administrative matters necessary for the efficient running of the office of Director of Public Prosecutions.

It also includes accounting to Parliament for the affairs of that office and the Department in which it functions. ***In this regard the words "subject to 76(2)" place on the Director a duty to keep the Attorney General informed of major and important matters of public interest or which affect the public interest.*** *[Emphasis Mine] He is not however obliged to follow any direction or instruction arising out of such discussions."*[229]

The Admissibility of Material from Hansard

384. Having considered the relevant cases put forward by all parties the following principles of law can be gleaned:

[229] Supra at page 70-71

(a) The court may have recourse to Parliamentary materials particularly the Hansard for the purpose of statutory interpretation where: (a) the legislation is ambiguous or obscure, or leads to an absurdity; (b) the material relied on consists of one or more statements by a minister or other promoter of the Bill together if necessary with such other parliamentary material as is necessary to understand such statements and their effect; (c) the statements relied on are clear. See Lord Browne Wilkinson in ***Pepper v Hart***[230]

(b) The principles in ***Pepper v Hart***[231] apply to ordinary domestic legislation and where the court is considering the construction of a particular statutory provision. These principles may not be strictly applicable when determining the purpose or object of a statute.

(c) Their Lordships in Privy Council decisions have referred extensively to Hansard Reports, for the purpose of identifying the mischief which the statute was intended to remedy. In ***Khoyratty***[232] Lord Steyn in identifying the mischief to which section 1 of the Constitution of Mauritius was directed, referred to speeches made by the Attorney General and the Prime Minister by quoting from the Hansard. No mention was made as to whether such reference was consistent with the principles laid down in ***Pepper v Hart.***[233]

[230] See the leading judgment of Lord Browne-Wilkinson in Pepper v Hart [1993] 1 All ER 42.
[231] ibid
[232] State of Mauritius v Khoyratty [2007] 1 AC 80 at page 94
[233] Pepper v Hart [1993] 1 All ER 42

385. In ***Gopaul (HV Holdings ltd) v Baksh (Incorporated Trustees of the Presbyterian Church of Trinidad and Tobago)***[234] Lord Walker reading the judgment of the Privy Council indicated that material concerning the passage of the Landlord and Tenants Act through parliament had been put before the Board. The material did not meet the stringent requirements of ***Pepper v Hart***[235] and thus could not "*be determinative of the particular issue of statutory construction*"[236] but could help explain the background and mischief which the Act sought to remedy. At paragraph 7 his Lordship stated: "*The Board cites these passages not as Pepper v Hart material but as a general indication of the legislative purpose.*"[237]

REASONING AND DECISION

386. Eight issues arise on the claim before this court. They are as follows:

i. Whether the Amendment Act is invalidated wholly or in part by reason of its contravention of the doctrine of separation of powers.

ii. Whether in adjudicating on the issue at (i) supra the Court ought to have regard to Reports of Parliamentary debates.

iii. Whether the Amendment Act is protected by the conjoint effect of section 13 of the ***Constitution*** and the 3/5th majority.

[234] Gopaul (HV Holdings ltd) v Baksh (Incorporated Trustees of the Presbyterian Church of Trinidad and Tobago) [2012] UKPC 1
[235] Pepper v Hart [1993] 1 All ER 42
[236] Gopaul (HV Holdings ltd) v Baksh (Incorporated Trustees of the Presbyterian Church of Trinidad and Tobago) [2012] UKPC 1 at paragraph 3
[237] Ibid at paragraph 7

iv. Whether the claimant conceived a legitimate expectation that he would not be required to face trial in respect of offences which he was accused of having committed more than ten (10) years ago, and if so, whether the frustration of such expectation amounts to an abuse of power.

v. Whether the claimant suffered a contravention of his right not to be deprived of his liberty except by due process of law according to his fundamental right at section 4(a) of the ***Constitution***.

vi. Whether the ***Amendment Act*** is invalid because it was enacted as a reaction to populist pressure.

vii. Whether the ***Amendment Act*** was enacted in breach of the rule of law.

viii. Whether there was unlawful interference by the Director of Public Prosecutions in the legislative process and if so, whether such interference amounted to an unconstitutional abuse of process.

I will consider each issue in the reverse order in which they are listed.

The Director

387. For many months prior to the proclamation of section 34 the Director had been involved in high level consultations in respect of the entire ***Administration of Justice (Indictable Proceedings) Bill***. His initial involvement dates back to March 2011, when the Minister of Justice invited the Director to comment on the Bill. In July, 2012, the Director also participated in a meeting with the Judiciary and Judicial Sector Committee.

388. It is also undisputed that the Director was unaware of the prospect of early proclamation of section 34 of the ***Act*** and according to his uncontradicted evidence, he first learnt of the freshly proclaimed section 34 on or about 31st August, 2012.

389. The Director's active involvement with section 34 and with its ultimate repeal commenced on 6th September, 2012. On this day, he received the application of Amrith Maharaj for relief under section 34 of the ***Act***. On the following day, when the Piarco proceedings were listed for hearing before her worship Ejenny Espinet, the Director sought an adjournment, for the stated purpose of considering the effect of section 34 on the Piarco prosecutions.

390. Thereafter, the Director became more proactive, writing letters to the Attorney General on 10th and 11th September, 2012 and expressly calling for the repeal of section 34. The letters speak for themselves, demonstrating a clear and undeniable emphasis on the Piarco prosecutions and the prospect of their being brought to an untimely end by the effect of section 34.

391. The Director issued his Press Release in order to enlighten the public as to the effect of section 34 principally on the Piarco prosecutions, but also on serious offences to which section 34 would apply.

392. The Director's involvement deepened when he supplied his views on the draft bill by way of a letter dated 13th September, 2012 to the Attorney General. This letter came to the attention of the Attorney General after the ***Amendment Act*** had been enacted.

393. The foregoing was the extent of the Director's involvement:- expression of alarm; the provision of advice and information to the Attorney General and the issue of a public statement. The Court must consider these actions in the light of the role and functions of the Director as prescribed by section 90 and 76(2) of the ***Constitution*** and as interpreted by Justice Bereaux in ***Dhanraj Singh v The Attorney General & DPP***[238]

394. In ***Dhanraj Singh v The Attorney General & DPP***[239] Justice Bereaux (as he then was) re-asserted the principle of the independence of the DPP from political interference in the exercise of his prosecutorial functions[240].

395. This learning, invaluable though it may be, is really collateral to the issue in this claim. There is no suggestion here that there was any attempt at political interference with the Director. By contrast, the complaint is that the Director was attempting to exercise control of the Attorney General and by extension, of the entire Parliament.

396. Even if such was the ambition of the learned Director, there is no evidence to suggest that he wielded such unusual power. Rather, the Director's actions had the effect of articulating in an emphatic manner his views of the events surrounding the entry into force of section 34.

[238] H.C.A.# S 395 of 2001.
[239] Ibid.
[240] Ibid at page70

397. Even if the actions of the Director may be seen as unusual or even officious, it is my view that they do not fall beyond the pale of the Director's function as outlined at section 90 of the ***Constitution***, where the Director's role is prescribed to be *"... subject to section 76(2)"*. This phrase received the critical scrutiny of Bereaux J. (as he then was) in ***Dhanraj Singh v The Attorney General & DPP.*** Justice Bereaux wrote:

> *"In this regard the words 'subject to 76(2)' place on the Director a duty to keep the Attorney General informed of major and important matters of public interest or which affect the public interest ..."* [241]

398. According to the analysis of Bereaux J the rationale for placing on the Director a duty to keep the Attorney General informed is to enable the latter to account to Parliament for the affairs of the office of the Director.

399. Accordingly, the pattern which emerges from the learning in ***Dhanraj Singh***[242] is the provision of information by the Director to the Attorney General for the ultimate purpose of reporting to Parliament. In my view, this pattern is discernible in the facts before me. The Director was anxious to inform the Attorney General as to the immediate effects of section 34 and what it augured for the future. Such information was supplied to the Attorney General ultimately for the purpose of accounting to Parliament. This the Attorney General accomplished by his address to Parliament on 12th September, 2012[243].

[241] Dhanraj Singh v The Attorney General & DPP H.C.A. #S 395 of 2001 at page 71
[242] Ibid
[243] See S.F. 22 affidavit of Steve Ferguson

400. Accordingly, it is my view and I hold that the Director did not act beyond his constitutionally created powers and his actions could not accurately be described as illegal.

401. It follows, therefore, that the argument on abuse of process must fail. In the event that I am wrong on this issue, however, I proceed to assume that the Director had engaged in illegal interference in proceedings to which he was a party and to consider whether such interference would entitle the claimant to a stay of the ongoing criminal proceedings against him.

402. The learning is clear and the authorities are myriad in support of the proposition that the criminal court is invested with the power to protect itself against abuse. This was dealt with extensively by Bereaux J. in ***Dhanraj Singh v The Attorney General & DPP*** [244]**.**

403. Accordingly, it is my view and I hold that even if the actions of the Director constituted an abuse of process, the power and duty to order the stay falls to the court which is seized of the criminal proceedings. The claim for a stay of proceedings is, therefore, refused.

Populist Pressure

404. Mr. Beloff, Q.C., who appeared for the three companies argued that the ***Amendment Act*** was unconstitutional because it was *"an impermissible response to popular pressure ..."*.

[244] Dhanraj Singh v The Attorney General & DPP H.C.A. # S-395 of 2001 page 23-26.

405. The substance of the popular pressure according to learned Queens Counsel was a cry for Galbaransingh and Ferguson to stand trial.

406. In support of his arguments Mr. Beloff Q.C. relied on ***R v Secretary of State for Home Department Ex. p Venables***[245] and ***R v Secretary of State for Home affairs Ex. p Pierson***[246]. The facts and findings in these cases have been summarised in an earlier part of this judgment[247].

407. In my view, the two cited cases are eminently distinguishable from the instant claim, since neither case concerned the enactment of legislation. ***Venables*** concerned a decision of the Secretary of State in fixing the tariff which would influence the period of detention of juvenile offenders. In so doing, it was clear that the Secretary of State was exercising a quasi-judicial role and public sentiment would have been an irrelevant factor to take into account.

408. By contrast, in the instant proceedings Parliament exercised not a quasi-judicial function, but a purely legislative one. In my view, therefore ***Venables*** does not assist the claimant.

409. Similarly, in ***Pierson***, their Lordships considered a complaint against the decision of the Secretary of State. Once again the impugned decision was the determination of the penal element of the period of detention to be served by a person convicted of having murdered his parents. In ***Pierson*** their Lordships applied ***Venables***. Significantly, Lord Steyn in

[245] [1997] 3 All ER 97.
[246] [1998] AC 539
[247] See supra at paragraphs 364 and 367.

the course of his exposition on the principle of legality noted that the Home Secretary was bound by the very constraints that operated on a Judge[248]. ***Pierson***, therefore, also concerns the exercise of a quasi-judicial function. It can therefore have no application to Parliament in the exercise of its legislative functions.

410. However, in my view, the logical consequence of the submission of learned Queens Counsel would require the court to embark on an examination of the motive of Parliament in the exercise of its legislative functions.

411. The Court may be justified in embarking upon such an enquiry where it is engaged in considering whether an Act falls within the exception to section 13 of the ***Constitution*** by not being *"reasonably justifiable"* in a society that has proper respect for the rights and freedoms of the individual.

412. It seems, however, that any other enquiry as to the motive of Parliament will constitute an impermissible intrusion by the Court on the domain of the legislature. It is my view, therefore, that the ***Amendment Act*** ought not to be declared to be invalid only because it was passed as a reaction to populist pressure.

Due Process of Law

413. Learned Queens Counsel, Mr. Fitzgerald, contends that the ***Amendment Act*** effectively prevented the claimant from completing proceedings which he had commenced under section 34, while it had been in force.

[248] [1998] A.C 539 at page 588.

414. It was the submission of learned Queens Counsel that the act of preventing the completion of existing proceedings constituted a breach of constitutional due process according to the decision of their Lordships in ***Thomas v Baptiste***[249]. The distinction between the instant claim and ***Thomas v Baptiste***, according to the submission of learned Queens Counsel, was that ***Thomas v Baptiste*** was concerned with the right to life[250] while in these proceedings the rights to liberty and property are engaged[251].

415. Since the pronouncement of their Lordships in ***Thomas v Baptiste***, the breadth of constitutional due process was again considered by their Lordships in ***The State v Brad Boyce***[252], where Lord Hoffman formulated a narrower definition of due process. Both these authorities were considered in ***Ferguson and Galbaransingh v The Attorney General***[253] where Justice of Appeal Kangaloo sought to reconcile the two apparently conflicting tests.

416. I have indicated earlier in this decision that I regard myself as bound by the decision of Justice of Appeal Kangaloo that the narrower Hoffman formula is preferable to the wider Millet formula.

417. According to Justice of Appeal Kangaloo the concept of "due process" guarantees *"... a fair process having regard to the nature of the proceedings in issue*[254].

[249] [2000] 2 AC 1.
[250] S. 4(a) of the Constitution.
[251] S. 4(a) of the Constitution.
[252] [2006] UKPC 1
[253]Civil Appeal No. 185 of 2010.
[254] Civ. App. 185 of 2010 Ferguson & Galbaransingh v The Attorney General at paragraph 43.

418. It is therefore necessary to consider whether the ***Amendment Act*** deprives the claimant of his right to a fair process in its provision at section 6 that existing proceedings be void.

419. In ***Ferguson and Galbaransingh***[255] Justice of Appeal Kangaloo emphasised that the right of the claimants was to a fair process having regard to the nature of the proceedings. It was for this reason that he embarked on an analysis of extradition proceedings. I will, therefore, consider the proceedings to which the claimant was a party, his status quo before the advent of section 34, the end which the section 34 application would inevitably have achieved and the loss which the claimant suffered by the provision in the ***Amendment Act*** that his application be invalidated from the date of the repeal.

420. Prior to the proclamation of section 34 in late August, 2012, the claimant was facing charges as an accused person in the Piarco Cases. In that capacity he was invested with all the fundamental rights to which an accused person has access. He would have been invested with the rights to each item of protection specified by section 5(2) of the ***Constitution***, which constitute further and better particulars of both the due process clause and the right at section 4(b) to the protection of the law. (See Lord Diplock in ***De Freitas v Benny*** [1975] 3 WLR 388).

421. Moreover, as an accused person, the claimant would have been entitled to seek the protection of the presiding Magistrate where unfair practices on the part of the prosecution amounted to an abuse of the court's process. See the decision of Bereaux J.

[255] Civ. App. 185 of 2010 Ferguson & Galbaransingh v The Attorney General at paragraph 43.

In ***Dhanraj Singh v The Attorney General & DPP***[256] where the learned Judge made extensive reference to two Privy Council decisions which were based on the premise that the trial Judge was empowered to take action to prevent abuse.

422. The power of the presiding Magistrate included the power to stay the proceedings on the ground of delay that was prejudicial to the defence. See ***Dhanraj Singh v The Attorney General & DPP*** where Justice Bereaux cited ***DPP v Tokai*** [1996] AC 856 and Lord Keith's quotation of the words of Chief Justice de la Bastide in ***Sookermany v DPP*** (Civ. App. #153 of 1995).

423. With the entry into force of section 34 the claimant became entitled to the benefit of a limitation provision.

424. Section 34, as with other limitation provisions was not designed to take account of the merits of the proceedings to which it was applied. By virtue only of the time when an offence was allegedly committed or a cause of action arose, the consequence flowed automatically, bringing the proceedings to an end. It was incumbent on the accused to do no more than approach the court by filing his application under section 34. In all this, the claimant continued to be invested with rights enshrined at section 4(a) of the Constitution.

425. The claimant then moves from being an accused person facing criminal charges and invested with all his constitutional rights to being an accused person still vested with his

[256] H.C.A. S. 395 of 2001.

constitutional rights, but entitled by virtue of the date of the alleged offence to have criminal proceedings discontinued.

426. Upon the retrospective repeal of section 34 the claimant's entitlement undergoes yet another change. He now loses his entitlement to rely on the limitation provision and reverts to his status of an accused person, invested with all the constitutional protections which he had never lost.

427. In my view, it would not be accurate to hold that he had been deprived of the fair process envisaged by Justice Kangaloo. The fair process, which had earlier protected him as an accused remained unchanged and intact. He may have lost the opportunity afforded by the limitation provision. He has however suffered no deprivation of the fair process which the Constitution guarantees and which the presiding Magistrate is empowered to enforce.

428. It is, therefore, my view that the Amendment Act has wrought no contravention of the right of the claimant's liberty or property and the right not to be deprived thereof by due process of law.

429. In the event that I am wrong in regarding myself bound by the views of Justice of Appeal Kangaloo, I proceed to consider whether the pre-mature termination of the claimant's proceedings contravened his right according to the formula of Lord Millet in ***Thomas v Baptiste***.

430. The applicants, Thomas and Hilaire were both convicted of murder and were condemned to face the penalty of death. An administration which was determined to implement the death penalty issued Instructions which effectively ended appeals to international human rights bodies. Where the appeals were pre-maturely ended by virtue of the Attorney General's instructions, the law would take its course, without the Mercy Committee having the benefit of the views of the international human rights bodies.

431. By the instructions of the Attorney General, the implementation of the penalty of death was not only fast forwarded, but the applicants were deprived of the possibility of a successful appeal to international bodies which may have had some substantial sway in their obtaining mercy.

432. I proceed to consider whether the claimant in these proceedings has suffered a comparable loss. He has lost the benefit of a section which was ostensibly enacted not so much for the benefit of the accused, but to free the system of deadwood matters and to liberate persons who by virtue of their inability to secure bail had probably been in custody for a period in excess of what would have been imposed as punishment on conviction. The benefit to which the claimant became entitled was in reality a by-product of a section which was designed to meet other needs.

433. Having lost this benefit, the claimant, unlike the applicants in ***Thomas v Baptiste*** is returned to his former status. The loss of the benefit did not have the effect of abridging the time at which he would face an irreversible end.

434. It is therefore my view and I hold that the claimant is far from comparable to Thomas and Hilaire. The claimant in these proceedings continues to retain the constitutional right to which he is and was always entitled.

Legitimate Expectation

435. It has been contended on behalf of the claimant that he acquired a legitimate expectation that he would not be tried for the historic offences alleged against him[257].

436. Three kinds of statements were identified in the submission of learned Q.C. as the foundation for a legitimate expectation on the part of the claimants. The first kind of statement was that made in the course of Parliamentary debates in respect of the Bill. The second statement was the proclaimed section 34 itself. In the words of learned Queens Counsel as appearing in his written submission of the 8th January, 2012:

> *"This expectation resulted firstly from the public clear and unequivocal terms in which the right not to be put on trial ... was created by the enactment and proclamation of section 34 ..."*

437. The third kind of statements are those made by the Honourable Minister of Justice to the media.

438. It is well settled by the highest authority that the claimant who claims the benefit of a legitimate expectation is required to prove *"a promise which is clear unambiguous and devoid of relevant qualification ..."*. These were the words of Lord Hoffman in ***R (on the application of Bancoult) v Secretary of State for Foreign and Commonwealth***

[257] See the written submission filed on behalf of the claimant on 8th January, 2013 at paragraph 1.7.

Affairs[258]**.** These words were quoted by Lord Dyson in ***Paponette v The Attorney General***[259] a decision of their Lordships from the Court of Appeal of Trinidad and Tobago.

439. Whether the promise in question was *"clear, unambiguous and devoid of relevant qualification"* depends on how it would reasonably be understood by those to whom it was made. I proceed therefore to consider each kind of statement in order to examine whether they could properly constitute the foundation for legitimate expectation.

440. Statements had been made by the Honourable Herbert Volney in the course of debates in the House of Representatives. Minister Volney (as he then was) stated that clause 34 would provide for the discharge of the accused on the ground of delay ...[260]".

441. The terms of clause 34 were altered, the amended version being read to the Senate on the 29th November, 2011.

442. The second statement is that appearing in the proclaimed section 34 itself (see Appendix I). The third kind of statement was made by Minister Volney to journalist Keino Swamber on the 5th September, 2012, following the entry into force of section 34.

443. In my view, none of the three kinds of statements could accurately be described as clear and unambiguous representations to the claimant that he would not stand trial for historic offences. The statements need to be examined in context and when this is done it is clear

[258] R (on the application of Bancoult) V Secretary of the State for Foreign and Commonwealth Affairs [2009] AC 453 at paragraph 60.
[259] [2012] 1AC 1
[260] See affidavit of Steve Ferguson filed on 3rd October, 2012 at paragraph 9.

that Minister Volney was making neither a promise or representation to the claimant or anyone else but was explaining at two different stages the legislative plan of government to address endemic delays in the criminal justice system. The first stage was when clause 34 was being debated in Parliament. The second stage was after section 34 had already been proclaimed. At this stage Minister Volney could do no more than to provide an opinion as to the proper interpretation of duly enacted legislation.

444. However, the difficulties which beset the claimants' contention are deeper. By the date on which the claimant complains that he suffered a frustration of his legitimate expectation, section 34 had already been made law. In the words of learned Queens Counsel for the claimant, the claimant's right had crystallised in the provision of the now enacted and proclaimed section 34.

445. Even in its rudimentary stages of its jurisprudential development, legitimate expectation arose in the absence of rights. More recently, the learning is clear that a legitimate expectation does not arise on the basis of a statute. Rather the rights crystallised by the statute will be founded on *"the black letters of the statute."* See ***R v DPP ex p. Kebilene***[261]**.**

446. The third statement was that made by Minister Volney to journalist Keino Swamber on 5th September, 2012. This was not part of an Act of Parliament and was clearly not covered by ***Kebilene***[262]. It is my view however, that following the proclamation of section 34, the proper interpretation of the section and the extent to which it conferred

[261] R v DPP ex p Kebilene [2000] 2 AC 326 per Law LJ at 355G.
[262] See 5 supra.

rights and obligations on anyone is a matter for the Court. Minister Volney could provide an opinion, an undoubtedly very persuasive opinion. His view as to the meaning of section 34 following its proclamation could however carry no greater importance. The rights of the claimant would continue to be founded on the words of the statute as interpreted and declared by the Court.

447. Accordingly it is my view that in respect of the ground of legitimate expectation the claimant has failed to prove that he was the beneficiary of a promise or representation on which a legitimate expectation could be based.

448. It is therefore wholly unnecessary to proceed to the second part of the ***Coughlan***[263] formula to decide whether the frustration of the representation constituted an abuse of power.

449. Learned Queens Counsel Mr. Fitzgerald also presented arguments on a second kind of legitimate expectation. This second kind, according to the submission of learned Queens Counsel arises at common law in criminal proceedings.

450. In the words of learned Queens Counsel

> *"...there is a general principle of law that the courts should not permit a prosecution to commence or to continue where the initiation or continuation of proceedings is in breach of a promise given by a representative of the State ...*[264] *".*

[263] R v North East Devon Health Authority Ex p. Coughlan [2001] QB 213.
[264] Written submissions filed on behalf of the claimant on 8th January, 2013 at paragraph 7.2.

451. In my view the claimant has failed on the evidence to prove that any representative of the State made a promise to him that his prosecution would be discontinued. Moreover, the authorities on which learned Queens Counsel relied relate to undertakings provided by the police and not to statements made in the course of Parliamentary debates as to the general significance of proposed legislation. Accordingly the authorities cited by learned Queens Counsel cited by learned Queens Counsel of ***R v Croydon Justices Ex p. Dean***[265] and ***Chu Piu-Wing v The Attorney General***[266] are eminently distinguishable.

452. Even if I am incorrect however, it is my view that the presiding Judge or Magistrate in the continuing prosecution is adequately empowered to give effect to the alleged expectation. The presiding Magistrate or Judge is also the proper authority to enforce the alleged expectation in the exercise of her power to protect the Courts process from abuse. This was the clear effect of the decision in ***R. Croydon Justices ex p. Dean*** where it was held that the application should have been made to the Crown Court at trial.

453. I hold therefore that the claimant has failed altogether to substantiate the ground of legitimate expectation.

Section 13

454. The ***Amendment Act*** was passed with the special parliamentary majority as prescribed by section 13 of the ***Constitution***. This section, which is set out in full at paragraph 325 of this decision, protects as Act of Parliament against a declaration of invalidity on the

[265] R v Croydon Justices Ex p Dean (1994) 98 Cr. App. R 76.
[266] Chu Piu-Wing v Attorney General [1984] HKLR 411.

ground that it is inconsistent with fundamental rights as enshrined at section 4 and 5 of the Constitution.

455. Learned Queens Counsel for the claimant has argued that notwithstanding the special majority with which the ***Amendment Act*** was passed, the Court should nonetheless declare it to be invalid because the ***Amendment Act*** has been *"shown not to be reasonably justifiable in a society that has a proper respect for the rights and freedoms of the individual."*

456. The Court is the ultimate arbiter of the constitutionality of an Act of Parliament. This principle was expounded by Justice of Appeal Kangaloo in ***Ferguson and Galbaransingh v The Attorney General***[267]**,** where the learned Justice of Appeal ruled that even where an ***Act of Parliament*** is certified as being inconsistent with sections 4 and 5 of Constitution, it remains open to the Court to conclude otherwise.

457. Earlier in this decision, I considered whether the ***Amendment Act*** was inconsistent with the fundamental rights to liberty and property and the right not to be deprived thereof except by due process of law. It was my view that there was no inconsistency.

458. The claimant also contended that he held a legitimate expectation that he would not be required to face trial for corruption offences.

[267] Civ. Appeal 185 of 2010.

459. The existence of a legitimate expectation being a manifestation of the rules of natural justice would have been protected pursuant to section 4(b) of the Constitution as one aspect of the fundamental right to the protection of the law. See the decision of their Lordships in ***Rees v Crane***[268], where the right to the protection of the law was held to include the right to natural justice.

460. I have however earlier in this decision held that the claimant had not conceived a legitimate expectation.

461. Having regard to my findings it is not necessary to consider whether the ***Amendment Act*** has been shown not to be reasonably justifiable in a society having proper respect for the rights and freedoms of the individual.

462. I will nonetheless proceed to consider this issue for two reasons. The first of course is that I could be wrong in my assessment of arguments on due process and legitimate expectation. The second reason is that it may have been possible for the claimant to contend that section 6 of the ***Amendment Act*** by providing that existing proceedings be void prevented access to the Court and therefore constituted a contravention of his right under section 4(b) of the ***Constitution*** to the protection of the law. See ***McLeod v The Attorney General***[269].

463. In assessing whether the ***Amendment Act*** has been shown not to be reasonably justifiable, this Court is guided by learning from the highest authorities in the Privy

[268] Rees v Crane [1994] 2 A.C. 173
[269] McLeod v The Attorney General [1984] 1 WLR 522.

Council decision in ***De Freitas v Permanent Secretary***[270] and from the Court of Appeal of Trinidad and Tobago in ***Attorney General v Northern Construction***[271]

464. In the latter, Chief Justice Archie made it clear that the onus rested on the applicant to show that the ***Act*** was not reasonably justifiable[272]. Chief Justice Archie continued by indicating that the burden on the applicant was a heavy one. The words of the learned Chief Justice are set out in full at paragraph 336 of this judgment. They are of great significance in placing this issue into its correct perspective. Chief Justice Archie said:

> *"... the responsibility for balancing the rights of the individual with the necessity for the good of society as a whole, to have effective means of combating crime lies in the first instance with Parliament."*

465. The learned Chief Justice continued:

> *"Courts must not intervene merely on the basis that a judge or judges form the view that a more appropriate means could be devised ..."*

466. With this caveat in mind I proceed to apply the three-fold test which was endorsed by the Chief Justice himself in ***Northern Construction***.[273]. They are:

- *Whether the legislative objective is sufficiently important to justify limiting a fundamental right.*
- *Whether the measures designed to meet the legislative objective are rationally connected to it, and*

[270] (1998) 53 WIR 131.
[271] Civ. App. No. 100 of 2002.
[272] Ibid at paragraph 22, of the judgment of Archie C.J.
[273] Ibid

- *Whether the means used to impair the right ... are no more than is necessary to accomplish the objective.*

467. In employing the three fold analysis, the Court was mindful of the undisputed evidence which had been filed. According to the uncontroverted evidence of the Attorney General the legislative objective which led to the enactment of the ***Amendment Act*** was the correction of an oversight on the part of the entire Parliament, in that section 34 as enacted and proclaimed provided for dismissal of charges for serious crimes.

468. According to the Attorney General, it was the oversight of the entire Parliament that persons on historic corruption charges as well as those charged with sedition and terrorism would have had the facility of declarations of innocence if the requisite time had passed.

469. The means employed to achieve the objective were not only a simple repeal of the section but also a provision for its retrospective operation. Parliament set out to achieve the metaphorical clean slate...

470. In my view the measures designed to meet the objective cannot be described as irrational.

471. As to the third question, it is in my view accepted by all parties that the means used to accomplish the objective was a provision declaring existing proceedings to be void and a provision against the accrual of any rights, expectations and obligations under the repealed section.

472. This was in effect the removal of a limitation provision. There was no effect on the merits of on-going criminal proceedings. The claimant continued to enjoy the presumption of innocence and the right to a fair trial. There was also no effect on power of the presiding magistrate to stay the proceedings on the ground of delay or other abuse.

473. The retroactive repeal was also achieved expeditiously, so as to minimize the possibility of the claimant acting to his detriment on the basis of the opportunity to avail himself of the limitation provisions.

474. In my view therefore the oversight of the entire Parliament may have led to excessive expenditure of resources. In my view however, the claimant has not discharged the burden which he carries to show that Parliament's legislative action was disproportionate. This ground will also be dismissed.

Use of Hansard Materials and the Separation of Powers

475. Powerful precedents are available in support of the submission that they Court may properly have recourse to Hansard Reports when considering the background to legislation. Among these authorities are the Privy Council decisions in ***The State of Mauritius v Khoyratty***[274] and the decision the Court of Appeal of Belize.

Separation of Powers

476. The principal ground of challenge which the claimant has mounted in his claim is that the ***Amendment Act*** is in breach of the doctrine of the separation of powers.

[274] [2006] UKPC 13

477. It is firmly established, as a matter of constitutional principle, that the very structure of the Westminster type Constitutions enshrines the separation of judicial from executive and legislative powers. This principle has been expounded by their Lordships in ***Liyanage***[275]and ***Hinds***[276] and upheld most recently by their Lordships in ***State of Mauritius v Khoyratty***[277] and ***DPP v Mollison***[278] where Lord Bingham observed that:

"...the separation between the exercise of judicial powers on the one hand and legislative and executive powers on the other hand is total or effectively so ...."

478. It was, therefore, accepted by learned Queen's Counsel for the Attorney General that a statute in breach of separation of powers would be void by reason of inconsistency with the ***Constitution*** even if it had been passed with a special majority. Powerful authority supporting this proposition may be found in the decision of their Lordships in ***State of Mauritius v Khoyratty***[279]**.**

479. A principle which is equally fundamental is the presumption of constitutionality. This presumption, which in my view is a corollary of the doctrine of separation of powers, requires the Court to begin by presuming that an Act of Parliament is valid. This presumption was expounded in the cases of ***Surratt v Attorney General of Trinidad and Tobago***; ***Grant v R*** a decision of their Lordships hearing an appeal from the Court of

[275] [1967] 1 AC 259
[276] [1976] 1 All ER 353
[277] [2006] UKPC 13
[278] [2003] 2 A.C. 411
[279] [2006] UKPC 13

Appeal of Jamaica and most recently by Justice of Appeal Kangaloo in ***Ferguson & Galbaransingh v Attorney General of Trinidad and Tobago***.[280]

480. Therefore, when the Court is seized of a claim which seeks an order that a duly enacted Act of Parliament is invalid, the Court begins by presuming that the Act is valid. The burden is carried by the claimant to prove that the Act is unconstitutional.

481. The court will, however, declare an Act to be unconstitutional, null and void if it constitutes a legislative usurpation of judicial power or if it constitutes an unlawful interference with judicial power.

482. The most glaring example of legislative usurpation of judicial power is the now extinct Bill of Attainder which was a legislative enactment which inflicted punishment on named individuals without a trial. See the definition of the Bill of Attainder by Chief Justice Mason in ***Polyukhovich v The Commonwealth of Australia***[281]**.**

483. The case of ***Liyanage*** provided an example of judicial interference which was as nearly egregious as the Bill of Attainder. In that case, which concerned the punishment of participants in an abortive coup in Ceylon, specific offenders were identified by name in the White Paper which preceded the 1962 ***Ceylon Act***. The severity of penalties was altered ex post facto. The Act limited its operation to those who had participated in the coup.

[280] Civ. Appeal 185 of 2010
[281] (1991) 172 CLR 501

484. Short of legislative usurpation of judicial power, there are instances of unlawful interference by the legislature. According to Professor Gerangelos in his article, ***"The Separation of Powers and Legislative Interference in Pending Cases"***[282], legislative interference with judicial power presents a more complex problem. Firstly, because interference may be more subtle than usurpation. Secondly, according to Professor Gerangelos, legislative interferences are not always regarded as unconstitutional.

485. Professor Gerangelos by reference to decided cases identified three indicia of unlawful legislative interference. Such legislation is often *ad hominem*, retrospective and tailored to address the very issues which arise in pending cases[283].

486. Another test by which the Courts have identified unlawful legislative interference is by considering whether the legislation in question is designed to engender a change in existing law or whether it constitutes a direction to the Court.

487. The Court is, therefore, required to engage in a balancing exercise. As the guardian of the Constitution, the Court must be concerned to uphold the legislative competence of Parliament, which is invested by the Constitution with the plenitude of legislative power for the peace order and good government of the state. On the other hand, the court must be astute to stem any erosion of judicial power or to strike any legislation which causes

[282] [2008] 30 Sydney Law Reports 61
[283]Professor Gerangelos: ***"The Separation of Powers and Legislative Interference in Pending Cases"***, [2008] 30 Sydney Law Reports at Para 244.

judicial power to be wholly absorbed by the legislature and taken out of the hands of Judges. See the words of Lord Pearce in ***Liyanage*** set out in full at paragraph 136 above.

488. Having considered the authorities, it is my view that regrettably, there is no mathematical formula by which the court could decide whether legislation constitutes interference. The Court is required to consider the true nature of the legislation in question.

489. I turn, therefore, to consider the provisions of the impugned ***Amendment Act***. There is no dispute that it is retrospective in its operation. Accordingly, section 2 of the ***Amendment Act*** provides:

"This Act is deemed to have come into force on 16th December, 2011..."

490. At section 5, the ***Amendment Act*** completely wipes the slate by providing:

"Section 34 of the Act is repealed and deemed not to have come into effect."

491. Retrospectivity of itself does not, however, invalidate an Act of Parliament. The authority relied on by learned Queen's Counsel for the Attorney General was ***Polyukhovich v The Commonwealth of Australia***[284], where the war crime committed between 1942 and 1943 would be punishable as an indictable offence.

492. Similarly, in the case of ***Kenilorea v Attorney General***[285] Connolly JA of the Court of Appeal of the Solomon Islands stated that it is not every enactment which is *ad hominem* and ex post facto that will infringe or usurp judicial power[286].

[284] (1991) 172 CLR 501
[285] (1984) SILR 179
[286] *Ibid* Para 147

493. The ***Amendment Act*** also intervenes into existing proceedings bringing them to a sudden end. Thus, section 6 of the ***Amendment Act*** provides:

> *"Notwithstanding any law to the contrary all proceedings under the repealed section 34 which were pending before the date of assent shall on the coming into force of this Act be void."*

494. Once again, learned Queen's Counsel for the defendant has produced authority for the proposition that interference in pending proceedings of itself does not constitute unlawful interference. Learned Queen's Counsel relied on ***R v Humby ex p. Rooney***[287] where Mason J of the High Court of Australia ruled that there was no prohibition, express or implied, that rights in issue in legal proceedings shall not be the subject of legislative declaration or action.

495. Similarly, in ***BLF v Commonwealth***[288] it was held that Parliament may legislate so as to affect and alter rights in issue in pending litigation.

496. In my view, however, the ***Amendment Act*** would fail and be entirely flawed if the claimant succeeds in his argument that the legislation is *ad hominem* or that it constitutes a direction to the Court.

497. By reference to the public furore that led to the enactment of the ***Amendment Act***, Lord Beloff Q.C. asserts that the claimants together with Piarco accused were unquestionably the target of the ***Amendment Act.*** The effect of the argument of learned Queen's Counsel is that, alerted by the public furore that the claimant and Mr. Galbaransingh were entitled

[287] (1974) 129 CLR 231
[288] (1986) 161 CLR 88

to the benefit of section 34, the Director sounded an alarm with the Attorney General, and that it was the prospect of *"Ish and Steve"* being set free that galvanised Parliament into repealing section 34.

498. It would therefore be useful to essay some rough definition of *ad hominem* legislation. Having regard to the authorities *ad hominem* legislation is directed at specific identifiable individuals. The extreme example of *ad hominem* legislation is the Bill of Attainder at present prohibited by the Constitution of the United States. A less extreme but equally stark example is the Act which had been struck down in ***Liyanage***[289], where the names of offenders were listed in the White Paper which preceded the Criminal Law (Special Provision) Act of Ceylon.

499. In identifying the boundaries of *ad hominem* legislation this court derived great assistance from the analysis of Mendes JA in ***Zuniga v The Attorney General of Belize***[290]**,** in which the learned Justice of Appeal quoted extensively from the vitriolic attack launched by the Prime Minister of Belize against persons to whom the Act was targeted. Mendes JA found that the evidence demonstrated clearly that in proposing the Bill to Parliament the Government had the appellants within its sight. Mendes JA noted however that the impugned Act was itself not expressed to apply to specific individuals. Mendes JA thus concluded that the new offence applied to everyone.

500. In considering whether the Supreme Court of Justice Amendment Act was *ad hominem*, Mendes JA focused on the express provisions of the statute and ignored the direction of Parliamentary debates which preceded the enactment of the impugned statute.

[289] [1967] 1 AC 259
[290] Civil Appeal Nos. 7, 9 and 10 of 2011 (Court of Appeal of Belize)

501. In the claim which at present engages my attention, the Parliamentary debate of the 12th September, 2012 was far more restrained and objective when compared with those in ***Zuniga***[291]**.** There was clear reference to the claimant and to Mr. Galbaransingh. The Attorney General referred as well to his dilemma in his decision to forego an appeal of the decision of Boodoosingh J[292]. The Attorney General referred as well to other corruption probes and those connected to other state enterprises. He told Parliament that the prosecution of other probes would be affected by section 34. While the "Ish and Steve duo" may have been part of his concern, it was no more than part of a wider concern that serious crimes should be tried on their merits, and not be dismissed pursuant to a mere limitation provision.

502. The express terms of the statute do not, in my view target any individual but are formulated to be of general application to all proceedings under section 34 which were pending before any court. These proceedings in fact included some 35 matters which were unconnected to the Piarco prosecutions. This is clear from the table annexed to the second affidavit of Roger Gaspard filed herein on the 18th January, 2013.

503. This court is persuaded by the reasoning in ***Zuniga***[293]**.** Because the express terms of the ***Amendment Act*** are drafted to be of general application it is irrelevant what statements had preceded the enactment of the ***Amendment Act*** whether they were contained in Parliamentary debates, newspaper articles or press releases.

[291] Supra
[292] CV 2010/4144 Steve Ferguson & Ishwar Galbaransingh v The Attorney General
[293] Supra

504. This leaves only the question of whether the ***Amendment Act*** constitutes an impermissible direction to the Court.

505. The law as to what constitutes an impermissible direction to the Court may be found in decided cases from jurisdictions as distant as Mauritius and the Solomon Islands as well as from epochs as antiquated as the 19th Century American Civil war.

506. In the case of ***US v Klein***[294] for example, the Supreme Court of the United States struck down a legislative provision which provided:

> *"... such pardon and acceptance shall be taken and deemed to be conclusive evidence that such person did take part in and give aid and comfort in the rebellion ... the jurisdiction of this court shall cease and the court shall forthwith dismiss the suit.*

507. In the Australian case of ***Chu Kheng Lim (the Cambodian Boat People Case),*** the High Court of Australia struck down the following provision as being a direction to the Court:

> *"A court is not to order the release from custody of a designated person*[295]

508. By contrast, a majority of the High Court of Australia in ***Nicholas v R*** 193 CLR 173 ruled that specified evidence should be disregarded. In that case Mc Hugh J formulated the test of impermissible interference as *"legislation that removes from the court their exclusive function of adjudgment and punishment of criminal guilt*[296]".

[294] 80 US 128
[295] Chu Kheng Lim v Minister for Immigration 1976 CLR. 1 See paragraph supra.
[296] Nicholas v R 193 CLR 173 at 220.

509. More proximate in time and in jurisprudential culture is the decision of Justice Mendes J.A. in ***Zuniga.*** At paragraph 66 of his decision, Mendes J.A. considered whether there was an impermissible direction to the judiciary. At paragraph 77 Mendes J.A. formulated the test in this way:

> *"What the legislature cannot do is having vested jurisdiction in the judiciary ... is to direct the judiciary as to the outcome of the exercise so granted ..."*

510. I therefore examined the impugned legislation in the light of the test as formulated by Mendes J.A. and considered whether the ***Amendment Act*** has the effect of directing the Court as to the outcome of the exercise of its jurisdiction.

511. Section 5 of the ***Amendment Act*** is not drafted as a direction to the Court. It no more than a provision for retrospective repeal.

512. The essential portion of section 6 provides:

> *"... all proceedings... shall be void ...".*

This section is not drafted in terms of a direction. It may nonetheless constitute a direction in substance. The court is therefore required by precedent to consider the true nature of the provision.

513. In my view this section provides for the proceedings to be void. It falls short of directing the Court to dismiss proceedings. Having enacted the provision, the Court continues to hold the power to hear submissions and place its own interpretation of the section, even if in reality there might be little room for manoeuvre.

514. On this issue, the wording of the pre-repealed section 34 provided that upon an application being made*, "the Judge shall discharge the accused and enter a verdict of not guilty …"*. In my view the pre-repealed section 34 provides a classic example of a direction to the Court. In this regard, I am grateful for the observations of learned Queens Counsel, Mr. Newman that the claimants may be hoisted on their own petard.

515. Accordingly, it is my view that section 6 of the ***Amendment Act*** does not constitute an impermissible direction to the Court.

516. A similar analysis is required for section 7 of the ***Amendment Act***, which provides in essence:

> *"… no rights, privileges, obligations … shall be deemed to have been acquired …"*

517. In his treatise *"the Separation of Powers and Legislative Interference in pending cases".* Professor Gerangelos identifies the *"deeming"* provision as one which is normally symptomatic of an impermissible direction. An example of an impermissible deeming provision may be found in the United Civil War case of ***US v Klein***, where it was provided that *"such pardon and acceptance shall be taken deemed … [to be] … conclusive evidence …"*.

518. Employing the test formulated by Mendes J.A. in Zuniga, I proceeded to examine section 7 of the ***Amendment Act.***

519. This section does not require the Court to deem the existence of any factor or circumstance. Rather it constitutes a prohibition against deeming. It is unclear as to whether this prohibition is directed to the Court. In my view however, a Court does not simply embark on an exercise of deeming rights and obligations to have accrued. A court makes a judicial finding based on legal principles and admissible evidence that rights have accrued or obligations have been incurred.

520. Section 7 is in my view ambiguous and may ultimately require interpretation as a provision resulting in manifest absurdity. In my view however in spite of the criticism which section 7 may attract, it does not constitute an impermissible direction to the Court.

521. It is therefore my view that the claim ought to be and is hereby dismissed.

522. When the deluge of the public furore has subsided, section 34 would be seen for what it really is that is to say no more than a limitation provision providing for the dismissal of criminal proceedings not on the merits but on the ground of delay. Its repeal may have resulted in inconvenience to the claimant and to other persons who had been astute to institute applications under section 34.

523. The Court continues however to be the guardian of the ***Constitution*** and above the din of public angst the court must keep its focus on the true import of the doctrine of separation of powers.

524. That is to say firstly that Parliament is invested with the plenitude of legislative power for the peace order and good government of the people of Trinidad of Tobago. This power is exercised always subject to the supremacy of the ***Constitution***.

525. Secondly that the ***Constitution*** provides for a Judiciary consisting of independent judges charged to interpret and apply the law.

526. The institution of an independent Judiciary has been universally recognized as a cardinal feature of the modern democratic state, a corner stone of the rule of law itself (see the words of Lords Bingham in ***A v Secretary of State for the Home Department***[297].)

527. These two critically important arms of Government must exercise their powers independently of intrusion by the other. The separation must be total or effectively so. (See the words of Lord Bingham in ***DPP v Mollison***)[298]remembering at all times that the separation of powers is respected by both arms of Government ultimately for the purpose of upholding the fundamental rights of the citizen.

Orders:

(i) The claim is dismissed.

(ii) The claimant to pay to the defendant the costs of and associated with the claim.

Dated this 5th day of April 2013.

Judge[299]
M. Dean-Armorer

[297] [2005] 2 A.C 68
[298] [2003] 2 A.C. 411 at 424C-E
[299] Gratefully acknowledging the assistance of my team members:
Judicial Research Assistants- Kendy Jean, Renee McLean
Judicial Secretary- Irma Rampersad
Judicial Support Officers- Maureen Ragoonanan, Janelle Seales, Anita Singh
Orderly- Maura Joseph

APPENDIX I

The Administration of Justice (Indictable Proceedings) Act 20 of 2011

Section 34

34. *(1) Where proceedings are instituted on or after the coming into force of this Act and the Master is not, within twelve months after the proceedings are instituted, in a position to order that the accused be put on trial, the Master shall discharge the accused and a verdict of not guilty shall be recorded.*

(2) Except—

(a) in the case of matters listed in Schedule 6; or

(b) where the accused has evaded the process of the Court, after the expiration of ten years from the date on which an offence is alleged to have been committed—

(c) no proceedings shall be instituted for that offence; or

(d) no trial shall commence in respect of that offence.

(3) Except—

(a) in the case of matters listed in Schedule 6; [Emphasis mine]

or

(b) where the accused has evaded the process of the Court,

where—

(c) proceedings have been instituted;

(d) an accused is committed to stand trial; or

(e) an order is made to put an accused on trial,

whether before or after the commencement of this Act, a Judge shall, on an application by the accused, discharge the accused and record a verdict of not guilty if the offence is alleged to have been committed on a date that is ten years or more before the date of the application.

Schedule 6 of the Act[300] provides a list of offences to which section 34 would not apply. Schedule 6 offences include:

OFFENCES TO WHICH DISCHARGE ON GROUNDS

OF DELAY DO NOT APPLY

1. Treason

2. Offences against the person, namely—

(a) Murder

(b) Conspiring or soliciting to commit murder

(c) Manslaughter

(d) Shooting or wounding with intent to do grievous bodily harm, unlawful wounding

(e) Assault occasioning bodily harm.

3. Offences involving kidnapping, namely—

(a) Kidnapping

(b) Kidnapping for ransom

(c) Knowingly negotiating to obtain a ransom.

4. Offences of a sexual nature, namely—

[300] Administration of Justice Act (*Indictable Proceedings*) Act No. 20 of 2011

(a) Rape

(b) Grievous sexual assault

(c) Sexual intercourse with female under fourteen years

(d) Sexual intercourse with female between fourteen and sixteen years

(e) Sexual intercourse with male under sixteen years

(f) Incest

(g) Sexual intercourse with adopted minor, etc.

(h) Sexual intercourse with minor employee

(i) Sexual intercourse with mentally subnormal person

(j) Buggery.

5. Drug trafficking, namely—

(a) Trafficking in a dangerous drug

(b) Possession of a dangerous drug for the purpose of Trafficking

6. Unlawful possession of a firearm or ammunition

7. Attempts to commit offences identified in items 1 to 4.

Appendix II

Administration of Justice (Indictable Proceedings) (Amendment) Act, 2012

1. *This Act may be cited as the Administration of Justice (Indictable Proceedings) (Amendment) Act, 2012.*

2. *This Act is deemed to have come into force on 16th December, 2011.*

3. *In this Act, "the Act" means the Administration of Justice (Indictable Proceedings) Act, 2011.*

4. *This Act shall have effect even though inconsistent with sections 4 and 5 of the Constitution.*

5. *Section 34 of the Act is repealed and deemed not to have come into effect.*

6. *(1) Notwithstanding any law to the contrary, all proceedings under the repealed section 34 which were pending before any court immediately before the date of assent of this Act shall, on the coming into force of this Act, be void.*

(2) In this section and section 7, "repealed section 34" means section 34 of the Act which is repealed by section 5.

7. *Notwithstanding any law to the contrary, no rights, privileges, obligations, liabilities or expectations shall be deemed to have been acquired, accrued, incurred or created under the repealed section 34.*