

IN THE PRIVY COUNCIL

No.37 of 1981

34/82

O N A P P E A L

FROM THE FIJI COURT OF APPEAL

B E T W E E N :

THE ATTORNEY-GENERAL

Appellant
(Defendant)

- and -

DIRECTOR OF PUBLIC
PROSECUTIONS

Respondent
(Plaintiff)

RECORD OF PROCEEDINGS

MACFARLANES,
Dowgate Hill House,
London, EC4R 2SY

Solicitors for the
Appellant

CHARLES RUSSELL AND CO.,
Hale Court,
Lincoln's Inn,
London, WC2A 3UL

Solicitors for the
Respondent

O N A P P E A L
FROM THE FIJI COURT OF APPEAL

B E T W E E N :

THE ATTORNEY-GENERAL

Appellant
(Defendant)

- and -

DIRECTOR OF PUBLIC
PROSECUTIONS

Respondent
(Plaintiff)

RECORD OF PROCEEDINGS

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2	Affidavit of Q.B.Bale apart from paragraphs 1-3 and 17-20 and exhibits V and W thereto	13th March 1981
3	Supplemental affidavit of Sailosi Kepa	15th July 1981
4	Certified copy of Order sealed on the Court of Appeal Judgment	18th August 1981

O N A P P E A L

FROM THE FIJI COURT OF APPEAL

B E T W E E N :

THE ATTORNEY GENERAL Appellant
(Defendant)

- and -

DIRECTOR OF PUBLIC PROSECUTIONS Respondent
(Plaintiff)

10

RECORD OF PROCEEDINGS

No.1

NOTICE OF MOTION

In the Supreme
Court of Fiji

No.1
Notice of
Motion

IN THE SUPREME COURT OF FIJI No.178/81
CIVIL JURISDICTION

5th March 1981

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

20

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

AND

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

BETWEEN: The Director of Public Prosecutions
Plaintiff

AND The Attorney-General Defendant

30

TO: The Attorney-General,
Crown Law Office,
Government Buildings,
Suva.

In the Supreme
Court of Fiji

No.1
Notice of
Motion

5th March 1981
(continued)

AND TO: The Chief Registrar,
Supreme Court,
Government Buildings,
Suva.

NOTICE OF MOTION BY THE DIRECTOR OF
PUBLIC PROSECUTIONS FOR A DECLARATION
AS TO CONSTITUTIONALITY OF A PURPORTED
ORDER PURPORTING TO ASSIGN TO THE
ATTORNEY-GENERAL RESPONSIBILITY FOR THE
CONDUCT OF CERTAIN "BUSINESS" AND FOR
ADMINISTRATION OF THE OFFICE OF THE
DIRECTOR OF PUBLIC PROSECUTIONS. 10
ALTERNATIVELY FOR A DECLARATION AS TO THE
SCOPE OF SUCH PURPORTED ORDER.

TAKE NOTICE that the Supreme Court of
Fiji will be moved on Friday the 13th day of
March, 1981 at 11.00 o'clock in the forenoon
or soon thereafter as counsel can be heard,
by counsel on behalf of the Director of Public
Prosecutions 20

(a) FOR AN ORDER under Section 97(1) of the
Constitution of Fiji declaring unconstitutional
and/or invalid the following portion of a
purported order published in the Fiji Royal
Gazette of the 6th February, 1981, a true copy
of which is annexed hereto and marked "X";

THAT part of the said Order appearing in column
1 of the schedule thereto which purports to
assign to the Attorney-General responsibility
for the "business" of criminal law and procedure 30
and evidence and that part appearing in column
2 of the schedule thereto which purports to
assign to the Attorney-General responsibility
for the administration of the Director of Public
Prosecutions' Office;

FURTHER TAKE NOTICE that the grounds of this
application are as follows :-

1. That the Office of the Attorney-General
is a political office and the super-
vision of the independent office of
the Director of Public Prosecutions
by the Attorney-General is incompatible 40
with the integrity and independence
of the Director of Public Prosecutions
as guaranteed by the Constitution of
Fiji.
2. That the decision to issue the afore-
said purported order was based upon a

fundamental misunderstanding of the legal effect of provisions of the Constitution namely :-

In the Supreme Court of Fiji

No.1
Notice of Motion
5th March 1981
(continued)

- 10 (a) that it was a legal requirement that the Office of the Director of Public Prosecutions should be subjected to Ministerial responsibility and control;
- 10 (b) that the Constitution of Fiji is essentially concerned with the issue of Ministerial responsibility.
3. That the Office of the Director of Public Prosecutions is not a "department of the Government" in respect of which directions may lawfully be given under Section 76(1) of the Constitution.
- 20 4. That the Office of the Director of Public Prosecutions does not carry on "business of the Government" in respect of which a Minister may lawfully be given conduct under Section 76(1) of the Constitution.
5. That the conduct of "criminal law and procedure" and "evidence" is not "business of the Government" for which a Minister may lawfully be assigned responsibility under Section 76(1) of the Constitution.
- 30 6. That the responsibilities vested in a Minister charged with administration of a department under Section 82 of the Constitution are mandatory and, accordingly, the purported exemption of Section 85 of the Constitution in regard to the administration of the Director of Public Prosecutions' Office, referred to in the aforesaid Order, is unconstitutional and/or invalid.
- 40 7. That the scope of significant activities in regard to the Director of Public Prosecutions and his office are those contained expressly or by implication in Section 85 of the Constitution and other written laws, the scope of which activities precludes a purported assignment to a Minister of "general direction and control" over the said Director of Public Prosecutions and his office.

In the Supreme
Court of Fiji

No.1
Notice of
Motion
5th March 1981
(continued)

8. That the conduct of "Criminal law and procedure" and "evidence" are not matters for which a Minister may lawfully be assigned responsibility as such purported assignment is incompatible with the exercise of the Director of Public Prosecutions' exclusive powers under Section 85 of the Constitution and/or other provisions of law. 10
9. That if, contrary to the Plaintiff's submissions, the purported exemption in the aforesaid gazette order of Section 85 is valid and/or constitutional, the purported assignment under the said Order is nonetheless unconstitutional and/or invalid for uncertainty in that the ambit of Ministerial responsibility is not delimited adequately and/or at all. 20
10. That the purported assignment to the Attorney-General of responsibility for the business including administration of the Director of Public Prosecutions' Office, subject to Section 85 of the Constitution, is incompatible with the concomitant responsibilities purportedly assigned to the said Attorney-General in regard to the Judiciary whose integrity and independence is guaranteed by the Constitution of Fiji. 30
11. That the purported assignment of responsibility to the Attorney-General under Section 76(1) of the Constitution in relation to activities of the Director of Public Prosecutions' Office is invalid and/or unconstitutional.

(b) ALTERNATIVELY

AN ORDER comprehensively delimiting the scope of such purported order should the same, contrary to the Plaintiff's submission, be held to be valid and/or constitutional since the effective functioning of the Plaintiff's Office requires proper legal clarification thereof 40

DATED at Suva this 5th day of March, 1981

Sd: R.E.Lindsay
Counsel for the Plaintiff

[1687

FIJI INDEPENDENCE ORDER, 1970

ASSIGNMENT OF MINISTERIAL RESPONSIBILITIES

No.1
Notice of Motion

5th March 1981
(continued)

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

The Attorney-General

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

Dated the 28th day of January 1981

By Command

20 L.Q. LASAQA
Secretary to the Cabinet

SCHEDULE

Column 1
(Business of the Government)

Column 2
(Ministry and departments of the Government)

- | | |
|--|--|
| <p>30 (a) Courts (legislation governing);
Criminal law and procedure;
Commission on the Prerogative of Mercy;
Civil law, practice and procedure;
Inquests;
Evidence;
Law Reform and revision;
Property law (including land transfer);
40 Bankruptcy;
Marriage;
Matrimonial causes (legislation);</p> | <p>Ministry of the Attorney-General, together with -
Crown Law Office;
Office of the Administrator-General;
Office of the Registrar-General;
Office of the Registrar of Titles;
Office of the Commissioner of Stamp Duties;
Office of the Director of Public Prosecutions (subject to section 85 of the Constitution);
The Judicial Department (subject to Chapter VII of the Constitution).</p> |
|--|--|

In the Supreme
Court of Fiji

No.1

Notice of
Motion

5th March 1981
(continued)

Column 1
(Business of the
Government)

(continued)

Column 2
(Ministry and
departments of the
Government)

Wills and succession;
Legitimacy;
Registration of births,
deaths and marriages;
Registration of bills
of sale; 10
Registration of crop
liens;
Stamp duties (legal);
Patents, trade marks
and designs;
Partnerships and
companies;
Registration of
business names; 20
Public trustee, trustees
and trustee corpora-
tions;
Credit unions and
friendly societies;
Religious and charitable
bodies;
Registration of indust-
rial associations;
Registration of trade
unions; 30
Hotels and guest houses
registration;
Disposal of uncollected
goods;
Gaming;
Registration of clubs;
Cinematographic films;
Liquor;
Control of methylated
spirits. 40

(b) All written law associated
with or arising from the
subject-matter specified
in paragraph (a).

FIJI INDEPENDENCE ORDER, 1970

ASSIGNMENT OF MINISTERIAL RESPONSIBILITIES

No.1 Notice of Motion

5th March 1981

(continued)

10

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

The Minister of Urban Development, Housing and Social Welfare

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

Dated the 28th day of January 1981

By Command

20

I.Q.LASAQA

Secretary to the Cabinet

SCHEDULE

Column 1 (Business of the Government)

Column 2 (Ministry and departments of the Government)

30

(a) Town and Country Planning; Housing and fair rents; Subdivision of land; Local Government; Business licensing; Fire services; Markets; Marriage guidance; Matrimonial causes (general); Adoption of Infants; Juveniles; Probation of Offenders; Public legal advice service; Family assistance; Burial and Cremation; Dog control.

Ministry of Urban Development, Housing and Social Welfare, together with - Department of Social Welfare and Social Development; Department of Town and Country Planning.

40

In the Supreme Court of Fiji

No.1

Notice of Motion

5th March 1981
(continued)

Column 1
(Business of the Government)

(continued)

(b) All written law associated with or arising from the subject-matter specified in paragraph (a).

Column 2
(Ministry and departments of the Government)

10

No.2

Notice of Request for Further and Better Particulars of Grounds of Application

11th March 1981

No.2

NOTICE OF REQUEST FOR FURTHER AND BETTER PARTICULARS OF GROUNDS OF APPLICATION

IN THE SUPREME COURT OF FIJI No.178/81
CIVIL JURISDICTION

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

20

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

AND

Civil action on behalf of Crown Law Office Exempt from Court Fees

Signature:

Date:11/3/81

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

BETWEEN: The Director of Public Prosecutions
Plaintiff

30

A N D: The Attorney-General
Defendant

NOTICE OF REQUEST FOR FURTHER AND BETTER PARTICULARS OF GROUNDS OF APPLICATION

To the Director of Public Prosecutions, the Plaintiff herein:

TAKE NOTICE that the Attorney-General, the

Defendant herein, requires further and better particulars of the Grounds of Application, set out in the Plaintiff's Notice of Motion and filed herein, as follows :-

In the Supreme Court of Fiji

No.2

Notice of Request for Further and Better Particulars of Grounds of Application

11th March 1981

(continued)

1. What specific provision or provisions of the Constitution of Fiji is or are alleged to have been contravened as mentioned in section 97(1) of the Constitution of Fiji?
2. What specific interests of the Plaintiff are being or are likely to be affected by such contravention as also mentioned in section 97(1) of the Constitution of Fiji?

10

Served on the 11th day of March 1981

Sd: G.Grimmett

GEOFFREY GRIMMETT, Crown Solicitors, for Solicitor-General of and whose address for service is Crown Law Office, Government Buildings, Suva, the Solicitor for the Defendant.

20

No. 3

PARTICULARS SUPPLIED
PURSUANT TO REQUEST

No.3
Particulars supplied pursuant to Request

IN THE SUPREME COURT OF FIJI No. of 1981
CIVIL JURISDICTION

12th March 1981

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

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

30

AND

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

BETWEEN: The Director of Public Prosecutions Plaintiff

AND: The Attorney-General Defendant

In the Supreme
Court of Fiji

No.3
Particulars
supplied
pursuant to
Request

12th March
1981

(continued)

PARTICULARS SUPPLIED BY THE DIRECTOR
OF PUBLIC PROSECUTIONS PURSUANT TO
REQUEST MADE BY THE ATTORNEY-GENERAL

To the Attorney-General, the defendant herein:

TAKE NOTICE that the Director of Public
Prosecutions, the plaintiff herein, hereby
answers the Attorney-General's request for
further and better particulars herein as
follows :-

1. With regard to the Attorney-General's first request the provisions of the Constitution contravened as mentioned in Section 97(1) are :-
Section 67; Section 76(1); Section 82;
Section 85; and Section 105. 10
2. With regard to the Attorney-General's second request the Attorney-General is referred to the affidavit of the Director of Public Prosecutions.

Served on the 12th day of March, 1981 20

Sd: R.E. Lindsay

ROBERT LINDSAY, Counsel for
the Plaintiff whose address
for service is the Director
of Public Prosecutions'
Office, Government Buildings,
Suva.

No.4
Ruling of the
Supreme Court

13th March
1981

No. 4

RULING OF THE SUPREME
COURT

30

IN THE SUPREME COURT OF FIJI
Civil Jurisdiction

Action No.178 of 1981

Between:

THE DIRECTOR OF PUBLIC
PROSECUTIONS

Plaintiff

- and -

THE ATTORNEY-GENERAL

R U L I N G

In the Supreme
Court of Fiji

No.4

Ruling of the
Supreme Court

13th March
1981

(continued)

Respondent has raised three preliminary issues :- firstly whether, in view of comments made in the press, and in view of the contents of a letter from the Chief Justice to the Attorney-General annexed to the respondent's affidavit, the Supreme Court of Fiji as presently constituted can fairly and impartially deal with this application. Respondent does not invite the Court to infer any linkage between the Chief Justice's letter and the comments that have, from time to time, appeared in the press. We draw no such inference of linkage.

10

Comments, some of them at least, are very strong indeed and allege alarm and distress on the part of the judges resulting from the Order. The Chief Justice's letter, no doubt, suggests that he, and the Judges generally, are opposed to the Order as it affects the Judiciary. A paper, written by another Chief Justice of Fiji, also annexed to the respondent's affidavit, on the other hand suggests equally strongly, that the appointment of a Minister of Justice having administrative control over the Judiciary and the Office of the Director of Public Prosecutions would be a salutary thing and that, there should be no legal impediment to the establishment of such a Ministry. These we regard as opinions largely as to desirability.

20

30

The sole issue before this Court, however, is whether or not the Order complained of contravenes the provisions of the Constitution. The issue must be decided by this Court which alone has original jurisdiction in this matter. To decline jurisdiction would be to bar relief altogether without any possibility of a hearing, and the Court, therefore, must accept jurisdiction. The Judges, by training and experience, are capable of isolating, and dealing with, issues of law quite independently of their personal views of the desirability of any administrative measures or of any opinions, no matter how strong, expressed in the press. We, therefore, consider this Court competent in every way to deal with the application, the sole issue being that of legality and not of desirability.

40

The second issue is: whether or not the Director of Public Prosecutions can come to this Court in his own official capacity as an applicant. It is not in dispute that in normal circumstances he cannot sue and be sued in his

50

In the Supreme
Court of Fiji

No.4
Ruling of the
Supreme Court
13th March
1981
(continued)

name as representative of the Crown. That power is vested in the Attorney-General.

The applicant, however, has come to this Court not as an authority that has been declared as a legal entity for purposes of ordinary litigation. He comes as a "person" under section 97 of the Constitution and claims that an order has been made which affects powers exclusively vested in him and he seeks a bare declaration that the Order is invalid. Both parties agree that this is the only Court to which he may come for the protection of these powers, if indeed, these powers are being threatened by the Order. The respondent submits that, as the D.P.P. is not specifically authorised by law to sue in his own official capacity he cannot have redress through Courts at all. We cannot accept that. It is now accepted in law that construction of the provisions of a Constitution requires a more liberal approach than construction of Acts of Parliament, "calling for principles of interpretation of its own" (see Minister of Home Affairs Bermuda v. Fisher (1979) 2 W.L.R. 889 at 895).

10

20

The Constitution of Fiji has created some special offices and vested the holders of these offices with special powers to the exclusion of everyone else. When and if, such powers are threatened, the aggrieved persons ought, in our view, have the right to come to this Court for a declaration. To hold otherwise would be to frustrate the intention of the framers of the Constitution who must have required that the powers vested in the holders of such offices should always be kept intact.

30

We, therefore, hold that the Director of Public Prosecutions has, in respect of this application, the right to be heard.

As for the respondent's application for an adjournment we feel that, on a matter such as this, this Court should have as much assistance from counsel as possible and this cannot be achieved if we accept the applicant's submission that the hearing proceed on next Monday. We are, on the other hand, equally convinced that the hearing of the application should not be unduly delayed.

40

The application is adjourned to 20th March 1981 9 a.m.

.....
Chief Justice

In the Supreme
Court of Fiji

No.4
Ruling of the
Supreme Court

.....
Judge

13th March
1981

(continued)

.....
Judge

Suva.
13th March 1981

No.5

No.5

Judgments

10

JUDGMENTS

10th April
1981

IN THE SUPREME COURT OF FIJI

(Civil Jurisdiction)

Civil Action No.178 of 1981

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

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

20

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

Between:

THE DIRECTOR OF PUBLIC
PROSECUTIONS

Plaintiff

- and -

THE ATTORNEY-GENERAL

Defendant

Mr. R.Lindsay with Mr.V.Maharaj for the plaintiff.
Sir John N.Falvey Q.C. with Mr.G.Grimmett for the
Defendant.

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JUDGMENT

No.5
Judgments
10th April
1981

(continued)

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

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

10

Williams J. on the other hand thinks there are ample grounds for holding that the said assignment is unconstitutional and that relief by way of declaration as sought in the motion should be granted to the plaintiff.

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

20

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

30

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

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

40

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

On 6th February, 1981 a notice of an Order purporting to relate to the Office of the DPP as well as other organs of Government appeared in the Fiji Royal Gazette at page 80. The terms of the Order state as follows :-

In the Supreme
Court of Fiji

No.5
Judgments

10th April
1981

(continued)

" FIJI INDEPENDENCE ORDER, 1970

ASSIGNMENT OF MINISTERIAL
RESPONSIBILITIES

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

The Attorney-General

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

Dated the 28th day of January 1981.

By Command.

I.Q. Lasaqa

Secretary to the Cabinet

SCHEDULE

Column 1
(Business of the
Government)

Column 2
(Ministry and depart-
ments of the
Government)

30 (a) Courts (legislation governing);
Criminal law and procedure;
Commission on the Prerogative of Mercy;
Civil Law, practice and procedure;
Inquests;
40 Evidence;
Law reform and revision;
Property law (including land transfer);

Ministry of the Attorney-General, together with -
Crown Law Office;
Office of the Administrator-General;
Office of the Registrar-General;
Office of the Registrar of Titles;
Office of the Commissioner of Stamp Duties;
Office of the Director of Public Prosecutions

In the Supreme
Court of Fiji

No.5
Judgments

10th April
1981

(continued)

Column 1
(Business of the
Government)

(continued)

Bankruptcy;
Marriage;
Matrimonial causes
(legislation);
Wills and success-
ion etc.

Column 2
(Ministry and depart-
ments of the Govern-
ment)

(continued)

(subject to section
85 of the Constitution);
The Judicial Depart-
ment (subject to
Chapter VII of the
Constitution). "

10

Section 76(1) reads :-

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

20

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

30

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

40

By virtue of the above provisions the Minister is given power to exercise general direction and control over the department assigned to him and the supervision of the department concerned is left to a Secretary or a supervising officer. The powers to appoint a Permanent Secretary or

supervising officer are vested in the Public Service Commission by section 105(1) which reads :-

In the Supreme Court of Fiji

No.5
Judgments

10th April
1981

(continued)

10

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

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

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

....

20

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

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

30

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

40

The appointment of Permanent Secretary and supervising officers for the purpose of section 82 is thus controlled by the Executive. It seems clear from all this that the powers to appoint a Permanent Secretary or supervising officer are not intended to operate other than in relation to a department of the Government within the meaning of section 76(1) or in relation to a Ministry of the Government created under powers conferred by sections 73(1) and 75(1). It is a matter of common knowledge that the Office of the DPP does not have a Permanent Secretary or a supervising officer within the

In the Supreme
Court of Fiji

No.5
Judgments

10th April
1981

(continued)

meaning of section 82 nor has the constitutional process for making such an appointment been used with respect to the Office of the DPP since 1970 when the present Constitution came into force. This omission which has continued for more than ten years strongly suggests that the Office of the DPP was never intended to be classified or construed as a department of the Government for the purpose of section 76(1).

10

Be that as it may, the purported assignment in question has in fact created an impossible position for the DPP because of the conflict inherent in the operation of the powers conferred on the A-G by section 82 and the powers under section 35(7) guaranteeing independence to the DPP in regard to the exercise of his functions. Section 82 requires the A-G to exercise general direction and control over the Office of the DPP while section 35(7) provides in no uncertain terms that in exercise of the powers conferred on him by the Constitution the DPP shall not be subject to the direction or control of any person or authority.

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

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the DPP of his functions. The situation that has arisen recalls to mind the words of de Smith in his book "The New Commonwealth and its Constitutions" where at page 144 he said :-

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

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

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

30 The problem that has arisen in relation to the Office of the DPP stems from the fact that a distinction which ought to have been drawn was not drawn as regards those departments of Government which fall logically and naturally within the ambit of section 76(1) and those offices or organs of Government which have been specially created by the Constitution and which by their very nature are intended to be insulated from direct political control and interference.
40 The fact that the powers under section 76(1) has been exercised in relation to the Office of the DPP without there being any concurrent appointment of a Permanent Secretary or supervising officer gives the A-G a large and unprecedented measure of direct control not only over the Office of the DPP but over the DPP himself by virtue of his de facto position as administrative head of his establishment.

50 It has been said that the administrative activity of the Office of the DPP is a matter within the proper purview of the A-G who is responsible to Cabinet and to Parliament under

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

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A further problem which has arisen, again stems from the fact that the use of powers under section 76(1) presupposes in the case of a department of Government within the meaning of section 76(1) an appointment of a Permanent Secretary or supervising officer to that department and in the case of a Ministry of the Government, the appointment of a Permanent Secretary to that Ministry. It is common knowledge that the Ministry of the A-G has had no Permanent Secretary appointed to it by the Public Service Commission with the concurrence of the Prime Minister since Fiji attained Independence in 1970. This constitutional lacuna raises the important question whether the Ministry of the A-G was at the time the notice of 6th February, 1981 was published constitutionally competent to have assigned to it the responsibility for the administration of the Office of the DPP? The answer seems to me to be rather obvious. In these circumstances it is difficult to resist the conclusion that the powers vested in section 76(1) were never intended to be applied to the Office of the DPP and in my opinion the fact that they have been so applied is clearly repugnant and contrary to the intention of the Constitution.

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Some concern has been expressed about the absence of accountability to Parliament by a Minister in regard to the administrative affairs of the Office of the DPP. Accountability to Parliament can be provided without resort to section 76(1). It can be done by the use of parliamentary convention which has hitherto served the Office of the DPP quite well over the past ten years or through the powers vested in the Prime Minister by sections

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73(1) and 75(1) of the Constitution. These powers enable a Ministry of the Government to be created and a Minister to be appointed thereto. Such a Minister if it is so desired could also be designated as the Minister responsible to Cabinet and Parliament for the Office of the DPP. These arrangements obviate the kind of constitutional problems associated with the indiscriminate use of powers conferred by sections 76(1) and, as we have seen, under which the A-G is given direct oversight and control of the Office of the DPP. This power of control over the Office of the DPP is unspecified in scope and uncertain in operation that it seems to me hardly likely that the framers of the Constitution intended the powers under section 76(1) to be used in such a way as to bring about so unsatisfactory a result in an area of high constitutional importance.

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In approaching the problem of construction arising from the use of powers under section 76(1) in relation to the Office of the DPP I have derived some assistance in the approach adopted in several recent leading cases on the construction of constitutions based on the Westminster model as Fiji's Constitution is, in common with those of many other Commonwealth countries. I need only refer to two of these cases. In Hinds v. The Queen (1976) 2 W.L.R. 366 at page 371 Lord Diplock stated:

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

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

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

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Part IV of the Constitution of the Republic of Singapore 'a generous interpretation avoiding what has been called the austerity of tabulated legalism.'"

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

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Sd: T.U.Tuivaga
(T.U.Tuivaga)
Chief Justice

Suva,
10th April 1981

IN THE SUPREME COURT OF FIJI

(Civil Jurisdiction)

Civil Action No. 178 of 1981

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

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

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

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Between:

THE DIRECTOR OF PUBLIC
PROSECUTIONS

Plaintiff

- and -

THE ATTORNEY-GENERAL

Defendant

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

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

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On 23rd July, 1970 Fiji became independent by virtue of the Fiji Independence Act 1970.

The Constitution of Fiji contains two short sections in the first Chapter. They read as follows :-

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"This Constitution is the supreme law of Fiji and if any other law is inconsistent with this Constitution, that other law shall, to the extent of the inconsistency, be void."

Chapter IV appoints the Governor-General as Her Majesty's representative.

Under Chapter V Parliament is established as one of the three organs which constitute the Government. Section 30 states :-

"30. There shall be a Parliament for Fiji which shall consist of Her Majesty, a House of Representatives and a Senate."

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The executive or Cabinet, the second arm of Government, is created by Chapter VI under which executive authority vests in Her Majesty and is exercised by the Governor-General. Section 73(1) establishes a Prime Minister, an Attorney-General and provides for other Ministers to be appointed if need be. Section 75(1) provides for a Cabinet composed of the Prime Minister assisted by any Ministers he chooses to select. The Prime Minister can remain as the sole member of the Cabinet. By section 75(2) the function of the Cabinet is to advise the Governor-General in the governing of Fiji.

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The third organ of the Government, the Judicature, is established by Chapter VII.

Chapter VI creates a Secretary to the Cabinet, a Commissioner of Police and section 85(1) creates a Director of Public Prosecutions whose office shall be a public office.

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The Fiji Constitution follows the pattern described by Lord Diplock as the Westminster Model (Hinds v. The Queen; Privy Council; (1976) W.L.R. 366 at 373A). It establishes a democratic form of Government in which judicial powers are exercised exclusively by the Judicature, and executive powers by the Executive

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(Cabinet) and legislative powers by the Legislature, that is to say Parliament.

Chapter VIII creates various Commissions with powers to appoint individuals to specified offices and to control them. Section 85(1) appoints the Director of Public Prosecutions.

Section 85(4) vests the powers of instituting and discontinuing all criminal proceedings in the Director of Public Prosecutions and subsection five makes it exclusive whilst subsection seven enacts that the Director of Public Prosecutions shall not be subject to external direction or control. During the past ten years the Director of Public Prosecutions has functioned without ministerial control or assistance.

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On Friday, 6th February, 1981, the Fiji Royal Gazette, Volume 108, contained several notices under section 76(1) outlining departmental responsibilities of various Ministers. Notice 168 allocates to the Attorney-General the business listed in Column 1 namely the drafting of a wide field of legislation which does not fall naturally into any other Ministry. Column 2 delegates to the Attorney-General responsibility for departments connected with matters legal such as the Crown Law Office, Administrator-General, Registrar-General and the Office of the Director of Public Prosecutions. Regarding the Director of Public Prosecutions the notice states that the Attorney-General's responsibility is subject to the provisions of section 85(7) whereunder the Director of Public Prosecutions is excluded from the control or direction of any person or authority. Under Column 2 the Attorney-General is also given responsibility for the Judicial Department.

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Section 76(1) reads :-

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

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Section 82 reads :-

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

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Provided that -

(a) any such department may be under the joint supervision of two or more supervising officers; and

20 (b) different parts of any such department may respectively be under the supervision of different supervising officers."

30 What does the Gazetted Notice mean by "the Office of the Director of Public Prosecutions"? It could mean "the clerks, typists, messengers and administrative staff of the Director of Public Prosecutions and the general administrative work done by them." To accept such a meaning could be unsafe because the framers of the notice may have in mind something wider such as the public office of the Director of Public Prosecutions. Therefore I think it necessary to consider the constitutional validity of the notice on the basis

(a) that it refers to the "public office of the Director of Public Prosecutions" and

(b) that it refers only to the clerical/administrative staff attached to the Director of Public Prosecutions.

40 In so doing one has to bear in mind that Ministers are responsible for departments of government.

The Director of Public Prosecutions regards the Notice 168 as providing the Executive organ of Government, with a measure of control over the Director of Public Prosecutions which could erode his authority and independence. Therefore he has filed a

Notice of Motion for a declaration under section 97(1) of the Constitution as to the validity of the notice in assigning responsibility for the administration of the Office of the Director of Public Prosecutions to the Attorney-General. Alternatively he asks for a declaration as to the scope of the notice.

Although I refer to the publication in the Gazette as a notice the Director of Public Prosecutions has described it as an Order in his Notice of Motion. 10

The Notice of Motion sets out the grounds upon which his application is based.

The first ground is that the Attorney-General's appointment is political and it is incompatible with the independence of the Director of Public Prosecutions to place him under the Attorney-General.

The second ground is based upon an explanation given by the Prime Minister to the Legislature that the gazetting of specific responsibilities to certain Ministries is a legal necessity. It alleges that the explanation reveals a misconception on the part of the Prime Minister's advisers that he was under a duty to place the Office of the Director of Public Prosecutions under ministerial control. I do not regard it as necessary to pursue the second ground. 20 30

Grounds 3 and 4 claim that the Office of the Director of Public Prosecutions is not a Government Department and that the Director of Public Prosecutions does not carry on any business of Government.

The notice states that the Attorney-General shall be responsible for "Criminal Law and Procedure" and "Evidence" and ground 5 alleges that this is not Government business assignable to a Minister under section 76(1). We see nothing wrong with that allocation of legislative drafting. 40

Grounds 6 and 7 allege that section 82 which gives the Minister general direction and control of the department assigned to him under section 76(1) conflicts with section 85(7) which exempts the Director of Public Prosecutions from such direction and control.

Grounds 8, 10 and 11 merely echo other grounds.

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Ground 9 complains that the notice does not sufficiently delineate the extent of ministerial responsibility and is void for uncertainty. The notice makes the Attorney-General responsible for administration of the departments shown in Column (2), but Column (2) refers to the office, not the department, of the Director of Public Prosecutions, thereby clearly accepting the terminology used by the Constitution. I think that this ground depends, to some extent, on whether the Prime Minister can under section 76(1) assign to a Minister responsibility for certain public offices established by the Constitution when section 76(1) only refers to government departments.

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Sir John Falvey referred to section 31 of the Supreme Court Ordinance which states that civil causes shall be heard by a "judge alone" and he wondered whether the present bench of three judges did not contravene that provision. We took the view that "judge alone" in that context meant a judge or judges sitting without assessors. Constitutional issues differ from civil causes contemplated by the Supreme Court Ordinance. The Constitution is silent as to the number of judges required to hear such applications but section 97(4) empowers the Chief Justice to make rules with respect to the practice and procedure of the Supreme Court in relation to the jurisdiction and powers conferred on it by section 97.

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Under Legal Notice 14 of 1981 the Chief Justice published the Supreme Court (Constitutional Redress and Relief Rules) 1981. Rule 2 thereof states that jurisdiction to hear such motions "shall be exercisable by a single judge". Use of the word "exercisable" demonstrates that the jurisdiction is not limited to a single judge.

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Grounds 1, 6 and 7 point to the undesirability of the Director of Public Prosecutions being subject to the direction and control of a politician. The undesirability of ministerial control would not affect the validity of the notice unless repugnant to the intention of the Constitution. A constitution is interpreted according to the intentions of the bodies who agreed to its provisions. Fiji's Constitution was agreed by representatives who

attended the Fiji Constitutional Conference 1970 in April and May as shown in Council Paper No.5 of 1970. There is no definition of department in the Constitution and it creates no department.

Section 121 refers to a Minister for Finance but does not create a Department of Finance nor a third Minister. Thus until he arranges for additional Ministers the Prime Minister will be Minister for Finance unless he allocates that responsibility to the Attorney-General. 10

Section 75(1) creates a Cabinet consisting of the Prime Minister and such Ministers as he may designate. Its function as stated by subsection two is advising the Governor-General in the governing of Fiji for which they are responsible to Parliament. As pointed out in Administrative Law, 4th Edition by H.W.R.Wade at page 49, the appointment of the Prime Minister is the act which sets the machinery of cabinet government in motion. The Cabinet is not the government; it is the administrative organ of the Government which functions through Ministers placed in charge of departments. The departments are created by the Prime Minister and approved by Parliament. If need be they can be abolished in the same way. They include numerous spheres of activity, e.g. Agriculture and Fisheries, Finance, Inland Revenue, Lands and Mines, Forests, Health, Education, Marine to name but a few. An example of a recently created department is The Department of Energy which was placed under the care of an existing Minister. 20 30

The Constitution creates public offices and Commissions which control the holders of public offices. The word "department" is used in section 76(1) and in section 82. Although it does not create departments the Constitution envisages their existence and provides for their administration by Ministers. Presumably the words "department of government" and the expression "public office" are used deliberately and cannot be regarded as synonymous. 40

Is it the intention of the Constitution to screen public offices from political influence? De Smith's "New Commonwealth and its Constitution" page 74 refers to the creation by Constitution of a Judicial Commission with responsibility for appointment, 50

10 promotion, transfer, disciplinary control and removal of magistrates and appointment of judges (other than the Chief Justice). The learned author states that such provisions give superior judges security from political influence. He shows that in order to protect criminal prosecutions from political influence Constitutions will create a Director of Public Prosecutions, vest him with special responsibilities and insulate him from the direction or control of politicians.

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20 In Fiji the Judicial and Legal Services Commission appoints Judges, the Director of Public Prosecutions and certain of his legal officers as well as Registrars and Deputy Registrars of the Supreme Court and the Solicitor-General. De Smith says that this procedure is intended to protect them from political influence. Section 85(7) of the Constitution appears to support that view in relation to the Director of Public Prosecutions when it says :-

"85 (7). In exercise of the powers conferred upon him by this section the Director of Public Prosecutions shall not be subject to the direction or control of any other person or authority."

30 If one accepts De Smith's views (supra page 144) it is apparent that the Director of Public Prosecutions is intended to be independent and when the Constitution describes the Office of the Director of Public Prosecutions as a public office it seems that the intention is to screen him from ministerial interference by the exercise of the Prime Minister's powers under section 76(1) over government departments. If a public office created by the Constitution is to be placed under ministerial control it would have to be specifically provided for in the Constitution as in section 84 in regard to the Office of the Commissioner of Police.

40 Section 84(1) makes the Office of the Commissioner of Police a public office and subsection two places him in command of the Force. By subsection three a Minister authorised by the Prime Minister "can give to the Commissioner of Police general directions of policy for maintenance of public safety and public order." Thus the Constitution especially limits the independence of the Commissioner of Police. Subsection four demonstrates the difference between a public office created by

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the Constitution and a department of government.
It reads :-

"84.-(4) Nothing in this section shall be construed as precluding the assignment to a Minister of responsibility under section 76(1) of this Constitution for the organisation, maintenance and administration of the Police Force, but the Commissioner of Police shall be responsible for determining the use and controlling the operations of the Force and, except as provided in the preceding subsection, the Commissioner shall not, in the exercise of his responsibilities and powers with respect to the use and operational control of the Force, be subject to the direction or control of any person or authority." 10

If the Office of the Commissioner of Police were a department of government then section 76(1) would automatically apply to it. But section 84(4) declares that a Minister can under section 76(1) be assigned responsibility for the organisation, maintenance and administration of the Police Force. Subsection three and four demonstrates that even limited responsibility for a public office can only be assigned to a Minister by virtue of a special provision in the Constitution. It appears that section 76(1) only applies to the Office of the Commissioner of Police because section 84(4) says that it shall. In my view section 76(1) would only apply to the Office of the Director of Public Prosecutions if the Constitution included a provision to that effect similar to section 84(4). 20 30

Section 85 contains no such provision for assigning responsibility for "the Office of the Director of Public Prosecutions" to a Minister but this is what the notice does, subject to section 85.

The Fiji Constitution Order 1966, Schedule 2, section 38 vested the Attorney-General with the same powers that are now vested in the present Director of Public Prosecutions under section 85 of the current Constitution and also screened him from the direction and control of any other person or authority. There must have been good reason for transferring those exclusive powers to the newly created Director of Public Prosecutions. The Director of Public Prosecutions contends that this was done to ensure his independence from political interference. Support for his contention appears in 40 50

the Fiji (Constitution) Order 1966 (Legal Notice 136 of The Laws of Fiji 1966, page 321) of which section 14 reads :-

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"14-(1) Until a member of the Executive Council who is also an elected member of the Legislative Council has, under section 34 of the Constitution, been appointed to hold, as a Minister, the office of Attorney-General, that office shall be a public office.

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(2) When the office of Attorney-General ceases to be a public office -

(a) section 38 (other than subsection (1) thereof) and sections 89(2) and 100(5) of the Constitution shall have effect as if the references therein to the Attorney-General were references to the Director of Public Prosecutions;

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(b) sections 41(1)(a) and 90(2) of the Constitution shall have effect as if references therein to the Attorney-General were references to the Solicitor-General;

(c) section 89(2) shall have effect as if a reference to the Solicitor-General were included therein.

(3) Notwithstanding section 39 of the Constitution, no appointment shall be made to the office of the Director of Public Prosecutions as long as the office of Attorney-General remains a public office."

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Section 14 enacts that when the Attorney-General ceases to be a public officer and becomes a politician he will cease to control criminal prosecutions and his powers vest in the non-political Director of Public Prosecutions. Obviously the present Constitution also intends that control of criminal prosecutions shall be beyond political interference thereby supporting the view that it distinguishes between the Office of the Director of Public Prosecutions and a department of government.

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The Gazette Notice states that the Minister's responsibility for the Office of the Director of Public Prosecutions is subject to section 85. But section 85 expressly states that the

Director of Public Prosecutions "shall not be subject to the direction or control of any other person or authority". There would be a clash between section 82 and section 85(7) if department of government and public office were synonymous. They can only exist together by accepting that the Constitution distinguishes between department of government and public office.

Section 127 of the Constitution defines "public office" as an "office of emolument" in the public service. In the layman's most basic parlance it is a "salaried job". It would be absurd to describe "a department of government" as an office of emolument. 10

The Attorney-General submits that the Director of Public Prosecutions needs office accommodation, equipment, clerks, typists and others to do the administrative work. To that extent there is, he argues, a department attached to the Office of the Director of Public Prosecutions which requires funds for that purpose. In order to make representation in Parliament for those funds there must be some form of parliamentary control and that is best achieved by having a Minister responsible for the administrative section. I concur in that proposition provided the extent of the ministerial responsibility is clearly set out in the notice. A vague statement that the Attorney-General is responsible for the administration of "the Office of the Director of Public Prosecutions" could, if accepted, become the "thin edge of the political wedge". It could be used to limit the Director of Public Prosecutions' right to administer his own office in carrying out his constitutional functions. 20 30

This very aspect was considered in The Queen v. Kirby and Others Volume 29 (1956) Aust.L.J. 658, by Dixon C.J. He referred on page 663 to the separation of powers by the Constitution of the Commonwealth in creating separate organs of government namely Executive, Judicature and Legislature. He quoted Sir William Harrison Moore's Commonwealth of Australia 2nd Edition as follows :- 40

"In the case of the Commonwealth Parliament it is impossible to avoid the conclusion that the separation of powers was intended to establish legal limitations on the powers of the organisations of 50

government, and that the Courts are required to address themselves to the problem of defining those functions."

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The learned C.J. at page 664 also quoted from Professor Willoughby's Constitutional Law of the U.S. 2nd Edition pages 1619 and 1620 :-

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"Thus it is not a correct statement of the principle of the separation of powers to say that it prohibits absolutely the performance by one department of acts which, by their essential nature, belong to another. Rather, the correct statement is that a department may constitutionally exercise any power, whatever its essential nature, which has, by the Constitution been delegated to it, but that it may not exercise powers not so constitutionally granted, which from their essential nature, do not fall within its division of governmental functions unless such powers are properly incidental to the performance by it of its own appropriate functions. From the rule as thus stated, it appears that in very many cases the propriety of the exercise of a power by a given department does not depend upon whether, in its essential nature the power is executive, legislative or judicial but whether it has been specifically vested by the Constitution in that department, or whether it is properly incidental to the performance of the appropriate functions of the department into whose hands exercise has been given."

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In my opinion that statement operates in two ways :-

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(a) It indicates that by implication the Judicature must have been vested with those administrative powers which are necessary to enable it to function under the Constitution which created it.

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(b) The Executive cannot exercise or vest itself with powers which were not granted to it by the Constitution and which do not fall incidentally within its direction as being governmental functions, viz. assuming control of the administration of the Judicature by purporting to make a Minister responsible for the administrative units without which the Judicature could not function.

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Unlike the Judicature the Office of the Director of Public Prosecutions is not a separate organ of Government. Nevertheless I consider that the observations of Dixon C.J. (supra) apply to that office in a similar manner and that the Director of Public Prosecutions being especially created by the Constitution is automatically invested with those powers of administration which are incidental to his functions.

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The views of Dixon C.J. were endorsed by the Privy Council in Attorney-General v. The Queen and Kirby v. The Queen Volume 30 (1957) Aust. L.J. 638. At page 644 their Lordships stated :-

"Many functions perhaps may be committed to a Court which are not of themselves exclusively judicial, that is to say which considered independently might belong to an administrator. But that is because they are not independent functions but form incidents in the exercise of strictly judicial powers."

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The various public offices and Commissions created by the Constitution require accommodation, furniture, administrative staff and money to enable them to function. In that respect they are no different from any other section of the Government. There cannot be a rigid definition of "department of government" but it does not mean every place where public servants carry on their functions. A "department of government" is a section or division which can be directed and controlled by a Minister. Judges and magistrates are employed and paid by the Government but that does not weld them into a department of government which can be directed and controlled by a Minister. Government departments do not happen accidentally; they are the deliberate creation of the Executive for the purpose of running the nation. Therefore such a notice should clearly state what it is that a Minister is assuming direction and control of because it may not be a government department and as a result may fall outside ministerial control and direction. With regard to statutory departments such as Highways, Public Works, Marine, they are the creations of statute and naturally fall within ministerial direction and control. However, the Constitution creates several public offices such as Auditor-General, Ombudsman, Director of Public Prosecutions and places the holders outside ministerial control;

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as stated in The Queen v. Kirby (supra) they necessarily have control of those administrative functions which are incidental to their own offices. Consequently the notice in question cannot be valid if it results in two authorities namely the Attorney-General and the Director of Public Prosecutions independently directing and controlling the administrative employees and establishment without which the Director of Public Prosecutions could not carry out the functions of his office. The qualification in the notice that the Minister's powers are subject to section 85 is so vague that it would probably lead to conflicting directions.

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How does one determine which administrative matters are necessarily incidental to the Director of Public Prosecutions' functions? I think I should again emphasise that the Director of Public Prosecutions is created by the Constitution and that the notice is issued under section 76(1) of the Constitution and any interpretation should have regard to the fact that the Constitution intends to screen the Director of Public Prosecutions from political pressure. Section 84 places the Commissioner of Police in command of a Police Force and section 84(4) allows responsibility for it to be assigned to a Minister under section 76(1) as in the case of any department. Unlike the Commissioner of Police no specific body of personnel is placed by section 85 under the command or direction of the Director of Public Prosecutions. Presumably the Director of Public Prosecutions' establishment is supplied by the Public Service Commission with such non-professional personnel as are from time to time necessary to enable him to function and without which the creation of his office and powers would be nullified. I do not think that the Director of Public Prosecutions will be allocated personnel who are superfluous and not incidental to his functions. Therefore if the notice means that "the Office of the Director of Public Prosecutions" is that portion of the office staff, equipment and office space which is not necessarily incidental to the Director of Public Prosecutions' functions it would be proper to conclude that it is superfluous to his requirement and cannot logically exist as an essential part of his establishment.

However if it can be accepted that a portion of the Director of Public Prosecutions' establishment does exist which he is not

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(continued)

entitled to administer on the ground that it is not necessarily incidental to his functions then no doubt a Minister can be made responsible for it under section 76(1). If such a portion exists in my view the Prime Minister had allocated that responsibility to himself, albeit indirectly. Gazette Notice 166 of Volume 108 (supra) makes the Prime Minister responsible for the statutory functions of the Public Service Commission. By section 5(1)(c) and (d) of the Public Service Act (No.4 of 1974) it is stated that :-

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"5.-(1) The Commission shall, in respect of the Public Service be responsible for -

(c) the provision of suitable office accommodation and the prescription and supervision of the physical working conditions of all employees in the Public Service;

(d) approving and reviewing establishments and the grading of posts. "

20

There is also provision under section 18 for the Public Service Commission to make regulations governing "the management and control" of the Public Service.

In using the words "establishment of the Director of Public Prosecutions" I am giving a meaning to the expression "Office of the Director of Public Prosecutions" in the notice which is different from that used in section 85(1) of the Constitution.

30

One may argue that if all the Director of Public Prosecutions' establishment is incidental to the exercise of his Constitutional functions then there is no portion for which a Minister can be made responsible and therefore the notice is meaningless. Accordingly, any attempt by the Attorney-General to exert general direction and control over "the Office of the Director of Public Prosecutions" could be set aside by the Court at the instance of the Director of Public Prosecutions on the ground that the notice cannot vest him with any powers although it purports to do so.

40

If some portion of his establishment is not necessary to the Director of Public Prosecutions' functions then it is surplus and can be the Minister's responsibility. Any direction the Minister gave to the "Office of

the Director of Public Prosecutions" would only affect that portion. An attempt to direct and control the rest of the Director of Public Prosecutions' establishment by including them in a directive to the non-incident portion could be set aside by the Court at the instance of the Director of Public Prosecutions. I cannot visualise such a situation arising since the Public Service Commission would not permit the Director of Public Prosecutions to purport to retain a part of an establishment which is not necessary to his functions.

10

If the notice is meaningless I would regard it as unconstitutional in that it could and probably would prove to be a recipe for confrontation and litigation between the Attorney-General and the Director of Public Prosecutions which could not be in the best interests of the nation.

20

The defendant argued that the Attorney-General is the Director of Public Prosecutions' boss and if some ministerial control could not be directed over the Office of the Director of Public Prosecutions he would not be answerable to Parliament for the conduct of his office. That observation reveals that the Executive does not regard "the public office of the Director of Public Prosecutions" created by section 85 as being quite separate from "the administrative office of the Director of Public Prosecutions". The validity of the notice cannot be supported by that argument because it is not necessary for the Director of Public Prosecutions to come under the direction of the Attorney-General to make him answerable under section 199 to the Judicial and Legal Services Commission for the conduct of his office and under section 136 the Supreme Court has jurisdiction to determine whether he has performed his functions lawfully.

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If there is a portion of his establishment which is not necessary to his functions it is under the control of the Prime Minister via the Public Service Commission.

Section 85 does not state that the Director of Public Prosecutions shall have an establishment but assumes that one will be created to enable him to function. The notice in saying "Office of the Director of Public Prosecutions subject to section 85" does not have in mind that the Director of Public

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In the Supreme
Court of Fiji

No.5
Judgments

10th April
1981

(continued)

Prosecutions must have control of his establishment in order to function. The notice must be taken to mean what it says and it says "Office of the Director of Public Prosecutions subject to section 85". There is no reference in section 85 to the effect that the Director of Public Prosecutions is vested with control over his own establishment because incidental control is implied generally. Therefore the reference in the notice to section 85 cannot be intended to mean that ministerial control of the Director of Public Prosecutions' establishment is subject to the control vested in the Director of Public Prosecutions by section 85 because it is not section 85 which creates such control. What the notice means is that the Director of Public Prosecutions shall have full control over criminal proceedings as set out in section 85(4)(5) with freedom from direction and control under section 85(7) but that the Minister will control the establishment by which he carries out those functions. When the notice refers to "the Office" it must be taken to mean the entire office or the Director of Public Prosecutions' entire establishment; if it meant just some portion e.g. some financial or future development section the notice would obviously say so. It is not for the Court to look around for sections or portions of the Director of Public Prosecutions' establishment which are not incidental to his functions and say that the notice must be taken to mean that the Minister only has direction and control over those sections and therefore it is legal.

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30

In departments of government Ministers do not take over the direction and control of the personnel e.g. labourers, clerks, office boys, artisans, lorries, excavators, technicians. Ministers are concerned with the broad aspects of Executive and departmental policy and with priorities among those requiring and demanding the service and help of departments, not with the provision of a typewriter to the Legislature or of a spade to the Public Works Department or the cost of those items. The words "general direction and control" in section 82 are particularly appropriate to Government policies and to the way in which a department shall operate and the projects it should undertake. If one applies that reasoning to the notice the words "general direction and control" over "the Office of the Director of Public Prosecutions" probably do not mean direction and control of the individual members

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of the staff but of the mode in which the establishment shall operate in accordance with the Executive policy regarding criminal prosecutions.

In the Supreme
Court of Fiji

No.5
Judgments

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1981

(continued)

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To give the Attorney-General power to control the Office or establishment of the Director of Public Prosecutions by directing the mode in which it shall operate would enable him to interfere with the Director of Public Prosecutions' functions and would be unconstitutional.

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For the reasons I have given I regard the notice as drafted as investing the Attorney-General with power to direct and control the establishment or "Office of the Director of Public Prosecutions" and to override similar powers impliedly vested in the Director of Public Prosecutions. Accordingly the notice conflicts with section 85(7) and is unconstitutional and a declaration should issue accordingly.

Sd: J.T.Williams
(J.T.Williams)

JUDGE

Suva,
10th April, 1981

In the Supreme
Court of Fiji

No.5
Judgments
10th April
1981
(continued)

IN THE SUPREME COURT OF FIJI No.178 of 1981
CIVIL JURISDICTION

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

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

AND

IN THE MATTER of an application by the 10
Director of Public Prosecutions pursuant
to Section 97(1) of the Constitution of
Fiji.

Between: The Director of Public
Prosecutions Plaintiff

And: The Attorney-General Defendant

Messrs. R.E.Lindsay and V.Maharaj for the
Plaintiff
Sir John Falvey, Q.C. and Mr.G.Grimmett for the
Defendant 20

J U D G M E N T

The plaintiff moves for a declaration that
an assignment of responsibility to the Attorney-
General made under Section 76(1) of the
Constitution and published in the Gazette dated
6th February, 1981 is unconstitutional in so
far as it relates to the Office of the Director
of Public Prosecutions. He alleges contraven-
tion of Section 85 ("section" in this judgment
means "section of the Constitution of Fiji"). 30

The relevant part of the direction assign-
ing the responsibility is in following terms:-

" FIJI INDEPENDENCE ORDER, 1970

ASSIGNMENT OF MINISTERIAL
RESPONSIBILITIES

IN exercise of the powers conferred upon
him by subsection (1) of Section 76 of
the Constitution, and acting in accordance
with the advice of the Prime Minister,
the Governor-General has, by directions 40
in writing, assigned to -

The Attorney-General
responsibility for the conduct of the
business of the Government specified in
Column 1 of the Schedule and responsibil-
ity for the administration of the Ministry
and departments of the Government speci-
fied in Column 2 of the Schedule.

In the Supreme
Court of Fiji

No.5
Judgments

10th April
1981

(continued)

Dated the 28th day of January 1981.

By Command

10

I.Q. LASAQA
Secretary to the Cabinet

SCHEDULE

Column 1
(Business of the
Government)

Column 2
(Ministry and
departments of the
Government)

Criminal law and
procedure;
Evidence;

Office of the
Director of Public
Prosecutions
(subject to section
85 of the Consti-
tution; "

20

Section 76 reads :

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

30

(2) Without prejudice to the assignment
of any responsibility to him under the
preceding subsection, the Attorney-General
shall be the principal legal adviser to
the Government."

Relevant parts of section 85 read :-

40

"85-(1) There shall be a Director of
Public Prosecutions whose office shall be
a public office.

.....
.....

In the Supreme Court of Fiji

No.5
Judgments
10th April
1981
(continued)

(4) The Director of Public Prosecutions shall have power in any case in which he considers it desirable so to do -

- (a) to institute and undertake criminal proceedings before any court of law (not being a court established by a disciplinary law);
- (b) to take over and continue any such criminal proceedings that may have been instituted by any other person or authority; and
- (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.

10

.....

(6) The powers conferred upon the Director of Public Prosecutions by paragraphs (b) and (c) of subsection (4) of this section shall be vested in him to the exclusion of any other person or authority:

20

.....
.....

(7) In the exercise of the powers conferred upon him by this section the Director of Public Prosecutions shall not be subject to the direction or control of any other person or authority. "

30

The powers conferred by this section were exercised by the Attorney-General until 1970 when the Office of the Director of Public Prosecutions was created.

Section 82 of the Constitution reads :

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

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Secretary or of some other supervising officer whose office shall be a public office:

In the Supreme Court of Fiji

No.5

Judgments

10th April 1981

(continued)

Provided that -

- 10 (a) any such department may be under the joint supervision of two or more supervising officers; and
- (b) different parts of any such department may respectively be under the supervision of different supervising officers. "

20 The plaintiff, for the purposes of this motion, invokes this Court's jurisdiction under section 97 of the Constitution. This jurisdiction is distinct from, and additional to, the jurisdiction given to this Court by the Supreme Court Ordinance or any other law. All preliminary matters, as well as the substantive motion, have been dealt with under this jurisdiction.

The plaintiff urges several grounds in support of the motion which can be summarised in what appears in ground 7.

- 30 "7. That the scope of significant activities in regard to the Director of Public Prosecutions and his office are those contained expressly or by implication in Section 85 of the Constitution and other written laws, the scope of which activities precludes a purported assignment to a Minister of 'general direction and control' over the said Director of Public Prosecutions and his office."

Put briefly, if the assignment complained of contravenes the provisions of section 85, it is invalid and the plaintiff must succeed. If not, he must fail.

40 The plaintiff contends that, because of the words "subject to the provisions of this Constitution" appearing in section 76(1), the assignment of responsibility under that section should be read subject to section 82 which requires that the assignee "shall exercise general direction and control over that department". That being so, says he, the assignment contravenes section 85(7) which specifically excludes any direction or control over the plaintiff in the exercise of the powers conferred

upon him by section 85(4).

It is difficult to see how sections 76 and 82 can be construed in the manner suggested. The words "subject to" in section 76 have a limiting effect. Section 82 cannot be construed so as to enlarge the powers given by it. Section 76 assigns powers and section 82 describes the manner in which they are to be used. The two sections, in our view, ought to be read together in order to assess their true intent.

10

The Constitution follows the Westminster model as do several recent Commonwealth Constitutions. (See New Commonwealth and its Constitution - de Smith).

Under Section 76 responsibility may be assigned to Ministers for the conduct of the business of the Government by various departments. The Ministers, however, must do this subject to the provisions of the Constitution. They must not tread on forbidden ground.

20

Section 82 states that over the departments for which the politically elected Ministers are responsible they "shall exercise general (underlining mine) direction and control" and that, subject to such direction and control, the departments must be administered by permanent officers of the Public Service. This construction, calculated to guarantee continuity, is consistent with the intention behind all Constitutions which follow the Westminster model.

30

That, in our view, is the essence of the two sections.

Powers assignable under section 76 are subject to section 85(7) and other similar provisions relating to offices whose holders cannot be subjected to direction and control in the exercise and performance of certain specified powers and functions. Assignment cannot be absolute. Any assignment purporting to be absolute would be unconstitutional. The assignment complained of is not in absolute terms. The defendant cannot invoke section 82 to arrogate to himself powers not assigned under section 76. He cannot assume any direction and control, general or specific, over ground forbidden to him by section 85. If he attempts to do so, his action will be unconstitutional, not the assignment.

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10 The plaintiff contends further that the 'Office' of the Director of Public Prosecutions created by section 85 is not a department of the Government envisaged by section 76. He, however, does have an establishment called the "Office of the Director of Public Prosecutions" employing numerous legal officers and other personnel. The Government provides them with office accommodation, furniture and, above all, money to enable them to perform their duties under section 85. In that regard, they are no different from any other section of the Government. The expression "department" is not defined by the Constitution and must be given the ordinary dictionary meaning as being "a division of a complex whole". A department of the Government is, in our view, any division of the governmental machinery where persons employed by the Government carry out functions assigned to them. These "departments" are, in various assignments, given different names, the names by which they are traditionally known. Most are called "departments"; some are called "offices", such as, Crown Law Office, Central Planning Office or Office of the Ombudsman; one, at least, is called a "bureau" - Bureau of Statistics; some stand by themselves such as "Archives of Fiji". Such terminology, wherever it appears in various assignments, is merely descriptive of the physical establishment where members of the public service carry out assigned functions and should not be given any legal significance for purposes of construction of constitutional provisions. The Constitution itself has created none of these establishments and the expression "office" in section 85(1) should not be confused with the word "office" used in the assignment. Section 85(1) creates, not a physical establishment, but a "public office" as defined in section 127 which can only be filled by a single individual. The assignment in question, read in its entirety, does not use "office" in that sense. Under "departments", for instance, the schedule to the assignment also includes "Office of the Registrar-General", "Office of the Administrator-General", "Office of the Commissioner of Stamp Duties" and "Crown Law Office".

50 Apprehension and prosecution of persons accused of crimes is, and has always been, an important Governmental function. Protection from interference conferred by the Constitution to ensure impartiality cannot alter that. Like any other department of the Government the "Office of the Director of Public Prosecutions"

In the Supreme
Court of Fiji

No.5
Judgments

10th April
1981

(continued)

employs public officers, assesses budgetary requirements and must find ways of procuring money from the same source as any other department. Its future requirements must find a place in any projected development plan. The Constitution, quite understandably, makes no provision for any separate machinery to accomplish that for this office. What is clear is that a great deal of work, completely unconnected with the powers conferred by section 85(4), must be done in order that those powers might be effectively exercised. The assignment made by the Governor-General covers this work, and this work alone, section 85 being specifically excluded from the scope of the assignment.

10

As for "Criminal law, Procedure and Evidence" it is conceded by the plaintiff that drafting and enactment of amending legislation relating to these must necessarily be the responsibility of the Attorney-General. As the powers given to the Director of Public Prosecutions under section 85(4) are specifically excluded, we consider that the assignment must equally necessarily relate solely to drafting and enactment of legislation.

20

Reference was made to the Prime Minister's speech in the House of Representatives explaining the reasons for assignment and a copy of the speech was annexed to the plaintiff's affidavit. We are unable to find any assistance from the speech. Reasons and motives leading to the assignment are largely irrelevant; we are concerned solely with the constitutionality of the assignment itself.

30

We accept the plaintiff's contention that a great many functions he has to perform, though not specifically included under section 85(4), must, by necessary implication, be regarded as incidental to a proper exercise of his powers under that section. To give one example, he must call for police dockets prepared by the Criminal Investigation Department. He must be able to give them directives on matters relating to investigation and prosecution of crimes. If the Minister in charge of the Police Force, or the Commissioner of Police himself, interferes with these functions this Court would, no doubt, regard such action as interference with powers conferred by section 85(4) and, consequently, unconstitutional. The assignment in question does not and cannot, in our view, cover functions necessarily

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incidental to the exercise of powers conferred by section 85. There is, however, outside such functions, a substantial area of administrative activity requiring cabinet consideration and parliamentary approval over which general control and direction may be exercised without violating the provisions of section 85.

In the Supreme
Court of Fiji

No.5
Judgments

10th April
1981

(continued)

10 Is the assignment administratively
necessary? Is it desirable? This Court must
avoid posing these questions, no matter how
great the temptation. To do so would only tend
to confuse the issue and may even interfere
with the discretion which belongs solely to
the Prime Minister. We recognise the possibility
that the powers assigned might be abused. For
that matter, we recognise that all power,
20 howsoever acquired, is susceptible to abuse.
Here, however, we are concerned only with
legality of acquisition, not susceptibility
to abuse.

In the result we find that the burden of
proving unconstitutionality has not been
discharged and the motion is consequently
dismissed.

30 As for the alternative declaration, we are
satisfied that, if the assignment, as worded,
is constitutional and valid, there is no power
in this Court to direct that it be worded
differently.

There will be no order for costs.

40 In passing we should, perhaps, make one
observation. Papers annexed to affidavits filed
by the parties suggest fear on the plaintiff's
part that the assignment complained of will be
manipulated as a basis for political interference.
It is not for this Court to say if such fear
is justified. The papers, however, do reveal
an extraordinary atmosphere of bitterness and
mutual recrimination between the two offices.
It may, on the one hand, be nostalgia for lost
powers; it may, on the other, preoccupation
with interference. The reason is immaterial.
Whether the situation was known at the time of
the choice of Ministers for various assignments
is not known. All this Court can say is that
the holders of the two offices are among the
highest custodians of the public interest and
any likelihood of open conflict between them
50 can only do harm to the country. The alterna-
tive declaration sought by the plaintiff

In the Supreme Court of Fiji

No.5
Judgments
10th April
1981
(continued)

suggests that this likelihood can be removed by a more specifically worded assignment. The defendant's counsel himself concedes that the assignment might have been more happily worded. The matter is one for Government consideration, not a Court declaration.

It is our firm belief, however, that any step taken to avert future litigation between the two important law enforcement agencies cannot but be in the best interests of the rule of law which the Constitution proclaims to be one of its major objectives.

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Sd: G.Mishra
(G.Mishra)
JUDGE

Suva,
10th April, 1981.

No.6
Order
10th April
1981

No. 6
ORDER

IN THE SUPREME COURT OF FIJI
CIVIL JURISDICTION

Civil Action
No. 178 of 1981

20

BETWEEN: Director of Public Prosecutions Plaintiff
AND: Attorney-General Defendant

DATED AND ENTERED THE 10TH DAY OF APRIL, 1981

This action coming on for trial before their Lordships, the Chief Justice Mr. Justice Tuivaga, Mr Justice Mishra and Mr Justice Williams on the 13th day of March, 1981 and the 20th day of March, 1981 before this Court in the presence of counsel for the Plaintiff and for the defendant

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AND UPON READING the pleadings and affidavits

AND UPON HEARING what was alleged by Counsel for the Plaintiff and the Defendant

THIS COURT DID ORDER that this action should stand for judgment

AND this action standing for judgment this day in the list in the presence of Counsel for the Plaintiff and Defendant.

In the Supreme Court of Fiji

No.6

Order

10th April 1981

(continued)

IT IS THIS DAY DECLARED that the notice assigning responsibility to the Attorney-General under Section 76(1) of the Constitution in relation to the Office of the Director of Public Prosecutions is unconstitutional.

BY ORDER

Sd:

R E G I S T R A R

Dated this 10th day of April, 1981

No.7

NOTICE OF APPEAL

In the Fiji Court of Appeal

No.7

Notice of Appeal

21st May 1981

IN THE FIJI COURT OF APPEAL F.C.A.No.18 of 1981
CIVIL JURISDICTION

(On Appeal from the Supreme Court of Fiji: No.178 of 1981)

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

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

AND

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

Civil Action on behalf of Crown Law Off. Exempt from Court Fees
Signature:

Date:21/5/80

BETWEEN: THE ATTORNEY-GENERAL Appellant
(Original Defendant)

AND: THE DIRECTOR OF PUBLIC PROSECUTIONS Respondent
(Original Plaintiff)

No.7
Notice of
Appeal
21st May 1981
(continued)

TAKE NOTICE that the Fiji Court of Appeal will be moved at the expiration of 14 days from the service upon you of this Notice, or so soon thereafter as Counsel can be heard, by Counsel on behalf of the Attorney-General, the above-named Appellant, on appeal from the Decision of the Honourable Mr. Justice Tuivaga, the Chief Justice, and of the Honourable Mr. Justice Williams, being a majority decision of the Supreme Court below with the Honourable Mr. Justice Mishra dissenting, given on the 10th day of April 1981 following the hearing of this matter whereby a Declaration was made, for Orders that :-

10

- (1) The majority decision of the Supreme Court below whereby a Declaration was made, be set aside; and
 - (2) the costs of and incidental to this Appeal, and the costs of the proceedings in the Supreme Court below, be paid by the Respondent.
- 20

AND FURTHER TAKE NOTICE that the grounds of this Appeal are :-

1. The judges constituting the Supreme Court below should have disqualified themselves from adjudicating.
 2. The Supreme Court below, in constituting itself with three judges instead of with one in accordance with the usual practice of the Supreme Court and as envisaged in the provisions of the Supreme Court Act, the Supreme Court Rules 1968 and the Supreme Court (Constitutional Redress or Relief) Rules, 1981, caused a miscarriage of justice.
 3. The Respondent is not a legal entity since the office of the Respondent is not a corporation sole, and it has not been clothed by the Constitution, by statute or otherwise with the ability to civilly sue and be sued.
 4. The Respondent had no 'locus standi' to bring the proceedings in the Court below.
 5. The Directions in writing addressed to the Appellant and given by His Excellency
- 30
40

the Governor General, acting in accordance with the advice of the Prime Minister pursuant to the provisions of section 75(1) of the Constitution of Fiji, notification of which was published in the Fiji Royal Gazette for Friday the 6th day of February 1981 as Gazette Notice numbered 168, are constitutional, lawful and valid Directions and in deciding otherwise the Court below erred in law.

In the Fiji
Court of Appeal

No.7
Notice of
Appeal
21st May 1981
(continued)

10

Dated the 21st day of May 1981

Sd: G. Grimmett

GEOFFREY GRIMMETT, Crown
Solicitor, for Solicitor-
General of and whose address
for service is Crown Law
Office, Government Buildings,
Suva, the Solicitor for the
above-named Appellant

20

To: Director of Public Prosecutions, the
above-named Respondent.

No.8

RESPONDENT'S NOTICE

No.8

Respondent's
Notice

11th June 1981

IN THE FIJI COURT OF APPEAL
CIVIL JURISDICTION

F.C.A.No.18 of
1981

(On Appeal from the Supreme Court of Fiji:
No.178 of 1981)

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

30

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

AND

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

In the Fiji
Court of Appeal

No.8

Respondent's
Notice

11th June 1981

(continued)

BETWEEN: THE ATTORNEY-GENERAL Appellant
(Original
Defendant)

AND: THE DIRECTOR OF PUBLIC
PROSECUTIONS Respondent
(Original
Plaintiff)

RESPONDENT'S NOTICE

TAKE NOTICE that the abovenamed Respondent intends upon the hearing of the Appeal under the Appellant's Notice of Appeal dated 21st May, 1981 from the majority judgment of Tuivaga CJ and Williams J given on the 10th April, 1981 to contend that the majority judgment should be affirmed on the following additional grounds: 10

1. That the purported assignment is unconstitutional in that the ambit of Ministerial responsibility is not delimited adequately and/or at all. 20

2. That the purported decision to assign to the Attorney-General responsibility for the Office of the Director of Public Prosecutions was based upon a fundamental misunderstanding of the provisions of the Constitution namely :-

(a) that it was a legal requirement that the Office of the Director of Public Prosecutions should be subjected to Ministerial responsibility and control; 30

(b) that the Constitution of Fiji is essentially concerned with the issue of Ministerial responsibility and an assignment of the office of the Director of Public Prosecutions under Section 76(1) of the Constitution to a Minister was consequently a formal requirement in regard to which the Prime Minister had no constitutional discretion. 40

ALTERNATIVELY, if the Honourable Court, contrary to the respondent's submissions, holds the purported directions in writing to be constitutional, the respondent seeks a declaration comprehensively delimiting the scope of such directions in writing since the effective functioning of the respondent's office requires

proper legal clarification thereof.

DATED this 11th day of June, 1981

Sd: R.E.Lindsay
Counsel for the Plaintiff

To: The Attorney-General

In the Fiji
Court of Appeal

No.8
Respondent's
Notice
11th June 1981
(continued)

No.9

JUDGMENT

No.9
Judgment
5th August
1981

IN THE FIJI COURT OF APPEAL

Civil Jurisdiction

10 Civil Appeal No. 18 of 1981

Between:

THE ATTORNEY-GENERAL Appellant

and

THE DIRECTOR OF PUBLIC
PROSECUTIONS Respondent

Sir John Falvey, Q.C. & D.Rabo for the Appellant
R.Lindsay & D.Fatiaki for the Respondent

Date of Hearing: 23rd and 24th July, 1981

Delivery of Judgment: 5th August, 1981

20 JUDGMENT OF THE COURT

Chilwell, J.A.

The judgment of the Supreme Court which is the subject of this appeal is expressed in the formal order of that Court as follows :

"It is..... Declared that the notice assigning responsibility to the Attorney-General under section 76(1) of the Constitution in relation to the Office of the Director of Public Prosecutions is unconstitutional."

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In the Fiji
Court of Appeal

No. 9

Judgment

5th August
1981

(continued)

The material parts of the notice, which appeared in the Fiji Royal Gazette on 6th February 1981, state:

" FIJI INDEPENDENCE ORDER, 1970

ASSIGNMENT OF MINISTERIAL
RESPONSIBILITIES

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

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The Attorney-General

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

Dated the 28th day of January 1981.

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By Command

I.Q.LASQA

Secretary to the Cabinet

SCHEDULE

Column 1
(Business of the
Government)

Column 2
(Ministry and depart-
ments of the Govern-
ment.)

(a) Courts (legisla-
tion governing);

Ministry of the
Attorney-General
together with -

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Criminal law and
procedure;

Office of the
Director of Public
Prosecutions
(subject to section
85 of the Constitu-
tion);

Evidence;

The Judicial Depart-
ment (subject to
Chapter VII of the
Constitution). "

40

That and similar notices gazetted that day dealt with a large number of headings of Government

business and a large number of Ministries and Departments of the Government.

In the Fiji
Court of Appeal

Section 76(1) of the Constitution provides:

No.9
Judgment

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

5th August
1981

(continued)

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The Office of Director of Public Prosecutions (D.P.P.) is created in section 85 of the Constitution within Chapter VI headed the Executive. We set that section out in full and draw immediate attention to subsections (4), (6) and (7).

20

"85(1) There shall be a Director of Public Prosecutions whose office shall be a public office.

(2) Power to make appointments to the office of Director of Public Prosecutions shall vest in the Judicial and Legal Services Commission:

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Provided that the Commission shall not select for appointment to hold that office a person who is not a citizen of Fiji and is not a public officer unless the Prime Minister has agreed that such a person may be so selected.

(3) A person shall not be qualified to hold or act in the office of Director of Public Prosecutions unless he is qualified for appointment as a judge of the Supreme Court.

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(4) The Director of Public Prosecutions shall have power in any case in which he considers it desirable so to do -

(a) to institute and undertake criminal proceedings before any court of law (not being a court established by a disciplinary law);

(b) to take over and continue any such criminal proceedings that may have

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been instituted by any other person
or authority; and

(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.

(5) The powers of the Director of
Public Prosecutions under the preceding
subsection may be exercised by him in
person or through other persons acting
in accordance with his general or
specific instructions.

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(6) The powers conferred upon the
Director of Public Prosecutions by
paragraphs (b) and (c) of subsection (4)
of this section shall be vested in him
to the exclusion of any other person or
authority:

Provided that, where any other person
or authority has instituted criminal
proceedings, nothing in this subsection
shall prevent the withdrawal of those
proceedings by or at the instance of that
person or authority at any stage before
the person against whom the proceedings
have been instituted has been charged
before the court.

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(7) In the exercise of the powers
conferred upon him by this section the
Director of Public Prosecutions shall not
be subject to the direction or control
of any other person or authority.

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(8) For the purpose of this section,
any appeal from any determination in any
criminal proceedings before any court,
or any case stated or question of law
reserved for the purposes of any such
proceedings to any other court, shall
be deemed to be part of those proceedings:

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Provided that the power conferred on
the Director of Public Prosecutions by
subsection (4)(c) of this section shall
not be exercised in relation to any
appeal by a person convicted in any
criminal proceedings or to any case
stated or question of law reserved except
at the instance of such a person. "

Section 82 is also relevant and in setting it out in full we draw immediate attention to the general control exercised by a Minister of a department of the Government and the supervisory control of the Permanent Secretary or other supervising officer of that department.

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

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Provided that -

- (a) any such department may be under the joint supervision of two or more supervising officers; and
- (b) different parts of any such department may respectively be under the supervision of different supervising officers. "

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The word department in the context "any department of the Government" is nowhere defined in the Constitution although the word is defined in the Public Service Act 1974 for the purpose of that Act as :

".....a Ministry of the Government or a Department within such a Ministry. "

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We think that the majority opinion in the judgments of Tuivaga C.J. and Williams J. can be synthesised in this way: The Office of D.P.P. is not a Department of the Government; in any event the assignment is complete, not partial and is contrary to section 85(7).

The grounds of appeal, which are not restricted to the interpretation question are as follows :

- "1. The judges constituting the Supreme Court below should have disqualified themselves from adjudicating.

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2. The Supreme Court below, in constituting itself with three judges instead of with one in accordance with the usual practice of the Supreme Court and as envisaged in the provisions of the Supreme Court Act, the Supreme Court Rules 1968 and the Supreme Court (Constitutional Redress or Relief) Rules, 1981, caused a miscarriage of Justice. 10
3. The Respondent is not a legal entity since the office of the Respondent is not a corporation sole, and it has not been clothed by the Constitution, by statute or otherwise with the ability to civilly sue and be sued.
4. The Respondent had no 'locus standi' to bring the proceedings in the Court below.
5. The Directions in writing addressed to the Appellant and given by His Excellency the Governor-General, acting in accordance with the advice of the Prime Minister pursuant to the provisions of section 76(1) of the Constitution of Fiji, notification of which was published in the Fiji Royal Gazette for Friday the 6th day of February 1981 as Gazette Notice numbered 168, are constitutional, lawful and valid Directions and in deciding otherwise the Court below erred in law. " 20 30

The respondent advanced arguments in support of the judgments of Tuivaga C.J. and Williams J. and by notice raised the following additional grounds also supported by argument why this Court should affirm the judgment below.

- "1. That the purported assignment is unconstitutional in that the ambit of Ministerial responsibility is not delimited adequately and/or at all. 40
2. That the purported decision to assign to the Attorney-General responsibility for the Office of the Director of Public Prosecutions was based upon a fundamental misunderstanding of the provisions of the Constitution namely:
(a) that it was a legal requirement

that the Office of the Director of Public Prosecutions should be subjected to Ministerial responsibility and control;

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(b) that the Constitution of Fiji is essentially concerned with the issue of Ministerial responsibility and an assignment of the office of the Director of Public Prosecutions under Section 76(1) of the Constitution to a Minister was consequently a formal requirement in regard to which the Prime Minister had no constitutional discretion.

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ALTERNATIVELY, if the Honourable Court, contrary to the respondent's submissions, hold the purported directions in writing to be constitutional, the respondent seeks a declaration comprehensively delimiting the scope of such directions in writing since the effective functioning of the respondent's office requires proper legal clarification thereof. "

Ground 1

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The appellant alleges bias on the part of the Supreme Court Judges, not actual bias but the presumptive bias which is inferred where a Judge acts in his own cause or is not seen to have been impartial between the litigants.

Sir John Falvey advised us that the Attorney-General (A-G) feels very strongly on this issue. He said that the A-G seeks a definitive judgment from this Court. If the rhetoric (albeit polite) accompanying Sir John's submissions is a guide he made the point in accordance with his instructions.

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At the core of the submission is the fact that in the same Gazette notice there was assigned to the A-G responsibility for the administration of

"The Judicial Department (subject to Chapter VII of the Constitution). "

The record discloses a letter written by the Chief Justice to the A-G at a time when the assignment was being considered and drafted and subsequent press comments which, taken together, are capable of the interpretation that the

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Judges were as such against the assignment to the A-G of responsibility for the administration of the Judicial Department as was the D.P.P. against the assignment to the A-G of responsibility for the administration of his office.

Sir John Falvey took the point with the Judges but his submissions to them do not appear to have been directed at the Judges acting in their own cause but at the expression in the press of what might be thought to be the views of the Judiciary affecting their ability to act impartially. The Judges considered his submissions and ruled against him. The relevant portion of the Judgment of the Court reads :-

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" Respondent has raised three preliminary issues: firstly whether, in view of comments made in the press, and in view of the contents of a letter from the Chief Justice to the Attorney-General annexed to the respondent's affidavit, the Supreme Court of Fiji as presently constituted can fairly and impartially deal with this application. Respondent does not invite the Court to infer any linkage between the Chief Justice's letter and the comments that have, from time to time, appeared in the press. We draw no such inference of linkage.

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Comments, some of them at least, are very strong indeed and allege alarm and distress on the part of the judges resulting from the Order, the Chief Justice's letter, no doubt, suggests that he, and the Judges generally, are opposed to the Order as it affects the Judiciary. A paper, written by another Chief Justice of Fiji, also annexed to the respondent's affidavit, on the other hand suggests equally strongly, that the appointment of a Minister of Justice having administrative control over the Judiciary and the Office of the Director of Public Prosecutions would be a salutary thing and that, there should be no legal impediment to the establishment of such a Ministry. These we regard as opinions largely as to desirability.

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The sole issue before this Court, however, is whether or not the Order complained of contravenes the provisions of the Constitution. The issue must be decided by this Court which alone has

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original jurisdiction in this matter. To decline jurisdiction would be to bar relief altogether without any possibility of a hearing, and the Court, therefore, must accept jurisdiction. The Judges, by training and experience, are capable of isolating, and dealing with, issues of law quite independently of their personal views of the desirability of any administrative measures or of any opinions, no matter how strongly, expressed in the press. We, therefore, consider this Court competent in every way to deal with the application, the sole issue being that of legality and not of desirability. "

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In his oral submissions to us Sir John said that the root of the declaration made by the Judges was that the Gazette notice violates the independence of the D.P.P. and is therefore unconstitutional; if the argument leading to that conclusion is tenable then how much stronger must it apply to the Judicial Department?; was there not concern on the part of all the Judges who preside over that Department that the assignments should be set aside?; if the Judges who delivered the majority judgment below are correct in their view that the Office of the D.P.P. is undermined how much more strongly must the Judicial Department have felt itself undermined? He concluded by saying :-

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"By being able to make a declaration in the proceedings issued by the DPP the Judicial Department effectively got itself of the same hook."

He cited the case of Dimes v. Grand Junction Canal (1852) 3 H.L.C. 759 and submitted that the three judges were being Judges in their own cause i.e. the cause of the Judicial Department.

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We do not have the advantage of an opinion from the Judges below upon this approach to the issue of bias. If it had been put to them in the way Sir John Falvey put it to us we feel sure that the Court in its judgment would have dealt with that aspect of bias.

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In the prepared written submissions which Sir John tendered to this Court but did not read in full the emphasis is upon the impartiality point. There is no express reference to the Judges acting in their own cause although that may possibly be implicit

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in some of the references to the press comments. We think we should record the substance of Sir John's written submissions because we have come to the conclusion that his oral submissions have to be considered in the context of the way he conducted the argument in the Court below and in the context of his written submissions prepared, as they were, in anticipation of the hearing of this appeal and tendered to this Court as his submission on ground 1. The opening paragraphs state:

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"The Appellant's first ground of appeal is that the judges constituting the Supreme Court below should have disqualified themselves from adjudicating.

I invited them to do so at the time and I read out to the Court at the first hearing on the 13th March 1981 the various relevant parts of the exhibits to Mr. Bale's first Affidavit which would have caused, I submitted, a right minded person to think that in the circumstances, there was a real likelihood of bias on the part of the judges constituting the Court.

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The Appellant does not assert that the judges constituting the Court below were in fact biased. The Appellant, I submit, does not have to go so far as that to succeed on this ground of appeal. The proper test to be applied, I submit, is whether the circumstances would cause a right minded person to think that there was a real likelihood of bias."

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The submissions then refer to certain authorities where there emerges a difference of opinion concerning the tests to be applied in deciding whether bias is to be presumed i.e. the "real likelihood" and "reasonable suspicion" of bias tests, the submissions proceed to examine extracts from the press comments, reference is made to the Chief Justice's letter and other evidentiary material and the concluding submissions then read :

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"Section 10 subsection (8) of the Constitution entitles a party in a civil action to a fair hearing and requires a civil court to be impartial.

Did the Attorney-General in the Court below get a fair hearing before an impartial Court?

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I will rephrase my rhetorical question.

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Bearing in mind what had appeared in the press in the few weeks prior to the Supreme Court hearings and particularly bearing in mind the contents of the Chief Registrar's Memorandum and Chief Justice's letter, together with the comments of the Chief Justice made during the course of the hearings, would right minded persons think that in the circumstances there was a real likelihood of bias?

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I submit that the conclusion must irresistably be that right minded persons would consider that there was a real likelihood of bias and that accordingly all three judgments of the Court below should be set aside

Relevant background facts are that the A-G discussed the proposed assignment in respect of the Judicial Department with the Chief Justice. The Chief Justice consulted the Judges of the Supreme Court and wrote to the A-G on 3rd November 1980 in which he tendered the views of the Judges. This exchange of views between the A-G and the Judges through the Chief Justice seems to us to have been entirely proper nor has any contrary view been advanced. The A-G did not accept the views of the Judges with the result that the assignment went ahead in its present form and that seems to have been the end of the matter until this action was commenced on 5th March 1981. Unlike the Chief Justice the D.P.P. was not consulted at all. The first knowledge he had of the proposal was when he read it in its final form in the Gazette. He made vigorous protests but was unable to achieve any amendment. He therefore issued the present proceedings. Press commentary appears to have commenced shortly after the publication of the Gazette and the D.P.P.'s proceedings added fuel to what had already been considered by some press commentators as a serious constitutional issue. On the 25th February 1981 the Prime Minister made a statement in the House of Representatives in which he said that any fears that might be held by people about possible ministerial interference in the judicial functions of the Judicial Department and in the constitutional functions of the D.P.P., were baseless. He affirmed that the Constitution "enshrines and safeguards" the principle of the independence of the Judiciary in the performance of its judicial functions, and the independence

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of the D.P.P. in the discharge of his functions. For the reasons given in his speech he said that there would be no alteration to the Gazette notice. The Press featured the Prime Minister's speech and certain trenchant criticisms by the Leader of the Opposition. The impression on the mind of an objective observer is that if the Press reflected correctly the political climate the assignments in respect of the Judicial Department and the Office of the D.P.P. had become a hot constitutional issue with the Supreme Court Judges and the D.P.P. ranged against the A-G each side holding diametrically opposed views.

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We have read the newspaper articles annexed to an affidavit filed on behalf of the A-G. In particular we have considered the extracts to which our attention was directed by Sir John Falvey in his written submissions. Out of concern to keep the size of this judgment within reasonable limits we have decided drastically to para-phrase what was written by the Press. It should be clearly understood that in no case does the writer of the article attribute his source of information as the Chief Justice or any member of the Judiciary or the Chief Registrar or his staff except in the case of the Registrar on the occasions when he refrained from comment or indicated that no statement would be made. The press articles fall into three time phases, a period after the Gazette notice first appeared, a period after the Prime Minister's speech and a period after the filing of the proceedings by the D.P.P. :

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The First Period

13/2/1981

The Chief Justice and D.P.P. believe that the notice is unconstitutional and could open the way to political interference with the independence of their offices.

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Chief Registrar unable to comment when asked about the Chief Justice's alarm.

14/2/81

The Chief Justice and D.P.P. are deeply concerned that the notice could result in future political interference with their offices, conduct of trials, investigations and prosecutions.

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15/2/81	Will the notice be amended to calm down the Chief Justice or D.P.P.?	In the Fiji <u>Court of Appeal</u>
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19/2/81	The Judicial Department and D.P.P.'s office very strongly oppose the notice.	Judgment 5th August 1981
		(continued)

The Second Period

10	26/2/81	Judges and Crown Prosecutors felt that the notice was unconstitutional. "Their mass resignations could result".
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A full statement will be issued after discussions between the Chief Justice and the D.P.P.

20	26/2/81	"It is believed that in spite of assurance from the Government neither have changed their views and that the Chief Justice, in a strongly-worded letter has called for the cancellation of the order."
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27/2/81	27/2/81	The entire Supreme Court bench is opposed to the notice.
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It is understood that the Chief Justice and the D.P.P. met yesterday on the matter.

30	27/2/81	Judges and prosecutors are said to have no doubt that an unscrupulous A-G could find ways of exerting political influence on them.
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There are suggestions that extreme action might be taken should the Government persist in refusing to withdraw the notice or amend it to satisfy the Judiciary.

40	27/2/81	"The Government must not ignore the Judiciary's expressions of alarm."
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28/2/81	28/2/81	Neither the Chief Justice nor the D.P.P. are ready yet to make public statements. The Chief Registrar said that the Chief Justice is not contemplating making
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a public statement at this stage.

Both the Judiciary and the D.P.P. are reported to be strongly opposed to the notice on the grounds of political influence on their independent offices.

The Third Period

- 7/3/81 The appointment of the new A-G may allay the fears of the Chief Justice and the D.P.P. about their independence. 10
- 9/3/81 Any confrontation between the Judiciary and the A-G can do irreparable harm to Fiji - Law Society view.
- 9/3/81 Law Society greatly concerned about the tension which now existed between the three vital institutions in the country i.e. the Judiciary, the A-G and the D.P.P. 20

There was no evidence that the source of information as to the views of the Judiciary was any member of the Judiciary or officer in the Judicial Department. Sir John Falvey said that he did not suggest that the Chief Justice's letter was "leaked to the press". That is referred to in the judgment of the Court previously mentioned. The statements made by the writers of the press articles are not admissible against the members of the Judiciary; they are classic instances of hearsay and on that ground inadmissible. 30

The Chief Justice's letter was written before the topic became controversial. We think we should recite it in full :

" 3rd November 1980

The Hon. Attorney-General,
Attorney-General's Chambers,
SUVA.

Dear Andrew,

Re: Ministerial Responsibilities

I refer to our recent discussion and to your letter of 29th October under above

reference for which I thank you.

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As you are aware I have been in full consultation with the Judges of the Supreme Court with regard to your proposal relating to the assignment of a Minister of the Crown under the provisions of section 76(1) of the Constitution to be responsible for the administration of the Judicial Department. With the exception of one Judge the rest of the Supreme Court Judges including the writer are opposed to such a move on the ground that it is contrary to the spirit of the Constitution and is not considered to be in the best interest of the Judiciary.

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It is felt that the move would do nothing to enhance the basic concept of the independence of the Judiciary. On the contrary difficulties in judicial administration are likely to arise by reason of the powers vested in a Minister by section 82 of the Constitution which is a complementary section to section 76(1). As you may know there have been several instances of serious conflicts between administrators and Ministers in other areas of Government in recent times and the Judiciary, as the third arm of Government, has no wish to be exposed to such a risk.

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The administrative affairs of the Judicial Department have been well served under existing arrangements and as far as can be seen there appears to be no strong reason for introducing changes in the direction you have indicated in relation to the Judiciary.

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In our view it is consistent with modern constitutional thinking that the Judiciary should have complete responsibility for the management and administration of its affairs.

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The Attorney-General is the Minister who, in accordance with convention, speaks on behalf of the Chief Justice in Cabinet and answers for the Judiciary in the Senate and in the House of Representatives. This convention which is now well-established has the advantage of being simple and informal and obviates the problems inherent in a formalised ministerial relationship.

Yours sincerely,
(sgd) T.U.Tuivaga
Chief Justice "

The letter does not state that the proposed assignment is unconstitutional. We agree with the judgment of the Court that the opinions expressed relate to the desirability of the assignment not its legality.

On the 18th February 1981, i.e. before the Prime Minister's speech, the Chief Registrar made submissions to the Public Service Commission a copy being sent to the Solicitor-General. The purpose of the submission was to reach a compromise. He tendered a draft form of proviso to the assignment. He indicated that his Department and the D.P.P. would accept an assignment with this new proviso. Implicit in the Prime Minister's speech was a rejection of any such amendment. There are some passages in the Chief Registrar's submissions upon which Sir John Falvey relies : 10 20

"3. One way of restricting the powers of the assigned Minister might be for the Supreme Court to declare the limits to the Minister's jurisdiction under the provisions of section 97 of the Constitution but, in view of the fact that the Judicial Department is itself one of the two departments involved, this procedure would not appear to be appropriate. The Judges could not properly be judges of their own cause. Furthermore, even if the preparation of a precise list of those areas into which the responsible Minister could and could not properly intervene were attempted, it is submitted that this list would be constantly subject to difficulties of interpretation brought about by changing and perhaps unforeseen circumstances. 30

4. The other alternative which is strongly favoured both by the DPP and the Judicial Department is that GN.168 should be revoked and replaced. 40

8. Both the DPP and the Chief Registrar on behalf of the Judicial Department are in agreement with the proposal for the revocation of gazette notice 168 and its replacement on the lines set out above. Although it would clearly be wrong for any

final decision to be taken prior to the return of the Chief Justice to Fiji, the Chief Registrar has no hesitation in predicting that the above proposal would receive his assent. The Chief Justice has throughout made it clear that he would welcome the appointment of a responding Minister (as opposed to a responsible Minister) for the Judicial Department in Parliament. His sole objection has been to the appointment of a Minister with the powers of control set out in section 82.

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10. It may be useful to point out that were the current gazette notice not to be withdrawn and were the legal proceedings commenced by Mr. Patel to continue then very considerable problems would arise. In view of the fact that the sitting Judges have already expressed their views on the propriety of GN.168 it is difficult to see how a Court could be constituted to hear the case. There is no provision under the Constitution whereby an overseas Judge could be appointed for the hearing. Furthermore any hearing would in all probability involve the taking of evidence from senior officers of the DPP, Crown Law Office as well as some or all of the Judges themselves. This would be highly embarrassing to say the least. "

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There was no evidence that this letter was written with the authority of the Chief Justice or of any Judge. There is no evidence that the opinions expressed are those of the Chief Justice or of any Judge. In any event no reasonable person reading the letter in its entirety would regard the opinions expressed as those of any one other than the Chief Registrar. We will guide ourselves accordingly.

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In an affidavit of the Solicitor-General filed in opposition to the D.P.P.'s proceedings he stated that no correction or retraction on behalf of the Judiciary was published in any newspaper relating to the views of the Judiciary or the stand taken by them on the propriety or otherwise of the Gazette notice. Failure to retract was advanced by Sir John Falvey as a relevant element, as it is, on the question of bias. He submitted that the Judiciary ought to have taken that opportunity on the two occasions when the press interviewed the Chief Registrar. We do not agree. We consider that the Chief Justice acted with complete propriety in refusing

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to allow the Judiciary to become involved in the newspaper debate. It was not the time nor the place to make any retraction or to explain the attitude of the Judiciary. The proper place for that was in Court and the proper time was when the issue was raised as a preliminary issue before the hearing on the merits commenced. That occurred on the 13th March 1981 when the judgment of the Court on that issue was delivered. The substantive hearing was adjourned to 20th March. In that judgment the attitude of the three Judges assigned to hear the action is clearly portrayed. When the action was called again on the 20th March Sir John raised as a further preliminary issue that which now features as ground 2 of this appeal (i.e. single judge or three judges). He asked to be informed whether the Judge referred to in the Chief Justice's letter as the one exception was presiding that day. The Chief Justice replied that the particular Judge no longer dissented. Thus the A-G knew precisely that the opinions expressed in that letter were held by the three presiding Judges and he knew from the judgment of the Court, delivered a week previously, that those Judges :

"....by training and experience, are capable of isolating, and dealing with, issues of law quite independently of their personal views of the desirability of any administrative measures or of any opinions, no matter how strong, expressed in the press. We, therefore, consider this Court competent in every way to deal with the application, the sole issue being that of legality and not of desirability."

That was an unequivocal assurance given on behalf of the three Judges presiding that they would determine the issues before them impartially. It was not accepted by the A-G. It should have been. It is a matter of concern to us that it was not but that, instead, he instructed his counsel to deliver a vigorous attack in this Court.

Turning now to the submission that the Judges were Judges in their own cause we think we should comment upon that very point raised by the Chief Registrar in his submissions to the Public Service Commission. His opinion was wrong. It was wrong because if an action had been commenced by the Judicial Department or even by or on behalf of the Judges they would

10 have been required by the Constitution to hear it. There is no other Court which could. See section 97. Quite apart from the principle *ex necessitate* the conclusion is inescapable that it was the intention of the framers of the Constitution that the Supreme Court should decide constitutional issues affecting the Judicature. See for example Jefferies v. New Zealand Dairy Production and Marketing Board /1967/ 1 A.C. 551. And if the Judges had been required to hear and determine such an issue section 10(8) of the Constitution would direct them to be independent and impartial and to give it a fair hearing.

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20 The complaint is that the Judges determined their own cause when they determined the cause of the D.P.P. against the A-G. The evidence does not establish that the Judges had a cause. They had made submissions through the Chief Justice to the Attorney-General in an unimpeachable way, their request to leave the position in statu quo was declined, that is no evidence that they were dissatisfied with that decision or that they wished to re-open the matter and certainly no evidence of any wish to engage the A-G in litigation. If there was a cause between them it was not demonstrated by any argument advanced to them or to us that the issues involved in the D.P.P.'s cause were sufficiently similar to those involved in the supposed cause of the Judiciary to support the inference of bias. We were not taken through the provisions of the Constitution which would have been relevant to the determination of that supposed cause. Counsel did not attempt to compare section 85 relating to the D.P.P. with the sections relating to the Judicature nor their relationship with sections 76 and 82. It seems to have been assumed by Sir John Falvey that the issues involved in the two assignments are the same and that we would act on that assumption. Much more than that is required when an allegation is made that causes are sufficiently similar to support the inference of bias. Finally, the Judges had no opportunity to address their minds to the proposition that they were adjudging their own cause. Had this issue been put they would have given us their opinion. We have been denied that advantage. This is an instance where a party must be bound by his conduct of the case below. Accordingly, as earlier indicated, we are prepared to consider the question as relevant only to the allied question of impartiality.

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Modern authorities indicate a difference of opinion as to whether the appropriate test to be applied should be "real likelihood" or "reasonable suspicion" of bias. Many of these authorities are reviewed by Mahon J. in Anderton v. Auckland City Council [1978] 1 N.Z.L.R. 657 who concluded that the tests are separate and distinct although they may overlap and interact in particular cases. The current view in Australia is expressed by the High Court in R. v. The Commonwealth Conciliation and Arbitration Commission: ex parte The Angliss Group (1969) 122 C.L.R. 546, 553 :

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"The requirements of natural justice are not infringed by a mere lack of nicety but only when it is firmly established that a suspicion may reasonably be engendered in the minds of those who come before the tribunal or in the minds of the public that the tribunal or a member or members of it may not bring to the resolution of the questions arising before the tribunal fair and unprejudiced minds. Such a mind is not necessarily a mind which has not given thought to the subject matter or one which, having thought about it, has not formed any views or inclination of mind upon or with respect to it."

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During the present session we adopted and applied that test in Una Dutt Sharma v. R. F.C.A. 6/81.

The question is whether the evidence firmly justifies the conclusion that a suspicion may reasonably be engendered in the minds of the parties or the public that the Judges may not bring fair and unprejudiced minds to the issues in the action. For the reasons already given none of the statements in the press can be attributed to the Judges. Neither the A-G nor members of the public could reasonably have expected the Judges to have commented other than in the traditional ways i.e. by using the A-G as their spokesman or by making an appropriate announcement in Court. The latter course was chosen and applied on the correct occasion i.e. upon the first call of this case in Court. That leaves the Chief Justice's letter. It was couched in moderate language, it set out the views of the Judges in an unimpeachable

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fashion, it did not directly challenge the legality of the proposed assignment (and we are not to be taken as ruling that it should not), it suggested that the spirit of the Constitution was in issue but in a restrained way, it questioned the desirability of the proposal and suggested that existing conventions appeared to work satisfactorily. Neither the A-G nor members of the public would reasonably have entertained the view that the Judges had any firm view one way or the other about the legality of the proposal. The evidence fails entirely, let alone to the degree of firmness required, to justify the conclusion that a suspicion may have reasonably been engendered in the minds of the parties or the public that the Judges may not at the hearing and determination then bring fair and unprejudiced minds to the determination of the issues which were entirely legal. On the contrary we find the allegation wholly unjustified. This ground of appeal is dismissed.

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(continued)

Ground 2

Section 97(4) of the Constitution empowers the Chief Justice to make rules with respect to the practice and procedure of the Supreme Court in relation to the jurisdiction and powers conferred on the Court by the section. This action was brought under the section. The Chief Justice made rules under the section on 20th January 1981. They are the Supreme Court (Constitutional Redress Or Relief) Rules, 1981 published in Legal Notice No.14 of 1981. Rule 2 states :

"2. The jurisdiction and powers conferred on the Supreme Court by or under sections 17 and 97 of the Constitution shall be exercisable by a single Judge."

At the hearing on the 20th March Sir John Falvey raised as a preliminary point the constitution of the Court comprising three Judges. He referred to section 31(1) of the Supreme Court Act which states :

"31(1) Civil causes in the Supreme Court shall be tried by a judge alone, except where express provision to the contrary is made by this or any other Ordinance."

The Chief Justice ruled that "judge alone" in that section means a trial before a judge sitting alone as distinct from a judge sitting

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(continued)

with assessors and that the word "judge" included the plural. He did not refer to but doubtless had in mind Parmanandam v. A-G (1972) 18 F.L.R. 90, 96-97. In his substantive judgment Williams J. referred to Rule 2 of the 1981 Rules and said:

"Use of the word 'exercisable' demonstrates that the jurisdiction is not limited to a single judge."

We stopped Sir John Falvey during argument. 10
We expressed the view that if we considered this ground meritorious the result would be a re-trial before a single judge and a possible further appeal to this Court. That did not seem to us to be a particularly sensible result for the parties who were already before this Court on the substantive issue. Sir John invited us to defer giving a definitive judgment so that the ground could remain in the event of an appeal from this Court. We 20
concurred in that course. We did not call upon Mr. Lindsay to answer ground 2.

The ground does not raise jurisdiction but miscarriage of justice. While expressing no concluded view, because we did not hear argument, we are unable to see as at present advised where the miscarriage of justice lies. We are aware that Courts throughout the Commonwealth sit in banco at first instance where the occasion warrants it. We think that 30
a constitutional issue of importance such as the present is such an occasion. The preservation of the Constitution is ultimately a matter for the Supreme Court. We think that the selection of three rather than one judge to preside indicated that the Judiciary were showing due concern for the Constitution committed to its care. It really is preposterous to suggest the contrary.

We have indicated our view that there was 40
no miscarriage of justice. Because of the way this issue was left at the hearing of this appeal we decline to give a definitive judgment but in order to preserve any right of appeal which the appellant may have we formally dismiss ground 2.

Grounds 3 and 4

The submission is that the D.P.P. is not a legal entity who can maintain this action as a plaintiff neither does he have locus 50

standi.

In the Fiji
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(continued)

These issues were raised as preliminary issues at the hearing on 13th March 1981, when the Court in its judgment stated :

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"The second issue is: whether or not the Director of Public Prosecutions can come to this Court in his own official capacity as an applicant. It is not in dispute that in normal circumstances he cannot sue and be sued in his name as representative of the Crown. That power is vested in the Attorney-General.

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The applicant, however, has come to this Court not as an authority that has been declared as a legal entity for purposes of ordinary litigation. He comes as a 'person' under section 97 of the Constitution and claims that an order has been made which affects powers exclusively vested in him and he seeks a bare declaration that the Order is invalid. Both parties agree that this is the only Court to which he may come for the protection of these powers, if indeed, these powers are being threatened by the Order. The respondent submits that, as the DPP is not specifically authorised by law to sue in his own official capacity he cannot have redress through Courts at all. We cannot accept that. It is now accepted in law that construction of the provisions of a Constitution requires a more liberal approach than construction of Acts of Parliament, 'calling for principles of interpretation of its own' (see Minister of Home Affairs Bermuda v. Fisher (1979) 2 W.L.R. 889 at 895).

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The Constitution of Fiji has created some special offices and vested the holders of those offices with special powers to the exclusion of everyone else. When and if, such powers are threatened, the aggrieved persons ought, in our view, have the right to come to this Court for a declaration. To hold otherwise would be to frustrate the intention of the framers of the Constitution who must have required that the powers vested in the holders of such offices should always be kept intact.

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We, therefore, hold that the Director of Public Prosecutions has, in respect of

this application, the right to be heard."

Section 97(1) of the Constitution provides for a specific cause of action arising not at common law but from the Constitution:

"S.97(1).....if any person alleges that any provision of this Constitution (other than Chapter II) has been contravened and that his interests are being or are likely to be affected by such contravention..... that person may apply to the Supreme Court for a declaration and for relief under this section." 10

Chapter II contains its own code for relief in respect of supposed contraventions of fundamental rights and freedoms.

The D.P.P. is a person who is appointed to an office which is a public office. He is a person within section 97(1). If he can establish that his interests are being or are likely to be affected by a supposed contravention of the Constitution he has the constitutional right given by the section to make application to the Court. It is the crux of his case that the administration of his office has been removed from his general direction and control and assigned to the A-G. We find it hard to comprehend any valid argument that his interests as a public servant charged with administering one of the most important offices in the Constitution are not affected. The section is so plain and the D.P.P. comes so plainly within it that we do not require to refer to authority. We are in no doubt that he has the ability to maintain this action and no doubt that he has locus standi in terms of the section itself "that his interests are being or are likely to be affected." 20 30

We were referred to A-G v. Shiu Prasad Halka (1972) 18 F.L.R. 210 where this Court held that the Public Service Commission was not a corporate entity and could not sue or be sued in its own name. That case is distinguishable first because the action was an ordinary writ claiming declarations and damages in respect of alleged wrongful termination of employment; it was not an action based on a specific constitutional cause of action: secondly because the Public Service Commission comprises several appointees unlike the Office of the D.P.P. which is held by a single person. 40 50

We agree that the Supreme Court was correct in its ruling on this matter. While we have not found it necessary to refer to authorities on the construction of the Constitution, because we regard the meaning of section 97(1) as plain, if there is any doubt then we agree with the principle of construction applied by the Supreme Court and we observe that the principle as enunciated in Minister of Home Affairs v. Fisher /1980/ A.C. 319 has been affirmed in several subsequent decisions of the Privy Council.

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(continued)

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Grounds 3 and 4 are dismissed.

Ground 5

This ground involves the main issue on this appeal and in the Court below. The question is whether the notice assigning to the A-G responsibility for the administration of the Office of the D.P.P. is unconstitutional.

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The material words in section 76(1) for the purpose of this case are those which describe the subject matter of assignments - viz. :

"... responsibility for the conduct (subject to the provisions of this Constitution and any other law) of any business of the Government, including responsibility for the administration of any department of the Government."

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These words have to be read as a whole. We reject Mr. Lindsay's argument to the contrary and specifically the argument which attached the words in brackets to the conduct of any business to the exclusion of the remainder of the words in the section. The governing phrase is "any business of the Government" which in accordance with the express wording of the section can include the administration of any department of the Government. Notwithstanding the nature of the Office of the D.P.P. and the guarantee of independence attaching to that office as provided for within the Constitution it is a business of the Government.

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We heard interesting arguments on the question whether the office of the D.P.P. is a department of the Government and we have carefully considered the judgments of the Court below on that issue. We agree with Williams J. that a rigid definition of department is not

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(continued)

possible. It will vary in meaning according to the section under consideration. We disagree with Mr. Lindsay's submission that "the Government" in the context "any department of the Government" is used throughout the Constitution in contradistinction to the Opposition. That may be so in provisions such as section 86(6) which defines the opposition party as a group of members of the House "in opposition to the Government" and section 74(5)(d) which provides for the vacation of Ministerial office following a "resolution of no confidence in the Government". The words "the Government", which are defined in section 127 as "Her Majesty's Government of Fiji", will vary in meaning according to the context. We do not find it necessary to decide whether the Office of the D.P.P. is a department of the Government because it is clearly a business of the Government. In our judgment the Governor-General had jurisdiction on the advice of the Prime Minister to assign responsibility for the conduct of that business to the A-G whether or not it also constituted a department of the Government. The fact that the draftsman of the notice drew a distinction between businesses and departments does not affect the jurisdiction invested by section 76(1) to assign the business of the Office of the D.P.P.

For the above reasons we accept that the Office of the D.P.P. was capable of assignment subject however to the limitation imposed by section 76(1) - viz. :

"(subject to the provisions of this Constitution and any other law)."

That limitation controls the whole scope of the section. Because the D.P.P. occupies a special position in the Constitution it is important to consider his office first historically and secondly under the Constitution.

Prior to the coming into force of the Constitution in 1970 the A-G had the exclusive powers now vested in the D.P.P. under section 85(4), (5) and (6). Section 38(2), (3) and (4) of the Constitution of Fiji appearing as Schedule 2 to the Fiji Constitution Order 1966 were in all material respects the same. Likewise the freedom from direction and control sections were virtually identical.

Compare sections 85(7) and 38(6). In addition the Fiji (Constitution) Order 1966 section 14(2) and (3) provided that when the Office of the A-G ceased to be a public office the D.P.P. would assume exclusive control of the powers then in section 38(2), (3) and (4).

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When the Constitution came into force in 1970 the Constitution vested these powers in the D.P.P. We think it important to re-state them :

(continued)

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"85.(4) The Director of Public Prosecutions shall have power in any case in which he considers it desirable so to do -

(a) to institute and undertake criminal proceedings before any court of law (not being a court established by a disciplinary law);

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(b) to take over and continue any such criminal proceedings that may have been instituted by any other person or authority; and

(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.

.....

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(6) The powers conferred upon the Director of Public Prosecutions by paragraphs (b) and (c) of subsection (4) of this section shall be vested in him to the exclusion of any other person or authority: "

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This change was made deliberately in accordance with conclusion No.55 of the report of the Fiji Constitutional Conference 1970. Notwithstanding the fact that any other person as well as the D.P.P. can institute criminal proceedings and notwithstanding the limited power of withdrawal contained in the proviso to subsection (6) by virtue of the D.P.P.'s power to take over proceedings instituted by others he has in a very real way the exclusive responsibility for controlling all criminal proceedings. In addition section 85(7) amounts to a constitutional guarantee of independence from the direction or control of any person in the exercise by the D.P.P. of his powers.

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(continued)

The independence of the D.P.P. is guaranteed in other ways. He is appointed by the Judicial and Legal Services Commission, (section 85(2)). By way of contrast Permanent Secretaries of departments and supervising officers are appointed by the Public Service Commission. The Prime Minister's concurrence is a condition of their appointments (section 105). The D.P.P. can be removed from office only if a tribunal comprising a chairman and two persons of high judicial office, appointed by the Judicial and Legal Services Commission, recommends his removal (section 109(1), (4) and (7)). Nor can he be required to retire (section 132). His salary and terms of office cannot be altered to his disadvantage after his appointment (section 124(3) and (5)). Any pension benefits to which he is entitled cannot be withheld, suspended or reduced even by the Judicial and Legal Services Commission unless he has been removed for misbehaviour (section 111(1), (3)). He cannot be made the subject of investigation by the Ombudsman in respect of the exercise of his administrative functions (sections 113(1) and 113(2)(e)(iv)). He and those of his officers who are referred to in Schedule 3 of the Constitution are subject to the discipline of the Judicial and Legal Services Commission (section 102(1)). This Commission is itself independently constituted and free from the direction or control of any person (section 101 and section 135(4)).

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The Constitution follows the Westminster model and in respect of the D.P.P. it follows it very closely. We refer to de Smith The New Commonwealth and its Constitutions (1964) page 74 :

" Secondly, an attempt will be made to insulate the process of prosecution from political influence. If the Attorney-General is to be a politician once self-government is reached, the constitution will vest special responsibilities in the Director of Public Prosecutions, a legally qualified public officer. The D.P.P. is not to be subject to the direction or control of any other person or authority in the exercise of his powers. He will have exclusive responsibility for deciding when to take over, continue or discontinue prosecutions instituted by other persons, and may institute and undertake prosecutions in person or through his own officers. In short, his

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constitutional powers in relation to criminal proceedings will be substantially those of the Attorney-General in England. He will be removable only for inability or misbehaviour and in pursuance of the recommendation of a judicial tribunal of inquiry. If the Attorney-General is not to be a politician but a public officer himself, then his constitutional position will correspond with that which would otherwise have been accorded to the Director of Public Prosecutions."

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(continued)

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We conclude that the Office of D.P.P. is a public office which in the exercise of the powers conferred is independent from the direction or control of any person including political direction or control. That is not to say that the D.P.P. is not accountable to any one. He is accountable to the Courts in the performance or non-performance of his functions (section 136), he is accountable to the Judicial and Legal Service Commission in respect of his professional conduct (section 102) and he is accountable to the Auditor-General for his financial administration (section 126).

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The assignment purports to make the D.P.P. also accountable to the A-G who is a politician. The effect of the assignment flows from section 82(1). The A-G has become charged with responsibility for the administration of the Office of the D.P.P. and because of that he is required to exercise general direction and control over that office. Prima facie that is in direct conflict with section 85. However the assignment seeks to modify its effect by the addition of the words "subject to section 85 of the Constitution". These must be taken to be words of limitation. They could not be interpreted as words defining the scope of the Office of the D.P.P. If that were so they would include the D.P.P.'s exclusive and protected powers as part of the assignment an interpretation which would render the assignment so patently contrary to section 76(1) as to deprive it of any validity whatever. Treating the words as words of limitation the interpretation of the Gazette notice most favourable to the A-G means that responsibility for the general direction and control over the administration of the Office of the D.P.P. is assigned to the A-G save and excepting the exclusive and protected powers of the D.P.P. vested in him by section 85.

We observe that the words of limitation in

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(continued)

the assignment make no express reference to "any other law". Other laws are within the limitation expressly imposed by section 76(1). Mr. Lindsay drew our attention by way of example to section 74 of the Criminal Procedure Code, Cap.14 which gives the D.P.P. the powers to appoint a public prosecutor for the purpose of any case. He submitted that the assignment ought to be subject to this particular provision. Our attention was not drawn to any other provisions of that Code or of the Penal Code, Cap.11. To the extent that section 74 and other provisions of those Codes vest powers in the D.P.P. they are, in our view, incidental to the powers conferred on him by section 85 of the Constitution and as such become exclusive. The omission to refer to any other law in the assignment does not therefore advance the argument against the validity of the assignment. 10 20

The question of incidental powers is however relevant in a more general way. We do not think that there is any doubt that in the exercise of the powers conferred on him by section 85 the D.P.P. may exercise all such powers as are necessary or proper to render his specific powers effective. See R. v. Kirby (1956) 94 C.L.R. 254 affirmed on appeal sub nom A-G. for Australia v. R. [1957] A.C. 288 and, persuasively, section 42 of the Interpretation Act 1967. The incidental powers include his administrative functions some of which will partake more of the character of general office administration than purely professional functions. There was no suggestion that the D.P.P. performed functions, administrative or otherwise, or used staff, Government property and facilities for purposes not necessarily incidental to the performance of his specific functions. 30 40

What we have called the exclusive and protected powers of the D.P.P. relate to the whole area of his functions. When he exercises his powers they are exclusive to him and protected from direction or control. He has no powers which fall outside the exclusive or outside the protected. His necessarily incidental powers fall within the same areas of exclusiveness and protection. The whole purpose in creating the office was to vest these powers in him exclusively and protectively with the former office holder, the A-G, specifically in mind for exclusion. What is then within the office that falls outside the 50

ambit of the D.P.P.'s exclusive and protected powers? Is it, as the A-G submitted in the Court below, the office accommodation, the office equipment, the non professional staff, the clerks, the typists and the messenger? We do not think that the Court can give a definite answer to that question. But if the answer is in the affirmative is this what is contemplated by section 82 as the area in which the A-G is to exercise general direction and control? Applying ordinary principles of construction we would answer that question in the affirmative because so long as the assignment, by its wording, does cover something material other than the exclusive and protected powers there is room for it to take effect and we would have said that it is not for the Court to determine the relevance of that material as a matter of degree.

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Judgment

5th August
1981

(continued)

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However the issue in this action involves a question of construction of a constitution and involved in that question is the further question whether the type of facilities provided by the Government and relied upon by the A-G as incidental to the running of the Office of the D.P.P. establishes a proper base for an assignment which, to persons untrained in constitutional law and the interpretation of constitutions, has every appearance of giving the A-G ascendancy over the D.P.P. in the exercise of the latter's exclusive and protected powers. There may be no harm in the type of facilities referred to being administered by the A-G. We do not doubt that the A-G would be particularly careful to ensure that such general direction and control as he exercised over facilities would do nothing to impede, embarrass or influence the D.P.P. in the exercise of his exclusive and protected powers. But in interpreting the Constitution the Court is required to adopt a generous rather than a legalistic approach. We refer to the judgment of the Privy Council delivered by Lord Diplock in Ong Ah Chuan v. Public Prosecutor /1980/ 3 W.L.R. 855, 864 :

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" This said, however, their Lordships would repeat what this Board has said on many previous occasions and most recently through Lord Wilberforce in Minister of Home Affairs v. Fisher /1980/ A.C. 319, 329: that the way to interpret a constitution on the Westminster model is to treat it not as if it were an Act of Parliament but 'as sui generis, calling for principles

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5th August
1981

(continued)

of interpretation of its own, suitable to its character.....without necessary acceptance of all the presumptions that are relevant to legislation of private law'. As in that case, which concerned fundamental rights and freedoms of the individual guaranteed by the Bermuda Constitution, their Lordships would give to Part IV of the Constitution of the Republic of Singapore 'a generous interpretation avoiding what has been called 'the austerity of tabulated legalism,' suitable to give to individuals the full measure of the (fundamental liberties) referred to' (p.328). 10

Accordingly their Lordships are unable to accept the narrow view of the effect of articles 9(1) and 12(1) of the Constitution for which counsel for the Public Prosecutor contended. " 20

We have referred briefly to the history of the Offices of the A-G and D.P.P. to the obvious intention of the framers of the Constitution when the Office of D.P.P. was created i.e. to remove the control of criminal proceedings from the A-G and place control with the D.P.P., to vest that control exclusively in the D.P.P. i.e. to the exclusion of the A-G and to guarantee to the D.P.P. independence from direction or control, political or otherwise, in the exercise of his powers. We think that section 76(1) evinces a manifest intention on the part of the framers of the Constitution to keep these two authorities part. We say that because of the limitation appearing in brackets in section 76(1) and because that limitation did not exist in section 34 in Schedule 2 of the Fiji Constitution Order 1966. Can it be said that the draftsman of the assignment has preserved that manifest intention in his notice where it is only by a close examination of the words he has used, a close examination of the relevant sections in the Constitution, and after full argument in the Supreme Court and in this Court it emerges that what prima facie has all the appearance of being a fully effective and complete assignment of responsibility for the general direction and control over the administration of the Office of the D.P.P. to the A-G is an assignment of responsibility for a part or parts only of the administration unconnected with the exclusive and protected part of the D.P.P.'s work? No list of items forming that part or parts was submitted by the 30 40 50

draftsman in his notice. We have come to the conclusion as a matter of common sense that no such list could transcend the need for making it perfectly plain that the functions of the D.P.P. in his independent allotted sphere within the Constitution were being maintained undiluted.

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No.9
Judgment

5th August
1981

(continued)

10 The manifest intention of the framers of the Constitution when enacting the words "subject to the provisions of this Constitution" was to ensure that no assignment breached the Constitution. Much more is involved than the bare words of the Constitution. As was said by Lord Diplock in Hinds v. R. /1977/ A.C.195 "a great deal can be, and in drafting practice often is, left to necessary implication from the adoption in the new constitution of a governmental structure which makes provision for a legislature, an executive and judicature."

20 The same principle applies in the present case where certain powers formerly held by the Chief Law Officer of the Crown have been taken from him and vested in an officer, the D.P.P. who is to be entirely independent of direction or control. When the A-G exercised those powers he had to divest himself of political partisanship. The responsibility for decisions to prosecute for an offence or to discontinue a prosecution once commenced were quasi-judicial in nature; they were not an executive function at all. See Sir Kenneth Roberts Wray Commonwealth and Colonial Law (1966) 350 A-G v. Times Newspapers Ltd /1973/ 3 All E.R.54, 74 Lord Diplock. Now, under section 85 of the Constitution, the country is assured that there will be no political partisanship in the decision making of the D.P.P. We think that the words "subject to the provisions of this Constitution" in section 76(1) manifest an intention to preserve the severance effected by the Constitution between the A-G and the D.P.P. in respect of the powers vested in the latter.

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50 The assignment has purported to comply with section 76(1) by making it subject to section 85. But as we have observed more is involved than the precise words of section 85. The whole concept of the independent office of the D.P.P. as envisaged by the framers of the Constitution is involved and that includes the severance aspect.

It was not in our view sufficient for the draftsman of the assignment to leave it to others or to the Courts to work out as

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No.9
Judgment

5th August
1981

(continued)

circumstances arise how effectively he has preserved that severance by the adoption of the drafting device "subject to section 85". By adopting that method he has failed to make it plain that he has preserved that severance. On the contrary the assignment adopts the drafting technique of assigning everything to the A-G thereby shifting the onus away from the A-G of establishing an exception whereas the onus should be placed upon him to establish what part or parts of the administration of the D.P.P.'s office have been assigned to him.

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That may not have been the intention of the draftsman of the notice or of those who inspired his work but in cases where constitutional legislation is in question :

"It must be presumed that a legislative body intends that which is the necessary effect of its enactments; the object, the purpose and the intention of the enactment is the same" - Kariapper v. Wijesinha [1968] A.C. 717, 741 Sir Douglas Menzies.

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A breach of a constitutional restriction is not excused by the good intentions with which the legislative power has been exceeded by the particular law" - Hinds v. R. supra, 226 Lord Diplock

The words "subject to section 85" were without doubt inserted in order to avoid patent collision with the Constitution but, as we have observed, they place the onus on the wrong person. It is the substance not the form of the assignment with which we are concerned. In Ladore v. Bennett [1939] A.C.468, 482, Lord Atkin said :

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"....the courts will be careful to detect and invalidate any actual violation of constitutional restrictions under pretence of keeping within the statutory field. A colourable device will not avail."

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That principle was applied in Hinds v. R. supra 224 and 227. The drafting technique adopted in this case, albeit accidental and not deliberate, forces us to the conclusion that the limitation imposed by the words in section 76(1) "subject to the provisions of this Constitution" has been denied its full and proper effect.

For the foregoing reasons, which in

certain respects are similar to those advanced by Williams J., we conclude that the notice assigning to the A-G responsibility for the administration of the Office of the D.P.P. contravenes section 76(1) of the Constitution and we accordingly uphold the declaration made by the Supreme Court.

In the Fiji Court of Appeal

No.9 Judgment

5th August 1981

(continued)

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Having determined the principal issue under ground 5 favourably to the respondent we do not consider it necessary to determine the additional grounds advanced in the respondent's notice.

Ground 5 is dismissed and with it the appeal. Costs to the respondent in this Court.

Sd: T.Gould
Vice President

Sd: B.C.Spring
Judge of Appeal

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Sd: M.F.Chilwell
Judge of Appeal

No. 10

ORDER

No.10 Order

5th August 1981

IN THE FIJI COURT OF APPEAL Civil Appeal No.
CIVIL JURISDICTION 18 of 1981

BETWEEN: The Attorney-General Appellant
(Original defendant)

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AND: The Director of Public Prosecutions Respondent
(Original plaintiff)

DATED AND ENTERED THE 5TH DAY OF AUGUST, 1981

This action coming before their Lordships, Gould VP, Spring JA, and Chilwell JA on the 23rd and 24th day of July, 1981 in the Fiji Court of Appeal and argument being presented by counsel

In the Fiji
Court of Appeal

No.10

Order

5th August
1981

(continued)

for the appellant and for the respondent.

AND UPON READING the pleadings and affidavits

AND UPON HEARING what was alleged by counsel
for the appellant and respondent

THIS COURT DID ORDER that this action should
stand for judgment

AND this action standing for judgment this day
in the list in the presence of counsel for the
appellant and respondent

IT IS THIS DAY DECLARED that the notice assign- 10
ing responsibility to the Attorney-General
under Section 76(1) of the Constitution in
relation to the Office of the Director of
Public Prosecutions is unconstitutional.

IT IS FURTHER ORDERED that, the appeal being
dismissed, costs be awarded to the respondent
in this Court.

BY ORDER

Sd:

R E G I S T R A R

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Dated this 1st (sic) day of September 1981

CERTIFIED TRUE COPY

Deputy Registrar

No. 11

ORDER GRANTING FINAL
LEAVE TO APPEAL TO
HER MAJESTY IN COUNCIL

In the Fiji
Court of Appeal

No.11
Order granting
Final Leave to
Appeal to Her
Majesty in
Council

18th August
1981

IN THE FIJI COURT OF APPEAL Civil Appeal No.
CIVIL JURISDICTION 18 of 1981

BETWEEN: THE ATTORNEY-GENERAL Appellant

AND : THE DIRECTOR OF PUBLIC Respondent
PROSECUTIONS

10 BEFORE THE HON. MR. JUSTICE MARSACA IN CHAMBERS
TUESDAY THE 18TH DAY OF AUGUST 1981

ORDER GRANTING APPELLANT FINAL LEAVE TO APPEAL
TO HER MAJESTY IN COUNCIL (The Fiji (Procedure
in Appeals to Privy Council) Order 1970,
Sections 4 and 12)

20 UPON READING the Notice of Motion herein dated
the 13th day of August 1981 filed on behalf of
the Attorney-General, the Appellant, seeking
Final Leave to appeal to Her Majesty in Council
against the judgment of the Fiji Court of
Appeal, given herein on Wednesday the 5th day
of August, 1981, and the Affidavit of Geoffrey
Grimmett filed in support thereof, and UPON
HEARING Mr. G.Grimmett of Counsel for the said
Attorney-General, and Mr. Lindsay with Mr. Raza
of Counsel for the Respondent, the Director of
Public Prosecutions, IT IS THIS DAY ORDERED
30 that the Attorney-General have Final Leave to
appeal to Her Majesty in Council against the
judgment herein of the Fiji Court of Appeal
AND IT IS FURTHER ORDERED that there be no
Order for costs.

BY ORDER

Sd:

Registrar

Fiji Court of Appeal

EXHIBITS

P1

Affidavit of
Sailosi Kepa

5th March 1981

EXHIBITS

P1

AFFIDAVIT OF SAILOSI
KEPA

IN THE SUPREME COURT OF FIJI
CIVIL JURISDICTION

No.178/81

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

IN THE MATTER of an Order purportedly made
pursuant to the Constitution of Fiji, Section 10
76(1) (Fiji Royal Gazette, Friday, 6th
February, 1981)

A N D

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

BETWEEN: The Director of Public
Prosecutions Plaintiff

AND: The Attorney-General Defendant

AFFIDAVIT OF SAILOSI KEPA 20

I, Sailosi Kepa of 55 Domain Road, Suva, Fiji
make oath and say as follows :-

1. THAT I am Fiji's Director of Public Prosecutions and have occupied this post continuously since 16th November, 1980. I am and always have been a citizen of Fiji and I was appointed by the Judicial and Legal Services Commission.
2. THAT I have exercised independent control over the activities of the Director of Public Prosecutions' office since my appointment on 16th November, 1980. There are at present nine officers attached to my office who carry out their duties under my general and specific instructions. In addition there are six clerical staff comprising four secretaries, one clerical officer and one messenger who work under my directions. The appointments of all legal officers to my office are made by the Judicial and Legal Services Commission and all officers are subject to the rules and regulations of the Judicial and Legal Services Commission. 40

The staff appointments are made by the Public Service Commission (with the exception of the messenger boy) and all staff are subject to the rules and regulations of the Public Service Commission.

EXHIBITS

P1

Affidavit of
Sailosi Kepa
5th March 1981
(continued)

10 3. THAT the activities of my office relate directly or indirectly to the exercise of the powers conferred upon me by Section 85 of the Constitution, matters incidental thereto, and other written laws. My duties and those of my officers include the following :

(a) Calling for and allocation of police dockets and other dockets relating to criminal matters and having access to and control over the same to the exclusion of any other person or authority;

20 (b) Advising the police upon sufficiency of evidence for the purpose of deciding whether or not to prosecute;

(c) Advising on the question of whether to appeal in criminal cases;

(d) Conduct of prosecutions and/or criminal appeals in the Magistrates Court, Supreme Court and Court of Appeal and preparation of documents relating thereto;

30 (e) Answering public correspondence concerning allegations in relation to alleged criminal activities;

(f) Assignment of officers for the conduct of prosecutions;

(g) Preparing budgetary estimates;

(h) Authorising accommodation, transport, and meal allowances for the conduct of prosecutions by my officers;

40 (i) Writing confidential reports in regard to the performance of my officers and staff;

(j) Authorising the payment of prosecution witness expenses for attending court;

(k) Authorising such investigations and inquiries as are necessary to enable me to exercise the powers conferred

EXHIBITS

P1

Affidavit of
Sailosi Kepa
5th March 1981
(continued)

upon me by the Constitution and other
written laws;

(1) Maintenance of confidentiality in all
matters pertaining to the aforesaid
investigations and inquiries.

4. THAT on the 6th February, 1981 there appeared in the Fiji Royal Gazette a purported order, a true copy of which is annexed and marked "SK1".
5. THAT I was not consulted, advised or informed in any way before the publication of the purported order SK1 which purported to assign responsibility to the Attorney-General for the matters referred to therein including responsibility for the general direction and control of my office. 10
6. THAT since publication of the said order I have received a copy of a letter and attachment written by the Solicitor-General to the Secretary of Cabinet, dated the 25th November, 1980, referring, inter alia, to preparation of the said order and stating that all "government Ministries and departments affected" with the exception of the Judicial department, have "generally accepted" the assignments made under the relevant orders. I annex herewith a copy of the said letter (see page 2 paragraph 2) and the relevant attachment marked "SK2". The assertion contained in the said letter is to the effect that my office had agreed to the proposed assignment yet this is totally untrue. At no time were my officers or I made aware of the proposed assignment. 20 30
7. THAT upon discovery of publication of the said purported order I sent a letter immediately to the Secretary of Cabinet and also a copy of the same to the Attorney-General. A true copy of the letter is annexed and marked "SK3". 40
8. THAT my request for revocation of the aforesaid purported order, in so far as it affected my office, did not meet with any response from the Secretary to Cabinet and on the 19th February I sent a further letter to the Secretary to Cabinet and copied the same to the Attorney-General. A true copy of the letter is annexed and marked "SK4". 50

EXHIBITS

P1

Affidavit of
Sailosi Kepa
5th March 1981
(continued)

9. THAT once again I received no reply from the Secretary to Cabinet. However, on the 25th February, 1981 I received from Mr. Q.B.Bale, the Acting Attorney-General, who now occupies, and at all material times occupied, the substantive post of Solicitor-General, a document which I annex and mark "SK5". The said document would appear to be the basis for a speech delivered by the Honourable Prime Minister in the House of Representatives on the same day, the Hansard report of which I annex and mark "SK6".
10. THAT I am desirous of challenging the validity and constitutionality of the purported order in so far as it purportedly assigns responsibility to the Attorney-General for the conduct of business and administration of my office. I verily believe that the aforesaid order contravenes the provisions of the Constitution (other than Chapter 2) and that my interests are being and are likely to be affected by the said contraventions since the aforesaid purported order purports to subject my office to political control. Alternatively, if the aforesaid portion of the purported order is held by This Honourable Court to be valid and/or constitutional contrary to the submissions made on my behalf I humbly request a declaration comprehensively delimiting the scope of the Attorney-General's responsibilities in relation to the said order.
11. THAT I verily believe that revocation of the aforesaid purported order is necessary in the public interest for I am informed and verily believe that attempts were made by the political office of the Attorney-General to interfere with my office during the tenure of my predecessor, Mr. Kulen Ratneser, as hereafter described.
12. ON THE 26th July, 1979 an anonymous person sent a letter to the Attorney-General alleging that the Director of Public Prosecutions had withdrawn a criminal charge against one Mahendra Pratap for improper reasons. I annex herewith a copy of the letter written by the anonymous person marked "SK7".

On the 1st August, 1979 the Solicitor-General, Mr Q.B.Bale, wrote to the

EXHIBITS

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Affidavit of
Sailosi Kepa

5th March 1981

(continued)

Commissioner of Police asking for the relevant police files and also suggesting that he be briefed on the matter. I herewith annex a copy of the Solicitor-General's letter marked "SK8".

On the 19th October, 1979 the Solicitor-General sent a further letter to the Commissioner of Police, a copy of which is annexed and marked "SK9".

On the 23rd October, 1979 the Director of Public Prosecutions, having discovered that the Solicitor-General called for the files, wrote the Solicitor-General a letter, a copy of which is annexed and marked "SK10".

10

13. THAT I am informed and verily believe that a further attempt at encroachment in respect of the exercise of the Director of Public Prosecutions' powers occurred in the case of R v Shardha Nand and Flour Mills of Fiji Limited when the trial judge was constrained to say in his summing up rendered upon the 23rd May, 1979 -

20

"In addition the Attorney-General in giving evidence for the defence, besides being seemingly concerned mostly in clearing his name, which is understandable, seems also to have taken advantage of the opportunity to make a personal attack on the Director of Public Prosecutions....."

30

"Again this was an attack on the good faith of the Director of Public Prosecutions, who is quite independent when it comes to the prosecution of offences. The complaint was that the Director of Public Prosecutions had not informed him of his (the Attorney-General's) involvement in the case....."

"In normal circumstances I suppose you might expect communication between the Attorney-General and the Director of Public Prosecutions as a matter of courtesy. But not as a right. The Director of Public Prosecutions was fully entitled not to keep the Attorney-General informed as to the case....."

40

"In any event the roles of Attorney-General and Director of Public Prosecutions

EXHIBITS

P1

Affidavit of
Sailosi Kepa
5th March 1981
(continued)

are not necessarily complementary. The appointment of Attorney-General is a political appointment, he is a legal adviser to the Government, and to Parliament and he may consider public interest rather more than legal interest. The Director of Public Prosecutions is a public servant vested with special powers and should be motivated by the interests of justice. This, perhaps unfortunate, difference in their approaches can be illustrated most clearly by an event of which evidence has been given in this court. The Director of Public Prosecutions in the exercise of his powers decided that justice required that Flour Mills of Fiji and Shardha Nand should be prosecuted for these offences. The Attorney-General, although he knew that publication of the Mumtaz Ali report would effectively kill the prosecution before it started, although he fairly put before Parliament the pros and cons of the situation, nevertheless recommended to Parliament that it be published. And as Crown Counsel has pointed out perhaps he was not the man to make that recommendation - at least not without declaring his interest in the matter in the light of his personal friendship with Vissanji and his close association with Flour Mills of Fiji..... "

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20

30

14. THAT I am informed and verily believe that no disapproval was made by the Court of Appeal and/or Judicial Committee of the Privy Council in respect of the learned trial judge's comments referred to in paragraph 13 of this affidavit, albeit the Judicial Committee did uphold the Court of Appeal's order of a retrial, on other totally unrelated matters.

40

15. THAT I verily believe that the matters referred to in paragraph 12 and 13 of this affidavit demonstrate the dangers inherent in a Political Attorney-General being invested with any responsibility for the operations and functions of this office.

50

SWORN by the said Sailosi)
Kepa before me this 5th day) Sd: Sailosi Kepa
of March, 1981 at Suva)

Sd:
A Commissioner for Oaths

EXHIBITS

P1

Affidavit of
Sailosi Kepa
5th March 1981
(continued)

This is the document marked "SK1" referred to in the affidavit of Sailosi Kepa sworn before me this 5th day of March, 1981

Sd:

Commissioner for Oaths

[168]

FIJI INDEPENDENCE ORDER, 1970

ASSIGNMENT OF MINISTERIAL
RESPONSIBILITIES

IN exercise of the powers conferred upon him by subsection (1) of section 76 of the Constitution, and acting in accordance with the advice of the Prime Minister, the Governor-General has, by directions in writing, assigned to - 10

The Attorney-General

responsibility for the conduct of the business of the Government specified in Column 1 of the Schedule and responsibility for the administration of the Ministry and departments of the Government specified in Column 2 of the Schedule. 20

Dated the 28th day of January 1981

By Command

I.Q.LASAQA

Secretary to the Cabinet

SCHEDULE

Column 1
(Business of the Government)

Column 2
(Ministry and departments of the Government)

(a) Courts (legislation governing);
Criminal law and procedure;
Commission on the Prerogative of Mercy;
Civil law, practice and procedure;

Ministry of the Attorney-General together with -
Crown Law Office;
Office of the Administrator-General;
Office of the Registrar-General;

30

Column 1
(Business of the
Government)

(continued)

Inquests;
Evidence;
Law reform and
revision;
10 Property law
(including land
transfer);
Bankruptcy;
Marriage;
Matrimonial causes
(legislation);
Wills and succ-
ession;
20 Legitimacy;
Registration of
births, deaths
and marriages;
Registration of
bills of sale;
Registration of
crop liens;
Stamp duties
(legal);
30 Patents, trade
marks and designs;
Partnership and
companies;
Registration of
business names;
Public trustee,
trustees and
trustee corpora-
tions;
40 Credit unions and
friendly societies;
Religious and chari-
table bodies;
Registration of
industrial associa-
tions;
Registration and
trade unions;
Hotels and guest
50 houses registra-
tion;
Disposal of uncoll-
ected goods;
Gaming;
Registration of clubs;

Column 2
(Ministry and depart-
ments of the Govern-
ment)

(continued)

Office of the
Registrar of Titles; (continued)
Office of the Commi-
ssioner of Stamp
Duties;
Office of the Direc-
tor of Public
Prosecutions;
(subject to section
85 of the Constitu-
tion);
The Judicial Depart-
ment (subject to
Chapter VII of the
Constitution).

EXHIBITS

P1

Affidavit of
Sailosi Kepa

5th March 1981

EXHIBITS

P1

Affidavit of
Sailosi Kepa
5th March 1981
(continued)

Column 1
(Business of the
Government)

Column 2
(Ministry and depart-
ments of the Govern-
ment)

(continued)

Cinematographic
films;
Liquor;
Control of methy-
lated spirits.

10

(b) All written law
associated with or
arising from the
subject-matter
specified in
paragraph (a).

[169]

FIJI INDEPENDENCE ORDER, 1970

ASSIGNMENT OF MINISTERIAL
RESPONSIBILITIES

20

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

The Minister for Urban Development,
Housing and Social Welfare

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

30

Dated the 28th day of January 1981

By Command

I.Q. LASAQA

Secretary to the Cabinet

SCHEDULE

EXHIBITS

Column 1 (Business of the Government)	Column 2 (Ministry and depart- ments of the Government)	P1 Affidavit of Sailosi Kepa 5th March 1981 (continued)
10	(a) Town and Country Planning; Housing and fair rents; Subdivision of land; Local Government; Business licensing; Fire services; Markets; Marriage guidance; Matrimonial causes (General); Adoption of Infants; Juveniles; Probation of Offenders; Public legal advice service; Family assistance; Burial and Crema- tion; Dog control.	Ministry of Urban Development, Housing and Social Welfare, together with - Department of Social Welfare and Social Development; Department of Town and Country Planning.
20		
30	(b) All written law associated with or arising from the subject-matter specified in para- graph (a).	

This is the document marked "SK2" referred to
in the affidavit of Sailosi Kepa sworn before
me this 5th day of March, 1981

Sd:
Commissioner for Oaths

40 The Solicitor-General 2:1581
The Secretary to the Cabinet AG.1033/1-3
25.11.80

ASSIGNMENT OF MINISTERIAL RESPONSIBILITIES

I refer to my memorandum dated 30th April
on the above subject, addressed to the Chairman
of the Public Service Commission and copied to
you.

EXHIBITS

P1

Affidavit of
Sailosi Kepa
5th March 1981
(continued)

Identifying and collating the functions of the various Ministers, and settling the departments for which they have responsibility proved to be a much more daunting proposition than I anticipated. The task was completed thanks to the able and willing co-operation of the Public Service Commission, which I gratefully acknowledge.

The outcome of our labours is to be found in the attached Gazette Notices (principal and two copies of each), which set out the business of the Government and the departments thereof for which we believe the Ministers concerned are, or should be, responsible.

10

At this juncture, it may assist if I set out briefly the legal background to this exercise, and explain our reasons for suggesting that it be pressed to a conclusion.

As you know, in terms of section 76(1) of the Constitution, the Governor-General is empowered, by directions in writing, and upon the advice of the Prime Minister, to assign to the Prime Minister and the other Ministers responsibility for prescribed areas of Government business and for the administration of associated departments of Government. This is what is popularly known as assigning Ministerial portfolios.

20

So far as we can ascertain, no formal action has been taken in terms of section 76(1), at least in recent years, the effect being that all Ministers, including the Prime Minister, are "Ministers without portfolio". This, of course, does not reflect the de facto position and in the circumstances you will probably agree that early action to rectify matters is called for.

30

Such action is also required to regularise the position of Permanent Secretaries (and supervising officers) under section 82 of the Constitution. As you will note, sections 76 and 82 are complementary and, strictly speaking, until a Minister has been charged with responsibility for a department it is arguable that there is nothing for a Permanent Secretary to supervise. He is in what might be described as a state of constitutional limbo.

40

There are therefore compelling constitutional reasons for carrying out this exercise. On a more practical front, I feel that the day

50

cannot be far away when a Minister will be challenged to show his constitutional authority for performing a particular executive act on behalf of Government. In the absence of written directions under section 76(1), such a challenge would prove difficult to answer.

EXHIBITS

P1

Affidavit of
Sailosi Kepa
5th March 1981

(continued)

10

The Schedules to the Gazette Notices have been compiled in consultation with the Government Ministries and departments affected, and, so far as we are aware, they have, with one exception, been generally accepted.

20

The exception is the Judicial Department, or more specifically the Chief Justice, who has expressed doubts as to whether any Minister should have responsibility for that department. I should point out that we are in complete agreement with the Chief Justice insofar as his argument relates to the judicial functions of the Department. Indeed, there are inbuilt constitutional safeguards to protect the Judiciary from interference by the Executive, and it would be an act of folly for any Minister to seek to cut across these protective provisions.

30

My view is, however, that there are a number of other functions of this Department which are purely governmental rather than judicial in character, and it is these governmental functions with which we are concerned. It is my considered opinion that, in the exercise of its non-judicial functions, the Judicial Department must be regarded in the same light as any other Government department, and thus be answerable for its activities through a Minister to Cabinet, and, ultimately, to Parliament.

40

It may be that the objection of the Chief Justice is based on principle rather than law, since he has offered no argument that the proposal is constitutionally improper. In any event, the Attorney-General has given a personal undertaking to the Chief Justice that his views would be communicated to the Prime Minister. I, therefore, enclose for consideration by the Prime Minister the photocopy of a letter from the Chief Justice to the Attorney-General, dated 3rd November, in which the former's views on the matter are set out.

50

While touching on the office of the Attorney-General, it is appropriate to raise the possibility of Fiji following the precedent, which is now well-established in a number of

EXHIBITS

P1

Affidavit of
Sailosi Kepa

5th March 1981

(continued)

Commonwealth countries, whereby the designation of the Attorney-General is broadened to "Attorney-General and Minister of Justice", or some similar title.

I think it is generally accepted that, for all practical purposes, the Attorney-General is the Minister responsible for justice, or as it is described in some places, for legal affairs. It is, however, felt that the term "Attorney-General" by itself does not properly convey the true nature and scope of the office.

10

A random check on other Commonwealth countries reveals that the designation "Attorney-General and Minister of Justice" is preferred in at least eight countries (Canada, New Zealand, Dominica, Guyana, Jamaica, Mauritius, Sierra Leone and Uganda), while "Attorney-General and Minister for Legal Affairs" is favoured in at least five (Malaysia, St. Lucia, St. Vincent, Trinidad and Tobago and Zambia).

20

For the foregoing reasons, it would be appreciated if you would place this suggestion before the Prime Minister for his consideration.

If the contents of the proposed Gazette Notices are acceptable to the Prime Minister, either with or without amendments, it is for him to decide if the assignments should go before Cabinet for information. There is no legal need for this, since it is the constitutional prerogative of the Prime Minister to advise the Governor-General on the matter of Ministerial responsibilities.

30

As you will appreciate, we have, by preparing Gazette Notices, moved on to the second stage of the exercise; the first priority will be the issue of directions by the Governor-General, after which the Gazette Notices can be published. By and large, the directions will follow the wording of the Gazette Notices, but in the event that it decided that this matter should be referred to the Governor-General, I shall be pleased to advise on the precise wording of the directions.

40

In the meantime, please do not hesitate to contact me if there are any points in this unavoidably long memorandum upon which you require clarification or elaboration.

(Q.B.Bale)

Encl:

Solicitor-General

FIJI INDEPENDENCE ORDER, 1970

P1

Affidavit of
Sailosi Kupa

5th March 1981

(continued)

ASSIGNMENT OF MINISTERIAL
RESPONSIBILITIES

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

The Attorney-General

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

DATED the day of 1980

By Command

Secretary to the Cabinet.

20

SCHEDULE

Column 1
(Business of the
Government)

Column 2
(Ministry and depart-
ments of the Government)

30 (a) Courts (legisla-
tion governing);
Criminal law and
procedure;
Commission on the
Prerogative of
Mercy;
Civil law, practice
and procedure;
Inquests;
Evidence;
Law reform and
revision;
Property law
(including land
transfer);
40 Bankruptcy;
Marriage;
Matrimonial causes
(legislation);

Ministry of the Attorney-
General together with-
Crown Law Office;
Office of the Admini-
strator-General
Office of the Registrar-
General;
Office of the Registrar
of Titles;
Office of the Commission
of Stamp Duties;
Office of the Director
of Public Prosecutions
(subject to section 85
of the Constitution);
The Judicial Department
(subject to Chapter VII
of the Constitution).

EXHIBITS

P1

Affidavit of
Sailosi Kepa
5th March 1981
(continued)

Column 1
(Business of the
Government)

Column 2
(Ministry and departments
of the Government)

(continued)

Wills and succe- ssion; Legitimacy; Registration of births, deaths and marriages;	10
Registration of bills of sale; Registration of crop liens; Stamp duties (legal); Patents, trade marks and designs;	
Partnerships and companies;	20
Registration of business names; Public trustee, trustees and trustee corporations; Credit unions and friendly societies; Religious and chari- table bodies;	
Registration of industrial associa- tions;	30
Registration of trade unions; Hotels and guest houses registration; Disposal of uncollected goods; Gaming; Registration of clubs; Cinematographic films; Liquor;	40
Control of methylated spirits.	

- (b) All written law associa-
ted with or arising from
the subject-matter
specified in paragraph
(a).

This is the document marked "SK3" referred to in the affidavit of Sailosi Kepa sworn before me this 5th day of March, 1981

EXHIBITS

P1

Affidavit of
Sailosi Kepa
5th March 1981
(continued)

Sd:

Commissioner for Oaths

12th February, 1981

The Secretary to the Cabinet,
Prime Minister's Office,
Government Buildings,
SUVA.

10

It was with considerable astonishment that I have just read in the Fiji Royal Gazette of the 6th February, 1981 that the Attorney-General has been assigned responsibility, purportedly under Section 76(1) of the Constitution, for the conduct of Evidence, Criminal law and procedure and also for the administration of my office.

20

I must point out to you that at no stage was I informed, advised or consulted concerning this purported assignment. I hope that the constitutional implications of this action were not known to you since it amounts to political interference in the administration of justice. Under Section 85(7) of the Constitution the Director of Public Prosecutions' power to institute, continue or discontinue criminal proceedings is not subject to the direction or control of any person or authority. Accordingly, a Minister cannot lawfully be assigned general direction and control over this office. This is what Section 82, read in conjunction with Section 76, purports to allow the Minister to do.

30

I trust that you will reconsider this purported assignment in view of its dire implications. I have requested my officers to examine the validity of this assignment with a view to possible court action. I hope, however, that you will give serious consideration to revocation of the order in so far as it relates to my office and so avoid any possibility of confrontation in the courts.

40

Sd: Sailosi Kepa
(Sailosi Kepa)

Director of Public Prosecutions

cc. Attorney General

EXHIBITS

P1

Affidavit of
Sailosi Kepa
5th March 1981
(continued)

This is the document marked "SK4" referred to
in the affidavit of Sailosi Kepa sworn before
me this 5th day of March, 1981

Sd:
Commissioner for Oaths

IN CONFIDENCE

19th February, 1981

The Secretary to Cabinet,
Office of the Prime Minister,
Government Buildings,
SUVA.

10

Dear Dr Lasaga,

I have not received a reply to my letter
of the 12th February, 1981 in which I requested
revocation of the order of the 6th February,
1981 in so far as it relates to the functions
and administration of my office.

On the 17th February, 1981 I was requested
to meet with you, the Chairman of the Public
Service Commission, Solicitor-General and the
Registrar of the Supreme Court to discuss the
matter for the first time. I re-affirmed that
revocation was imperative and indicated that
I would have no alternative but to institute
a court action if you were not prepared to
revoke.

20

I have heard nothing more. I understand
that a solicitor in private practice has now
commenced a court action seeking revocation and
therefore your silence on the matter is even
harder to understand.

30

I must request that you indicate whether
or not you propose to revoke by 3.00 p.m.
Friday afternoon. If I have heard nothing by
that time I propose to institute legal proceed-
ings for revocation.

Yours faithfully,

(Sailosi Kepa)
Director of Public Prosecutions

c.c. The Attorney-General

40

This is the document marked "SK5" referred to in the affidavit of Sailosi Kepa sworn before me this 5th day of March, 1981

EXHIBITS

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Affidavit of
Sailosi Kepa

5th March 1981

(continued)

Sd:

Commissioner for Oaths

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THE CONSTITUTION OF FIJI, ALONG WITH MANY OTHER COMMONWEALTH CONSTITUTIONS, IS BASED ON THE PRINCIPLE OF MINISTERIAL RESPONSIBILITY. THAT IS TO SAY, THAT OUR CONSTITUTION REQUIRES THAT THOSE WHO HAVE BEEN ELECTED TO FORM THE GOVERNMENT OF THIS COUNTRY ARE ANSWERABLE TO THE ELECTORATE AND CITIZENS OF FIJI THROUGH MINISTERS WHO ARE RESPONSIBLE TO PARLIAMENT FOR THE CONDUCT OF THE BUSINESS OF GOVERNMENT AS A WHOLE.

20

MINISTERS ARE APPOINTED BY THE GOVERNOR-GENERAL ON THE ADVICE OF THE PRIME MINISTER UNDER SECTION 73(1) OF THE CONSTITUTION. WHEN MINISTERS ARE APPOINTED THE CONSTITUTION REQUIRES THAT THEY BE ALLOCATED AND BE RESPONSIBLE FOR SPECIFIC AREAS OF GOVERNMENT BUSINESS AND THE ASSOCIATED MINISTRIES AND DEPARTMENTS. THIS IS WHAT IS POPULARLY KNOWN AS THE ALLOCATION OF PORTFOLIOS.

30

SINCE INDEPENDENCE IN 1970 WE HAVE BEEN CONTENT WITH THE INSTRUMENTS OF APPOINTMENT OF EACH MINISTER TO CONVEY THE NATURE AND SCOPE OF HIS RESPONSIBILITIES AND PORTFOLIO. HOWEVER, OVER THE YEARS THE BUSINESS OF RUNNING OUR GOVERNMENT HAS BECOME MORE AND MORE COMPLEX AND IT HAS BEEN FOUND NECESSARY TO DEFINE MORE ACCURATELY AND CLEARLY THE VARIOUS AREAS OF GOVERNMENT BUSINESS WHICH FALL WITHIN THE AREA OF RESPONSIBILITY OF EACH MINISTER OF THE CROWN.

40

IT WAS PRIMARILY WITH THIS IN MIND THAT GOVERNMENT MOUNTED AN EXERCISE DURING THE COURSE OF LAST YEAR TO IDENTIFY AND COLLATE THE FUNCTIONS OF VARIOUS MINISTERS AND TO SETTLE BEYOND DOUBT THE DEPARTMENTS FOR WHICH THEY HAVE RESPONSIBILITY. THE OUTCOME OF OUR LABOURS IS TO BE FOUND IN THE GAZETTE NOTICES WHICH WERE PUBLISHED IN THE ISSUE OF THE ROYAL GAZETTE OF FRIDAY 6TH FEBRUARY, 1981. THESE SET OUT ALL AREAS OF GOVERNMENT BUSINESS AND DEPARTMENTS THEREOF AND ALSO IDENTIFY THE RESPONSIBLE MINISTER FOR EACH OF THESE AREAS.

IT WOULD, OF COURSE, BE QUITE IMPOSSIBLE FOR EACH MINISTER OF THE CROWN PERSONALLY TO

EXHIBITS

P1

Affidavit of
Sailosi Kepa
5th March 1981

(continued)

TAKE ALL THE DECISIONS WHICH HAVE TO BE MADE IN HIS AREA OF RESPONSIBILITY BUT HE WILL TAKE POLITICAL RESPONSIBILITY FOR WHAT IS DONE IN HIS MINISTRY OR DEPARTMENT. PUBLIC BUSINESS COULD NOT BE CARRIED ON IF THAT WERE NOT THE CASE.

THE LEGAL AUTHORITY FOR THE EXERCISE RECENTLY UNDERTAKEN BY GOVERNMENT IS TO BE FOUND IN SECTION 76(1) OF THE CONSTITUTION WHICH PROVIDES :-

10

"THE GOVERNOR-GENERAL, ACTING IN ACCORDANCE WITH THE ADVICE OF THE PRIME MINISTER, MAY, BY DIRECTIONS IN WRITING, ASSIGN TO THE PRIME MINISTER OR ANY OTHER MINISTER RESPONSIBILITY FOR THE CONDUCT (SUBJECT TO THE PROVISIONS OF THIS CONSTITUTION AND ANY OTHER LAW) OF ANY BUSINESS OF THE GOVERNMENT, INCLUDING RESPONSIBILITY FOR THE ADMINISTRATION OF ANY DEPARTMENT OF THE GOVERNMENT."

20

WITH THE FOREGOING AS ESSENTIAL BACKGROUND IT IS CLEARLY IN THE PUBLIC INTEREST THAT THERE SHOULD BE A CLEAR AND FULL UNDERSTANDING OF THE RECENT GAZETTE NOTICE NOTIFYING THE ASSIGNMENT TO THE ATTORNEY-GENERAL OF MINISTERIAL RESPONSIBILITY FOR THE BUSINESS OF THE GOVERNMENT RELATING TO CERTAIN SUBJECTS AND THE ADMINISTRATION OF CERTAIN DEPARTMENTS INCLUDING THE JUDICIAL DEPARTMENT AND THE OFFICE OF THE DIRECTOR OF PUBLIC PROSECUTIONS, SUBJECT TO THE SAFEGUARDS RELATING TO THESE DEPARTMENTS PROVIDED FOR IN THE PROVISIONS OF THE CONSTITUTION AND ANY OTHER LAW

30

IT SHOULD BE STATED AT THE OUTSET THAT THE ASSIGNMENT TO THE ATTORNEY-GENERAL OF MINISTERIAL RESPONSIBILITY IN THESE MATTERS DOES NOT, AND IS NOT INTENDED, IN ANY WAY TO INTERFERE WITH THE PRINCIPLE WHICH IS WELL ESTABLISHED IN THE CONSTITUTION THAT THE JUDICIARY, IN THE DISCHARGE OF ITS JUDICIAL FUNCTIONS AND THE D.P.P., IN THE DISCHARGE OF HIS CONSTITUTIONAL FUNCTIONS RELATING TO THE INSTITUTION AND CONDUCT OF CRIMINAL PROCEEDINGS, ARE NOT SUBJECT TO MINISTERIAL INTERFERENCE OR CONTROL.

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WHILE THE CONSTITUTION OF FIJI ENSHRINES AND SAFEGUARDS THE PRINCIPLE OF THE INDEPENDENCE OF THE JUDICIARY IN THE PERFORMANCE OF ITS JUDICIAL FUNCTIONS, AND THE INDEPENDENCE OF THE D.P.P. IN THE DISCHARGE OF HIS FUNCTIONS RELATING TO CRIMINAL PROSECUTIONS, THE CONSTITUTION ALSO REQUIRES THAT THERE BE MINISTERIAL

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10 RESPONSIBILITY TO PARLIAMENT AND THE COUNTRY
FOR THE CONDUCT OF THE BUSINESS OF THE
GOVERNMENT IN RELATION TO THOSE MATTERS WHICH
DO NOT INVOLVE THE JUDICIAL FUNCTIONS OR THE
ADMINISTRATION OF THE CRIMINAL LAW. FOR
EXAMPLE IF MONEYS ARE NEEDED FOR THE CONSTRUC-
TION OF A NEW COURT COMPLEX, OR INCREASES IN
STAFF, THESE MONEYS CAN ONLY BE PROVIDED BY
OR WITH THE APPROVAL OF PARLIAMENT. GIVEN
THE COMPETING CLAIMS OF EACH MINISTRY AND
DEPARTMENT WITHIN OUR LIMITED RESOURCES, IT
IS A MINISTER WHO MUST JUSTIFY TO PARLIAMENT
THE NECESSITY FOR THESE MONEYS TO BE PROVIDED.

EXHIBITS

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Affidavit of
Sailosi Kupa
5th March 1981
(continued)

20 AGAIN, IF THERE IS NEED FOR THE ENACTMENT
BY PARLIAMENT OR LEGISLATION FOR ANY OF THE
PURPOSES OF THE JUDICIAL DEPARTMENT OR THE
D.P.P. IT IS A MINISTER WHO MUST TAKE THE
CONSTITUTIONAL RESPONSIBILITY FOR THE INTRODUC-
TION TO CABINET AND ITS LATER PASSAGE THROUGH
PARLIAMENT OF SUCH LEGISLATION.

30 IT MUST BE APPRECIATED THAT AS DISTINCT
FROM MINISTERIAL RESPONSIBILITY IN THESE
MATTERS, THE MINISTER HAS NO RESPONSIBILITY IN
REGARD TO THE APPOINTMENT OR DISPOSITION OF
JUDGES, JUDICIAL AND LEGAL OFFICERS, OR OTHER
OFFICERS WHO ARE ENGAGED IN THE ADMINISTRATION
OF THE JUDICIAL FUNCTION. THIS IS THE
CONSTITUTIONAL RESPONSIBILITY OF THE JUDICIAL
AND LEGAL SERVICES COMMISSION OR THE PUBLIC
SERVICE COMMISSION. NOR DOES ANY MINISTER
HAVE ANY RESPONSIBILITY IN REGARD TO THE
ACTUAL DISCHARGE OF THE JUDICIAL FUNCTION OR
THE ENFORCEMENT OF THE CRIMINAL LAW BY PROSE-
CUTIONS AS THESE ARE THE FUNCTIONS WHICH THE
CONSTITUTION RESERVES FOR THE INDEPENDENT
DISCHARGE BY THE JUDICIARY AND THE D.P.P. AND
IN WHICH NO MINISTER CAN PROPERLY INTERFERE
EITHER DIRECTLY OR INDIRECTLY. IN FACT THE
40 INDEPENDENCE OF THE JUDICIARY IS SPELT OUT IN
CLEAR TERMS IN THE PREAMBLE TO THE JUDGES'
REMUNERATION AND EMOLUMENTS ACT, 1974 WHICH IS
AS FOLLOWS :

"WHEREAS THE JUDICIARY OF FIJI IS BY
THE CONSTITUTION INDEPENDENT OF THE
EXECUTIVE AND THE LEGISLATURE IN THE
EXERCISE OF ITS JUDICIAL FUNCTIONS."

AS FOR THE D.P.P. SECTION 85(7) OF THE
CONSTITUTION IS UNAMBIGUOUS :

50 "IN EXERCISE OF THE POWERS CONFERRED UPON
HIM BY THIS SECTION THE D.P.P. SHALL NOT
BE SUBJECT TO THE DIRECTION OR CONTROL OF

EXHIBITS

P1

Affidavit of
Sailosi Kepa

5th March 1981

(continued)

ANY OTHER PERSON OR AUTHORITY."

THUS THE INDEPENDENCE OF THE D.P.P. IS ABSOLUTE
IN THE DISCHARGE OF HIS CONSTITUTIONAL
FUNCTIONS.

THE ADMINISTRATION OF ANY DEPARTMENT OF
GOVERNMENT BY A MINISTER IS CARRIED OUT THROUGH
A PERMANENT SECRETARY OR SOME OTHER SUPERVISING
OFFICER AS LAID DOWN IN SECTION 82 OF THE
CONSTITUTION. THE SUPERVISING OFFICER FOR THE
JUDICIAL DEPARTMENT IS THE CHIEF REGISTRAR, WHO, 10
OBVIOUSLY NEEDS TO CONSULT THE CHIEF JUSTICE
IN THE PERFORMANCE OF HIS DUTIES. AND BECAUSE
THE CHIEF REGISTRAR IS A PUBLIC OFFICER, AND
SINCE THE CHIEF JUSTICE IS A CONSTITUTIONAL,
NON-POLITICAL AND NON-MINISTERIAL POSITION, THE
CHIEF REGISTRAR AND THE JUDICIAL DEPARTMENT
WILL REQUIRE THE ASSISTANCE OF THE ATTORNEY-
GENERAL TO PUT TO CABINET AND TO PARLIAMENT
AS NECESSARY, THE FINANCIAL AND OTHER NEEDS OF
THE JUDICIAL DEPARTMENT. IN THE SAME WAY THE 20
D.P.P. HAS BEEN DESIGNATED SUPERVISING OFFICER
FOR HIS OFFICE. HE TOO WILL NEED THE HELP OF
THE ATTORNEY-GENERAL IN SIMILAR MATTERS.

THE FORMAL ASSIGNMENT OF RESPONSIBILITY
TO THE ATTORNEY-GENERAL LEGALLY CONFIRMS THE
ROLE HE HAS TRADITIONALLY PERFORMED IN RESPECT
OF THE JUDICIAL DEPARTMENT AND THE OFFICE OF
THE D.P.P. AS EXPLAINED ABOVE; IT HAS NO OTHER
IMPLICATION. IT IS NOT AN ATTEMPT TO AND IT
CANNOT AS A MATTER OF LAW ERODE THE PRINCIPLE 30
OF THE INDEPENDENCE OF THE JUDICIARY AND THE
D.P.P. IN THE PERFORMANCE OF THEIR CONSTITU-
TIONAL FUNCTIONS, WHICH PRINCIPLE IS WELL
PROTECTED UNDER THE CONSTITUTION AND OTHER LAWS
AND WILL CONTINUE TO BE SCRUPULOUSLY RESPECTED
BY GOVERNMENT. ITS PURPOSE IS NOT TO SUBVERT
THE PRINCIPLES ENSHRINED IN THE CONSTITUTION
BUT TO FULLY IMPLEMENT THEM.

WITH THE RECENT CHANGES AMONG MINISTERS,
THERE WAS A REVIEW OF THE ENTIRE RANGE OF THE 40
RESPONSIBILITIES ASSIGNED TO VARIOUS MINISTERS,
AS INDICATED IN THE GAZETTE NOTICES RECENTLY
ISSUED. THE OPPORTUNITY WAS TAKEN PROPERLY
AND FORMALLY TO ASSIGN TO THE ATTORNEY-GENERAL
INTER ALIA THE MINISTERIAL RESPONSIBILITY IN
REGARD TO THE JUDICIAL DEPARTMENT AND THE
OFFICE OF THE D.P.P. WHICH HE HAD HITHERTO
INFORMALLY ASSUMED. IT DOES NOT MEAN THAT THE
ATTORNEY-GENERAL WILL NOW UNDERTAKE THE
ADMINISTRATION OF THOSE DEPARTMENTS. THEIR 50
ADMINISTRATION WILL CONTINUE TO BE CARRIED OUT

IN THE SAME MANNER AS HITHERTO BUT THE MINISTERIAL RESPONSIBILITY THEREOF, WHICH WAS INFORMALLY ASSUMED BY THE ATTORNEY-GENERAL HAS NOW BEEN FORMALLY ASSIGNED.

EXHIBITS

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Affidavit of
Sailosi Kepa
5th March 1981
(continued)

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PERHAPS FEAR MAY HAVE BEEN ENTERTAINED ABOUT POSSIBLE MINISTERIAL INTERFERENCE IN THE JUDICIAL FUNCTIONS OF THE JUDICIAL DEPARTMENT AND THE CONSTITUTIONAL FUNCTIONS OF THE D.P:P. SUCH A FEAR IS BASELESS AS THESE FUNCTIONS ARE PROTECTED AND RESERVED TO THESE TWO DEPARTMENTS UNDER THE CONSTITUTION AND OTHER LAWS. AS HAS BEEN STATED ABOVE THE ASSIGNMENT OF THE ATTORNEY-GENERAL'S RESPONSIBILITY UNDER SECTION 76(1) OF THE CONSTITUTION AS NOTIFIED IN THE GAZETTE NOTICE RECENTLY PUBLISHED IS A LEGAL REQUIREMENT AND ITS REAL EFFECT IS SIMPLY TO FORMALISE THE CONVENTION THAT HAS EXISTED IN THE PAST AND GIVES THE ATTORNEY-GENERAL PROPER AUTHORITY TO BE SPOKESMAN FOR THESE TWO DEPARTMENTS. THEREFORE, GAZETTE NOTICE 168 SHOULD REMAIN IN FORCE AS IT CONFIRMS THE LEGAL POSITION AND EXISTING PRACTICE IN AS FAR AS THE ATTORNEY-GENERAL IS THE MINISTER RESPONSIBLE FOR THE NON-JUDICIAL FUNCTIONS OF THE JUDICIAL DEPARTMENT AND THE ADMINISTRATIVE AND GOVERNMENTAL FUNCTION OF THE OFFICE OF THE D.P.P.

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This is the document marked "SK6" referred to in the affidavit of Sailosi Kepa sworn before me this 5th day of March, 1981

Sd:

Commissioner for Oaths

25 Feb., 1981 Adjournment

Mr. Speaker, that the issuance of a Supreme Court writ may have placed the Government in some difficulty in making a statement but that obstacle has now been removed and I, Mr. Speaker, Sir, as the Opposition's spokesman on law, order and justice, call upon the Government to give an explanation and clear the air.

40

RT. HON. RATU SIR KAMISESE MARA. - Mr. Speaker, the Constitution of Fiji, along with many other Commonwealth constitution, is based on the principle of ministerial responsibility. That is to say that our Constitution requires that those who have been elected to form the Government of this country are answerable to

EXHIBITS

P1

Affidavit of
Sailosi Kepa
5th March 1981
(continued)

the electorate and citizens of Fiji through Ministers who are responsible to Parliament for the conduct of the business of Government as a whole.

Ministers are appointed by the Governor-General on the advice of the Prime Minister under Section 73(1) of the Constitution. When Ministers are appointed the Constitution requires that they be allocated and be responsible for specific areas of Government business and the associated ministries and departments. This is what is popularly known as the allocation of portfolios. 10

Since independence in 1970, we have been content with the instruments of appointment of each minister to convey the nature and scope of his responsibilities and portfolios. However, over the years the business of running our Government has become more and more complex and it has been found necessary to define more accurately and clearly the various areas of Government business which fall within the area of responsibility of each minister of the Crown. 20

It was primarily with this in mind that Government mounted an exercise during the course of last year to identify and collate the functions of various ministers and to settle beyond doubt the departments for which they have responsibility. (This responsibility by the way, has been questioned in Court and it has been found that one of the Ministers has no responsibility in accordance to the Constitution. This is one of the reasons why we want to rectify such a defect). The outcome of our labours is to be found in the Gazette which has been mentioned by the Indian Member for Sigatoka (H.C.Sharma) - the Gazette notices which were published in the issue of the Royal Gazette of Friday 6th February, 1981. These set out all areas of Government business and departments thereof, and also identify the responsible minister for each of these areas. It would, of course, be quite impossible for each minister of the Crown personally to take all the decisions which have to be made in this area of responsibility but he will take political responsibility for what is done in his ministry or department. We have seen examples of that this morning where ministers having to answer what his officers had to make. 30 40

The legal authority for the exercise recently undertaken by Government is to be found in Section 76(1) of the Constitution(which has been 50

mentioned) which provides, and I quote:

EXHIBITS

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Affidavit of
Sailosi Kepa
5th March 1981
(continued)

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

20

With the foregoing as essential background, it is clearly in the public interest that there should be a clear and full understanding of the recent Gazette notice notifying the assignment to the Attorney-General of the ministerial responsibility for the business of Government relating to certain subjects and the administration of certain departments including the Judicial Department and the office of the Director of Public Prosecutions, subject to the safeguard relating to this department provided for in the provision of the constitution and any other law. It should be stated at the outset that the assignment to the Attorney-General of ministerial responsibility in these matters does not, and is not intended, in any way to interfere with the principle which is well established in the Constitution that the Judiciary in the discharge of its judicial function and the Director of Public Prosecutions in the discharge of his constitutional functions relating to the institution and conduct of criminal proceedings, are not subject to ministerial interference or control.

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While the constitution of Fiji enshrines and safeguards the principle of the independence of the Judiciary in the performance of its judicial functions, and the independence of the Director of Public Prosecutions in the discharge of its functions relating to criminal prosecutions, the Constitution also requires that there be ministerial responsibility to Parliament and to the country for the conduct of business of Government in relation to those matters which do not involve the judicial functions or the administration of the criminal law - Parliament is supreme.

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For example if moneys are needed for the construction of a new court complex, or increases in staff, these moneys can only be provided for by or with the approval of Parliament.

EXHIBITS

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Affidavit of
Sailosi Kepa

5th March 1981

(continued)

Given the competing claims of each ministry and department within our limited resources, it is the minister who must justify to Parliament the necessity for these moneys to be provided.

We had an example towards the end of last year. Because these areas of responsibility were not quite clear and it was informally accepted, the Attorney-General did not realise that he had to compete for the resources of this country for the needs of the Judicial Department. It was not towards the end of the year, when all consultation had been completed by other Ministries, that the Attorney-General came up with the requisition for over \$2 million for a new court house. We said, "We are sorry, this cannot be considered now because we have been doing this exercise throughout the year and no one has come up with this requisition". So, we are now trying to rectify this so that whoever is responsible to the Judiciary should know from the beginning of the year that he is the one who should be seeing both the Judiciary as well as the Minister of Finance as to the needs of the department.

10

20

Again, if there is need for the enactment by Parliament of legislation for any of the purposes of the Judiciary Department or the Director of Public Prosecutions, it is a Minister who must take the constitutional responsibility for the introduction to Cabinet Government. Its purpose is not to subvert the principles enshrined in the Constitution but to fully implement them.

30

With the recent changes among Ministers, there was a review of the entire range of the responsibilities assigned to the various Ministers, as indicated in the Gazette notices recently issued which has been mentioned before the House. The opportunity was taken properly and formally to assign to the Attorney-General inter alia the ministerial responsibility in regard to the Judicial Department and the Office of the Director of Public Prosecutions, which he had hitherto informally assumed. It does not mean that the Attorney-General will now undertake the administration of those departments. As I have mentioned, the Chief Registrar has the responsibility for the Judiciary, and the Director of Public Prosecutions himself is the supervising officer for his own department. The administration will continue to be carried out in the same manner as hitherto but the ministerial responsibility thereof, which was informally assumed by the Attorney-General has

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now been formally assigned.

EXHIBITS

P1

Affidavit of
Sailosi Kepa
5th March 1981
(continued)

10

Perhaps fear may have been entertained about the possible ministerial interference in the judicial functions of the Judicial Department and the constitutional functions of the Director of Public Prosecutions. Such fears are baseless as these functions are protected and reserved to these two departments under the Constitution and other laws. As I have stated, the assignment of the Attorney-General's responsibility under section 76(1) of the Constitution, as notified in the Gazette recently published, is a legal requirement. Any Member of this House could question the Attorney-General as to his right to speak for the Judiciary or the Director of Public Prosecutions, if he has not got this legal entitlement. And its real effect is simply to formalise the convention that has existed in the past and give the Attorney-General proper authority to be the spokesman for these two departments. Therefore, Gazette notice 168 should remain in force as it confirms the legal position and existing practice in as far as the Attorney-General is the Minister responsible for the non-judicial functions of the Judicial Department and administrative and governmental function of the office of the Director of Public Prosecutions.

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30

Sir, the honourable Deputy Speaker asked the question as to why there has not been any publicity from Government on this subject, but as he has already stated, there was a writ in Court but since that writ has been withdrawn, our respect for Parliament is greater than our desire to have publicity. So, we wish to inform Parliament before we release the publicity to the press.

HON. MEMBERS. - Vinaka, Vinaka.

Question put.

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Motion agreed to.

The House adjourned sine die at 1.40 p.m.

EXHIBITS

P1

Affidavit of
Sailosi Kepa
5th March 1981
(continued)

This is the document marked "SK7" referred to in the affidavit of Sailosi Kepa sworn before me this 5th day of March, 1981

Sd:

Commissioner for Oaths

COPY

C/- P.O. Tavua
July 26th 1979

The Hon. The Attorney General,
Government Buildings,
SUVA.

10

Dear Sir,

I am writing this letter as a matter of concern, not only to me but for the rest of the community of Tavua and Rakiraki. There is a man here by the name of Mahendra Pratap, a headmaster of Rabulu Indian School. Early this year he was charged by Tavua police for stealing water. There was plenty of evidence against him. When he was caught he asked for forgiveness but the police did not agree and charged him. His lawyer M.T.Khan then wrote a letter to the Director Public Prosecutions. The DPP then directed the police to withdraw the charge without any good reason. This was most improper because he was a learned man, he should have known better. Would the DPP do the same thing to other poor people? After this Mahendra Pratap started boasting he had spend One thousand dollars in bribing the Water Supervisor, the District Officer, the DPP and his staff and police can do nothing to him. This have belittled the police in the eyes of the public.

20

30

One month ago this same person Mahendra Pratap got involved in an accident. The Police again charged him because he appeared to be at fault. Now he is again saying that his lawyer M.T.Khan will see DPP and he will then summon the police. I think this might just happen. We do not know how this person has so much influence over there. I know that the DPP has discretionary powers, but surely if the allegation by this person is true, then it must be investigated. There is also a talk that M.T. Khan has some kind of hold over the DPP and his staff, because he rings direct to DPP and his requests for cases to be withdrawn and

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changed in charges is always agreed to. People now talk that if we go to M.T.Khan he can do the impossible because of connection with the DPP.

EXHIBITS

P1

Affidavit of
Sailosi Kepa
5th March 1981

10 This is very serious and you and your Government ought to look into this affair Why does the DPP always agrees to his requests? (continued) What influence he has on him? You can look into the police files if you do not want to believe me. Before this thing comes in open through the press and gossips I expect some action on this information that I am passing to you. I am not giving my name this time, but the next time the press can quote me. It is just not fair to withdraw case against a rich man and prosecute and persecute a poor man because he cannot afford to fire a lawyer. I want a fair play for every one regardless of whoever he may be.

20

Concerned Citizen

Prime Minister
Leader of the Opposition
President, Fiji Law Society
Director of C.I.D. Police

This is the document marked "SK8" referred to in the affidavit of Sailosi Kepa sworn before me this 5th day of March, 1981

Sd:

Commissioner for Oaths

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COPY

211581
AG.1042/1-3

The Solicitor-General
The Commissioner of Police

RE: COMPLAINT AGAINST D.P.P. 1.8.79

40

I refer to an anonymous letter purporting to be written by a "Concerned Citizen" from Tavua concerning certain allegations involving the Director of Public Prosecutions, one Mahendra Pratap (headmaster of Rabulu Indian School) and Mr. M.T.Khan, Solicitor of Tavua. This correspondence was copied, amongst others, to you.

My first reaction to an anonymous letter of

EXHIBITS

P1

Affidavit of
Sailosi Kepa
5th March 1981
(continued)

this kind is to throw it away into the rubbish
tin. But I do not feel that this will be
proper in this case and I should be grateful
if you would brief me fully about whatever can
be followed in these allegations. I should be
interested to see the police files, if any, in
respect of these allegations. I consider that
it will be in the interest of the Director of
Public Prosecutions and his Office that the
Attorney-General deals with this complaint
despite the fact that it concerns allegations
which would normally be referred to his Office.

10

(Sgd) Q.B. BALE

Solicitor-General

This is the document marked "SK9" referred to
in the affidavit of Sailosi Kepa sworn before me
this 5th day of March, 1981

Sd:

Commissioner for Oaths

COPY

211581
AG.1042/1-3

20

The Solicitor-General
The Commissioner of Police

RE- COMPLAINT AGAINST D.P.P. 19.10.79

I return herewith your Tavua U/Docket No.6
of 1979 which you forwarded to Chambers under
cover of your minute (11) therein and in
connection with my request for the docket (see
folio D-12) which in turn had been prompted by
a complaint a copy of which is at folio D-14.

30

There is, of course, no evidence in this
Docket to support the ground upon which the
Director of Public Prosecutions appears to have
withdrawn the charge preferred against (B-1).
That ground is to the effect that the Water
Authority in Tavua, in particular the Water
Supervisor - one Mr. Ramayan Prasad, had made
representations against the prosecution of
(B-1), as they preferred, it is claimed, a
warning. But this evidence may have been made
available directly to the Director of Public
Prosecutions Office.

40

This decision to terminate proceedings in this case certainly appears odd in my personal opinion but I have no doubt that the Director of Public Prosecutions must have had additional information with him to justify his decision.

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P1

Affidavit of
Sailosi Kepa
5th March 1981

As I cannot reply to his anonymous complaint (continued) I shall, after having "looked into" this complaint, now close my file on the matter

10 I have passed on to the Director of Public Prosecutions your Tavua Traffic Docket A.R. No. 29 of 1979.

(Sgd) Q.B.Bale
Solicitor-General

This is the document marked "SK10" referred to in the affidavit of Sailosi Kepa sworn before me this 5th day of March, 1981

Sd:
Commissioner for Oaths

20 The Director of Public Prosecutions
The Solicitor General 23.10.79

REG -v- MAHENDRA PRATAP s/o RAM KISSUN

I have come to learn that you had called for two police dockets in respect of the above mentioned person, one in which the prosecution had been concluded and the other in which a prosecution was pending.

30 The contents of a police investigation docket in respect of a pending prosecution should under no circumstances be disclosed to persons other than those involved in the investigation and the prosecution of a case. The Solicitor General and his staff are all persons who have nothing whatsoever to do with criminal prosecutions and I therefore hope that there will never be an occasion when a police docket in respect of a pending criminal prosecution is called for by your office without my prior approval.

You have explained to Mr. Gates, my Principal Legal Officer the circumstances under which you

EXHIBITS

P1

Affidavit of
Sailosi Kepa
5th March 1981
(continued)

called for these police dockets. I am told that an Anonymous Petition alleging dishonesty on the part of the Director of Public Prosecutions pertaining to these prosecutions has been received at your office. In the circumstances you decided to "investigate" the complaint, without my knowledge.

I am surprised that you as the Solicitor General of this country had thought it fit to "investigate" a complaint against a legal officer leave alone the Director of Public Prosecutions. If an allegation of dishonesty is made against a legal officer it is for the Criminal Investigations Department and not you or the Crown Law Office to make such investigations. If there is evidence of misconduct, it is for the Criminal Investigations Department to refer the matter to the Judicial and Legal Services Commission. In the case of the Director of Public Prosecutions it is for the Judicial and Legal Services Commission to then consider whether the matter ought to be further investigated by the appointment of an appropriate tribunal (please see Section 109 of the Constitution of Fiji).

The Director of Public Prosecutions is not above the law. He, like anyone else is subject to criminal investigation and prosecution. But investigation into his conduct and discipline are matters for the tribunal specially provided for under the Constitution.

You have not only taken upon yourself the function of an "investigator" into the affairs of the Director of Public Prosecutions which is totally outside your duties as a Solicitor General but what is worse, you have as a Solicitor General even discussed this matter with one of my junior officers Mr. Fa without my knowledge and without my consent and obtained from him information on my departmental files.

In so doing you have virtually counselled him to transgress the Official Secrets Act. I am alarmed and concerned for the future of this country that a Solicitor General could have acted in this way. I hope I can put it down to the fact that you are inexperienced in your new job and did not appreciate the seriousness of your conduct. If you require any information from my office, for the performance of your duties, you will in the future make those inquiries from me in the first instance and not undermine the discipline in my office and encourage officers to breach official secrecy,

by making inquiries from my subordinate officers, particularly young legal officers.

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Affidavit of
Sailosi Kepa
5th March 1981
(continued)

10

The decision of the Director of Public Prosecutions in respect of criminal prosecutions whether to institute, proceed with or discontinue a prosecution should never be the subject of any inquiry by you or anyone else in your department. The Solicitor General is a Permanent Secretary to the Attorney General who is a Cabinet Minister in the ruling party of the day. The Director of Public Prosecutions is not and is not in any way responsible to the Attorney General or the Solicitor General. I therefore take the greatest exception to your conduct lest it be said in the future that the Director of Public Prosecutions had even in the slightest degree condoned same.

20

I have decided to put this on record so that all Directors who come after me and Solicitor Generals who follow you will know that I have not permitted and will not permit the independence of this office to be encroached on in any way.

A copy of this letter is being sent to Hon. the Attorney General and to the Judicial and Legal Services Commission and the Commissioner of Police for their information. I have also decided to forward to them copies of the minutes in our file relating to the case.

30

(Kulen Ratneser)
Director of Public Prosecutions

cc: Attorney General
Secretary, Judicial & Legal Services
Commission
Commissioner of Police

P.S.

40

Since writing this letter Mr Tony Gates a Principal Legal Officer, has passed on to me a note with enclosures delivered in a "confidential" envelope addressed to him I am enclosing copies of this as well to the Hon. Attorney General and the Judicial and Legal Services Commission. I resent the gratuitous opinion expressed by you to the Commissioner of Police.

EXHIBITS

D1

Affidavit of
I.Q.Lasaqa

12th March 1981

EXHIBITS

D1

AFFIDAVIT OF I.Q.LASAQA

IN THE SUPREME COURT OF FIJI No. 178/81
CIVIL JURISDICTION

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

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

10

AND

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

BETWEEN: The Director of Public
Prosecutions

Plaintiff

A N D : The Attorney-General

Defendant

AFFIDAVIT OF DR. I.Q. LASAQA

20

I, ISIRELI QALO LASAQA of 49 Nasevou Street,
Lami, Secretary to Cabinet, make oath and say
as follows :-

1. I am employed by the Government of Fiji
as Secretary to Cabinet.
2. In my capacity as Secretary to Cabinet I
have custody of all files relating to
Cabinet and also files containing official
correspondence to and from the Prime
Minister.
3. In my custody as aforesaid is a letter
dated the 26th day of November 1974 from
Clifford H. Grant, the then Chief Justice
of Fiji, addressed to the Prime Minister.
4. Enclosed with that letter is a paper
written by Clifford H. Grant in his capacity
as Chief Justice entitled "Ministry of
Justice" in which the Chief Justice
proposes the creation of a Ministry of
Justice.

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EXHIBITS

D1

Affidavit of
I.Q. Lasaqa
12th March 1981
(continued)

5. It was stated in the said paper written by the Chief Justice that the Director of Public Prosecutions was in favour of the proposal for the creation of a Ministry of Justice and of his, the Director of Public Prosecutions' Office falling within that Minister's portfolio. It was also stated therein that the Director of Public Prosecutions' functions were fully safeguarded under the Constitution.

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6. A true copy of the said paper entitled "Ministry of Justice" written by Clifford H. Grant is annexed hereto and marked with the letter "A".

7. I verily believe that the Director of Public Prosecutions was in favour of the said proposal and that he took no step at that time to disassociate himself from it.

8. Paragraphs 1, 2, 3, 4, 5 and 6 of this my Affidavit are to my knowledge true and paragraph 7 of this my Affidavit is true to the best of my knowledge, information and belief.

20

SWORN by the said ISIRELI)
QALO LASAQA at Suva on the)Sd: I.Q.Lasaqa
12th day of March 1981)

Before me: (Sd) J.G.Gardiner
Commissioner for Oaths

This Affidavit is filed on behalf of the
Defendant.

30

EXHIBITS

"A"

D1

MINISTRY OF JUSTICE

Affidavit of
I.Q.Lasaqa
12th March 1981
(continued)

In view of the provisions of the Constitution of Fiji, in particular sections 73 and 75, there is no constitutional impediment in the way of appointing a Minister of Justice nor of his being designated to Cabinet.

The concept of a Ministry of Justice is by no means a new one. Many countries have had a Minister of Justice for many years, and so long as there are certain safeguards against political interference in judicial appointments or decisions and against erosion of the separation of powers between Parliament, The Executive and The Judicature - which safeguards are built in to the Constitution of Fiji - it is a position which fills a very real need and achieves a very useful purpose.

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No true analogy can be drawn with England, which for historical reasons does not require a Ministry of Justice in view of the functions of the Lord Chancellor's Office and of the Home Office, to which Fiji has no equivalent.

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New Zealand, for example, has a Minister of Justice, as does Western Samoa, and as do some of the States of Australia (eg. New South Wales and Queensland), the Provinces of Canada (eg. Quebec, New Brunswick, Cape Breton Island), and the West Indies (eg. Jamaica).

Indeed, a Ministry of Justice plays such an essential role that surprise has been expressed (particularly by very senior Judges in New Zealand) as to how the administration of justice in Fiji can function, without a Minister of Justice and a voice at Cabinet level. In New Zealand the Permanent Secretary to the Minister of Justice is a key figure, and is called in to all Cabinet meetings at which any matter appertaining to the administration of justice is raised.

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The term "administration of justice" is not confined to the Judiciary but covers all allied institutions concerned with prosecutions, penology and legal aid. It does not embrace the police force which is concerned not with the administration of justice but with the maintenance of law and order. Nor does it apply to the Crown Law Office which is traditionally responsible to the Attorney-General for advising

Government and departments of Government in all matters on which a legal opinion is required. The Attorney-General is, by virtue of the Constitution (section 76(2)) the Law Officer to the Crown, and his powers, responsibilities and functions would in no way be impaired by the creation of a Ministry of Justice. As will appear, a Minister of Justice is never called upon to make legal decisions and does not require any legal qualifications.

EXHIBITS

D1

Affidavit of
I.Q. Lasaqa
12th March 1981

(continued)

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So far as the Judiciary is concerned, it is considered of vital importance that it has a voice in Cabinet and in Parliament, for a variety of reasons, the major ones being as follows :

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(a) regrettably, attacks are made on the Judiciary, which is not in a position to answer back or effectively deal with unjust criticism (unless and until it reaches a certain point), as there is no Minister responsible for the Judiciary to act as spokesman, and the Chief Justice cannot attend Cabinet meetings or Parliament and traditionally does not make statements to the news media or, if it can possibly be avoided, become involved in controversy;

30

(b) in the absence of a Permanent Secretary, the responsibility for preparing the Estimates falls on the Chief Registrar of the Supreme Court. This is not the proper function of a Chief Registrar who, as a result, has to set aside other important duties, thereby impairing the efficiency of the administration of the Supreme Court. Further, there is no one at Cabinet level to support the Estimates, to impress the financial needs of the Judiciary on the Minister of Finance and to fight for a fair proportion of the funds available. A Judiciary should not be placed in such an invidious position;

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(c) a disproportionate amount of time is spent by the Chief Justice on matters concerning remuneration and conditions of service of judicial and legal personnel, which is a crucial subject, particularly as the shortage of legally qualified officers has reached crisis proportions, but which should be dealt with at Ministerial level;

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EXHIBITS

D1

Affidavit of
I.Q. Lasaqa
12th March 1981
(continued)

- (d) in addition to the Constitution and to the Ordinances specifically vesting powers in the Courts (The Court of Appeal Ordinance, Supreme Court Ordinance, Magistrates Courts Ordinance, Penal Code and Criminal Procedure Code), there are over thirty other Ordinances and Acts of Fiji vesting powers in the Chief Justice, some of which are of an administrative nature, others of which are of a quasi-political or industrial nature which could prove an embarrassment, and which should appropriately be vested in a Minister of Justice, as traditionally a Judge (including the Chief Justice) should remain independent of and disengaged from matters of public disputation falling outside the discharge of ordinary judicial duties; 10
- (e) in view of the various matters with which the Chief Justice has to deal and the problems with which he is faced outside the province of his judicial functions, there are occasions when he is obliged, in the absence of a Minister of Justice, to bring them to the attention of the Prime Minister in the interests of the country. The vast majority of these matters do not fall within the portfolio(s) of the Prime Minister who should not have to be troubled with problems in respect of which he has no Permanent Secretary to keep him fully briefed and to supply him with all relevant facts and figures. A Prime Minister is not the Minister responsible - but without a Minister of Justice there is no Minister responsible. 20 30

So far as the Office of the Director of Public Prosecutions is concerned, there is at present no Minister responsible, and consequently no Permanent Secretary to prepare the Estimates, and no official representation at Cabinet or Parliamentary level. The Director of Public Prosecutions is accordingly in favour of a Ministry of Justice and of his Office falling within the Minister's portfolio. The functions of the Director of Public Prosecutions are fully safeguarded under the Constitution. 40

So far as the Prisons are concerned, if there is to be a Ministry of Justice the Prisons Department would logically fall within its ambit rather than being, as at present, under the Ministry of Urban Development, Housing and Social Welfare. The Controller of Prisons is in favour 50

of a Ministry of Justice and of the Prisons being included. The Adviser to Social Welfare also approves the principle, and considers that the removal of the Prisons Department from the Ministry of Urban Development, Housing and Social Welfare would enable the context of that Ministry to be enlarged so as to include rural as well as urban development (in the sense of human development as distinct from material development which falls within the sphere of responsibility of the Ministry of Fijian Affairs).

EXHIBITS

D1

Affidavit of
I.Q.Lasaqa

12th March 1981

(continued)

10 There are other institutions which at present have no satisfactory "home", but which would happily fall within the ambit of a Ministry of Justice.

20 The first of these is the Legal Aid Office. The current position regarding public legal aid leaves a lot to be desired. The Supreme Court administers legal aid in criminal cases - an anomalous situation - and the Public Legal Adviser whose office falls under the Ministry of Urban Development, Housing and Social Welfare administers legal aid in civil cases. For cogent reasons, fully set out in the "Report on the Public Legal Adviser" by the Adviser to Social Welfare, while the Office of the Public Legal Adviser should be expanded to cover all aspects of legal aid (which is not an uneconomic proposition), it should not, in any event, remain a part of the Social Welfare Department. (See 30 para. 8 of the Report). It would not be appropriate to include same under the portfolio of the Attorney-General as the role of the Crown Law Office is to advise Government and not individuals.

40 The second is the Executioner, in respect of which correspondence has passed between the Ministry of Urban Development, Housing and Social Welfare and the Supreme Court. For constitutional reasons the Judiciary cannot be responsible for employing a "hangman" and at present the obligation appears to vest in the Ministry responsible for Prisons. One could well understand a Minister of Social Welfare finding this obligation repugnant.

50 The third is at present academic but, in the interests of Fiji, should not remain so much longer in view of the acute shortage of professional Magistrates, and the sharp increases in the cost of fuel and other expenses involved in travelling long distances. It concerns the

EXHIBITS

D1

Affidavit of
I.Q.Lasaqa
12th March 1981
(continued)

possibility of establishing a judicial presence in the more remote areas and in the outer islands by the creation of resident non-qualified "judicial officers" with limited powers for hearing of minor cases, a right of review being vested in the Senior Magistrate of the Division. A draft paper for Cabinet was drawn up some years ago on these lines by the Ministry of Fijian Affairs and Local Government; and if some such type of scheme is to be implemented the "judicial officers" in question could well come within the sphere of responsibility of a Ministry of Justice.

10

The fourth consists of tribunals, which are required to be constituted under various Ordinances and Acts, but in respect of which there is no coordinating body responsible for accommodation and administrative arrangements.

This leads, finally, to the fact that there is no coordinating body for the ever-increasing inflow of invitations to international conferences concerned with various aspects of the administration of justice or for establishing priorities in regard thereto; for the collation and distribution of literature relating thereto; or for dealing with enquiries from international bodies. Fiji, as a member of the United Nations, receives invitations to various international gatherings, such as the Fifth United Nations Congress on the Prevention of Crime and the Treatment of Offenders to be held in Toronto in 1975. It is clear from the wide programme that in the absence of a Minister of Justice a delegation would have to be drawn from the various agencies in Fiji concerned with the respective aspects of crime prevention, criminal legislation, powers and policies of the Judiciary, and the treatment of prisoners. This would be a prohibitively expensive undertaking; whereas a Minister of Justice could attend this type of conference on behalf of all interested agencies and disseminate respectively the information obtained. Another example is that of the Australian Institute of Criminology which is now inviting (with all expenses paid) police officers, prison officers, probation officers and other suitable persons to attend its Courts and Seminars. Without coordination, persons who are not necessarily the ones likely to benefit may attend - or the same person might attend a number of different courses, the invitations to which could have been allocated more beneficially to more than one person. Again, there are numerous Judicial

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Conferences to which Judges of the Supreme Court of Fiji, and in some cases Magistrates, are invited, but which generally require some financial contribution on the part of Fiji. All such invitations could be channelled through a Ministry of Justice and priorities determined in consultation with the heads of department and according to the financial resources available.

EXHIBITS

D1

Affidavit of
I.Q. Lasaqa
12th March 1981
(continued)

10 Fiji, as a member of the family of nations, is obligated to reply to questionnaires from the United Nations relating to a variety of matters concerning the administration of justice, all of which could be dealt with more efficiently if channelled through a Ministry of Justice.

20 To summarise, the primary functions of a Ministry of Justice would be to provide an "umbrella" for the following institutions concerned with the administration of justice, namely the Fiji Court of Appeal, the Supreme Court, the Magistracy, the Office of the Director of Public Prosecutions, the Prisons Department, and the Office of the Public Legal Adviser, and to be responsible for their collective Estimates, for upholding their legitimate claims and for protecting their legitimate interests. It would be responsible for employing an Executioner; and could be responsible for any non-professional "judicial officers" that may be considered necessary; and for the administration of tribunals. It would be a coordinating body in respect of all matters touching on the administration of justice in the international field.

30 In conclusion, it is reiterated, as should have become apparent, that a Minister of Justice does not require a legal qualification; and indeed it is quite usual in other countries for the Minister not to be a lawyer. A legal qualification is superfluous, as the functions of the Minister are administrative, representative and confluent, not legal.

40 This is the annexure marked "A" referred to in the annexed Affidavit of ISIRELI QALO LASAQA sworn before me on 12th day of March, 1981

Sd: J.G.Gardiner
A Commissioner for Oaths

EXHIBITS

D2

Parts of Affidavit of Q.B. Bale

13th March 1981

Civil Action on behalf of Crown Law Office Exempt from Court Fees Signature: Date: 13/3/81

EXHIBITS

D2

PARTS OF AFFIDAVIT OF Q.B. BALE

IN THE SUPREME COURT OF FIJI
CIVIL JURISDICTION

No. 178/81

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

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

10

And

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

BETWEEN: The Director of Public Prosecutions

Plaintiff

A N D: The Attorney-General

Defendant

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AFFIDAVIT OF MR Q.B. BALE

I, QORINIASI BABITU BALE of 6 Berkeley Crescent, Domain, Suva, Solicitor-General, make oath and say as follows :-

1. I am employed by the Government of Fiji as Solicitor-General.
2. I have been authorised by the Governor-General to perform the functions of Attorney-General pending the appointment of a substantive Attorney-General.
3. The Plaintiff's Notice of Motion and Affidavit in support herein were served in the Crown Law Office at 4 p.m. on Monday the 9th day of March, 1981.
17. Annexed hereto and marked with the letter "V" is a true copy of a letter dated the 3rd day of November 1980 written by the Chief Justice of this Honourable Court to the Attorney-General.

30

18. Annexed hereto and marked with the letter "W" is a true copy of a Memorandum dated the 18th day of February 1981 from the Chief Registrar of this Honourable Court and addressed to the Chairman of the Public Service Commission, and copied, amongst others, to me.

EXHIBITS

D2

Parts of Affidavit of Q.B. Bale

13th March 1981

(continued)

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19. No correction or retraction on behalf of the Judiciary has, so far as I am aware, been published in any Newspaper published in Fiji, relating to the Judiciary's views or stand taken on the propriety or otherwise of the said Gazette Notice No.168 published in the Fiji Royal Gazette on Friday the 5th day of February 1981.

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20. Paragraphs 1, 2, 4-12 and 14-19 of this my Affidavit are to my knowledge true and paragraphs 3 and 13 of this my Affidavit are true to the best of my knowledge, information and belief.

SWORN by the said)
QORINIASI BABITU)
BALE at Suva on the) Sd: Q. Bale
13th day of March)
1981)

Before me: Sd: J.G.Gardiner
A Commissioner for Oaths

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This is the annexure marked "V" referred to in the annexed Affidavit of QORINIASI BABITU BALE sworn before me on 13th day of March 1981

Sd: J.G.Gardiner
A Commissioner for Oaths

Chief Justice's Chambers,
Supreme Court,
Suva, Fiji.

3rd November 1980

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The Hon. Attorney-General,
Attorney-General's Chambers,
SUVA.

Dear Andrew,

Re: Ministerial Responsibilities

EXHIBITS

D2

Parts of
Affidavit of
Q.B. Bale
13th March 1981
(continued)

I refer to our recent discussion and to your letter of 29th October under above reference for which I thank you.

As you are aware I have been in full consultation with the Judges of the Supreme Court with regard to your proposal relating to the assignment of a Minister of the Crown under the provisions of section 76(1) of the Constitution to be responsible for the administration of the Judicial Department. With the exception of one Judge the rest of the Supreme Court Judges including the writer are opposed to such a move on the ground that it is contrary to the spirit of the Constitution and is not considered to be in the best interest of the Judiciary.

10

It is felt that the move would do nothing to enhance the basic concept of the independence of the Judiciary. On the contrary difficulties in judicial administration are likely to arise by reason of the powers vested in a Minister by section 82 of the Constitution which is a complementary section to section 76(1). As you may know there have been several instances of serious conflicts between administrators and Ministers in other areas of Government in recent times and the Judiciary, as the third arm of Government, has no wish to be exposed to such a risk.

20

The administrative affairs of the Judicial Department have been well served under existing arrangements and as far as can be seen there appears to be no strong reason for introducing changes in the direction you have indicated in relation to the Judiciary.

30

In our view it is consistent with modern constitutional thinking that the Judiciary should have complete responsibility for the management and administration of its affairs.

The Attorney-General is the Minister who, in accordance with convention, speaks on behalf of the Chief Justice in Cabinet and answers for the Judiciary in the Senate and in the House of Representatives. This convention which is now well-established has the advantage of being simple and informal and obviates the problems inherent in a formalised ministerial relationship.

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Yours sincerely,
(Sgd) T.U.Tuivaga
(T.U.Tuivaga)
Chief Justice

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MEMORANDUM

D2

From: The Chief Registrar,
Supreme Court.
The Chairman, Public Service
Commission.

Parts of
Affidavit of
Q.B. Bale
13th March 1981
(continued)

Phone No. 211481
File No. SC.P-25
Date: 18.2.81

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MINISTERIAL RESPONSIBILITIES

Gazette Notice 168 of 1981 involves the assignment of ministerial responsibilities under the provisions of section 76(1) of the Constitution. Any assignment under section 76(1) necessarily involves section 82 which imposes upon the Minister a duty to exercise "general direction and control" over the department assigned to him.

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2. The problem in so far as the Office of the Director of Public Prosecutions and the Judicial Department are concerned is that the words "general direction and control" are broad enough apparently to permit interference into those functions of the two departments which by common consent should remain free from executive interference.

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3. One way of restricting the powers of the assigned Minister might be for the Supreme Court to declare the limits to the Minister's jurisdiction under the provisions of section 97 of the Constitution but, in view of the fact that the Judicial Department is itself one of the two departments involved, this procedure would not appear to be appropriate. The Judges could not properly be judges of their own cause. Furthermore, even if the preparation of a precise list of those areas into which the responsible Minister could and could not properly intervene were attempted, it is submitted that this list would be constantly subject to difficulties of interpretation brought about by changing and perhaps unforeseen circumstances.

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4. The other alternative which is strongly favoured both by the DPP and the Judicial Department is that GN.168 should be revoked and replaced.

5. It is suggested that all reference to the DPP and the Judicial Department should be removed

EXHIBITS

D2

Parts of
Affidavit of
Q.B. Bale
13th March 1981
(continued)

from column 2 of the schedule. But the matter should not be left to rest there since both departments acknowledge that their purely administrative functions should be subject to public accountability in Parliament. Furthermore both departments recognize their need to be represented in Cabinet as well as the desirability of having access to ministerial advice and assistance.

6. In order to achieve this object it is recommended that the replaced gazette notice should contain the following rider : 10

"For the avoidance of doubt it is hereby declared that by virtue of his position as Principal Legal Adviser to the Government under the provisions of Section 76(2) of the Constitution the Attorney-General shall be the responding Minister in Parliament in respect of the administrative functions of the Office of the Director of Public Prosecutions and the Judicial Department. " 20

7. The advantage of extending the duties of the Attorney-General under section 76(2) of the Constitution as opposed to section 76(1) is that such additional functions do not involve the assumption of those broad controlling powers which are set out in section 82 and which must follow automatically from any assignment under section 76(1). 30

8. Both the DPP and the Chief Registrar on behalf of the Judicial Department are in agreement with the proposal for the revocation of gazette notice 168 and its replacement on the lines set out above. Although it would clearly be wrong for any final decision to be taken prior to the return of the Chief Justice to Fiji, the Chief Registrar has no hesitation in predicting that the above proposal would receive his assent. The Chief Justice has throughout made it clear that he would welcome the appointment of a responding Minister (as opposed to a responsible Minister) for the Judicial Department in Parliament. His sole objection has been to the appointment of a Minister with the powers of control set out in section 82. 40

9. The proposal set out above has been communicated to the Solicitor-General and if accepted should, it is believed lead to the abandonment of the legal proceedings recently 50

commenced by Mr. Patel.

EXHIBITS

D2

Parts of
Affidavit of
Q.B. Bale
13th March 1981
(continued)

10

10. It may be useful to point out that were the current gazette notice not to be withdrawn and were the legal proceedings commenced by Mr. Patel to continue then very considerable problems would arise. In view of the fact that the sitting Judges have already expressed their views on the propriety of GN.168 it is difficult to see how a Court could be constituted to hear the case. There is no provision under the Constitution whereby an overseas judge could be appointed for the hearing. Furthermore any hearing would in all probability involve the taking of evidence from senior officers of the DPP, Crown Law Office as well as some or all of the judges themselves. This would be highly embarrassing to say the least.

Sd: M.D.Scott

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(M.D.Scott)
Chief Registrar

This is the annexure marked "W"
referred to in the annexed Affidavit
of QORINIASI BABITU BALE sworn before
me on 13th day of March 1981

Sd: J.G.Gardiner
A Commissioner for Oaths

EXHIBITS

D3

Supplemental Affidavit of Q.B. Bale

18th March 1981

Civil Action on behalf of Crown Law Office Exempt from Court Fees Signature:

Date: 18/3/81

EXHIBITS

D3

SUPPLEMENTAL AFFIDAVIT OF Q.B. BALE

IN THE SUPREME COURT OF FIJI No. 178/81
CIVIL JURISDICTION

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

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

10

AND

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

BETWEEN: The Director of Public Prosecutions Plaintiff

A N D: The Attorney-General Defendant 20

SUPPLEMENTAL AFFIDAVIT OF MR. Q.B. BALE

I, QORINIASI BABITU BALE of 6 Berkely Crescent, Domain, Suva, Solicitor-General, make further oath and further say as follows :-

1. This affidavit is supplemental to my previous Affidavit sworn and filed herein on the 13th day of March 1981.
2. I have read the copy Notice of Motion and copy Affidavit in support of Sailosi Kepa both of which documents were served on me, the original of which Affidavit was sworn on the 5th day of March 1981 and filed herein, which Affidavit is hereinafter referred to as "the Affidavit in support". 30
3. I am unaware of any order so named made as specified in the heading to these proceedings although I am aware that His Excellency the Governor-General, acting in accordance with the advice of the Prime Minister 40

pursuant to the provisions of section 76(1) of the Constitution of Fiji has given administrative directions and has assigned, by Directions in Writing, to various Ministers of the Crown, responsibility for the conduct of specified business of Government, and, for the administration of their Ministries together with certain specified departments of Government.

EXHIBITS

D3

Supplemental Affidavit of Q.B. Bale

18th March 1981

(continued)

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4. In all, the Governor-General, pursuant to the provisions of section 76(1) of the Constitution of Fiji, has assigned responsibility to 18 Ministers of the Crown and notification thereof was published in the Fiji Royal Gazette for Friday the 6th day of February 1981 in 18 separate Gazette Notices therein numbered 164 to 181 inclusive.

20

5. Gazette Notice numbered 168 published as aforesaid relates to the responsibilities assigned as aforesaid to the Attorney-General.

6. Annexed hereto and marked with the letter "X" is a true copy of the original Directions in Writing signed by His Excellency the Governor-General and addressed to the Attorney-General.

30

7. I admit that the contents of paragraph 1 of the Affidavit in support are correct.

40

8. As to paragraph 2 of the Affidavit in support I have no reason to doubt the accuracy of the matters stated in the second, third, fourth and fifth sentences. However, as to the first sentence thereof I verily believe that the Director of Public Prosecutions is a public officer and, except as specifically exempted therefrom by the relevant provisions of the Constitution of Fiji or by any other written law, is as much subject to the direction and control of Government as any other public officer. I furthermore verily believe that the office of the Director of Public Prosecutions referred to in Column 2 of the Schedule set out in the said Gazette Notice numbered 168 is a department of Government.

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9. As to paragraph 3 of the Affidavit in support I admit that the Director of Public

EXHIBITS

D3

Supplemental
Affidavit of
Q.B. Bale

18th March 1981

(continued)

Prosecutions' duties, and those of his officers, include the matters specified in sub-paragraph (a) therein but I verily believe that it is not correct that those duties are exclusive to the Director of Public Prosecutions and his officers as stated, since, for example, Magistrates under the provisions of section 7(1) of the Inquests Act, as a matter of practice and in accordance with Form 7 of the Fifth Schedule to the Inquests Rules, send the relevant police investigation file to the Attorney-General attached to their reports. Furthermore, if the Attorney-General is to properly perform his functions under section 20 of the Inquests Act, he must first see the police investigation file before deciding whether to exercise his discretion to apply to this Honourable Court for an order. I verily believe that the only powers conferred upon the Director of Public Prosecutions which are exclusive to him are those set out in section 35(4)(b) and (c) of the Constitution of Fiji and even that exclusiveness is subject to the proviso set out in section 85(6) of the Constitution of Fiji.

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10. Police Investigation files are frequently requested and received as a matter of routine in the Crown Law Office in connection with the following matters :-

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a) Advising the Permanent Secretary for Finance on questions of gross negligence for financial surcharge of Government drivers under Stores Regulations 338 and 340, and for financial surcharge of public officers generally under section 26 of the Finance (Control and Management) Act (Chapter 52).

40

b) Assessing the civil liability of Government where a civil claim is made against Government in respect of a matter which the police have investigated, for example, a road accident involving a Government or Police driver, or a death involving allegations of Government medical or other negligence.

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c) Advising the various departments of Government in relation to proposed

disciplinary proceedings against Government officers in connection with matters which have been investigated by the Police.

EXHIBITS

D3

Supplemental Affidavit of Q.B. Bale
18th March 1981
(continued)

- 10
- d) Assessing the civil liability of Government where allegations of impropriety, false arrest, assault, and so on, have been made against a police officer in the course of his duties and a civil claim has been or is likely to be made in respect thereof.
- e) In civil court proceedings involving Government where the contents of a police investigation file are required to be disclosed on discovery to the other party or parties.
- 20
- f) Generally where Government's own interests are involved in a matter for which the Commissioner of Police holds an investigation file.

11. I verily believe that the following Government officers also call for the production of police investigation files from time to time in connection with their official duties :-

- 30
- a) The Auditor-General
b) The Permanent Secretary for Finance
c) The Ombudsman
d) The Secretary to the Public Service Commission
e) The Permanent Secretary for Labour, Industrial Relations & Immigration.

40

12. I verily believe that the practice as set out in paragraphs 10 and 11 of this my Affidavit do not in any way contravene or diminish the exclusive powers of the Director of Public Prosecutions under section 85(4)(b) and (c) of the Constitution of Fiji as aforesaid and I verily believe that such practices are consistent with the proper exercise of Governmental executive and administrative powers.

13. As to paragraph 3(k) and (l) of the Affidavit in support, I verily believe that it is generally the practice and function

EXHIBITS

D3

Supplemental
Affidavit of
Q.B. Bale
18th March 1981
(continued)

- of the Commissioner of Police to investigate criminal matters and to maintain confidentiality in respect thereof, and not the Plaintiff in these proceedings.
14. As to paragraph 4 of the Affidavit in support, I repeat paragraphs 3, 4, 5 and 6, of this my Affidavit.
15. As to paragraphs 5 and 6 of the Affidavit in support, I agree that the Plaintiff may not have been advised or informed as stated therein but it was the Public Service Commission which was identifying and collating the functions of the various Ministers and not me as appears from paragraph 2 of my memorandum (hereinafter called "my Memorandum") a copy of which is marked "SK2" and annexed to the Affidavit in support. 10
16. I genuinely believed when I wrote my Memorandum that the Plaintiff had generally accepted the position as stated in paragraph 2 on page 2 of my Memorandum and that the only exception was the Judicial Department as stated in paragraph 3 on page 2 of my Memorandum. 20
17. Immediately I discovered that the Plaintiff had not been so advised or informed, I made up a file containing photocopies of various relevant documents, including photocopies of advice and opinions given by me, and supplied the Plaintiff with the same. Although, at the same time, I requested the Plaintiff to advise me of the grounds of his objections, he did not do so prior to the commencement of these proceedings. 30
18. As to paragraph 7 and 8 of the Affidavit in support, I admit that the Memorandum and Letter referred to therein were sent and received as stated therein but of course since the Administrative Directions in Writing were those of His Excellency the Governor-General himself, the Secretary to Cabinet, to whom the Memorandum and Letter were both addressed, had no power, so far as I am aware, to revoke the Directions as required by the Plaintiff. So far as I am aware, the Plaintiff has never commenced any proceedings for revocation as mentioned in the last paragraph of his letter to the Secretary to 40 50

Cabinet dated the 19th day of February 1981.

EXHIBITS

D3

Supplemental Affidavit of Q.B. Bale

18th March 1981

(continued)

10 19. As to paragraph 9 of the Affidavit in support I agree that I sent the document annexed to the Affidavit in support and marked "SK5" to the Plaintiff and that that document formed the basis for a speech delivered in the House of Representatives by the Prime Minister as mentioned therein.

20 20. As to paragraph 10 of the Affidavit in support I reiterate that so far as I am aware there was no 'order' as I have stated in paragraphs 3, 4, 5 and 6 of this my Affidavit. Furthermore, I verily believe that it is incorrect to state, as the Plaintiff has done in paragraph 10 of the Affidavit in support, that "it purportedly assigns responsibility to the Attorney-General for the conduct of business and administration of my office". The Administrative Directions in Writing given to the Attorney-General by His Excellency the Governor-General assign responsibility to the Attorney-General "for the conduct of the business of the Government specified in Column 1 of the Schedule" (which does not refer to the office of the Director of Public Prosecutions and which is referred to in Column 2 of that Schedule) "and responsibility for the administration of the Ministry and departments of the Government specified in column 2 of the Schedule." I further verily believe that no interests of the Plaintiff, either personally or as vested in him in the capacity of his post, are being or are likely to be improperly affected. I also verily believe that the office (not the post) of the Director of Public Prosecutions is a department of Government as is shown by its inclusion in Column 2 as set out in the Schedule to the said Gazette Notice.

40 50 21. As to paragraphs 11 and 12 of the Affidavit in support I sent a reply to the Director of Public Prosecutions, in answer to his Memorandum dated the 23rd day of October 1979, and a true copy of the Memorandum in reply from me dated the 25th day of October 1979 is annexed hereto and marked with the letter "Y".

EXHIBITS

D3

Supplemental
Affidavit of
Q.B. Bale

18th March 1981

(continued)

22. I verily believe that in the circumstances of that case I acted quite properly and in the public interest in requesting sight of the police investigation file. 10
23. As to paragraphs 13 and 14 of the Affidavit in support, I verily believe that even if the contents thereof are true and correct, and I am not in a position to say whether they are true or not, such contents are irrelevant to the matters in issue in these proceedings. 10
24. By reason of the matters deposed to in paragraph 23 of this my Affidavit I verily believe that it would be inappropriate for me to comment in detail on the statement of opinion contained in paragraph 15 of the Affidavit in support. Nonetheless I also verily believe that these proceedings are not concerned with any "dangers inherent" as mentioned therein (which expression relates to the desirability or otherwise of the Administrative Directions in Writing) but are concerned solely with the validity of such Administrative Directions in Writing. 20
25. I make this Affidavit from matters within my own knowledge and from information acquired by me in my capacity as Solicitor-General. Paragraphs 1-7, 10, 14-19 and 21 of this my Affidavit are to my knowledge true and paragraphs 8, 9, 11, 12, 13, 20, 22, 23 and 24 of this my Affidavit are true to the best of my knowledge, information and belief. 30

SWORN by the said)
 QORINIASI BABITU BALE)
 at Suva on the 18th) Sd: Q. Bale
 day of March 1981)

Before me: (Sd:) Amil J. Singh 40
A Commissioner for Oaths

This Affidavit is filed on behalf of the Defendant.

"X"

EXHIBITS

GOVERNMENT HOUSE,
SUVA, FIJI

D3

Supplemental
Affidavit of
Q.B. Bale

28th January 1981

18th March 1981

Sir,

(continued)

10 In accordance with section 76(1) of the
Constitution and on the advice of the Prime
Minister, I direct that there be assigned to
you, in your capacity as Attorney-General,
responsibility for the conduct of the business
of the Government specified in Column 1 of the
Annexure hereto and responsibility for the
administration of the Ministry and departments
of the Government specified in Column 2 of the
Annexure.

I have the honour to be,
Sir,
Your obedient servant,

20 Sd: G.K. Cakobau
Governor-General

The Hon. A.I.N. Deoki OBE
Attorney-General
Suva.

This is the annexure marked "X" referred
to in the annexed Affidavit of
QORINIASI BABITU BALE sworn before me
on 18th day of March 1981

Sd: Amil J. Singh
A Commissioner for Oaths

Column 1
(Business of
Government)

Column 2
(Ministry and depart-
ments of the Govern-
ment)

EXHIBITS

D3

Supplemental
Affidavit of
Q.B. Bale
18th March 1981
(continued)

10 Gaming;
Registration of
clubs;
Cinematographic
films;
Liquor;
Control of methylated
spirits.

(b) All written law
associated with or
arising from the
subject-matter specified
in paragraph (a).

CONFIDENTIAL

"Y"

20 The Solicitor-General 211581
The Director of Public AG.1042/1-3
Prosecutions 25.10.79

REG -v- MAHENDRA PRATAP s/o RAM KISSUN

D/AG of 23.10.79

I have received your memorandum of 23rd
October, 1979.

30 It is patently obvious that you have completely
misconstrued my motives in relation to this
matter. However, in view of the intemperate tone
of your memorandum there would clearly be no
point in my endeavouring to furnish you with a
detailed response.

(Q.B.Bale)
Solicitor-General

Distribution:-

Secretary, Judicial and Legal Services Commission
Commissioner of Police.

This is the annexure marked "Y" referred
to in the annexed Affidavit of QORINIASI
BABITU BALE sworn before me on 18th day
of March 1981

40 Sd: Amil J. Singh
A Commissioner for Oaths

IN THE PRIVY COUNCIL

No.37 of 1981

O N A P P E A L
FROM THE FIJI COURT OF APPEAL

B E T W E E N :

THE ATTORNEY-GENERAL

Appellant
(Defendant)

- and -

DIRECTOR OF PUBLIC
PROSECUTIONS

Respondent
(Plaintiff)

RECORD OF PROCEEDINGS

MACFARLANES,
Dowgate Hill House,
London, EC4R 2SY

Solicitors for the
Appellant

CHARLES RUSSELL AND CO.,
Hale Court,
Lincoln's Inn,
London, WC2A 3UL

Solicitors for the
Respondent