of 1977

IN THE PRIVY COUNCIL No.10 of 1975

ON APPEAL

FROM THE SUPREME COURT OF MAURITIUS

BETWEEN:

1. Henri Lincoln
2. Ameer Abdullah
3. Krishnananda Ramsamy

Appellants (Petitioners)

- and -

1. The Governor General of Mauritius Sir Raman Osman
2. The Prime Minister of Mauritius Sir Seewoosagur Ramgoolam
3. The Speaker of the Legislative Assembly Sir Harilall Vaghjee

Respondents (Respondents)

RECORD OF PROCEEDINGS

HATCHETT JONES & KIDGELL,
9 Crescent,
London, EC3N 2NA.

Appellants' Solicitors.

CHARLES RUSSELL & CO.,
Hale Court,
Lincolns Inn, London,
WC2A 3UL.

Respondents' Solicitors.

IN THE PRIVY COUNCIL — No. 10 of 1975

ON APPEAL

FROM THE SUPREME COURT OF MAURITIUS

BETWEEN :

1. HENRI LINCOLN
2. AMEER ABDULLAH
3. KRISHENANANDA RAMSAMY

APPELLANTS (PETITIONERS)

- and -

1. THE GOVERNOR GENERAL OF MAURITIUS SIR RAMAN OSMAN.
2. THE PRIME MINISTER OF MAURITIUS SIR SEEWOOSAGUR RAMGOOLAM
3. THE SPEAKER OF THE LEGISLATIVE ASSEMBLY SIR HARILALL VAGHJEE

RESPONDENTS (RESPONDENTS).

RECORD OF PROCEEDINGS

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DOCUMENTS TRANSMITTED TO THE PRIVY COUNCIL
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Description of Document	Date
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Notice to Attend Court	28th September 1973
Cause List	3rd October 1973

Description of Document	Date
Minutes of Proceedings	3rd October 1973 5th November 1973 and 31st January 1974
Petitioners' List of Witnesses	1st February 1974
Petitioners' Counsel's arguments and Responts' Reply	7th February 1974
Minutes of proceedings	14th May 1974
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IN THE PRIVY COUNCIL

No.10 of 1975

ON APPEAL

FROM THE SUPREME COURT OF MAURITIUS

B E T W E E N :

1. HENRI LINCOLN
2. ANEER ABDULLAH
3. KRISHNANANDA RAMSAMY

Petitioners

v.

1. THE GOVERNOR GENERAL OF MAURITIUS SIR RAMAN OSMAN
2. THE PRIME MINISTER OF MAURITIUS SIR SEEWOOSAGUR RAMGOOLAM
3. THE SPEAKER OF THE LEGISLATIVE ASSEMBLY SIR HAREELALL VAGHJEE

Respondents

RECORD OF PROCEEDINGS

No. 1

PETITION

In the Supreme Court

No.1

Petition 27th September 1973

To/

Their Lordships, the Honourable JUDGES OF THE SUPREME COURT.

The humble Petition of HENRI LINCOLN, AMEER ABDULLAH, KRISHNANANDA RAMSAMY: electing their legal domicile in the office of the undersigned Attorney-in-Law.

R E S P E C T F U L L Y S H E W E T H:-

1. That Your Petitioners are citizens of Mauritius.

1. (Bis) That Petitioners Nos. 1 and 2 are registered as electors on the Register of electors in the Constituency of Curepipe-Midlands and are qualified to vote and to elect representatives of

In the Supreme Court

No.1

Petition 27th September 1973 (continued)

their choice at any election to be held in that Constituency.

1. (Ter) That Petitioner No.3 is registered as an elector on the register of electors in the Constituency of Riviere des Anguillea-Souillac and is qualified to vote and to elect a representative of his choice at any election to be held in that Constituency.

1. (Quater) That Petitioner No.1 is further qualified to stand as candidate in any election in Mauritius.

2. The Governor General of Mauritius, hereafter called the Respondent No.1, is exercising the executive authority in Mauritius on behalf of Her Majesty and has among other duties:-

(a) to signify his assent to Bills passed by the Legislative Assembly or to withhold his assent thereto;

(b) to require the Electoral Supervisory Commission to issue Writ or Writs of Election for filling a vacancy in the Legislative Assembly or electing a new Parliament as the case may be;

(c) to make regulation in virtue of the Powers conferred upon him by the Emergency Powers Ordinance.

3. The Prime Minister of Mauritius, hereafter called (Respondent No.2) exercises executive authority in Mauritius and presides over meetings of the Cabinet and both the Cabinet and the Prime Minister tender "advice" to the Governor General who acts according to that advice.

4. The Speaker of the Legislative Assembly hereafter called the Respondent No.3 presides over meetings of the Legislative Assembly and is responsible for accepting or refusing that certain matters be debated in the Legislative Assembly, and for putting to the votes any question debated in the Assembly.

5. That the following vacancies exist in the Legislative Assembly:

(a) one vacancy in the Constituency of Curepipe-Midlands since the 20th July 1972;

(b) one vacancy in the Constituency of

Triolet-Pamplemousses since 24th August 1972;

(c) one vacancy in the Constituency of Riviere des Anguilles-Souillac since the 5th December 1972;

(d) one vacancy in the Constituency of Belle Rose-Quatre Bornes since 1.1.1973.

6. That according to Subsection (3) of Section 35 of the Constitution, a Writ for an election to fill a vacancy ought to be issued within 90 days from the occurrence of the vacancy.

7. That the Representation of the People Ordinance provided that the Governor General acting in accordance with the advice of the Prime Minister shall appoint a day for the election to take place within certain minimum and maximum delays.

8. That on October 9, 1972, the Governor General, then Sir Len William in the purported exercise of the powers vested in him by Section 3 of the Emergency Powers Ordinance, 1968, made regulations, the Emergency Powers (Legislative Assembly) Regulations 1972 providing that notwithstanding anything contained in Section 41(2) of the Representation of the People Ordinance, 1958, the Governor General, acting in accordance with the advice of the Prime Minister, may for the purpose of filling any vacancy which has occurred or may occur in the Legislative Assembly fix any day to be the day of election or a polling day, as the case may be.

9. That Writs for filling the vacancies in the Constituencies of Curepipe-Midlands and Pamplemousses-Triolet were issued on the 13th October 1972.

10. That H.E. The Governor General in virtue of the Emergency Powers (Legislative Assembly) Regulations, 1972 by order appointed the 4th June 1973 as the date of election.

11. That the validity of these regulations were challenged before the Supreme Court and eventually found to be null and void to all intents and purposes (Vallet v. Ramgoolam and anor).

12. That whilst the above case was pending before the Court, on the 4th November 1972, it was published in the Gazette an act entitled The

In the Supreme Court

No.1

Petition 27th September 1973 (continued)

Representation of People (Amendment) Act 1972 (No.24 of 1972) purporting to amend with retrospective effect as from the 1st October 1972 the the Representation of People Ordinance 1958, in order to abolish maximum delays within which elections to fill vacancies in the Legislative Assembly shall be held.

13. That on the 28th February 1973, a Writ was issued in respect of the vacancy which occurred in the Constituency of Riviere des Anguilles-Souillac and under Section 41(1)(b) of the Representation of the People Ordinance, 1958, H.E. the Governor General, appointed the 6th July 1973 as the day of election and 5th September as the polling date.

14. That on the 28th February 1973 at the time of the issue of the said Writ a vacancy had already occurred since the 1st January in the Constituency of Belle Rose-Quatre Bornes.

15. That on the 26th March 1973, a Writ was issued in respect of the vacancy which occurred in the Constituency of Belle Rose-Quatre Bornes, and under Section 41(1)(b) of the Representation of the People Ordinance, 1958, H.E. the Governor General appointed the 10th September 1973 as the day of election and the 22nd of October 1973 as the polling date.

16. That after the issue of the Writ dated 26th March 1973 fixing the 10th of September 1973 as the date of election in respect of the Constituency of Belle-Rose Quatre Bornes, the reasonableness of the delay for the holding of the election was challenged before the Supreme Court, in a Petition dated 16th April 1973 (A. Mathoorasing v/s The Governor General).

17. That the Court on the 8th of May fixed the case to be heard on the Merits on the 24th, 25th and 30th of May 1973.

18. That whilst the case was sub-judice, by regulations dated the 18th May 1973 and published on the 21st of May 1973, and made in virtue of the Emergency Powers, the Respondent No.1 substituted the 19th of November as polling day in respect of all the four vacancies above mentioned and substituted the 10th of September, 1973 as election date in respect of the three Constituencies of Curepipe-Midlands, Triolet-Pamplemousses, and Riviere des Anguilles-Souillac which election dates stood

respectively as 4th June 1973, 4th June 1973, 6th July 1973.

19. That on the 3rd of September 1973, in the purported exercise of the powers conferred upon him by Section 3 of the Emergency Powers Regulations Ordinance, 1968, the Respondent No.1 caused to be published, the Emergency Powers, Legislative Assembly (Change of dates) Regulations (No.2) 1973 substituting the 14th January 1974 and 18th February 1974 for the 10th September 1973 and 19th November 1973, as election dates and polling dates in respect of the four Constituencies.

20. That the haste in which these regulations were made did not even give time to the Electorial Commissioner to give notice to the Public of the change of date before the 10th September 1973.

21. That the said regulations are null and void to all intents and purposes.

22. Petitioners aver that at the time of the issue of all the Writs above referred to, Respondent No.2 never had and still has no intention of complying with the law and of holding the said bye-elections.

23. The Petitioners aver that the purpose of subsection (3) of Section 35 of the Constitution is that any election should be held as soon as is reasonably practicable after the necessity for it has arisen.

24. The Petitioners further aver that in fixing the day of election to the 14th January 1974 the Respondents Nos. 1 & 2 are offending against the spirit, purpose and object of both the Constitutional and legal requirements relating to the holding of elections.

25. The Petitioners aver that in selecting the 14th January 1974 as the day of election, the Respondent No.2 is unduly and without reasonable cause, arbitrarily and in bad faith delaying the filling of the said vacancies in the Legislative Assembly and consequently delaying the Petitioners' right to vote for representatives of their choice to sit in the Legislative Assembly and to seek to be elected to the said Assembly.

26. That the use made by Respondents of the provisions of the Emergency Powers Ordinance 1958, to postpone the said bye-elections is an

In the Supreme Court

No.1

Petition 27th September 1973 (continued)

unreasonable, unlawful and arbitrary use of Emergency Powers which cannot be used wantonly and should be limited to strict necessity.

27. That the Respondent No.2 and the other Ministers have the intention of asking the Legislative Assembly to amend the Constitution of Mauritius.

28. The Petitioners aver that it would be in violation of democractic principles, and against the letter and the spirit of the Constitution and against the provisions of the declaration of Human Rights, that any vote be taken in the Legislative Assembly on proposed amendments to the Constituion before the four vacancies under reference are filled by an election as provided by law.

29. The Petitioners aver that the Respondent No.2 is deliberately and in bad faith postponing the said bye-elections solely because the Government is unable to face the electorate and wish to amend the Constitution of Mauritius without having four new elected members taking part in the debate when it will come in the Legislative Assembly.

30. That any vote taken in the Legislative Assembly having for effect an amendment of the Constitution by members of an Assembly whose mandate would have expired since August 1972 had it not been extended by the members of the Assembly themselves would be in violation of the democratic principles enshrined in the Constitution itself, the more so if the Assembly is deprived of the arguments and votes of four new representatives of the People of Mauritius.

31. That all those responsible for the holding of the said bye-elections have agreed that all the four bye-elections should take place on the same date.

32. Petitioners therefore humbly pray this Honourable Court for a judgment:

(a) declaring the Emergency Powers (Dates of Election) Regulations (No.2) 1973 to be null and void to all intents and purposes;

(b) declaring the regulations substituting the 14th January 1974 for the 10th September 1973 and the 18th February 1974 for the 19th November 1973 for the day of election and polling date

respectively to be unreasonable;

(c) ordering the Respondent No.1 to alter the day of election fixed for the bye-election and to fix it to a date which the Court will find just and reasonable in the circumstances;

(d) making in consequence any order which the Court shall deem reasonable and in particular fixing a maximum delay within which polling is to take place;

(e) prohibiting Respondent No.2 from introducing for debate in the Legislative Assembly any matter having in view an amendment of the Constitution of Mauritius until the four vacancies have been filled by an election according to law;

(f) prohibiting Respondent No.1 from assenting to any Bill passed by the Legislative Assembly having for effect an amendment of the Constitution of Mauritius;

(g) ordering the Respondent No.3 of the Legislative Assembly, not to accept for discussion or debate, nor to allow the members of the Legislative Assembly to put to the votes any motion, Bill or other proposal having in view an amendment of the Constitution of Mauritius until the four vacancies have been filled by an election as provided by law.

AND as in duty bound, Your Petitioners will ever pray.

Dated at Port Louis, this 27th day of September, 1973.

(sd) Patrice Lagesse

Of George Guibert Street,
Port Louis.

PETITIONERS' ATTORNEY

(sd) K. Ramsamy

(sd) A.H. Abdullah

(sd) H. Lincoln

PETITIONERS

Petitioners state that they understand the English Language and are aware of the contents of the present petition.

In the Supreme Court

No.2

Order 27th September 1973

No.2

ORDER OF SENIOR PUISNE JUDGE

Be it remembered that on this 27th day of September in the year of Our Lord one thousand nine hundred and seventy-three Henri Lincoln, Ameer Abdullah and Krishnananda Ramsamy came before me the Honourable H. Garrioch, Senior Puisne Judge of the above Court and then presented me with a petition in writing praying for a judgment :-

(a) declaring the Emergency Powers (Dates of Election) Regulations (No.2) 1973 to be null and void to all intents and purposes;

(b) declaring the regulations substituting the 14th January 1974 for the 10th September 1973 and the 18th February 1974 for the 19th November 1973 for the day of election and polling date respectively to be unreasonable;

(c) Ordering the Respondent No.1 to alter the day of election fixed for the bye-election and to fix it to a date which the Court will find just and reasonable in the circumstances;

(d) making in consequence any order which the Court shall deem reasonable and in particular fixing a maximum delay within which polling is to take place;

(e) prohibiting Respondent No.2 from introducing for debate in the Legislative Assembly any matter having in view an amendment of the Constitution of Mauritius until the four vacancies have been filled by an election according to law;

(f) prohibiting Respondent No.1 from assenting to any Bill passed by the Legislative Assembly having for effect an amendment of the Constitution of Mauritius;

(g) ordering the Respondent No.3 of the Legislative Assembly, not to accept for discussion or debate, nor to allow the members of the Legislative Assembly to put to the votes any motion, Bill or other proposal having in view an amendment of the Constitution of Mauritius

No.2

Order 27th September 1973 (continued)

until the four vacancies have been filled by an election as provided by law.

WHEREUPON I have caused the present petition to be made returnable in Court on Monday the 15th day of October, 1973, at 10.30 a.m. thereupon to be fixed for hearing.

CHAMBERS this 27th day of September, 1973.

(sd) H. GARRIOCH

Senior Puisne Judge.

No. 3

No.3

Plea of Respondents

RESPONDENTS' PLEA

Plea

In Limine litis

(1) Respondents Nos. 2 and 3 should be put out of cause with costs inasmuch as -

(a) in relation to the Regulations the validity of which is sought to be impugned -

(i) Respondent No.2 acted in an advisory capacity only;

(ii) Respondent No.3 had no part whatsoever to play in the making of the Regulations;

(b) the Legislative Assembly has, by virtue of the Constitution itself, an unfettered right to discuss or vote any proposal for the amendment of the Constitution.

(2) Paragraphs 27, 28, 29 and 30 and sub-paragraphs (e), (f) and (g) of paragraph 32 of the petition should be struck out accordingly.

On the merits

1. Respondents admit paragraphs 1, 1(bis),

In the Supreme Court

No.3

Plea of Respondents (continued)

1(ter), 1 (quarter), 2, 6, 7, 8, 9, 10, 11, 13, 14, 15, 16, 17, 18 and 31 of the petition.

2. As regards paragraph 3, Respondents admit that the Respondent No.2 presides over meetings of the Cabinet and that the Cabinet and Respondent No.2 tender advice to the Governor-General but avers that executive authority in Mauritius is exercised by the Government.

3. As regards paragraph 4, Respondents admit that Respondent No.3 presides over meetings of the Legislative Assembly but aver that his duties as Speaker are regulated by the Standing Orders of the Legislative Assembly, by Parliamentary practice and by the Constitution.

4. The Respondents admit paragraph 5 but aver that the vacancy as regards the constituency of Riviere des Anguilles"Souillac occurred in 1972.

5. As regards paragraph 12, the Respondents aver that the Representation of the People (Amendment) Act 1973 not merely purported to amend but in fact amended section 41 of the Representation of the People Ordinance, 1958.

6. As regards paragraph 19, Respondents deny that regulations under the title referred to were published and aver that Respondent No.1 had full power to make and did make the Emergency Powers (Dates of Elections) Regulations No.2 of 1973 which were published on the 3rd of September.

7. The Respondents deny paragraph 20 and aver that notice of the change of date for the election was in effect given on the publication, on the 3rd September 1973, of the Emergency Powers (Dates of Elections) Regulations No.2 of 1973.

8. Respondents deny paragraphs 21, 22, 23, 24, 25, 26, 28, 29 and 30.

9. Respondents deny the averment that is contained in paragraph 27 as regards Respondent No. 2 and aver that they have no knowledge of the intention of the other ministers.

10. The respondents accordingly move that the petition be dismissed with costs.

In the Supreme Court

No.4

Court Minute 5th November 1973

No.4

COURT MINUTE

On Monday the 5th day of November, 1973

Before Hon. Sir Maurice Latour-Adrien, Chief Justice

Hon. W.H. Garrioch, Senior Puisne Judge

Hon. D. Ramphul, Judge.

17635 - H. Lincoln & Ors v. The Governor General of Mauritius & Ors.

F. Vallet for Petitioners.

V. Glover for Respondents.

Both Counsel argue on the plea in Limine Litis (Vide transcript of shorthand notes).

Judgment is reserved.

(sd) Y. Bhunnoo

for Master and Registrar.

No.5

Judgment 9th November 1973

No.5

JUDGMENT

JUDGMENT

At 10.15 a.m. to-day learned Counsel for the petitioners appeared before me in Chambers and made an application to the effect that, until the final judgment of the Supreme Court in the action entered by the petitioners against the respondents, I should grant them an interim injunction -

(1) restraining the Prime Minister from introducing for debate in the Legislative Assembly, to day on or any other day, and bill having in view an amendment of the Constitution;

(2) restraining the Speaker from allowing the discussion, debate or voting of the said Bill;

In the Supreme Court

No.5

Judgment 9th November 1973 (continued)

(3) restraining the Governor-General from assenting to the said Bill.

They further prayed that a summons should issue, calling upon the respondents to show cause why the Said interim order should not be converted into an interlocutory order.

If jurisdiction to grant such an injunction existed, the circumstances in which the application is made would have placed the judge in a most embarrassing situation. When I first read the application, in view of the importance of the interests at stake, I was at first minded to stay it, until the respondents could be heard. But the petitioners' counsel stated that the Bill was due for debate at 3 p.m. to day. It follows that the respondents would hardly have time to study the issue and to present arguments, so that no useful purpose would be served in calling upon them to appear. In other words, the petitioners are asking me to decide a highly complex political issue without hearing the other side, without time for reflexion, and without adequate information. The mere fact that what the circumstances require is not the exercise of discernment and reason, but a wild jump in the dark, leads one to doubt whether this is a fit question to be submitted to a judge.

The difficulty of reaching a decision would not have deterred me, but I am satisfied that I have no jurisdiction in such a matter. The only authority which was quoted to me was Harper v. Secretary of State (1955) 1 A.E.R. 331. If that decision is at all relevant, it is unfavourable to the petitioners.

In my view the petitioners trying to drag the Court into what is not a judicial, but a political arena: I have no intention of following them there. Our Constitution clearly distinguishes between the functions of the Judiciary and those of the Legislature. No doubt the Supreme Court has jurisdiction to decide whether an act has been passed in accordance with the Constitution or not; but it would be neither legal nor reasonable for it to interfere with the internal business of Parliament. It is for the Assembly and the Assembly alone, to decide when it will sit, and what business it will discuss. If a Court of law sought to prevent, or even to delay, the introduction of a bill, it would not be exercising a judicial power, but usurping a legislative function.

The application is refused.

(sd.) M. RAULT
Judge

9th November, 1973

In the Supreme Court

No.5

Judgment 9th November 1973 (continued)

No.6

AFFIDAVIT OF APPLICANTS

No.6

Affidavit of Applicants 16th November 1973

WE:

1. HENRI LINCOLN, of Curepipe.

MAKE OATH AND SAY:

2. AMEER ABDULLAH, of Curepipe.

MAKE SOLEMN AFFIRMATION AS A MAHOMEDAN AND SAY:

3. KRISHNANANDA RAMSAMY, of Souillac

MAKE SOLEMN AFFIRMATION AS A HINDOO AND SAY:

1. That we are the Petitioners in the above matter which is an action praying for a Judgment from the above Court inter alia fixing a date for the holding of bye-elections due to be held only in February 1974.

2. That since the Petition was entered, and a preliminary point argued, the Legislative Assembly met and voted a Bill purporting to abolish bye-elections in Mauritius.

3. That we are advised that it is now necessary to amend or Petition as follows:

1. By inserting after paragraph 31, the following:

31 (bis) That since this present Petition was filed, and a preliminary objection argued, Respondent No.2, whilst the matter was still sub-judice introduced in the Legislative Assembly a Bill purporting to amend the Constitution of Mauritius.

In the Supreme Court

No.6

Affidavit of Applicants 16th November 1973 (continued)

31 (ter) That the said Bill which was passed by a majority of votes in the Legislative Assembly and which has received the assent of The Governor General to become an Act of Parliament is null and void to all intents and purposes, at any rate in so far as the bye-elections under reference are concerned.

2. By adding in para. 32 of the Petition, the following:

(h) Declaring the Constitution of Mauritius (Amendment) Act 1973 to be null and void to all intents and purposes at any rate in so far as the bye-elections under reference are concerned.

Sworn by the 1st Deponent, Solemnly affirmed as a Mahomedan by the 2nd Deponent and Solemnly affirmed as a Hindoo by the 3rd Deponent at Chambers, Supreme Court House, Port Louis, this 16th day of November, 1973

(sd.) H. Lincoln
A. Abdullah
K. Ramsamy

Before me,

(sd.) P. de Ravel,

Master and Registrar,

Supreme Court.

No.7

Motion Paper 26th November 1973

No.7

MOTION PAPER

MOTION PAPER :-

Counsel is instructed to move this Honourable Court for an order authorising the Petitioners to amend the Petition filed by them in the above matter as follows:-

by adding the following paragraphs after para. 31 of the Petition:

31.(bis) That since this present Petition was filed, and a preliminary objection argued, Respondent No.2, whilst the matter was still sub-judice introduced in the Legislative Assembly a

Bill purporting to amend the Constitution of Mauritius.

In the Supreme Court

No.7

Motion Paper 26th November 1973 (continued)

31.(ter) That the said Bill which was passed by a majority of votes in the Legislative Assembly and which has received the assent of The Governor General to become an Act of Parliament is null and void to all intents and purposes, at any rate in so far as the bye-elections under reference are concerned.

AND this for the reasons fully set forth in the herewith annexed Affidavit.

Dated at P. Louis, this 26th day of November 1973
(sd.) Patrice Lagesse Of George Guibert Street, Port-Louis

PETITIONERS' ATTORNEY

(sd.) France Vallet, Of Counsel for Petitioners

No.8

No.8

Notice of Motion 21st November 1973

NOTICE OF MOTION

TAKE NOTICE in order that you may not plead or pretend ignorance of the same, that the above-named Petitioners shall on Monday the 26th day of November 1973, move the above Court for leave to amend the Petition filed by them in the above matter as follows:-

By adding the following paragraphs after para. 31 of the Petition, viz:-

31 (bis) That since this present Petition was filed, and a preliminary objection argued, Respondent No.2 whilst the matter was still sub-judice introduced in the Legislative Assembly a Bill purporting to amend the Constitution of Mauritius.

31 (Ter) That the said Bill which was passed by a majority of votes in the Legislative Assembly and which has received the assent of The Governor General to become an Act of Parliament is null and void to all intents and purposes, at any rate in so far as the bye-elections under reference are concerned.

In the Supreme Court

No.8

Notice of Motion 21st November 1973 (continued)

AND this for the reasons fully set forth in the affidavit, a copy of which is herewith served upon you.

AND TAKE FURTHER NOTICE that the aforesaid motion shall be made on the day and at the hour aforesaid whether you be present or not.

Dated at Port-Louis, this 21st day of November, 1973.

(sd.) Patrice Lagesse

Of George Guibert Street, Port-Louis.

PETITIONER'S ATTORNEY.

To/

The Respondents abovenamed, at the domicile by them elected in the office of Mr. Crown Attorney.

No.9

Court Minutes 26th November 1973

No.9

COURT MINUTES

IN THE SUPREME COURT OF MAURITIUS

On Monday 26th November, 1973

Before Hon. Sir Maurice Latour-Adrien, Chief Justice.

H. Lincoln & Ors. v. Governor General & Ors.

Mr. F. Vallet for applicants files one affidavit, one Notice of Motion and moves in terms of motion paper.

Mr. V. Glover for the respondents draws the attention of the Court that there is apparently a discrepancy between the affidavit and the Notice of Motion i.e. the affidavit in paragraph (2) speaks of a paragraph 32 whereas the Notice of Motion does speak of that at all.

Mr. Vallet moves for a postponement to consider the position. Mr. Glover not objecting, case is postponed to 3/12/73 for Mention.

(sd.) Y. Bhunnoo

for Master & Registrar.

No.10

In the Supreme Court

No.10

Notice of Motion 28th November 1973

NOTICE OF MOTION

TAKE NOTICE in order that you may not plead or pretend ignorance of the same, that the above-named Petitioners, shall on Monday the 3rd day of December, 1973, move the above Court for leave to amend the Petition filed by them in the above matter as follows:-

By adding the following paragraphs after para. 31 of the Petition, viz:-

31.(bis) That since this present Petition was filed, and a preliminary objection argued, Respondent No.2, whilst the matter was still sub-judice introduced in the Legislative Assembly a Bill purporting to amend the Constitution of Mauritius.

31 (ter) That the said Bill which was passed by a majority of votes in the Legislative Assembly and which has received the assent of The Governor General to become an Act of Parliament is null and void to all intents and purposes, at any rate in so far as the bye-elections under reference are concerned.

By adding in para. 32 of the Petition, the following:

(h) Declaring the Constitution of Mauritius (Amendment) Act 1973 to be null and void to all intents and purposes at any rate in so far as the bye-elections under reference are concerned.

AND this for the reasons fully set forth in the affidavit, a copy of which is herewith served upon you.

AND TAKE FURTHER NOTICE that the aforesaid motion shall be made on the day and at the hour aforesaid whether you be present or not.

Dated at Port-Louis, this 28th day of November, 1973.

(sd.) Patrice Lagesse

Of George Guibert Street, Port-Louis.

PETITIONERS' ATTORNEY

TO/

The Respondents abovenamed, at the domicile by them elected in the office of Mr. Crown Attorney.

In the Supreme Court

No.11

Motion Paper 3rd December 1973

No.11

MOTION PAPER

MOTION PAPER:-

Counsel is instructed to move this Honourable Court for an order authorising the Petitioners to amend the Petition filed by them in the above matter as follows:

By adding the following paragraphs after para. 31 of the Petition:

31.(bis) That since this present Petition was filed, and a preliminary objection argued, Respondent No.2 whilst the matter was still sub-judice introduced in the Legislative Assembly a Bill purporting to amend the Constitution of Mauritius.

31.(ter) That the said Bill which was passed by a majority of votes in the Legislative Assembly and which has received the assent of The Governor General to become an Act of Parliament is null and void to all intents and purposes, at any rate in so far as the bye-elections under reference are concerned.

By adding in para. 32 of the Petition, the following:-

(h) Declaring the Constitution of Mauritius (Amendment) Act 1973 to be null and void to all intents and purposes at any rate in so far as the bye-elections under reference are concerned.

AND this for the reasons fully set forth in the herewith annexed affidavit.

Dzted at Port-Louis, this 3rd day of December, 1973.

(sd.) Patrice Lagesse

Of George Guibert Street, Port-Louis

PETITIONERS' ATTORNEY

(sd.) France Vallet

Of Counsel for Petitioners.

No.12

In the Supreme Court

COURT MINUTES

No.12

Court Minutes 3rd December 1973

On Monday 3rd December, 1973

Before Hon. Sir Maurice Latour-Adrien, Chief Justice.

F. Vallet for applicants.

V. Glover for respondents.

Mr. Vallet files affidavit, notice of motion and motion paper and moves to amend his application of the 26th November, 1973.

V. Glover states there is no objection to motion and will file an amended defence in a day or two and moves for a postponement.

Motion granted.

Case will be mentioned on a date to be fixed later -

Mr. Glover states he will raise a point in limine relation to the amended motion, and that the case will have to be fixed for argument on the said point.

Mr. Valet states that this motion is of a very urgent nature.

Case postponed to be fixed later.

(sd.) Y. BHUNNOO

for Master & Registrar.

No.13

No.13

Plea of Respondents

PLEA OF RESPONDENTS

Plea

In Limine Litis

(1) Respondents Nos. 2 and 3 should be put out of cause with costs inasmuch as -

(a) in relation to the Regulations the validity of which is sought to be impugned -

In the Supreme Court

No.13

Plea of Respondents (continued)

(i) Respondent No.2 acted in an advisory capacity only;

(ii) Respondent No.3 had no part whatsoever to play in the making of the Regulations;

(b) the Legislative Assembly has, by virtue of of the Constitution itself, an unfettered right to discuss or vote any proposal for the amendment of the Constitution.

(2) Paragraphs 27, 28, 29 and 30 are subparagraphs (e), (f) and (g) of paragraph 32 of the petition should be struck out accordingly.

(3) (a) Respondents Nos. 2 and 3 should be put out of cause with costs inasmuch as it is not averred that they have, or either or them has, done any act in contravention of the Constitution.

(b) Paragraphs 27, 28, 29 and 30 and subparagraphs (e), (f) and (g) of paragraph 32 of the petition should be struck out in view of the passing of the Constitution of Mauritius (Amendment) Act, 1973.

On the merits

1. Respondents admit paragraphs 1,1(bis), 1(ter), 1(quarter), 2, 6, 7, 8, 9, 10, 11, 13, 14, 15, 16, 17, 18 and 31 of the petition.

2. As regards paragraph 3, Respondents admit that the Respondent No.2 presides over meetings of the Cabinet and that the Cabinet and Respondent No.2 tender advice to the Governor-General but avers that executive authority in Mauritius is exercised by the Government.

3. As regards 4, Respondents admit that Respondent No.3 presides over meetings of the Legislative Assembly but aver that his duties as Speaker are regulated by the Standing Orders of the Legislative Assembly, by Parliamentary practice and by the Constitution.

4. The Respondents admit paragraph 5 but aver that the vacancy as regards the constituency of Riviere des Anguilles/Souillac occurred in 1972.

5. As regards paragraph 12, the Respondents aver

No.13

Plea of Respondents (continued)

that the Representation of the People (Amendment) Act 1973 not merely purported to amend but in fact amended section 41 of the Representation of the People Ordinance, 1958.

6. As regards paragraph 19, Respondents deny that regulations under the title referred to were published and aver that Respondent No.1 had full power to make and did make the Emergency Powers (Dates of Elections) Regulations No.2 of 1973 which were published on the 3rd of September.

7. The Respondents deny paragraph 20 and aver that notice of the change of date for the election was in effect given on the publication, on the 3rd September, 1973, of the Emergency Powers (Dates of Election) Regulations No.2 of 1973.

8. Respondents deny paragraphs 21, 22, 23, 24, 25, 26, 28, 29 and 30.

9. Respondents deny the averment that is contained in paragraph 27 as regards Respondent No.2 and aver that they have no knowledge of the intention of the other Ministers.

10. The Respondents admit paragraph 31(bis) of the Petition.

11. The Respondents deny paragraph 31 ter of the petition and aver that the Parliament of Mauritius has, in accordance with the Constitution effected a valid amendment to the Constitution contained in the Constitution of Mauritius (Amendment) Act, 1973.

12. The Respondents accordingly move that the Petition be dismissed with costs.

No.13

No.14

Amendment to Respondents' Plea

AMENDMENT TO RESPONDENTS' PLEA

AMENDMENT TO PLEA FILED ON 5.12.73

For paragraph (3) (b) of the plea in limine litis substitute the following:-

(3) (b) The petition should be dismissed in view of the passing of the Constitution of Mauritius (Amendment) Act, 1973.

In the Supreme Court

No.15

Interlocutory Judgment 31st January 1974

No.15

INTERLOCUTORY JUDGMENT

JUDGMENT

In this petition, which is directed against the Governor-General, the Prime Minister and the Speaker of the Legislative Assembly, the petitioners originally asked the Court for a judgment -

(a) declaring the Emergency Powers (Dates of Election) Regulations (No.2) 1973 to be null and void to all intents and purposes;

(b) declaring the regulations substituting the 14th January, 1974, for the 10th September 1973 and the 18th February 1974 for the 19th November, 1973 for the day of election and polling date respectively to be unreasonable;

(c) ordering the Respondent No.1 to alter the day of election fixed for the bye-election and to fix it to a date which the Court will find just and reasonable in the circumstances;

(d) making in consequence any order which the Court shall deem reasonable and in particular fixing a maximum delay within which polling is to take place;

(e) prohibiting Respondent No.2 from introducing for debate in the Legislative Assembly any matter having in view an amendment of the Constitution of Mauritius until the four vacancies have been filled by an election according to law;

(f) prohibiting Respondent No.1 from assenting to any Bill passed by the Legislative Assembly having for effect an amendment of the Constitution of Mauritius;

(g) ordering the Respondent No.3 of the Legislative Assembly, not to accept for discussion or debate, nor to allow the members of the Legislative Assembly to put to the note any motion, Bill or other proposal having in view an amendment of the Constitution of Mauritius until the four vacancies have been filled by an election as provided by law.

Upon the motion of Counsel for the respondents a preliminary point, made on their behalf to the

effect that the Prime Minister and the Speaker should be put out of cause, was first heard and the Court reserved its judgment. While the case was under consideration the Constitution of Mauritius (Amendment) Bill 1973 purporting to amend the provisions of the Constitution relating to the holding of bye-elections, was introduced into the Legislative Assembly, was passed by the Assembly, received the Governor-General's assent and became law (Act No. 40 of 1973). The effect of the Act would be impliedly to revoke the Regulations, the validity of which is challenged by the petitioners, and to render imoperative anything done for the purpose of, and in relation to, the holding of bye-elections.

Subsequently to the passing of the Act, the petitioners sought and obtained leave to amend their petition for the purpose of questioning the validity of the Act and adding to their prayers a further prayer that the Court should decree the Act to be invalid.

It is evident that with the passing of the Act any question that might arise with regard to the validity or effect of the Regulations and of anything done under them has become subordinate to the main question whether the Act is valid or not.

There would consequently be no point in deciding any other issue for the moment other than that question of law and we do not propose to decide or to go into any other matter until we have heard the parties on that issue.

(sd.) M. Latour-Adrien
Chief Justice

(sd.) H. Garrioch
Senior Puisne Judge

(sd.) Broopnath Ramphal
Judge.

31st January 1974.

No.16

In the Supreme Court

JUDGMENT

JUDGMENT

No.16

Judgment 1st February 1974

This is an application under Rule 89 of the Rules of the Supreme Court to obtain the attendance of the first two respondents before the Court on the 7th February 1974, for the purpose of obtaining their personal answers. It appears from the record of the main action (Record No. 17635) that the case will be heard on the 7th February. It also appears from a judgment delivered on the 31st January, 1974, that the Court will not decide or go into any other matter until it has heard the parties on a question of law.

Being given that the Court will only hear Counsel's arguments on a question of law on the 7th February, I hold that sufficient ground has not been shown to warrant the making of the order.

I therefore refuse the application.

(sd.) Droopnath Ramphul
Judge

1st February, 1974

No.17

Court Minute 7th February 1974

No.17

COURT MINUTE

On Thursday 7th February, 1974.

Before Hon. Sir Maurice Latour-Adrien, Chief Justice

Hon. W.H. Garrioch, Senior Puisne Judge.

F. Vallet appears for the Petitioners.

V. Glover appears for the respondents.

Vallet calls and examines:-

1. - Yadulla Bhunnoo. S.A.M. (PRINCIPAL COURT OFFICER, Registry, Supreme Court)

Exhibits A,B,C & D

Documents A. B. C & D put in.

No Cross-Examination.

2. Jean Marc David, sworn: Chairman Electoral Supervisory Commission.

Documents E & F put in. *

No.17
Court Minute
7th February
1974
(continued)

Witness is cross-examined by Glover and re-examined by Vallet.

Vallet addresses the Court -

Glover replies.

* Exhibits E & F

(Evidence & Arguments - vide Shorthand Transcript Notes)

The Court Reserved Judgment

(sd.) F. Koo Seen Lin

for Master and Registrar.

No.18

No.18
Petitioners
Evidence
7th February
1974

PETITIONERS EVIDENCE

On Thursday the 7th day of February, 1974

Before: The Honourable Sir Maurice Latour-Adrien, C.J.

The Honourable H. Garrioch, S.P.J.

The Honourable D. Ramphul, J.

Mr. F. Vallet appears for the petitioners

Mr. V. Glover appears for the respondents

Mr. Vallet calls the Master and Registrar of the Supreme Court to produce certain documents.

Mr. Y. Bhunnoo (SAM) represents the Master and Registrar.

MR. VALLETT: Mr. Bhunnoo, you produce the Supreme Court record in the case of Vallet v. Ramgoolam?

A. Yes, My Lord, No. 17064, entered in 1972.

Q. You also produce Supreme Court record in the case of Mathooraming v. The Governor General?

In the Supreme Court

No.18

Petitioners Evidence 7th February 1974 (continued)

A. Yes, record No. 17347 of the 25th April 1973.

Q. At the same time you produce two judgments?

A. Yes, given in Chambers in the case of Lincoln v. The Governor General of Mauritius delivered on the 9th November 1973 and another judgment delivered in the case of Lincoln v. The Governor General of Mauritius delivered on 1st February, 1974.

No cross-examination by Mr. Glover.

Jean Marc David 7th February 1974

Mr. Vallet calls and examines: Mr. Jean Marc David (sworn); Chairman, Electoral Supervisory Commission

MR. VALLET: Mr. David, it is not the first time that we have the pleasure of having you in the witness box. In the last case record of which has been produced, evidence given before this court, you have your comments on postponement of elections, and in the course of which you had drawn the attention of Government that you cannot make any comment because you have not been given any reason?

A. Yes.

Q. There has been since a purported amendment to the constitution.which was passed in all its readings with the certificate of urgency on the 9th November. Has this amendment been referred to your commission for your comments?

A. Yes.

Q. Can you say when you received it for your comments?

A. There were two steps My Lord. On the 6th November 1973, as chairman, I received from the secretary to the Cabinet a letter to which was attached a draft bill and the letter put forward the reasons for the proposed change. I immediately convened a meeting of the Commission for the next day, that is, Wednesday 7th November 1973 at 2.30 p.m.; at the same time, before 2.30 p.m. I was informed by the Attorney General that the proposed draft was going to be altered and the Commission will be supplied with a new draft; but the Attorney General verbally and unofficially gave me an idea of the various changes that would take place to the Bill.

So, when the Commission met on the 7th November at 2.30 p.m., I informed the Commission of the position and we were able unofficially to discuss what we expected the bill to be. Then, on the 7th November, 1973 the very same day, later on, I received a copy of the draft bill from the secretary to the Cabinet and thereupon a meeting of the Commission took place on Thursday the 8th November 1973 in the morning and a further meeting of the Commission took place on the 9th November 1973, at 1.30 p.m. We sent our comments to the secretary to the Cabinet on the draft bill. There had been a previous letter on the 8th November, after our meeting of the 8th November and after our meeting of the 9th November, a final letter was sent.

Q. Your letter was sent on the 9th November at about what time, 3 or 4 p.m.?

A. It must be round about, I should say, 4 p.m.; it was rather a long meeting.

Q. Your comments were sent to the secretary to the Cabinet?

A. Yes.

Q. And not to the Governor General?

A. A copy was sent to the Governor General. I would like to add that on the 9th November 1973, we were no longer interested in the question of the principle of the change that was contemplated. We were interested in the mechanics of the proposed system, because according to the contemplated change it would have been the responsibility of the Electoral Supervisory Commission to fill the various vacancies instead of proceeding by way of bye-elections. So that during a stage of our discussions on the 9th November, we asked to speak to the Solicitor General who very kindly agreed to see us and we communicated verbally to the Solicitor General our views on the mechanics of the proposed system, asking him to convey our comments verbally to the authorities. But immediately afterwards a letter was drafted, which I signed, and sent round about 4 o'clock or slightly later. That was on the Friday 9th November.

In the Supreme Court

No.18

Petitioners Evidence
Jean Marc David
7th February 1974
(continued)

Q. All these verbal conversations with the Attorney General, with the Solicitor General, all these you could not have in writing because there was no time?

A. So far as the verbal conversation is concerned the first part is that the Attorney General sent for me; that was on the 7th, in order to inform me that a change was intended in the structure of the bill. He told me that verbally. As I had a meeting of the Commission, I informed the Commission verbally. It was recorded. So far as the second part of the question was concerned; we knew that it was the intention of Government to consider this bill at the Legislative Assembly on Friday 9th November.

Q. At 4 o'clock?

A. I do not know when. The only thing I knew, it was proposed that the bill would be introduced on Friday 9th November, 1973. The question of time was for me quite irrelevant. We saw certain difficulties relating to the implementation of the system; we thought that the Solicitor General was the proper person to discuss the matter with. He agreed to come to the meeting. We discussed it, naturally verbally, we told him: these are our comments, the Commission is gratified to see that the Solicitor General had amended certain things in the bill in the light of our consideration.

Q. When you say that the Commission at a certain stage was no more interested with the actual bill but with the mechanics; actually the Commission felt that it was scheduled for introduction in the Assembly, and you knew that there was a certificate of urgency attached to it on the 8th November 1973?

A. Immediately we looked at the bill, we saw that the change envisaged in the bill was of an essentially political nature and we felt that the Commission was not called upon to comment on this aspect of the matter. It was a question whether vacancies should be filled in by way of bye-election or by way of appointment. We felt that that was a political decision. We did not comment upon that. We saw that we would have the responsibility of implementing the system if it was passed, therefore we gave

our attention to the mechanics.

Q. In fact when your final comments were sent to the Governor General and to the secretary of the Cabinet, the Assembly was already in session considering the bill?

A. So I understand. I would not say considering the bill, I would say that the Assembly was in session. But whether the Assembly was considering the bill, I am afraid I cannot say. I understand that the Assembly met on that day at 3.30 p.m., but I would not like to swear at that. We started the meeting at 1.30p.m.

Q. Did you send a copy of your comments to the secretary to the Cabinet; there were two comments?

A. We wrote a letter on the 8th November, but the actual comments on the mechanics were filed on the 9th November, 1973.

Letters put in, marked "E" and "F"

Exhibits "E" and "F"

Q. You drew the attention that the time given to you was unduly short?

A. Yes.

Q. These amendments concern the filling of four vacancies, the one in Curepipe-Midlands, occurring as a result of the resignation of Mr. Gaetan de Chazal elected for that constituency?

A. I think the bill was of a general nature, but of course specifically to have an immediate effect on those vacancies.

Q. I say the vacancy which occurred in Curepipe-Midlands was as a result of the resignation of a member, Gaetan de Chazal?

A. Yes.

Q. It was the same, concerning the resignation of Mr. Virsh Sawmy, member for Triolet-Pamplemousses?

A. Yes.

Q. Mr. Gaetan de Chazal is still alive, Mr. Virsh Sawmy as well, as you know?

In the Supreme Court

No.18

Petitioners Evidence Jean Marc David 7th February 1974 (continued)

A. Very much so.

Q. The other two vacancies concern those members who are unfortunately dead

A. Yes.

Cross-Examined

XED by Mr. Glover

Q. Mr. David, would I be correct in assuming that the conveyance of your final comments verbally to the Solicitor General were meant by the Commission to be conveyed to the Governor General?

A. It was; in fact we made reference to that in our letter.

Q. You have also mentioned the Commission's gratification. Perhaps to be more precise. Would I say that the amendments which the Commission suggested should be made to the draft bill were in fact made?

A. They were all made.

Q. Would I be correct in assuming that when these comments were conveyed verbally and subsequently put in writing, the Commission at that time was satisfied that it had no further comments to offer?

A. That is correct.

Re-Examination

Re-examined by Mr. Vallett:

Q. You were satisfied that you had no comments to offer because you considered it to be a matter of a political nature?

A. We mentioned that in both letters.

Q. Because of the political nature of the bill?

A. So far as the Political nature of the bill was concerned, we made comments with a view to Government accepting our point of view and effecting the necessary amendments to the bill

in case Government decided to carry on with the introduction of the bill. We did not want to have an act which would give us difficulty for the implementation of the system.

COURT

After you had made these comments you had nothing to add?

A. Yes.

MR. VALLET: On the propriety of passing the bill. You say it is of a political nature, we shall not comment on this. If it passes?

A. Not if it passes, but if it is introduced, we would like it to be introduced in a certain way which according to our lights would avoid us any difficulty.

No.19

JUDGMENT

JUDGMENT

Following the judgment delivered by this Court on the 31st January last, Counsel have been heard on the question whether the Constitution of Mauritius (Amendment) Act, 1973, (for convenience referred to as "the Act" in this judgment) or any of its provisions is invalid or not.

Broadly stated the main thesis of the petitioners is that the whole Act is void because its provisions conflict with other provisions of the Constitution and violate the tenets of true democracy. Subsidiarily the petitioners contend that, even if the Act is not void for those reasons, its section 5 at least, which makes transitional provisions, should be struck down as being discriminatory in its effect.

In presenting his argument to the Court, Counsel for the petitioners has thought it of relevance at the start to recount the events that have led to these proceedings and the earlier of which have formed the basis of two previous constitutional cases decided by this Court /Vallet v. Ramgoolam & anor (SCR No.17064) and Mathoorasing

In the Supreme Court

No.19

Judgment of Hon. Sir Maurice Latour-Adrien C.J. and Hon. W.H. Garrioch S.P.J. 14th May 1974 (continued)

v. Governor-General (SCR No. 17347)7. This evocation of the past had, it seems, two objects the first was to demonstrate the course of systematic bad faith on the part of the Government in concealing the real purpose of the several pieces of legislation by which it had endeavoured to deprive the citizens of their constitutional right of having bye-elections held and of the consequent opportunity to express their views about the way in which the country was being ruled. Such bad faith had been disclosed the more patently by the manner in which the Government had by last minute and retroactive legislative measures foiled any attempt to obtain from the Court the invalidation of the enactments challenged by the petitioners. It was still more apparent from the conduct of the defence which had consisted all along in denying facts on which the petitioners relied and which their opponents knew to be true. The last manifestation of it was to be seen in the plea given on behalf of the Prime Minister (the second respondent to this action) traversing the petitioners' averment that he and the other Ministers intended to have the Constitution amended by the Legislative Assembly, when the evidence showed that at the very moment this denial was being put forward, the bill which was to become the Act was in preparation. The second object was to call the Court's attention to the menace to democracy which the action of Government is suppressing bye-elections would constitute if permitted to prevail.

The point which Counsel sought to make out of this reference to past happenings was that whereas in the previous cases in which the validity of the various enactments by which Government had wished, in his view, to infringe the right of the electors and prospective candidates to have bye-elections in time, the Court had not found it possible to strike down those enactments because the evidence adduced did not, in the opinion of the Court, conclusively establish such bad faith and undemocratic tendencies on the part of those responsible for the passing of those enactments as to warrant their avoidance, in the present action, the realisation of all that the petitioners had alleged and foretold left no room for any doubt as to the motives and goal of Government.

It appears to us that this argument of the petitioners' counsel proceeds from wrong premises. In the previous cases cited by him, the Court had to pronounce upon the validity, first of an Act of Parliament with regard to a discretionary power

which it conferred on the executive of determining the times of bye-elections, and then of subordinate legislation or administrative orders providing for the postponement of those elections. The Court held that the exercise of the discretionary power vested by that Act (not the Act itself) on the one hand, and the subordinate legislation on the other, were all subject to the test of good faith and reasonableness because the Constitution, as in force at the moment of decision, required that the time-table for bye-elections should be worked out by the authorities in such a way as to exclude bad faith and unreasonableness. The Court was then interpreting and applying the law, both constitutional and ordinary, as it was at that time and in the factual context established also at that time. For this reason, we think that the previous decisions of this Court afford no assistance to the petitioners in the present instance where the intrinsic validity of an Act of Parliament amending the Constitution itself is in issue. When it had to deal with such an Act, in Berenger v. Governor-General & anor (SCR No. 17275), this Court said:

> We have deliberately refrained from asking any reference in this judgment to the evidence which was adduced by the respondent presumably with a view to establishing that Parliament had acted reasonably and in good faith when it had altered s.57 of the Constitution. We consider that the question whether or not Parliament had acted reasonably and in good faith is irrelevant. This Court has to be satisfied that the alteration was made in accordance with the procedure laid down in the Constitution and that it is not inconsistent with the Constitution. In our view, the Court cannot go beyond this and enquire as to the reasonableness of the Act or the motive behind the making of it. The legislature does not have to satisfy the Court that it acted reasonably and in good faith. Whether or not it has a moral duty to satisfy the electorate it is not for this Court to say. We consider it highly undesirable that the Court should be put in a position where it might feel tempted to express opinions on matters of a purely political character. It is our opinion that the Court should not be expected to deliver certificates of reasonableness or unreasonableness, good faith or bad faith, unless it is required by law to do so. In the present case, as we have already said,

In the Supreme Court

No.19

Judgment of Hon. Sir Maurice Latour-Adrien C.J. and Hon. W.H. Garrioch S.P.J. 14th May 1974 (continued)

the question of reasonableness or good faith does not arise.

The proper question for the Court, therefore, at this stage is not whether the petitioners in the other cases were right or wrong in fore-knowledge, foresight and forebodement. Facts are now immaterial except in so far as it would be necessary to enquire whether the procedure laid down in the Constitution itself for its alteration has been complied with. Once the question of procedure has been settled, the only question that will arise will be one of law, whether there exists in the Constitution itself any limitation on the power of Parliament to amend its provisions in the manner in which the Act has done. For that purpose the way in which the defence has been conducted is immaterial. It has even become irrelevant, and it is neither the time nor the place for the Court, to enquire whether there was or is any justification for such conduct

We shall now turn to the question of procedure. This is governed by section 47 of the Constitution which it is necessary to set out in full. The section reads:

> 47.- (1) Subject to the provisions of this section, Parliament may alter this Constitution.
>
> (2) A bill for an Act of Parliament to alter any of the following provisions of this Constitution, that is to say:
>
> (a) this section;
>
> (b) sections 28 to 31, 37 to 46, 56 to 58, 64, 65, 71, 72 and 108;
>
> (c) Chapters II, VII, VIII and IX;
>
> (d) schedule 1; and
>
> (e) Chapter XI, to the extent that it relates to any of the provisions specified in the preceding paragraphs,
>
> shall not be passed by the Assembly unless it it is supported at the final voting in the Assembly by the votes of not less than three-quarters of all the members of the Assembly.
>
> (3) A bill for an Act of Parliament to

alter any provision of this Constitution (but which does not alter any of the provisions of this Constitution as specified in sub-section (2) of this section) shall not be passed by the Assembly unless it is supported at the final voting in the Assembly by the notes of not less than two-thirds of all the members of the Assembly.

(4) In this section references to altering this Constitution or any part of this Constitution include reference -

(a) to revoking it, with or without re-enactment thereof or the making of different provision in lieu thereof;

(b) to modifying it, whether by omitting or amending any of its provisions or inserting additional provisions in it or otherwise; and

(c) to suspending its operation for any period, or terminating any such suspension.

Now, it is not disputed that the Bill for the inpugned Act was one purporting to amend certain sections of, and the first schedule to, the Constitution, the alteration of which required the support of three-fourths of all the members of the Assembly. Nor is it contested that the Bill did have that support and that it was, accordingly, passed in accordance with the provisions of section 47. But it is contended on behalf of the petitioners that the Bill was subject to one more procedural requirement, namely, its submission to the Electoral Supervisory Commission and to the Electoral Commissioner under section 41(3) of the Constitution which requirement, it is contended, had not been fulfilled in respect of the Act. The effect of that provision has been expounded in Vallet v. Ramgoolam & anor (supra) and the requisites of a valid reference to the Commission and Commissioner there laid down. Counsel for the petitioners called the Chairman of the Electoral Supervisory Commission with a view to establishing that the reference of the Bill for the Act, which had admittedly been made to the Commission, did not satisfy the test formulated by the Court having regard to the very short time allowed to the Commission for studying and commenting on its contents.

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No.19

Judgment of Hon. Sir Maurice Latour-Adrien C.J. and Hon. W.H. Garrioch S.P.J.
14th May 1974
(continued)

Upon such an issue the question for the Court is, in our view, not what length of time should have been afforded to the Commission or Commissioner in any circumstance or whether the Commission or Commissioner could properly exercise its or his functions in the period allotted, but whether it was as a fact possible for the Commission or Commissioner to perform those functions within the time at its or his disposal. This is a question of fact which the Commission itself or the Commissioner himself is better placed to answer. In the present instance, we are satisfied upon the evidence of the Chairman of the Commission that the Commission had sufficient time to consider and comment on the Bill; the more so as the Court has had it from the Chairman that the Bill was subsequently amended so as to take account of recommendations made by the Commission.

In dealing with the point, we have assumed that section 41(3) of the Constitution applies to a bill for the alteration of the Constitution as it applies to any other bill. It is, however, a question which we think should be left open whether a bill to amend the Constitution in respect of which a special procedure is laid down in section 47 of the Constitution in particular a bill dealing not with the conduct or machinery of elections but with the electoral system itself is additionally subject to section 41(3).

With procedure satisfied, the next question is whether, as urged on behalf of the petitioners, the Act in so far as it modifies the electoral system of Mauritius is invalid in that it offends against the overriding idea of democracy enshrined in the Constitution. Counsel for the petitioners has made several points in support of his proposition, for all of which he submitted he could find authority in this Court's own pronouncements in the previous constitutional cases. It was for this Court, he argued, to determine what was the form of democracy according to which Mauritius should be governed and what this form of democracy allowed or forbade to be done in any given circumstance. The Court had already held that the democratic form of Government granted to this country by the Mauritius Independence Order, 1968, and declared by section 1 of the Constitution was one which closely followed the pattern of the United Kingdom and that that form of democracy required that periodical elections should be held to allow the people to have in Parliament representatives of their choice.

In the United Kingdom bye-elections were still regularly held when necessary. The effect of the Act, counsel concluded, would be to deprive the citizens of the right by their votes to give expression to their dissatisfaction of the manner in which the country was being administered. It constituted a step in the execution of a clear design on the part of a majority of members in Parliament to render themselves unmovable even against the wish of the people. The existence of other democracies in the world where bye-elections were dispensed with did not alter the position, for if their constitutions were looked at, it would be found that the method resorted to was to provide for second choice candidates for whom the elector was also asked to cast his vote, so that the substitute was, in effect, also elected by the electorate. That was the essential difference from the situation created by the Act. The persons by whom the members of the Assembly elected to represent constituencies would be replaced would not be of the electors' choosing. In fact, they were unreturned candidates who would be imposed upon the electorate of the constituency against the will clearly manifested by them at the time of election. This was made the more conspicuous if one bore in mind that, hypothetically speaking, the process of replacement envisaged by the amendment brought about by the Act could extend to any number of vacancies, so that by that process the whole composition of the Assembly could be changed by the importation of non-elected persons. The electoral structure instituted by the first schedule to the Constitution provided for the election of three members to represent constituencies. A clear distinction was made throughout the Constitution between those members and those selected to fill additional seats. If the Act were allowed to have effect, constituencies would no longer be represented by members of their choice, but by outsiders.

Counsel's argument disregards, we think, an essential aspect of the Court's rulings in the decisions cited, which is emphasised in this passage from the judgment in Vallet v. Ramgoolam (supra) where the Court says in conclusion with respect to the right of the people to elect their representatives in Parliament -

> It is quite evident, therefore, that any law that would have for effect to suppress that right or to render it nugatory would be inconsistent with the Constitution, <u>as now in</u>

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(continued)

force, and void to that extent.

We have underlined the words "as now in force" which we think sets the Court's pronouncement in its true perspective. The Court is by this phrase in effect drawing a most material distinction between laws enacted in the exercise of ordinary and general legislative powers and laws enacted in the exercise of what may be terms (and has in fact been referred to by Commonwealth and other courts and text-book writers) as constituent powers. The former kind of power is conferred by the Constitution upon Parliament by section 45 which lays down that, subject to the provisions of the Constitution, Parliament may make laws for the peace, order and good government of Mauritius. This power is thus expressly made subject generally to the provisions of the Constitution. No law enacted in pursuance of that power can run counter to the Constitution which, by section 2, is the supreme law of the land. When passing upon the validity of the enactments concerned in the previous cases, other than Acts amending the Constitution, the Court had, therefore, to test that validity by reference to what the Constitution prescribed, permitted or forbade at the time. The constituent power of Parliament is, on the other hand, conferred by section 47 of the Constitution which subjects its exercise solely to the requirements of that section itself, that is to say, conditions it upon the obtention of a specified number of votes in the Assembly. Beyond that no restriction is placed by the Constitution on the amplitude of Parliament's power to alter its provisions. For Counsel's submission to succeed one would have to postulate some supra-constitutional concept deduced from section 1 of the Constitution to which even the provisions of the Constitution are subordinate, and this in the teeth of section 2 which makes it the supreme law.

As a matter of fact a similar contention was advanced in Berenger v. Governor-General (supra) in which the validity of Act No.39 of 1969 amending section 57 of the Constitution for the purpose of extending the duration of the present Parliament was challenged on the ground, among others, that it offended against section 1 of the Constitution. The Court said in answer to that contention: "When the Constitution itself permits the alteration of section 57 which deals with the prorogation and dissolution of Parliament and lays

down the procedure for such alteration we do not understand how it can be said that the alteration, when made, is contrary to the declaration contained in section 1 of the Constitution".

It may still be useful to add a few words concerning section 1 of the Constitution. As rightly observed by counsel, this Court in Vallet v. Ramgoolam (supra) held that by that section our Constitution makers had intended to bestow upon our people a form of democracy akin to the British democracy. The section, however, if left to itself, would say either too much or too little. Actually the idea of a democratic form of government which it proclaims in the abstract is concretised by these other provisions of the Constitution which create and regulate the essential components of a democracy. Such are these provisions which deal with fundamental rights and freedoms of the citizens, the composition, duties and functions of the executive, and of the Legislature, the election of members of the Legislative Assembly, the electoral system, the duration of the Assembly, an independent judiciary, and so on and so forth. However, the Constitution itself has made all those provisions, without exception, alterable by the Parliament of the day. The procedure that has been laid down in section 47 simply makes it more or less difficult to do so depending on the subject-matter of the alteration. So Parliament could, if supported by the appropriate majority, legally change much of the original structure of our Government and endow our democracy with a new face, be it prettier or less attractive.

What Counsel for the petitioners has been striving to warn the Court against as constituting a threat by the party in power to seat itself permanently to the detriment of true democracy ought to be a common feature of any constitution that abandons to Parliament the constituent power of amending its provisions indiscriminately, subject only to procedural restrictions. One could without strain add a few touches to the sombre picture painted by counsel by pointing to more anomalies or incongruities that might stem from the political set up created by the Act, but that again would be of no avail: While the Court will unhesitatingly, conscious of its solemn duty as guardian of civic rights, seize every opportunity of slowing down to the utmost whatever it feels to be an erosion of the rights of citizens under true democratic rule, it is obvious that its desire for intervention must yield before a clear and explicit text. All

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this is to say that if ever and whenever an evil of the brand foretold by the petitioners were thought to have been or to be likely to be wrought by those at the helm of Government the antidote is not in this Court's giving; the issue must be fought at the bar of public opinion and the people be left to seek their own way of venting their dissatisfaction of these who rule them. This may not be the ideal course and is naturally fraught with danger, but the Court cannot help it unless in its turn it were prepared to elevate itself above the law and assume powers which it does not possess.

The European Convention of Human Rights to which the petitioners' counsel made a passing reference, and to which this Court itself alluded in Vallet v. Ramgoolam is of no relevance here. While the Court will willingly turn to the Convention and to the decisions of the European Court of Human Rights for guidance when it has to determine the meaning and scope of the fundamental rights and freedom embodied in our Constitution, it could plainly not see in the Convention some kind of supra-national law to which the municipal law of this country is subordinate unless and until our minicipal law itself made provision for its overriding by the Convention. If ever the Government could be taken to task for infringing the terms of the Convention, the forum for an eventual complainant must be some other than this Court.

Counsel for the petitioners has referred the Court to the recent constitutional case decided by the Supreme Court of India (Bharati v. The State of Kerala and anor) and seemed to suggest that it supported the proposition that the power of Parliament to amend the Constitution was, apart from the limitations expressed in section 47, also bridles by some kind of inherent concept of unchangeability when it chose to interfere with some fundamental principles embodied in the Constitution. However tempting it would be to review at length, just for the pleasure, that monumental achievement in forensic science and judicial learning, we do not deem it necessary to advert to it any more than to emphasize a most substantial difference between the case and ours. The learned Indian judges were there essentially concerned with the proper construction to be placed on Article 368 of the Constitution of India, which provides for the amendment of that Constitution, and with the question whether the power to amend

given by that Article extended to Article 13(2) which, in its original form, enacted that the State shall not make any law which takes away or abridges the Fundamental Rights. What actually supplied immense scope to Bench and Bar alike for discussion and analysis was principally, if not only, the contested signification of the word "law" in Article 13(2) and of the word "amend" in Article 368. One of the views held was that "law" in Article 13(2) included an Act for the amendment of the Constitution under Article 368 and that, consequently, the Fundamental Rights were involuable. Another view was that "law" did not comprise an Act amending the Constitution, but that the power to amend the provisions of the Constitution, including the Fundamental Rights did not extend to damaging or destroying the basic features of the Constitution. A third view was that Parliament's amending power under Article 368 was unfettered and unlimited. Thus, the ambiguity of the texts which they had to construe drove the judges to call in help all the rules of constitutional interpretation. This is not so with section 47 of our Constitution subsection (4) of which sets out a most comprehensive definition of what an alteration of the Constitution can be and which refere to all the provisions of the Constitution leaving none out of reach.

The Petitioners' counsel appears also to have made it a point that the Act clashed with some of the existing provisions of the Constitution which the Act did not expressly amend. If that were the case, there would be no ground in that inconsistency for invalidating the amending provisions which, if clear and explicit, must be taken as amending any inconsistent existing provision, provided the latter provision is one which can be amended by the procedure (that is, one passed at the Assembly by the prescribed number of votes) required for its alteration /cf. Kariapper v. Wijesinha (1967) 3 All E.R. 485/.

For those reasons, we hold that the amendments made to the Constitution by sections 2, 3 and 4 of the Act have been validly made.

We shall now address ourselves to the petitioners' second proposition, that section 5 of the Act, at least, should be struck down as being in violation of the prohibition contained in the Constitution against discriminatory laws or measures.

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14th May 1974
(continued)

We think this is the proper place for us to comment on the manner in which the petitioners have presented their case to this Court. The procedure for bringing actions founded on an infringement of the rights of a person under the Constitution is regulated by the Constitutional Rights (Application for Redress or Relief) Rules, 1967. Two modes of application are provided for. The first, which is by way of plaint with summons, is the one prescribed for an application under section 17(1) of the Constitution in respect of an alleged contravention of a provision of Chapter II of the Constitution which deals with the protection of fundamental rights and freedoms of the individual; the second, which is by way of petition, is that prescribed for an application under section 83(1) of the Constitution in respect of an alleged contravention of a provision of the Constitution (other than Chapter II). In both forms of application the applicant is required to set out in his pleading the provision or provisions of the Constitution which he alleges to have been or to be likely to be contravened in relation to him.

Now, the present action has been brought by petition, which was an indication that the petitioner was not relying and did not intend to rely on any breach of the provisions of Chapter II of the Constitution. The petition in its original form did not refer to any particular provisions of the Constitution apart from section 35(3) which has to do with the issuing of writs for bye-elections. It alluded generally to the letter and spirit of the Constitution, to the object and purpose of both the constitutional and legal requirements relating to the holding of elections and to the idea of democracy in the Constitution. The amendments made to the petition for the purpose of challenging the validity of the Act have not altered the position. In particular, the additions made contain no mention either of section 41(3) of the Constitution, which provides for reference to the Electoral Supervisory Commission and Electoral Commissioner of legislation dealing with some aspects of the electoral law or of section 16 of the Constitution which prohibits discrimination. It appears, therefore, that the issues raised by the petitioners in reliance upon those sections were so raised in breach of the rules. In fact, the Court when delivering its interlocutory judgment was then unaware that any such issue was to be raised and

for that reason had ruled that no other question arose at that stage than the question of law whether the Act was valid or not. It so happens, however, that the petitioners have produced evidence by the deposition of the Chairman of the Electoral Supervisory Commission with a view, as it appeared from their counsel's argument later, to establishing a contravention of both sections 16 (1) and 41(3) of the Constitution. Whether he should have been allowed to lead that evidence, it is too late to ascertain, (the passing of the Act while the proceedings were pending might excuse, in some measure, confusion in the petitioners' line of attack and slips on the part of all concerned). But it is certainly not too late to examine the implications of the petitioners' mode of pleading. The statement of policy made by this Court in Vallet v. Ramgoolam, that in constitutional cases of importance no useful purpose would be gained by an insistence on form which would have for consequence only to postpone a decision on the merits, must not be taken as an encouragement of any laxity in the conduct of a case. What must here be considered is not a mere omission on the part of the petitioners to specify the provisions of the Constitution they had in mind to invoke, which could have been set right by an amendment applied for in time. It is not even a mere wrong choice of originating process in so far as the issue of discrimination was concerned, but their consequence which has been that evidence has one-sidely been placed before the Court on the factual aspects of questions which the petitioners intended to raise under sections 16 and 41(3) of the Constitution, so that, at least as regards the issue of discrimination, that aspect has not been fully canvassed. The result is that, while the Court has been able to decide the point in respect of the alleged contravention of section 41(3) it finds itself unable to make a pronouncement on the issue raised under section 16, the more so as more than one question of law will arise from that issue which have not, or scarcely been touched upon by counsel on both sides.

It is here necessary to state the respondents' answer to the petitioners' second proposition. It took two aspects. First, on the facts, it was contended that no sufficient evidence had been ushered to establish positively that section 5(2) of the Act was discriminatory on one of the several grounds listed in subsection (3) of section 16 of the Constitution; secondly, it was submitted, in law,

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that at the time the Act was passed there was in force a proclamation such as provided for in section 18 of the Constitution the effect of which was to make it lawful to derogate from the provisions of section 16.

The respondents' first point is covered by what we have already said with respect to the sufficiency of the evidence on record. Their second point gives rise to some of the questions of law which we say require to be more deeply looked into. First, the petitioners' would have to satisfy the Court concerning their locus standi with respect to the alleged breach of section 16; in other words, that that section has been contravened in relation to them. The second question derives from the distinction upon which we have founded our conclusion on the petitioners' first proposition, that is, the distinction between Parliament's constituent powers and its ordinary legislative powers, the point being whether section 5(2) of the Act can be said to have been enacted in exercise of Parliament's constituent powers; the third and following, which will only arise if the preceding is answered in the negative, are respectively: (a) does Proclamation No. 17 of 1971, by which a derogation from section 16 of the Constitution was made permissible, having regard to its lack of specificity, satisfy the requirements of the proviso to section 18(1) of the Constitution under which it purported to be issued in so far as section 5(2) of the Act would be concerned; (b) assuming that the answer is in the affirmative, does section 5(2) of the Act come within the exception laid down in section 18(1) of the Constitution?

In view of what precedes we are of opinion that the Court cannot and should not proceed to a determination of the petitioners' second proposition which should simply be overruled for the time being.

We accordingly hold that the petition should be dismissed but, having regard to the circumstances, we are of opinion that no order should be made as to costs.

(sd.) M. LATOUR-ADRIEN
Chief Justice

(sd.) W.H. GARRIOCH
Senior Puisne Judge.

14th May, 1974.

No.20

JUDGMENT

In the Supreme Court

No.20

Judgment of The Hon. D. Ramphul J.

14th May 1974

JUDGMENT

I have had the advantage of reading the judgment of My Lord the Chief Justice and my learned brother the Senior Puisne Judge and I agree that the petition should be dismissed for the reasons given therein. I only propose to add a few observations.

The two main questions which the Court is asked to decide are: (i) Is the Constitution of Mauritius (Amendment) Act, 1973, void? (ii) Is section 5 of the said Act in conflict with sections 16 of the Constitution which provides for protection from discrimination?

I shall deal with the second question first. Nowhere in the amended petition is it alleged that section 5 of the Act contains a provision which is discriminatory either of itself or in its effect. Nor was any evidence adduced to show that the section afforded different treatment to different persons attributable wholly or mainly to their respective descriptions by race, caste, place of origin, political opinions, colour or creed. (See s. 16(3) of the Constitution). It was only in the course of his arguments that learned counsel for the petitioners raised the question of discrimination for the first time. And even then, his contention was that the section was discriminatory because it offered Mr. Dev Virsh Sawmy, an elected member who had resigned his seat, the option to resume his seat in the Legislative Assembly, but did not offer a similar option to another elected member, Mr. Gaetan de Chazal, who too had resigend his seat. In my opinion, this fact does not make the provision of the section discriminatory within the meaning of section 16 of the Constitution. Discrimination cannot be presumed: it must be proved, and the proof must consist of facts showing, or tending to show that the different treatment afforded to different persons was attributable wholly or mainly to their respective descriptions by race, caste, place of origin, political opinions, colour or creed. As no such evidence was put before the Court, I must conclude that discrimination has not been proved.

There is another reason why the petitioners

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Judgment of The Hon. D. Ramphul J. 14th May 1974 (continued)

must fail on this question of discrimination. Had they proceeded under section 17 of the Constitution, which deals with the enforcement of the protective provisions of Chapter II, they would have had to allege - and prove - that the provisions of section 16 of the Constitution had been contravened in relation to them. Their petition contains no such allegation. The present action has been brought under section 83 of the Constitution. Before the Court may entertain such an action, it must be satisfied that there is an allegation that a provision of the Constitution (other than Chapter II) has been contravened and that the interests of the petitioners are being or are likely to be affected by such contravention. Even if the Court were to entertain in the present action the petitioners' allegation of discrimination (which, in my opinion, it should not), in the absence of any evidence showing that the petitioners' interests were being or were likely to be affected, it would still be bound to refuse to make a declaration to the effect that section 5 of the Act is discriminatory either of itself or in its effect. The proviso to s. 83(2) of the Constitution clearly lays down that -

> .....the Supreme Court shall not make a declaration in pursuance of the jurisdiction conferred by this subsection unless it is satisfied that the interests of the person by whom the application under the preceding subsection is made [.....] are being or are likely to be affected.

I shall now consider the petitioners' allegation that the Constitution of Mauritius (Amendment) Act, 1973, is void because it acts against the declaration contained in section 1 of the Constitution.

Section 1 of the Constitution has, in a number of recent cases, been the subject of lengthly arguments and pronouncements of this Court. The section simply declares that "Mauritius shall be a sovereign democratic State". Much has been said about the concept of democracy but nothing has been said about the word "sovereign" which, in my view, is the most important word in the declaration. This Court is not concerned with the political aspect of sovereignty. It is, however, very much concerned with its legal aspect. In Constitutional law, a sovereign State is a legal order in which power is exercised by an absolute and determinate

authority. The power exercised by that authority is unlimited, and it may even act unwisely or unjustly because, for the purpose of legal theory, the character of its actions is irrelevant and the law it makes must be obeyed and cannot be questioned on the ground of unreasonableness or bad faith. In law, therefore, a sovereign State imples the existence of a sovereign or supreme authority. The Constitution, which declares that Mauritius shall be a sovereign democratic State, has, in conformity with well-established constitutional principles, appointed Parliament as the supreme authority without which there can be no real sovereignty. It has been said that, although Parliament is legally the supreme authority, the real supreme power is exercised by the electorate because a Parliament that acts contrary to the will of the people will soon cease to be a Parliament. But I am here verging on the political nature of sovereignty, and it is not within the province of this Court to delve into it.

It may be argued that the legislative power of Parliament is not unlimited because it is stated in section 2 of the Constitution that the Constitution is the supreme law of Mauritius and if any other law is inconsistent with the Constitution, that other law shall, to the extent of the inconsistency, be void. If there is any truth in this argument, then Mauritius cannot be said to be a sovereign State, and one may be justified in saying that section 1 of the Constitution is in glaring conflict with section 2. But there is no contradicition, and the reason is simple; Section 47 empowers Parliament to alter the Constitution. In fact, the section lays down the procedure for the alteration of the Constitution and empowers Parliament to revoke it, modify it or suspend its operation for any period. In the exercise of its power under section 47 Parliament may even make a new Constitution.

There is another observation that I should like to make. It concerns the type of democracy to which reference is made in the Constitution. In my opinion, one must not go outside the Constitution to discover the form of democracy which obtains in Mauritius. The Constitution itself prescribes the form. This form, however, may be altered by an alteration of the Constitution. It is therefore futile to consider the conventions of the British Constitution in order to discover the form of democracy that obtains in Mauritius. Many lawyers,

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Judgment of The Hon. D. Ramphul J. 14th May 1974 (continued)

including well-known jurists, believed, until recently, that the conventions of the British Constitution had been impliedly incorporated into the British made written Constitutions of former British Colonies. There is, in my view, no foundation for such belief. The case of Adegbenro v. Akintola and Sir Adoremi [1963] 3 W.L.R. 63 throws some light on this important aspect of Constitutional Law. S.33 (10) of the Constitution of Western Nigeria empowers the Governor to remove the Premier from office but lays down that the power shall not be exercised "unless it appears to him that the Premier no longer commands the support of the majority of the members of the House of Assembly". After receiving a letter purported to be signed by 66 out of the 124 members of the House of Assembly to the effect that they (the 66 members) no longer had confidence in the Premier, the Governor dismissed Chief Akintola, the Premier. The latter applied to the Supreme Court inter alia for a delcaration that the Governor was wrong to have exercised his power to remove him from office under s.33(10) of the Constitution without prior decision or resolution on the floor of the House of Assembly showing that he no longer commanded the support of the majority of the House. It was submitted on the Premier's behalf that the Governor could only exercise his power to remove after an adverse vote in the House of Assembly. It was also argued that s. 33(10) "was an attempt to write into the Constitution a convention of the English Constitution and its interpretation should thus be based on the way the convention had worked historically and the state it had reached in 1960 when it was embodied in the Nigerian Constitution". The majority of the Court, including the Chief Justice, accepted the submission that s.33(10) was an attempt to write a convention into the Constitution and ruled that the Governor had wrongly exercised his power. In a dissenting judgment, Brett F.J., while conceding that the clearest and most orthodox way in which a loss of confidence in the Premier could be proved was by an adverse vote in the House, refused to import into the written Constitution of Nigeria a convention of the British Constitution. He therefore found that the Governor had exercised his power in accordance with s.33(10). On appeal to the Privy Council, the judgment of the majority was overruled and the minority judgment upheld. Their Lordships accepted the view that it was dangerous for the Governor to have acted on the strength of anything other than actual votes in the House, but observed that -

"the arguments are considerations of policy and propriety which it is for him to weigh on each particular occasion: they are not legal restrictions which a court of law interpreting the relevant provisions of the written Constituion can import into the written document and make it his legal duty to observe".

In short, the Privy Council refused to interpret the subsection of the written Constitution of Nigeria by reference to a convention of the British Constitution. It also refused to read in the subsection under reference something that was not there.

As I said earlier, I agree that this petition should be dismissed. I also agree that no order should be made as to costs.

(sd.) Droopnath Ramphul Judge.

14th May, 1974

EXHIBITS

Exhibits

EXHIBIT "E"

Exhibit "E" Letter Jean M. David to Secretary to the Cabinet 8th November 1973

LETTER TO JEAN M. DAVID TO SECRETARY TO THE CABINET

Sir, 8th November 1973.

With reference to your letters No. 1091/24 of the 6th and 7th November last, this is to inform you that the Commission considered the draft Bill in question this morning.

The Commission has noted with satisfaction that reasons have been given to it for the introduction of the proposed legislation.

It will be appreciated that the time given to the Commission for the consideration of the draft Bill has been unduly short, especially in a matter of such importance, and its deliberations have accordingly been affected - the more so as the Commission has in the course of its deliberations been deprived of the expertise of the Electoral Commissioner who was not in attendance.

As the change envisaged in clause 2 of the Bill is of an essentially political nature, the Commission does not feel called upon to comment upon it.

On the other hand, as the Commission would eventually have the responsibility for implementing the proposed method of filling vacancies in the Assembly, the Commission wishes to raise the following point on that aspect of the Bill in question:

Exhibits

Exhibit "E" Letter Jean M. David to Secretary to the Cabinet 8th November 1973

Reference clause 3: In the admittedly unlikely, but still possible, event of there being no unreturned candidate belonging to the community and the party to which the member who has vacated his seat belonged at the time of the election, the seat would as a result of the proposed amendment remain unfilled.

I am sending a copy of this letter to H.E. the Governor-General and the Solicitor-General.

I am, Sir,
Your Obedient Servant,
(sd.) Jean M. David Chairman.

The Secretary to the Cabinet,
Prime Minister's Office,
Port-Louis.

Copy to: H.E. The Governor-General
the Solicitor-General.

Exhibit "F" Letter Jean M. David to Secretary to the Cabinet 9th November 1973

EXHIBIT "F"

LETTER JEAN M. DAVID TO SECRETARY OF THE CABINET

CONFIDENTIAL

ESC/28

Electoral-Supervisory Commission,
Port Louis, Mauritius.

9th November, 1973

Sir,

Further to my letter of the 8th November last, this is to inform you that, after consultation with the Electoral Commissioner, the Commission met anew today and with the Electoral Commissioner considered further the draft Bill in question.

The Commission, having now had the opportunity of examining the Bill more fully, came across certain difficulties in the application of the proposed method of filling vacancies. The Commission thereupon invited the Solicitor-General to the meeting and discussed these with him.

As a result, the Commission, with the concurrence of the Electoral Commissioner, finally made observations to the Solicitor-General who undertook to communicate them to the proper authority.

These observations concerned the following points :-

Exhibits

Exhibit "F"
Letter Jean M. David to Secretary to the Cabinet 9th November 1973
(continued)

(i) In the proposed amendment of paragraph 6 -

(a) subparagraph (2) applies only to the subparagraph 1(b), there being no similar provision in relation to subparagraph 1(a):

(b) in subparagraph 1(b) the expression "regarded as a member of any party" is not clear.

(ii) In Clause 5(2) of the Bill, there might be practical difficulty regarding the identification of the party to which the seat in question would be allocated in case the member/ resigned refused to fill the vacancy himself.

I am sending a copy of this letter to H.E. the Governor-General and the Solicitor-General.

I am, Sir,
Your Obedient Servant,

(sd) J. Marc David
Chairman

The Secretary to the Cabinet,
Prime Minister's Office,
Port-Louis.

Copy to: H.E. the Governor-General

The Solicitor General

In the Supreme Court

No. 21

Order granting final leave to Appeal to Her Majesty in Council 4th March 1975

No. 21

ORDER GRANTING FINAL LEAVE TO APPEAL TO HER MAJESTY IN COUNCIL

IN THE SUPREME COURT OF MAURITIUS

On Tuesday the 4th day of March 1975 in the 24th year of the reign of Queen Elizabeth II

In the matter of :-

1. Henri Lincoln of Curepipe

2. Anoor Abdullah of Curepipe

3. Krishnananda Ramsamy of Souillac

APPLICANTS

v.

1. The Governor General of Mauritius

   His Excellency Sir Raman Osman

2. The Prime Minister of Mauritius,

   Sir Seewoosagur Ramgoolam

3. The Speaker of the Legislative Assembly,

   Sir Harilall Vaghjee

RESPONDENTS

Upon hearing F. Vallet of counsel for the applicants and V. Glover for the respondents who states that he has no objection to the motion;

IT IS ORDERED that the Applicants BE and THEY ARE HEREBY granted final leave to appeal to Her Majesty's Privy Council against the judgment of this Court in S.C.R. 18004.

By the Court

(O.A. Khodadin)

for Master and Registrar.

EXHIBITS

Exhibits

EXHIBIT "A"

Exhibit "A"
Judgment dated
31st January
1973

RECORD NO. 17064

IN THE SUPREME COURT OF MAURITIUS

In the matter of :

LOUIS JOSEPH FRANCE VALLET — Applicant

v.

THE HON. SIR SEEWOOSACUR RAMGOOLAM & ANOR — Respondents

JUDGMENT

In these proceedings the applicant moves for an order of mandamus directed, on the one hand, to the Prime Minister, the first respondent, and on the other, to the Governor-General, the second respondent, requiring them to take action, in the manner to be presently set out, for the alteration of the date fixed by the Governor-General for the holding of a bye-election.

The circumstances in which the application is being made to the Court are these. On July 20, 1972, the seat of an elected member of the Legislative Assembly for the Constituency of Curepipe - Midlands became vacant through resignation. Section 35(3) of the Constitution of Mauritius, which provides for the filling of casual vacancies among members of the Legislative Assembly representing constituencies, enacts that the writ for an election to fill the vacancy shall, unless Parliament is sooner dissolved, be issued within ninety days of the occurrence of the vacancy. At the time of that occurrence, by the law then in force, section 41(2) of the Representation of the People Ordinance, 1958, (as enacted by section44 of Ordinance No. 49 of 1969), the day of election (which, under regulation 5(2) of the Legislative Assembly Regulations, 1968, must be specified in the writ) was to be appointed by the Governor-General, acting in accordance with the advice of the Prime Minister, and was to be not less than five days nor more than twenty days after the date on

Exhibits

Exhibit "A"
Judgment dated
31st January
1973
(continued)

which the writ was issued. On October 9, 1972, however, the Governor-General, in purported exercise of the powers vested in him by section 3 of the Emergency Powers Ordinance, 1968, by virtue of which he is authorised during a period of public emergency to make regulations for, among other things, amending any law suspending the operation of any law, and for applying any law with or without modification, made regulations (the Emergency Powers (Legislative Assembly) Regulations, 1972, in this judgment referred to as "the Regulations") providing that notwithstanding anything in section 41 (2) of the Representation of the People Ordinance, 1958, the Governor-General, acting in accordance with the advice of the Prime Minister, may for the purpose of filling any vacancy which has occurred or may occur in the Legislative Assembly, fix any day to be the day of election or polling day, as the case may be. Following these Regulations, the Governor-General made an order appointing the 4th June, 1973, as the day of election for filling the vacancy in the Legislative Assembly which had occurred on July 20, 1972. Then, on October 13, 1972, a writ was issued by the Electoral Supervisory Commission (at the request of the Governor-General, as required by law) specifying the day of election so ordered by the Governor-General. Notice of the writ was published by the Electoral Commissioner in the Government Gazette of October 19, 1972. Some time after the publication of the Regulations the Electoral Commissioner, as it appears from his evidence, called the attention of the Prime Minister to the fact that the Regulations had not been referred to him as he thought was required by section 41 (3) of the Constitution. It further appears that the Regulations were not referred to the Electoral Supervisory Commission as also provided by that section. On October 22, 1972, a Sunday, a draft of a bill purporting to amend, with retrospective effect to the 1st October 1972, section 41(2) of the Representation of the People Ordinance, 1958, by removing the maximum time-limit of twenty days of the period for appointing a day of election prescribed therein, was referred to the Electoral Supervisory Commission and Electoral Commissioner for their comments. By October 25, 1972, the Electoral Supervisory Commission and the Electoral Commissioner had reported that they had no comments to offer. The Bill was published in the Government Gazette on October 28, 1972. On October 31, it was passed by the Legislative Assembly, and on November 3, 1972, it received the Governor-General's assent and become law (Act No.24 of 1972, hereinafter referred to as

"the Act"). In the meantime, on October 23, 1972, the applicant had given notice to the respondents that he would on October 30, 1972, move this Court for an order of mandamus (1) directing the first respondent to advise the second respondent to alter the date fixed for the bye-election (4th June, 1973) and fixing that date within the time-limit prescribed by law, that is, not later than the date the Court will order; (2) directing the second respondent to appoint a day of election as ordered by the Court; or (3) giving such other directions as the Court would find just in the circumstances and in accordance with the Constitution. In an affidavit made in support of the motion, in which he described himself as the leader of a political party and a prospective candidate for the bye-election, the applicant referred to the foregoing events up to the making of the Regulations by the Governor-General, and averred that the regulations were null and void to all intents and purposes and that the date fixed for the bye-election (4th June, 1973) was accordingly outside the time-limit prescribed by the law in force prior to the Regulations and was consequently both unlawful and against the Constitution.

The motion was made on October 30, 1972. Counsel for the respondents stated that the motion was resisted and applied for a postponement. The Court ordered the case to be mentioned on November 10, 1972. On that date the Solicitor-General, who appeared for the respondents, intimated his intention not to file affidavits in reply to the applicant's, and stated that the respondents' stand would be (1) that the application was premature; (2) that the order prayed for could not issue against either of the two respondents; (3) that the acts complained of were lawfully done. The applicant then said that he proposed to file an affidavit in answer to the statement made on behalf of the respondents. The case was postponed to November 13, 1972, for mention. On that day, the applicant put in an affidavit in which he made reference to the passing of the Act and set out expressly the grounds on which he was relying to urge that both the Regulations and the Act were invalid, namely, because, in the first place, they had been passed or made without section 41(3) of the Constitution relative to elections being complied with; secondly, they were against the letter and spirit of the Constitution; thirdly, they were contrary to the Convention of Human Rights to which the Government of Mauritius was

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pledged. A fourth ground was invoked by the applicant against the validity of the Regulations which was, that they purported to provide "for matters to take place at a time when the Emergency Powers Ordinance have no force of law". The case was then fixed for hearing. Subsequently, notice was given on behalf of the respondents that the following preliminary objections would be raised to the application -

1. That the applicant had failed to demand from the respondents the performance of their respective alleged duty prior to the application;

2. that the affidavits in support of the application did not make out a case for the issue of the order prayed for or, alternatively, did not show a title to the order prayed for;

3. that the order prayed for could not issue against either of the two respondents;

4. that the application for the order prayed for was premature inasmuch as the applicant had not obtained the leave of the Court before making his application.

We need not concern ourselves with the fourth objection which has in an interlocutory ruling been already overruled by the Court. The three others have been dealt with together with the merits of the application. We shall consider them straightaway.

The first objection is founded on the general rule, constantly and strictly applied, that before mandamus will lie, there must be a demand for the performance of the duty sought to be enforced and a refusal to perform it. The principle from which this rule stems is that the party complained of must be aware of what it is that he was required to do, and thus be given an opportunity of considering whether or not he should comply. There are, however, recognised exceptions to that rule. As was observed in R. v. Hanley Revising Barrister (1912) 3 KB. 518, the requirement of a demand and refusal is a very useful one, but it cannot obviously be applicable in all possible cases, as for instance in the case just cited where the time for the performance of an act sought to be done

had passed. It is the applicant's contention that the present application comes within the exceptions. The substance of his submission is that no demand should be required where it would serve no purpose at all. In his view, the respondents had, by being parties to the passing of two enactments (one of these with retroactive effect) altering the time-limit originally prescribed by section 41 (2) of the Representation of the People Ordinance, 1958, and by fixing a day of election outside that time-limit, clearly envinced their intention of persisting in the course taken by them, more specially after notice of this application had drawn their attention to what the applicant alleged to be an excessive exercise of their powers.

The Solicitor-General, on behalf of the respondents, appeared to have been of the view that the requirement of demand and refusal was peremptory and must be insisted on by the Court except in well defined and limited instances among which the present application found no place. He quoted the decision of the Privy Council in Commissioner for Local Government etc. v. Kaderbhai (1931) A.C. 652, as authority for the proposition that upon an application for mandamus it was important that the proper practice should be followed.

This issue has been fought by the parties on principles which govern the making of an order of mandamus as formulated by the Courts in England, but we have been invited by the applicant, as judges of a newly independent country, to shake off any procedural shackles which those principles may impose if we find that they would unduly hamper us in doing justice. It seems to us, however, that any justification for relaxing rules of restraint which have come down to us at the same time as the equitable powers of the High Court of England, vested in this Court by law, and by which the exercise of those powers ought to be regulated, will be found, not in our recently acquired independence, but in the distinctive as well as privileged position of this Court under the Constitution of this country. Unlike the Courts in England this Court is, by virtue of a written Constitution which is the supreme law of the land, endowed with original jurisdiction not only to interpret, but also to enforce obedience to, its provisions, and for so doing is provided

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with a wide range of remedies from which to choose (including an order of mandamus). It is the Court's duty to determine the validity of any statute which is alleged to be unconstitutional, because no law that contravenes the Constitution can be suffered to survive, and the authority to determine whether the legislature has acted within the powers conferred upon it by the Constitution is vested in the Court. The Court's primary concern, therefore, in any case where a contravention of the Constitution is invoked, is to ensure that it be redressed as conveniently and speedily as possible. For those reasons, while it is true to say that, where the form of redress applied for is an order of mandamus, the Court should and will, as far as feasible, follow the English principles applicable to that order, it is obvious that, having regard to its special powers and duties under the Constitution, the Court may find it necessary to evolve principles of its own, in certain circumstances, which may not always accord with those applicable in England.

In the present case, for example, the applicant is admittedly moving for an order of mandamus, but he is actually, by his application, challenging the constitutionality of the two enactments under reference, namely, the Regulations and the Act. What he is in effect primarily endeavouring to obtain is that the Court should pronounce those enactments invalid. If successful, he further applies for an order directing the respondents to proceed under section 41 (2) of the Representation of the People Ordinance, 1958, as previously in force, and to fix the day of election within the time-limit imposed by that section. If, by the time the Court gives its decision in the matter, that time-limit has expired, then the applicant asks that the respondents be enjoined to fix that day in accordance with the directions of the Court. The question therefore arises whether, in these circumstances, the condition precedent of demand and refusal should be insisted on. We are clear that it should not. It would, in our view, have been futile for the applicant to demand of the respondents a relief which itwwas not in their power to give until the enactments concerned (the Act, in particular,) were declared ultra vires or unconstitutional by this Court. A demand in such circumstances would have been a mere ceremony the performance of which this Court could not inflict on the applicant. We must, accordingly, overrule the

respondents' first preliminary objection.

We must also, we think, disregard a submission made on behalf of the respondents, in connection with the first objection, to the effect that an application for mandamus was not the correct way of questioning the constitutionality of an enactment and that the proper procedure was by application under section 83 of the Constitution, which entitled a person to seek redress from this Court for an alleged contravention of the provisions of the Constitution (not being provisions specifically excepted). We concede that, at first sight, the procedure adopted by the applicant appears unusual and may on further consideration be found not to be the most appropriate. Even if that was the case, we would see no ground in that fact for dismissing this application without further ado, first because section 83 itself contemplates other lawful modes of proceeding; secondly, because we think that in a matter of such great public interest, as the present case is in our view, no useful purpose will be gained by an insistence on form which would have for consequence only to postpone a decision on the merits. A similar attitude was adopted by the Privy Council in Kariapper v. Wijesiuha (1967) 3 W.L.R. 1460, where the Judicial Committee found it proper to deal with the appeal upon its merits, namely, to decide on the constitutionality of an Act of the Parliament of Ceylon, although it was to come in the end to the conclusion that the procedure adopted to bring the validity of the Act before the Supreme Court, that is, an application for a mandate in the nature of a writ of mandamus, was not appropriate.

The second objection is grounded on another condition precedent to the issue of mandamus which is, that the applicant should in his affidavit state distinctly all the facts and circumstances showing his title to the order. In the present case the respondents contend that the applicant ought to have clearly shown in his affidavit either that he had made a demand to, and that his demand had been refused by, the respondents or, if he thought that he was justified in not making a demand, to have included a statement to that effect. This objection must evidently follow the fate of the first. We have ruled that no demand was necessary. As for the justification, it had to be grounded on law and for the purpose of deciding the question of law the facts recited in the affidavit were, in our view, sufficient. The respondents' contention with

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regard to their third objection is, briefly, that mandamus cannot issue to the first respondent; on the one hand, because the part which the Prime Minister has to play in the fixing of the day of election is merely advisory and his duty to give advice is owed to the Governor-General and not to any member of the public; on the other hand, because in giving advice to the Governor-General, who is the Queen's representative in Mauritius, he acts as a Crown servant, and as such, mandamus cannot lie against him. Similarly the second respondent is the Queen's representative. A mandamus to him would be like a mandamus to the Crown which the Court cannot grant.

It seems to us that the principles on which the respondents place reliance, in so far as they concern the immunity of the Crown and its servants, cannot find their application in the present instance. It is elementary that mandamus does not lie against the Crown. It is also well established that it does not lie against Crown servants in their capacity as agents of the Crown. This is so because in that capacity they are responsible to the Crown alone and are under no legal duty towards a subject. Nor can mandamus issue against Crown servants to do any act within the scope of the duties discharged by them on behalf of the Crown. Where, however, government officials have been constituted agents for carrying out particular duties in relation to subjects, among other ways, by statute, so that they are under a legal obligation towards those subjects, an order of mandamus will lie for the enforcement of the duties. (Conrau v. Colonial Secretary & Ors. (1932) M.R. 227 and generally Halsbury's Laws of England, 3rd edn. Vol.11, para. 184). In the case in hand, to begin with the second respondent we entertain no doubt that the duty of fixing the day of election is not one which the Governor-General is called upon to perform in his capacity as the Queen's representative, but one with which he is charged by statute to carry out in relation to the subjects, and, therefore, one which may be enforced by mandamus. Similarly, the first respondent's part in appointing the day of election does not qualify him as a Crown servant so as to render him immune as such. His position, however, is still not clear. He certainly is not an ordinary adviser. By section 41 (1) of the Representation of the People Ordinance, 1958, the Governor-General is required to act in accordance with the advice of the Prime Minister, which is,

we apprehend, a courteous form of words for saying that the Governor-General is bound to fix the date which has been selected by the Prime Minister. It follows, therefore, that the day of election under section 41 of the Ordinance cannot be fixed without the cooperation of both the Governor-General and the Prime Minister. Consequently, one may, at first sight, be inclined to think, as was in fact argued by the applicant, that any person who is entitled to have that day appointed must logically obtain an order directed against both. A somewhat question does, however, arise, namely, whether there is a legal duty (a condition precedent to mandamus) imposed upon the Prime Minister to give advice to the Governor-General under section 41 of the Ordinance and enforceable by mandamus. The answer must, we think, be in the negative. The main reason is that the legal duty of fixing the day of election is cast on the Governor-General, who in turn is required to act in accordance with the Prime Minister's advice and who, as a result, has the further duty of seeking that advice. As for the Prime Minister himself, his duty lies to the Governor-General, not to any other person.

We therefore hold that mandamus will not lie to the Prime Minister in the present instance and he is put out of cause.

We thus come to the question of considerable substance concerning the validity of the Regulations on the one part, and of the Act on the other, The applicant's first proposition is that they offend against section 41(3) of the Constitution which enacts that every proposed Bill and every proposed regulation or other instrument having the force of law relating to the registration of electors for the election of members of the Assembly or to the election of such members shall be referred to the Electoral Supervisory Commission and to the Electoral Commissioner at such time as shall give them sufficient opportunity to make comments thereon before the Bill is introduced in the Assembly or, as the case may be, the regulation or other instrument is made.

It is agreed that, in so far as the Regulations are concerned, there has been no such reference to the Commission or to the Commissioner as provided by the section. With respect to the Act, the applicant

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contends that, having regard to the haste and hurry with which the Bill has been rushed through, the reference, although actually made, has not been true and genuine as mandatorily prescribed by the section.

In developing his first proposition the applicant appears to have taken for granted that a reference for comments was no different from consultation and quoted in support of his contention authorities defining the scope of "consultation" in those enactments where it was imposed as a preliminary step to action. The Solicitor-General, on the other hand, maintained that there was a substantial difference between the two requirements and was of opinion that a reference for comments was, in view of its purpose, not of such a mandatory nature as would, in the event of non-compliance, affect the validity of the action. In our view, in ordinary parlance and for ordinary purposes there ought perhaps to be made a distinction between the two modes of seeking the views of a consultative or advisory authority. There is inherent in the word "consultation" a connotation that the advice of the authority is to be sought which is not, we think, to be found in a mere reference for comments. But whether such a difference may or may not exist generally, we think it of no relevance here because it seems to us that the requirement of a reference to the authorities concerned will gain or lose nothing by assimilation with consultation. The requirement in section 41 (3) of the Constitution is, we have not the slightest doubt, peremptory and non-compliance with it would avoid any law passed in ignorance of it. Our conclusion is substantially grounded on the wording of the provision itself which prescribes not only that there should be a reference of the proposed law to the Commission and Commissioner, but also that they should be given sufficient opportunity to make their comments before the law, if a bill, is introduced in the Assembly, if another instrument before it is made. By "opportunity" we understand that the Commission and Commissioner would not only be allowed sufficient time for consideration and discussion, but would also be supplied with sufficient information, if necessary, to enable them to make any comment worthy of the name, which are indeed the two prerequisites of "consultation" as expounded in Rollo v. Minister of Transport (1948) 1 All E.R. 13. Our conclusion also takes account of the vital role ascribed by the

Constitution in particular to the Commission as an impartial, independent and apolitic body charged, not with any responsibility, but with the general responsibility for, among other things, the conduct of elections of members to Parliament. Whether justifiably or not, the framers of our Constitution, as has been the case for many a state of the Commonwealth upon attaining independence, have thought it wise to provide safeguards against any form of abuse of power and the creation of an Electoral Supervisory Commission is one of these.

For those reasons we hold that the Regulations are invalid. As regards the Act, however, we are, after hearing both the Chairman of the Electoral Supervisory Commission and the Electoral Commissioner, unable to agree with the applicant that there has not been due compliance with the requirement of section 41 (3) of the Constitution, and we shall accordingly reject his first proposition in so far as it concerns the Act. Having regard to our finding on this issue, it becomes unnecessary to give any further attention to the other questions raised concerning the validity of the Regulations, and we shall investigate only those that relate to the Act.

We turn now to the second point made by the applicant and shall consider whether the Act, as he submitted, violates the letter and spirit of the Constitution. The applicant's argument fastened first and foremost on the opening section of our Constitution: "Mauritius shall be a sovereign democrativ state" One of the fundamental characteristics of democracy, he said, was the possibility for the people to choose their representatives in Government by suitably organised free elections. So, by suppressing the limit of time within which an election was to be held, the Act would in effect have for consequence to vest in the Prime Minister or the Governor-General the discretion to postpone as long as he pleased any election, incidental or general, and to allow the Government of the day to remain in power even against the will of the people. Again, he argued, the framers of the Constitution had thought it necessary to impose upon the responsible authority the duty of issuing a writ of election within a specified time [ninety days in the case of a bye-election under section 35(3) and sixty days in the case of a general election under section 56(3)]. Those provisions showed a clear intention that any elections should

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be held as soon as reasonably possible after the occurrence which had rendered the elections necessary. Actually, the applicant went on to remark, the provisions made in the First Schedule to the Constitution for the filling of vacancies among the additional seats required that the replacement should be effected as soon as reasonably practicable. Was it not, therefore, obviously contrary to the object of those sections that the person entrusted with the duty of fixing the date of election should be given an unfettered and uncontrolled freedom to make his choice? The sovereignty of Parliament was not, he stressed, absolute as in the United Kingdom; its legislative powers were circumscribed by the limits set out by the Constitution. Any law passed by Parliament which was inconsistent with the letter and spirit of the Constitution, the supreme law of Mauritius, would, as enacted by section 2, be void to the extent of the inconsistency. The Act, in his view, was wholly inconsistent with the Constitution and should be declared null and void.

The point made by the applicant raises an issue of particular constitutional moment. Of recent years more than a few cases have come to this Court in which the validity of enactments has been challenged on the ground of inconsistency with the Constitution and in which this Court has had the opportunity to observe and rule that the sovereignty of our Parliament was subject to the limitation placed on its Legislative freedom by the Constitution [e.g. in Seegobin v. R. (1969) M.R. 17]. In all those cases, however, the challenge had been founded on a clear prescript of the Constitution. Not so in the present instance. The sections of the Constitution which have been invoked by the applicant, apart from laying down a limitation period for the issue of the writs of election, make no explicit provision as to the timing of elections. They do not even appoint the authority responsible for the issue of the writs. The applicant seemed to suggest that those matters were at the time of the coming into force of the Constitution, already prescribed by the ordinary law and for that reason the framers of the Constitution did not think it necessary that provision should be made for them in the Constitution itself. The inference, he contended, was that the relevant provisions of the Representation of the People Ordinance, were

intended to remain unaltered in their object, if not in their tenor. We agree that the omission must have been deliberate, but the reason for it was simply, in our view, that it would have been unadvisable to go, in the Constitution itself, into the details of the electoral law which are best provided for by ordinary legislation. We are, consequently, left to consider the applicant's broad proposition that the Act offends against the idea of democracy proclaimed in the very opening section of the Constitution as a fundamental characteristic of the state.

It is at this juncture that the question of justiciability has to be answered. Is this Court competent to test the validity of an Act of Parliament by reference to the concept of democracy expressedly embodied in the Constitution? Before the question is answered, it may be useful to take stock of the full implications of the assumption of such competence. The Constitution provides no definition of a democratic state. Is it to be inferred that the notion of democracy is so well settled among the nations of the world that it may dispense with definition? One need not be a scholar in political science to know that this is not so. In Europe alone, we see totalitarian communist states, constitutional monarchies and republics all sporting the label of democratic governments despite the difference in their political outlook and methods of administration. Is the Court then empowered on the occasion of any proceedings submitted to its arbitration, authoritatively to formulate the principles whereof the government of this country should be observant in making decisions or in enacting laws, according to what the Court's own views of democratic standards are? In other words, to promulgate, so to speak, a charter of democratic rights enforceable before our courts? Reason and prudence would prompt a negative answer to this question. The basic principle of separation of powers inherent in our Constitution would seem to require that any broad issue of political organisation founded on a still broader concept of a democratic form of government should be held non-justiciable. And yet this view would be mistaken. Rightly or wrongly the framers of our Constitution have placed on the shoulders of the Judges of this Court the invidious task of

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determining, in particular instances, the norms of a democratic society. In Chapter II of the Constitution, which provides for the protection of fundamental rights and freedoms of the individual, several sections contain a saving that nothing in those sections shall invalidate any law or action passed or taken for certain specified purposes, that is "reasonably justifiable in a democratic society". It is quite evident, therefore, that when a citizen, who claims that such a law or action infringes his rights under any of those sections, addresses himself to this Court as the authority vested by section 17 of the Constitution with the power to give him redress, there arises a justiciable issue, in the last resort, which is whether the law or action is reasonably justifiable in a democratic society, for the determination of which the Court must first be prepared to enquire what is meant by a "democratic society". We know at least of one instance where a court of the Commonwealth and on appeal the Privy Council have had to consider such an issue [Olliver v. Buttigieg, (1966) 2 All E.R. 459].

Apart from those particular instances of a reference to a democratic society there is, we have said it already, the first section of the Constitution which proclaims that Mauritius shall be a sovereign democratic state. What is the import of such a provision? First, it should be remarked that our Constitution is, like only a few others among the newly independent territories of the Commonwealth, distinctive in that this adherence to democratic principles is expressed, not by way of a preamble as in the case of the United States or India and many other countries with written Constitutions, but as part of the enactments contained in the Constitution. The result, it would seem, is that section 1 of the Constitution must be viewed not merely as an interpretative adjuvant in ascertaining, for instance, the policy of a statute, but as an express provision of the Constitution to which ordinary legislation must yield. Another result is that a competent court of law before which the validity of an enactment is impugned as repugnant to section 1 of the Constitution has not only the power but also the duty, just as in the particular instances provided for in Chapter II to which reference has been made, to test that validity by what it thinks are the standards of democracy applicable to this country. This is the startling though seemingly inescapable conclusion to which one is bound to come.

One further consequence is that no real assistance can be derived from the case-law of those other countries like the United States and India to whose rich fund of experience in the constitutional sphere one automatically turn. So be it. However, in approaching an issue of this kind, we are fully aware of the crucial need for the Court to impose upon itself some forms of restraint. First, the Court should remain conscious all along of the elementary necessity of keeping distinct the judicial and political fields; secondly, it should strictly confine its pronouncement to the matter in dispute and refrain from any statement that might savour of legislating, or, in other words, from formulating rules that are wider in their application than required by the facts under review. We propose, in addition, as in this Court's decisions in the cases of Police v. Moorba (S.C.R. 16276 of 1971) and D.P.P. v. Masson (S.C.R. 16599 of 1972), to apply what is termed the presumption of constitutionality, one result of which is that, except where the violation of a constitutional provision is patent on the face of a statute, the Court is to presume the existence of facts which can be reasonably conceived to sustain the constitutionality of the statute.

With those warnings in mind we shall now turn to the question under examination. The contention of the applicant, as has been made to appear, raises the issue whether the Act has deprived the citizens of this country of the democratic right of having elections held in the natural order which, he submits, is guaranteed by section 1 of the Constitution. What then is this species of democracy to which we are plighted? There can be no doubt that our Constitution-makers by embodying in it such of the constitutional practice and principles of the United Kingdom, aimed at giving Mauritius a democratic form of government closely akin to that enjoyed by the British people. There can be equally no doubt that by incorporating most of the fundamental rights and freedoms of the individual guaranteed by the European Convention on Human Rights, they have introduced into the Constitution itself, as an integral part of it, the undertaking given by the signatory States (among which the United Kingdom and the several then dependent territories, including Mauritius, on whose behalf the convention was signed) to respect the fundamental principles

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of democracy. Now, one of those fundamental principles set out in article 3 of the First Protocol to the Convention, is that the people of a country should have the opportunity to elect representatives of their choice to govern them by means of periodical elections. It is quite evident, therefore, that any law that would have for effect to suppress that right or to render it nugatory would be inconsistent with the Constitution, as now in force, and void to that extent. The question then is whether the Act is such a law, as argued by the applicant.

It may be convenient, to begin with, to give some consideration to the history of the provision in the electoral law of time-limits for holding elections. Prior to the year 1966, constitutional instruments which regulated the machinery of our form of government, made no provision for bye-elections. With respect to general elections, on the other hand, they specified a time-limit (three months) for the holding of such elections (not for the issue of the writ). While those constitutions were in force, the ordinary law did no more than prescribe a minimum period after the date of the writ that had to elapse before the election could take place [fourteen days under regulation 4(2) of the Legislative Council Elections Regulations, 1958]. The change occurred with the Constitution of 1966. For the first time, provision was made in the Constitution for the filling of a casual vacancy among elected members (which provision was doubtless thought necessary because of the new electoral system introduced by that Constitution). For the first time also, no time-limit was fixed in the Constitution for the holding of elections, but merely for the issue of the writ. However, (and this is a feature of great interest indeed) the regulations made by the Governor for the purpose of elections that were to be held under the new Constitution (the Legislative Assembly Elections Regulations, 1967) provided, for the first time again, not only for a minimum but also for a maximum period after the issue of the writ for fixing the day of election. The position remained unaltered with the present Constitution. Its provisions relating to bye-elections and general elections are identical with those of the 1966 Constitution. The same may be said of the ordinary law. The Legislative Assembly Elections Regulations 1968, which replaced the 1967 regulations (and the main aspect of which is to entrust to the Electoral Supervisory Commission the duties

formerly discharged by the Governor, including the issue of the writ and the fixing of the day of election) similarly provided for the two time-limits [regulation 5(2)]. In 1969, by Act No. 49 of that year, the time-limits were removed from regulation 5(2) and inserted in a new section 41 added to the Ordinance and at the same time reduced to five and twenty days respectively. Act No. 49 of 1969 also brought about a significant alteration to the electoral set up. The new section 41 of the Ordinance has now transferred to the Governor-General, acting in accordance with the advice of the Prime Minister the power and duty of appointing the day of election and, if necessary, the day of taking a poll hitherto vested in a non-political authority, that is, first the Governor, later his successor the Governor-General, and then an independent Electoral Supervisory Commission. Finally, there came the Act under reference, by which the maximum of twenty days in section 41 was done away with. To complete this review of the law it is relevant to note that any time-limit prescribed for appointing the day of election could, so long as it was provided for in the regulations, that is to say, until Act No. 49 of 1969, be varied by the authority concerned. [cf. reg.46 of the Legislative Council Elections, 1958; reg. 62 of the Legislative Assembly Regulations, 1967; reg. 59 of the Legislative Assembly Regulations, 1968].

It has been contended by the applicant that the combined effect of the Acts of 1969 and 1972 was to invest the Prime Minister adversely to true democratic tenets with an unfettered discretion to postpone any election indefinitely. We are not concerned here with general elections. The applicant has come to us in the garb of a prospective candidate in a bye-election and has put himself upon our jurisdiction to grant him redress. His success on the issue in hand must depend on his ability to challenge the validity of the Act in so far only as it affects him. In other words, this Court must confine its enquiry into the constitutionality of the Act to its alleged effect on the holding of the bye-election. We appreciate, however, that much that we shall say on the subject will equally apply to the effect of the Act on general elections.

Is it then true to say that the Act contravenes the Constitution by vesting the Prime Minister (and

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through him the Governor-General) with an unfettered discretion to put off a bye-election as he pleases. The contention of the applicant is correct in so far as it assumes that the Prime Minister plays a predominant role in the choice of the day of election. Since the Governor-General is required by section 41 of the Ordinance to act in accordance with the Prime Minister's advice when fixing the day of election, it is actually the Prime Minister who will decide on that date. It was at one time submitted by the applicant that the granting of this discretion to the Prime Minister was contrary to section 41 of the Constitution under which the Electoral Supervisory Commission was entrusted with, among other things, the conduct of elections, which conduct, in the applicant's submission, would include the fixing of the day of election. We must confess that, at first sight, it would appear from the regulations of 1968 that the idea was to charge the Electoral Supervisory Commission with all the duties imposed up to then on the Governor, as a neutral authority; but even if that were so, we are not prepared, as at present advised and on the material available, to pronounce on the validity of the Act by reference to such a wide notion as the word "conduct" would offer. Nor do we agree that the removal of the maximum time-limit for the purpose of a bye-election is against the principles of democracy. First, we must repeat an observation already made that prior to 1966 no provision was to be found in the constitutional instruments for the holding or timing of a bye-election and that in those days only a minimum period was prescribed in the ordinary electoral law for appointing the day of elections (which minimum period, be it remembered, as also the maximum period that was later to be prescribed, could be varied if necessary). Secondly, it is not, in our view, altogether correct to say that the Prime Minister or the Governor-General is given an absolute discretion to postpone a bye-election as he pleases. The Constitution mandatorily enacts that a writ for a bye-election should be issued within a specified time. The writ must still under the law (and we do not see how this could be logically altered) specify the day of election. It is, therefore, in an unlawful exercise of the discretion itself, namely in selecting the date, not in the law by which it is vested in the responsible authority, that fault may or will be found in the name of

true democracy. What we mean to say is that the constitutionality of a law should not be determined merely with reference to the manner in which it has been or may be administered by those entrusted with its application. The bare possibility that a discretionary power given by a statute may be abused is no ground for invalidating it; if the authority vested with the discretion misuses it, then his act may be invalidated. Now, we cannot read section 41(2) of the Ordinance, as amended by the Act, in the absence of express language and having regard especially to the presumption of constitutionality already alluded to, as conferring on the Prime Minister or the Governor-General as unlimited arbitrary power to determine the day of election according to his mere whim and caprice. In our view, it is a discretion that must be exercised with conscientious and faithful regard for the purpose and object of both the constitutional and ordinary legal requirements relating to the holding of elections, which object and purpose are undoubtedly that any election should be held as soon as is reasonably practicable after the necessity for it has arisen. Upon this construction, the Act, as also section 41 (2) of the Ordinance which it amends, are, in our opinion, and in the light of the principles we have just set out, not inconsistent with the Constitution.

For the purposes of this application, the Court is not called upon to pronounce upon the propriety or impropriety of the exercise of the Prime Minister's discretion in advising the 4th of June, 1973, for the bye-election. Whatever submissions were made by the applicant in that connection were, we surmise, aimed at showing a lack of good faith in the Government as part of what the applicant contended was its apparent policy of gradual encroachment on civil liberties. The applicant's observations have, however, evoked a comment from the Solicitor-General which should not, we think, pass unnoticed. Referring to the evidence concerning the reasons given by the Prime Minister in the Legislative Assembly for deciding on the 4th June 1973, learned Counsel appears to have been of opinion that the facts put forward by the Prime Minister were matters which had to be appreciated subjectively and were not such as could be enquired into by the Court. He observed that the law had not made reasonableness a condition of the Prime Minister's use of his discretion. The Court, he said, could not enquire

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into the merits or demerits of the facts relied on by the Prime Minister. The Solicitor-General's submission would seem to suggest that where the law itself provides for no limits to executive discretion the courts are powerless to enquire into the reasons for its exercise one way or the other. This is not an altogether sound contention. We cannot do better than first to refer to the English case of Padfield v. Minister of Agriculture, Fisheries and Food(1968) 1 All E.R. 694, in which the House of Lords disavowed the concept of unfettered discretion, and respectfully make our own the views of the Court and secondly to quote a few passages from a note entitled "The Myth of Unfettered Discretion" published in the Law Quarterly Review, Vol. 84, p.166 - which aptly sums up the effect of the House of Lords' decision and which is worth reading in its entirety. The author writes -

> " It is sometimes said, particularly by those who think that English courts lack the resources of the French Conseil detat, that the law of this country is powerless when Parliament gives unfettered discretion to a Minister. This criticism has never seemed to accord either with theory or with fact; for in theory every discretion is capable of unlawful abuse; and in fact the courts have usually been astute to detect implied limits in the vague subjective expressions which Parliament uses so freely, for example, in empowering a public authority to act "as it thinks fit" or "if it is satisfied". The rule that executive discretion must be exercised reasonably goes back at least to Rooke's case (1598) 5 Co.Rep. 99b, and today it is perhaps more active than ever before.
>
> The House of Lords has emphatically reinforced both theory and practice in Padfield v. Minister of Agriculture, Fisheries and Food (1968) 1 All E.R. 694. The Agricultural Marketing Act 1958 provides for the establishment of a committee of investigation which has to consider complaints about the operation of marketing schemes "if the Minister in any case so directs". Mandamus has now been granted to oblige the Minister to refer a complaint to the Committee, on the ground that his reasons for not doing so were unsatisfactory. The Minister's power to direct or not to direct, which on the face

of the Act is unrestricted, is held to be a power coupled with a duty to direct in a proper case. The importance of the decision lies in the express repudiation of the concept of unfettered discretion, in the court's willingness to look critically at the Minister's reasons and in the vigorous assertion of the court's powers of control over unreasonable executive action. No conseil d'Etat, surely, could do better than their Lordships on this occasion. Yet, the decision contains nothing revolutionary. The same conclusion was reached by the Divisional Court and by Lord Denning M.R. in the Court of Appeal, although the other members of that court (Diplock and Russell L.J.J.) held otherwise.

.....

The House also dealt faithfully with the Minister's argument that he was entitled to give no reasons at all. This, they held, would in no way protect him. As Lord Pearce put it, if all the prima facie reasons pointed to a certain course, and the Minister gave no reason for taking a contrary course, the court might infer that he had no good reason and was not using his power in accordance with the Act. This is a particularly important element in the decision, since it would be most unfortunate if Ministers were to conclude that silence was the path of safety. The giving of reasons is one of the fundamentals of good administration, and it is most salutary to have it established that a Minister will withhold them at his peril. English law can now match the Conseil d'Etat's famous decision in Barel, C.E. May 28, 1954, where the same principle was acted upon in a similar context of wide discretionary power.

The heart of the case is the rejection of the whole idea of unfettered discretion. It was argued for the Minister that he must have discretion to refuse to refer some kinds of complaint, for example, complaints that were frivolous or repetitive, and that therefore he must have unfettered discretion to refuse to refer any particular complaint. The House of Lords granted his first proposition but rejected his second as a non sequitur. In disposing of it Lord Upjohn said that not only was the

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introduction of the adjective "unfettered" an "unauthorised gloss by the Minister"; it would probably make no difference in law even if that adjective had been inserted by the draftsman (p.719):

> "But the use of that adjective, even in an Act of Parliament, can do nothing to unfetter the control which the judiciary have over the executive, namely, that in exercising their powers the latter must act lawfully, and that is a matter to be determined by looking at the Act and its scope ... rather than by the use of adjectives." ".

No words could better express the policy upon which the courts have so often acted, that the executive must obey the spirit as well as the letter of the law.

On the applicant's third proposition we wish to observe, in the first place, that the European Convention of Human Rights which he has invoked insists on periodical general elections at regular intervals, but makes no special mention of bye-elections. Even if it impliedly did so, for the same reasons as have helped us decide on the constitutionality of the Act, we would see no contradiction between the Convention and the Act. We consequently find no need to enter into the question raised on behalf of the respondents as to which of the convention or of a municipal law should prevail in case of conflict.

The applicant has sought to derive a further argument from the word "prescribed" used in sections 56 and 57 of the Constitution in connection with the fixing of the day for polling at an election. He submitted that "prescribed" was defined in section 101 of the Constitution as meaning prescribed by a law; it was consequently not possible validly to allow the Prime Minister or the Governor-General alone to select the day for polling which, the applicant seemed to say, was the effect of section 41 of the Representation of the People Ordinance, 1958. We do not agree. Apart from the fact that sections 56 and 57 of the Constitution concern general elections which are not in question here, it seems obvious that the word "prescribed" in those sections cannot refer to the date of polling itself but to the

manner in which it is to be fixed and brought to the notice of the public.

In the result, therefore, this application fails and is dismissed. Having regard to our findings regarding the Regulations upon the invalidity of which the applicant commenced proceedings, we make no order as to costs.

(sd) M. Latour-Adrien
Chief Justice

(sd) H. Garrioch
Senior Puisne Judge

(sd) Droopnath Ramphul
Judge

31st January, 1973.

EXHIBIT "B"

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JUDGMENT

RECORD No. 17347

IN THE SUPREME COURT OF MAURITIUS

In the matter of :

A. MATHOORASINGH Petitioner

v.

THE GOVERNOR-GENERAL OF MAURITIUS

Respondent

JUDGMENT

Section 83 (1) of the Constitution provides that, subject to the provisions of sections 41(5), 64(3) and 101(1) of the Constitution, if any person alleges that any provision of the Constitution (other than Chapter II) has been contravened and that his interests are being or are likely to be affected by such contravention, then, without prejudice to any other action with

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respect to the same matter which is lawfully available that person may apply to the Supreme Court for a declaration and for relief under the section. Rule 5 of the Rules made by the Chief Justice under the Constitution and published under Government Notice No. 106 of 1967 requires an application for a declaration and for relief under section 83 of the Constitution to be made by way of a petition which must contain, inter alia, particulars of (a) the provision or provisions of the Constitution (other than Chapter II) alleged to have been contravened, and (b) the nature of the applicant's interests which are being or are likely to be affected by the contravention. It is therefore clear that, to be able to act under the provisions of section 83 an applicant must satisfy two essential conditions; he must allege (1) that a provision of the Constitution (other than Chapter II) has been contravened, and (2) that his interests are being or are likely to be affected by such contravention.

In the amended petition which is now before the Court, the applicant states that he is a registered elector for the constituency of Belle Rose - Quatre Bornes and that, since the 1st January, 1973, a vacancy exists in the Legislative Assembly as a result of the death of an elected member of the said constituency. The writ for an election to fill the vacancy was issued on the 23rd March, 1973. On the 18th May, the Governor-General, in the exercise of the powers vested in him by the Emergency Powers Ordinance, 1968, made Regulations (Emergency Powers (Dates of Elections) Regulations, 1973) which were published under Government Notice No. 54 of 1973. Under these Regulations, he fixed the 10th September, 1973, the 19th November, 1973, and the 22nd November, 1973, respectively, as the date of election, the date of taking of a poll (if necessary) and the return day for filling the said vacancy.

From a perusal of the petition I gather that the applicant's allegation that a provision of the Constitution has been contravened is contained in paragraphs 9 and 10 which read thus:

> 9. The Petitioner avers that the purpose of subsection (3) of section 35 of the Constitution is that any election should

be held as soon as is reasonably practicable after the necessity for it has arisen.

10. The Petitioner further avers that in fixing the nomination day to the 10th September 1973 the Respondent is offending against the purpose and object of both the constitutional and legal requirements relating to the holding of elections.

In paragraph 11 he alleges that, by "unduly and without reasonable cause delaying the filling of the said vacancy in the Legislative Assembly", the respondent is delaying his right to vote for a representative of his choice to sit in the Legislative Assembly. He therefore prays for a judgment -

(a) - declaring that the order fixing the Nomination day to the 10th September 1973 is unreasonable;

(a)bis - declaring the Emergency Powers (Dates of Elections) Regulations 1973 to be null and void to all intents and purposes;

(a)ter - declaring the regulation fixing the 10th September 1973, 19th of November 1973 and 22nd of November 1973 respectively as day of election (Nomination day), polling day and date of return to be unreasonable;

(b) - ordering the respondent to alter the nomination day fixed for the bye-election and to fix it to a date which the Court will find just and reasonable in the circumstances;

(c) - making in consequence any order which the Court shall deem reasonable and in particular fixing a maximum delay within which polling is to take place.

As far as prayer (a) is concerned, it is obvious that it refers to a previous order made by the Governor-General under the Representation of the People Ordinance, 1958 - which order has been superseded by the Regulations referred to in prayer (a) bis.

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In his plea, the respondent has denied paragraphs 9, 10 and 11 of the petition.

It seems to me that the applicant's contention is that, by fixing the dates referred to above as election day, polling day and return day, the respondent has contravened section 35(3) of the Constitution which reads thus:

> If the seat in the Assembly of a member who represents a constitutency becomes vacant otherwise than by reason of a dissolution of Parliament, the writ for an election to fill the vacancy shall, unless the Parliament is sooner dissolved, be issued within ninety days of the occurrence of the vacancy.

It is clear that the subsection simply requires that a writ for an election to fill a vacancy shall be issued within ninety days of the occurrence of the vacancy. In the present case, the vacancy occurred on the 1st January, 1973, and the writ was issued on the 26th March, that is to say, within the prescribed period of ninety days. It cannot therefore be said that there has been a contravention of the provision of section 35(3). The applicant contends that the "purpose" of section 35(3) "is that any election should be held as soon as is reasonably practicable after the necessity for it has arisen", and in support of his contention he has cited the judgment delivered by the Court on the 31st January, 1973 in Vallet v. The Honourable Sir S. Ramgoolam and Anor (S.C. Record No. 17064). In that case, which was an application for an order of mandamus, the question arose whether the Governor-General (acting on the advice of the Prime Minister) had an unlimited arbitrary power under section 41(2) of the Representation of the People Ordinance, 1958, as amended, to determine the day of election. The Court observed:

> "In our view, it is a discretion that must be exercised with conscientious and faithful regard for the purpose and object of both the constitutional and ordinary legal requirements relating to the holding of elections, which object and purpose are undoubtedly that any election should be held as soon as is reasonably practicable after the necessity for it has arisen."

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I am not prepared to say that, in expressing this view, the Court meant to add to section 35(3) of the Constitution something that was not there. The Court was simply laying down a guiding principle for the exercise of the power conferred on the Governor-General under section 41(2) of the Representation of the People Ordinance.

The questions which the Court is asked to decide in the present case are: (1) Are the Emergency Powers (Dates of Elections) Regulations, 1973, valid? and (2) Is the Regulation fixing the day of election, the polling day and the return date unreasonable? If the Regulations are held invalid, then, the dates fixed under them would cease to have any effect.

In the course of his arguments on the question of the validity of the Regulations, learned counsel for the applicant referred to the Emergency Powers Ordinance, 1968, section 3(1) of which enacts that, during a period of public emergency, the Governor-General may make regulations as appear to him to be necessary or expedient for the purpose of maintaining and securing peace, order and good government in Mauritius or any part thereof. He then referred to the definition of "period of public emergency" and submitted that, on a true interpretation of section 19(7) of the Constitution, read together with section 57 and considered in "the spirit of the Constitution", it was clear that no period of public emergency "should last longer than twelve months unless renewed for further periods not exceeding twelve months". This submission is, in my view, devoid of any merits. What is clear is that there is in force a Proclamation by the Governor-General under section 19(7)(b) of the Constitution declaring that a state of public emergency exists, and this Proclamation has been duly approved by a resolution of the Legislative Assembly. The Constitution requires nothing more to be done in order to validate the Proclamation. I consider it unnecessary to say more on this question being given that it was fully dealt with by this Court in Notee v. The Queen 1969 M.R.34. In that case the Court held that there was no limit fixed for the duration of the period of public emergency proclaimed by the Governor-General under section 19(7)(b) of the Constitution - a decision with which I respectfully agree. I must also observe that the Proclamation may be revoked at any time.

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The next question which must be considered is whether the Emergency Powers (Dates of Elections) Regulations, 1973, are valid. When one has to consider the validity of Regulations made under an Act of Parliament, one must examine closely the provisions of the enabling enactment. In this case, the powers given to the Governor-General to make Regulations are to be found in the Emergency Powers Ordinance, 1968. The powers given under section 3(1) are very wide. Indeed, the legislature has delegated to the Governor-General all the powers which it possesses under section 45(1) of the Constitution which reads thus:

> Subject to the provisions of this Constitution, Parliament may make laws for the peace, order and good government of Mauritius.

It is therefore clear that, during a period of public emergency, the Governor-General may, if he considers it necessary and expedient, exercise all the legislative powers of Parliament. Section 5 of the enabling Ordinance goes even further. It enacts -

> Every regulation made under section 3 and every order or rule made in pursuance of such a regulation shall have effect notwithstand ing anything inconsistent therewith contained in any law; and any provision of a law which is inconsistent with any such regulation, order or rule, shall, whether that provision has or has not been amended, modified or suspended in its operation under this Ordinance, to the extent of such inconsistency have no effect so long as such regulation, order or rule remains in force.

"Law" is defined in section 2 as any rule of law, whether statutory or otherwise, except the Constitution and the enabling Ordinance itself.

In Notee v. The Queen (supra) it was argued that the Emergency Powers Ordinance, 1968, was invalid because Parliament had transferred the whole of its legislative powers to the Executive without laying any limit or standard, and that the legislature had accordingly abdicated its function and had set up a parallel legislature. The Court held that the Parliament of Mauritius was a sovereign body and that there were no fetters on its right to delegate legislative

powers to any person or body.

A question which often arises in cases of delegated legislation is whether a legislature can delegate its law-making power to other agencies. A legislature which is supreme and without limitations, such as the United Kingdom Parliament, is free to make and unmake any law, and it may delegate its legislative powers as it pleases. In countries where the legislature is not supreme and derives its legislative powers from a written constitution, legislative delegation is generally permissible, unless expressly prohibited by the constitution. Thus, although the constitutions of the U.S.A., Australia, Canada and India are all silent on this point, the courts have invariably held that legislative delegation is permissible, although certain limitations have been placed in certain countries. In a number of cases the Privy Council has laid down that, as a rule, when the constitution is silent on the question of delegated legislation, the legislature can transfer some or all its law-making power to other agencies so long that it does not abdicate its legislative powers. The delegation in the case before this Court does not, in my view, amount to abdication. Although Parliament has delegated all its legislative powers to the Governor-General, it has not surrendered those powers. It still retains the power and the right to revoke them. It can do so by repealing or amending the enabling Ordinance, the Proclamation declaring the existence of a state of public emergency is also revocable.

The next question to be considered is whether the regulation fixing the dates referred to above is unreasonable. Here, it is important to bear in mind the fact that the Court is not concerned with the question of unreasonableness as it arises in a case where the law gives a discretionary power to some authority, Minister or public officer to do certain acts which he is required to do in the exercise of his public duties. The question here is not the reasonable exercise of an ordinary discretion, but the reasonableness of delegated legislation. It is also important to remember that, in the exercise of his functions under the Constitution or any other law, the Governor-General is required by section 64(1) of the Constitution to act in accordance with the advice of the Cabinet or of a Minister acting under the general authority of the Cabinet except in cases where he is required by the Constitution to act in accordance with the advice

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of, or after consultation with, any person or authority other than the Cabinet or in his own deliberate judgment. When he made the Regulations in the exercise of his powers under the Emergency Powers Ordinance, he acted in accordance with the advice of the Cabinet. The Regulations are therefore executive legislation.

The question of unreasonableness of the Regulation raises another question: Can the validity of a Regulation be challenged on the ground of unreasonableness? In the United Kingdom, subordinate legislation emanating from local authorities (e.g. a municipal bye-law) must be reasonable in order to be held valid by the courts. This rule, it is said, is based "on presumed intention of the legislature that while conferring on such bodies power to make laws, it did not authorise them to make unreasonable provisions". The leading case on the subject is Jruse v. Johnson (1898) 2 Q.B. 91 with which all students of Constitutional law are familiar. It has, however, been held in several English cases that executive legislation, for example, when powers to make rules and regulations are conferred on a Minister or a government department, such legislation is not subject to the requirement of reasonableness. Thus in Sparks v. Edward Ash Ltd. (1943) K.B. 223 and Taylor v. Brighton Borough Council (1947) K.B. 736, the Court refused to examine on the ground of unreasonableness the validity of regulations made by Ministers. The reason given was that the arbiter was the Minister himself who was responsible to Parliament.

In Australia, in a number of cases, the courts did not recognise unreasonableness as a ground for challenging the validity of statutory regulations, /See Victorian Chamber of Manufacturers v. The Commonwealth 71 C.L.R. 184 (1943): King Gee Clothing Co. v. The Commonwealth 71 C.L.R. 184 (1945)/. In South Africa, the position is different. There, the courts require all subordinate legislation to be reasonable and no distinction is made between municipal bye-laws and government department regulations. The reason for this can be found in the following passage from Statute Law and Subordinate Legislation, 1957, by L.R. Caney (a retired Judge of the South African Supreme Court):

> "In our country, however, where racial conflicts and colour consciousness abound

and where by far the majority of the population is not only illiterate but also has the most meagre, and often no part in the process of government (National, provincial and local), the courts should be ready to bear the full measure of the burden of deciding upon the reasonableness ..... of subordinate legislation, for the protection of minorities and also of the politically inarticulate, and in the interests of justice."

In India, the courts have adopted the English distinction between bye-laws and statutory rules. The High Courts of Bombay, Madras and Madhya Pradesh have held that the validity of statutory rules cannot be questioned on the ground of unreasonableness. (See Mulchand v. Mukund, A.I.R. 1952, Bombay 296; Subharoc v. I.T. Commissioner A.I.R. 1952, Madras 127; Banta Singh v. State of M.P., A.I.R. 1958, M.P. 193).

As I have already pointed out, the Regulations with which this Court is concerned are statutory regulations made under statutory authority by the Governor-General, acting in accordance with the advice of the Cabinet. Under section 61(2) of the Constitution, the functions of the Cabinet, are to advise the Governor-General in the government of Mauritius, and the Cabinet is collectively responsible to the Assembly for any advice given to the Governor-General by or under the general authority of the Cabinet and for all things done by or under the authority of any Minister in the execution of his office. It is therefore clear that the Cabinet is responsible to the Assembly for the Regulations. In the United Kingdom and in India such legislation is excluded from the test of reasonableness. I see no reason for this Court to apply the test of reasonableness to these Regulations made under the Emergency Powers Ordinance. I therefore refuse to examine the reasonableness of the Regulation fixing the various dates. I must qualify my decision by adding that the position would have been different if the test of reasonableness had to be applied in relation to certain provisions of Chapter II of the Constitution.

Apart from the question of unreasonableness there is also the question of bad faith which sometimes arises. In the United Kingdom, Australia, Canada and India, legislative Acts cannot be questioned by the Courts on the ground that they have been obtained by improper motives. If the

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law passed by a legislature is found to be within its legislative field, its validity cannot be questioned on the ground that improper motives induced its enactment. But when a statutory authority is conferred on the administration or any other body, it must be exercised in good faith. Thus, in the United Kingdom, Canada, South Africa and India, delegated legislation made by administrative authorities, including the executive head, is subject to the test of good faith. In Rex. v. Comptroller General of Patents, (1941) 2 K.B. 306 at p. 316, Clauson L.J. observed:

> "If, on reading the Order in Council making the regulation, it seems in fact that it did not appear to His Majesty to be necessary or expedient for the relevant purposes to make the regulations, I agree that, on the face of the Order, it would be inoperative.

In Australia, however, the Courts have refused to enquire into motives behind delegated legislation. In Victorian etc. Co. v. Meakes and Digman (1932) 46 C.L.R. 73, the Australian High Court applied the rule against enquiry into motives to regulations made by the Governor-General(on the advice of a Minister) and refused to consider motives behind such regulations for examining their validity. Gavan Duff C.J. and Stark, J. said:

> "If parliament, however, placed in the hands of the Executive the power of making the Regulations, the subject of attack in these proceedings, and that power has been abused or misused, the only remedy is by political action, and not by appeal to the courts of law."

It has been said that the justification for excluding motives from judicial examination was based on the legislative character of the function performed by the Governor-General in making the provisions. To quote the words of Rich, J:

> ".... the power given by the Delegation is so akin to that of legislation that the reasons and motives of the donee, whether appearing ex facie the Regulations or aliunde, cannot affect their validity."

In a later case, however, [Arthur Yates &

Co. v. Vegetable Seeds Committee (1945) 72 C.L.R.37_7 a distinction was made between delegated legislation issued by the Governor-General on the advice of a responsible Minister and that issued by "a domestic, executive or administrative body". The Court affirmed that the former could not be questioned on the ground of bad faith but the latter could be so questioned because it was not "an act of a pure legislative body."

In the petition now before the Court, the applicant has not questioned the validity of the Regulations on the ground of bad faith, although his counsel, in the course of his arguments, hinted that government had been induced by improper motives to make the Regulations fixing the various dates. The question of bad faith having not been raised in the petition, I refrain from considering it. I must, however, state that, if I had to consider it, I would probably have allowed myself to be guided by the decision of the Australian Court in Arthur Yates & Co. v. Vegetable Seeds Committee (supra) with which I am in complete agreement.

There is one last question to be decided. Are the Regulations inconsistent with the Constitution? As I said earlier, the applicant's contention seems to be that the Regulation fixing the various dates is inconsistent with section 35(3) of the Constitution. I have already said that the Regulation does not in any way contravene the letter of the subsection. Learned Counsel for the applicant has invoked the "spirit" of the subsection and of other sections of the Constitution. Assuming, for the sake of argument, that section 35(3) contains an implied condition that "an election should be held as soon as is reasonably practicable after the necessity for it has arisen", can it be said that the dates fixed are inconsistent with section 35(3) ? There is in force a Proclamation that a state of public emergency exists. The dates have been fixed by Regulations made under the Emergency Powers Ordinanace. The vacancy occurred on the 1st January. The writ was issued on the 23rd March. The 10th September will be the day of election. If necessary, a poll will be taken on the 19th November. The vacancy will therefore be filled within a period of less than a year. In this connection, it is interesting to note that section 57(5) of the Constitution (after its amendment) provides that, at any time when there is in force a Proclamation by the Governor-

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General declaring, for the purpose of section 19 (7)(b) of the Constitution, that a state of public emergency exists, Parliament may from time to time extend the period of five years specified in sub-section (2) of this section (section 57) by not more than six months at a time, provided that the life of Parliament shall not be extended under the subsection for more than one year. So, during a period of public emergency, the Constitution permits the extension of the life of Parliament for one year. Is the Executive acting against the spirit of the Constitution when it provides for the filling of a vacancy within one year during a period of public emergency? This question must be answered in the negative. I therefore hold that the Regulation fixing the dates is not inconsistent with either the letter or the spirit of the Constitution. It is therefore valid.

I should like to mention another point which learned counsel for the applicant raised in the course of his arguments. The draft Regulations had to be referred to the Electoral Supervisory Commission for its comments. They were duly referred and the comments were submitted on the 18th May, 1973. The Regulations were signed by the Governor-General on the same day. The question raised is whether the requirements of section 41(3) of the Constitution have been complied with. There can be only one answer, and it is yes. In a letter dated the 18th May, the Commission stated a number of facts, made a suggestion for the inclusion of a date which had been omitted, and concluded by saying that it was unable to offer any comments on the necessity of the contemplated legislation. There is nothing to show that the Commission's letter was not considered before the Regulations were signed. On the contrary, it would appear that the Commission's suggestion had been accepted and given effect to in the Regulations.

For the reasons I have given above, I am of the opinion that this petition should be dismissed with costs.

(sd) Droopnath Ramphul
Judge

21st June, 1973.

IN THE PRIVY COUNCIL No.10 of 1975

ON APPEAL

FROM THE SUPREME COURT OF MAURITIUS

BETWEEN:

1. Henri Lincoln
2. Ameer Abdullah
3. Krishnananda Ramsamy

Appellants (Petitioners)

- and -

1. The Governor General of Mauritius Sir Raman Osman
2. The Prime Minister of Mauritius Sir Seewoosagur Ramgoolam
3. The Speaker of the Legislative Assembly Sir Harilall Vaghjee

Respondents (Respondents)

RECORD OF PROCEEDINGS

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