IN THE COURT OF APPEAL, FIJI
ON APPEAL FROM THE HIGH COURT OF FIJI

CIVIL APPEAL NO. ABU 109 OF 2019
(On appeal from High Court No. HBC 108 of 2019)

BETWEEN	:	**ATTORNEY-GENERAL on behalf of Ministry of Education, Heritage & Arts**
		Appellant
AND	:	**VATUVONU SEVENTH DAY ADVENTIST COLLEGE**
		1st Respondent
AND	:	**LUKE NARABE & OTHERS**
		2nd Respondent
Coram	:	**Lecamwasam JA** **Tuilevuka JA**
Counsel	:	**Mr. S. Sharma (Solicitor-General), Ms. P. Prasad, Ms. S. Chand and Ms. O. Solimailagi for the Appellant** **Mr. D. Bennett QC, Mr. A. Tokeley QC, Mr. W. Clarke and Ms. M. Tikoisuva for the Respondents**
Date of Hearing	:	**14 February 2020**
Date of Judgment	:	**3 June 2021**

JUDGMENT

Lecamwasam JA

1. I agree with the reasoning and conclusions of Tuilevuka JA.

Tuilevuka JA

INTRODUCTION

2. This is an appeal from a decision of the High Court in Suva which was handed down on 22 November 2019.

3. The appeal was heard on 14 February 2020 before a three-member panel chaired by the Resident Justice of Appeal and then Acting President, the late Mr. Justice Suresh Chandra. Unfortunately, on 10 April 2020, Chandra JA passed away in Suva. Both the appellant and the respondents have consented to have the judgment delivered by the two remaining judges pursuant to section 19(1) of the Court of Appeal Act 1949 which provides as follows:

> **19**.-(1) If, in the course of any proceedings under this Part, or in the case of a reserved judgment in any such proceedings at any time before delivery thereof, any judge taking part or having taken part in the hearing of the proceedings dies, or is unable through illness or any other cause to attend, or continue to attend, the proceedings or otherwise exercise his functions as a judge of appeal in relation thereto, the proceedings shall if the parties consent, continue before, and, without prejudice to the provisions of section **18**, the judgment or reserved judgment, as the case may be, shall be given by the remaining judges of the Court, not being less than two, and the Court as so remaining constituted shall, for the purposes of the proceedings, be deemed to be duly constituted notwithstanding the death, absence or inability to act of such judge as aforesaid.

4. Vatuvonu Seventh Day Adventist College (**"SDA College or College"**) is located in Cakaudrove, about 106 miles North of Suva, on the Island of Vanua Levu. The College was established and registered by the Seventh Day Adventist Church of Fiji on 01 February 2012, pursuant to section 16 of the Education Act 1966 (**"Education Act"**). It is governed by the Board of Trustees of the Seventh Day Adventist Church of Fiji (**"SDA Board"**) whose members are named herein as the second respondents.

5. The SDA College has been receiving grant-in-aid from the Ministry of Education up to the current time. Because it receives aid by way of a "recurrent grant out of public funds", the College is, by definition under section 2 of the Education Act, an *"aided school"*.

6. Notably, as at 15 April 2019, the College had a roll of one hundred and seventy-eight (178) students. Of these, only fifty-four (54) were of the SDA faith.

7. Most schools in Fiji are aided schools. A teacher who is appointed and paid by the State to teach in an aided school as part of government grant-in-aid to the school, is technically a **"staff in the Ministry"** in terms of section 127(7) of the Constitution of the Republic of Fiji (**"the Constitution"**) and is therefore a civil servant. Section 127(7) of the Constitution provides as follows:

> 127(7) The permanent secretary of each ministry shall have the authority to appoint, remove and institute disciplinary action against all staff of the ministry, with the agreement of the Minister responsible for the ministry.

8. There is a small number of private schools in Fiji which are totally self-maintained through private funds (**"private schools"**). By their own choice, these schools receive no assistance whatsoever from the State. A teacher in such a school is appointed, employed and paid by the school's governing body, or, "*controlling authority*" which is the term used in the Education Act (section 12(1)).

9. There are also a few government schools in Fiji. These are defined in section 2 of the Education Act as schools which are *"…maintained out of public funds and controlled by the Department"*. A teacher in a government school is appointed, employed and paid by the State and is a civil servant.

10. All three categories of schools are required to be registered or recognized under section 16 of the Education Act, whether or not they receive any assistance from the State.

BACKGROUND

11. At the heart of this appeal, is an executive decision of the Permanent Secretary for Education (**"Permanent Secretary"**) to appoint one Mr. Raikivi to act as Head Teacher for the College**.** The appointment was made in early 2019 after the position of College Principal became vacant.

12. However, the SDA Board vigorously opposes the appointment. The Board's position is that, in addition to being qualified academically, with some relevant experience, whoever is appointed to fill the vacant position is expected to be the Head of the Faith and must run and manage the College in accordance with the SDA ethos and principles; Mr. Raikivi is not of the SDA faith; While he may rank high in experience, and may be the most academically qualified candidate, he is ill-suited for the post, taking into account the genuine work-related qualities required; The appointee must belong to the SDA faith; The SDA Church has a right under sections 22(4) and 22(5) of the Constitution to manifest its religion or belief; This includes the right to establish a faith-based school, and to maintain and manage it to suit its religious or denominational goals; This also includes the right to teach religious subjects from an SDA perspective; Accordingly, the Permanent Secretary's appointment of Mr. Raikivi, and her insistence to the Board to accept the appointment, is unconstitutional because it denies the Church its right to have the College function and be managed as a vehicle for the expression of its faith; Ultimately, this is an intrusion into the Church's religious liberty.

13. However, the Permanent Secretary is adamant that Mr. Raikvi is the best from the pool of candidates vying for the position. He was identified and selected in accordance with the Open Merit Recruitment and Selection Guideline (**"OMRS Guideline"**) issued by the Public Service Commission under section 21 of the Civil Service Act 1999 which provides as follows:

> 21 - In accordance with section 127(7) and (8) of the Constitution, a permanent secretary must exercise all of his or her powers in relation to the employment, recruitment, discipline and reward of any staff in accordance with guidelines, directives, policies and other rules or regulations issued by the Commission.

14. This Guideline is based ultimately on section 127(8)(b) of the Constitution, and on the values and principles of public service espoused in 123(i) and (ii).

15. Section 127(2) of the Constitution provides that each Government Ministry in Fiji is under the administration of a Permanent Secretary. Section 127 subsections (7) and (8) provide that the Permanent Secretary shall be vested with powers to appoint and remove staff and to determine all matters pertaining to the employment of staff in the Ministry including, as set out in section 127(8)(b):

> 127(8)(b) the qualification requirements for appointment and the process to be followed for appointment, which must be an open, transparent and competitive selection process based on merit;

16. Section 123 defines the values and principles of State Service to include recruitment and promotion based on objectivity, impartiality, fair competition, ability, education, experience and other characteristics of merit.

17. The goal of the OMRS is to ensure consistency, and that no individual or group seeking employment into the Civil Service is discriminated favourably or unfavourably. Hence, if the Permanent Secretary was to accede to the SDA Board's demand, she would be compromising on her obligations under the OMRS Guideline and would be held accountable for engaging in a recruitment practice which violates the anti-discrimination provisions of section 26 of the Constitution.

18. For one reason or another, Mr. Raikivi was not a party in the proceedings below. If the Permanent Secretary had acceded to the Board's position, it would have been open to Mr. Raikivi to institute proceedings against the State for denying him an employment opportunity in the public sector on account of his faith, or non-faith. This is a prohibited ground of discrimination under the section 26(3), and a denial of his equal worth as protected by section 26 sub-sections (1) and (2) of the Constitution which provides as follows:

> 26.—(1) Every person is equal before the law and has the right to equal protection, treatment and benefit of the law.
>
> (2) Equality includes the full and equal enjoyment of all rights and freedoms recognised in this Chapter or any other written law.
>
> (3) A person must not be unfairly discriminated against, directly or indirectly on the grounds of his or her— (a) actual or supposed personal characteristics or circumstances, including race, culture, ethnic or social origin, colour, place of origin, sex, gender, sexual orientation, gender identity and expression, birth, primary language, economic or social or health status, disability, age, religion, conscience, marital status or pregnancy; or (b) opinions or beliefs, except to the extent that those opinions or beliefs involve harm to others or the diminution of the rights or freedoms of others, or on any other ground prohibited by this Constitution.

BOARD'S DECISION TO CLOSE ALL ITS SCHOOLS

19. After some exchange of emails and phone calls, the parties could not see eye to eye on the issue. The Board informed the Permanent Secretary vide a letter dated 2 April 2019, that it would close the College later in the month.

20. It appears that the Board's letter was not a request to the Permanent Secretary to close the College. Rather, the letter carried a decisive tone to it, as if the Board had settled the matter once and for all by its decision to close the College.

21. The Permanent Secretary would respond by urging the Board to keep the College open until the end of the 2019 school year to allow her time to make alternative arrangements for teachers and students.

22. On 5 April 2019, the Permanent Secretary met with the Board. At this meeting, the Board revealed its grand plan about privatising all SDA schools. The Permanent Secretary again pleaded with the Board to defer that plan. Nothing was resolved.

23. Five days later, on 10 April 2019, the parties had another meeting. At this meeting, the Board requested the Permanent Secretary to search the list of candidates and select the top-most qualified candidate of SDA faith. The Permanent Secretary refused. She felt that this would compromise the OMRS selection process required by law.

PROCEEDINGS

24. The Attorney-General filed an Originating Summons and also an urgent *ex-parte* Notice of Motion on 15 April 2019, seeking various declarations. Interim orders were granted on 15 April 2019, to preserve the status quo. Included in these Orders was a direction that the

Board relinquish to the Ministry all responsibility over the public funds allocated to the College until the final determination of the action.

25. On 22 November 2019, the High Court pronounced the following final orders and declarations:

    (a) "the Board has no lawful right to close the SDA College without the sanction of the Permanent Secretary.
    (b) only the Permanent Secretary has the lawful authority under the Education Act to order the closure of the SDA College.
    (c) the Ministry has the lawful right to appoint a suitable Head of School to any Acting position in terms of the Open Merit Recruitment and Selection process and in a manner consistent with the Constitutional right in section 22 (4).
    (d) the application for a declaration that the Ministry has the lawful right to appoint any suitable Head of the School and any Acting positions thereof without any interference by the Board is declined.
    (e) the application for an Order that Board does not interfere with the Ministry's rights to appoint any suitable Head of the School and any Acting positions thereof is declined.
    (f) the application to have the Board handover the management and control of the SDA College to the Ministry, until the outcome of investigations by the Ministry into some alleged abuse of funds by the Board and any prosecutions thereof - is declined.
    (g) no order as to costs."

26. The Attorney-General filed its appeal on 09 December 2019, and an application to stay execution on 16 December 2019. Stay was granted on 20 December 2019.

ISSUES

27. Both the appellant and the respondents have filed extensive grounds of appeal and cross-appeal. These may be reduced to the following three:

    (a) whether the Permanent Secretary's decision limited the SDA's right to freedom of religion?
    (b) supposing the answer to (a) above is "*yes*", is the limitation justifiable in a democratic society?
    (c) whether the SDA's right to establish, maintain and manage places of education has, concomitant to it, the right to close the place of education?

28. It is absolutely imperative that the above issues are addressed in the right analytical approach. In such a case as this, where an executive decision made pursuant to a valid legislative or constitutional power, in pursuit of a legitimate end, has had the effect of pitching two or three constitutionally recognised rights against one another, there will undoubtedly be a tension which the Court must resolve on a balancing exercise.

29. The inherent tension is aptly described by Murphy, Bobbi - "**Balancing Religious Freedom and Anti-Discrimination: Christian Youth Camps Ltd v Cobaw Community Health Service Ltd**" [2017] MelbULawRw 5; (2017) 40(2) Melbourne University Law Review 594:

> At the heart of the balancing act between the right to freedom of religion and the right to be free from discrimination is a tension between liberty and equality, two of the values underpinning most democratic and pluralist societies. Both are considered fundamental rights, deserving of legislative protection.

30. Where should the balance be struck in the tension between religious liberty on the one hand, and the right to freedom from discrimination on the other? Should the SDA's right to freedom of religion be prioritised over and above the State's legitimate interest in the policies which underpin the OMRS, or Mr. Raikivi's right to be treated fairly and to not be discriminated unfairly on the ground of his belief? Is the right to equality, equal protection by the law, and freedom from discrimination also a fundamental right and if so, is it not equal in status to the right to religious liberty?

BALANCING EXERCISE & PRINCIPLES OF INTERPRETATION

31. The analytical approach applied by this Court in **Attorney-General v Yaya** [2009] FJCA; 60; ABU 0037.2007 (9 April 2009) lays emphasis on a balancing process which is guided by the *"values and ideologies in society"*. Court of Appeal at paragraph 46 stated as follows:

> "[46] In each case, there must be a balancing of the means with the end, and necessarily with the rights and freedoms of others. Is it acceptable to limit due process rights to enforce the rights of many to life without crime? What of the rights of suspects in custody? What is proportionate to a legitimate aim requires a careful balancing of the values and ideologies in a society. In the context of section 37 of the Constitution, it requires an assessment of what inroads can be made, in the public interest, into the rights of an individual to a private life. (*emphasis added*).

32. In **Yaya**, which was a constitutional redress case, the complainant/respondent was aggrieved when his picture and name were published on three occasions in a local daily, apparently, to alert the public that he was a suspect wanted by the Fiji Police for the crime of *Robbery With Violence*. The Commissioner of Police (**"Commissioner"**) had authorised the advertisements. The issue was whether the respondent's constitutionally protected right to privacy was breached by the publications.

33. Section 37(2) of the 1997 Constitution limited the right to privacy as follows:

> "*may be made subject to such limitations prescribed by law* ***as are reasonable and justifiable in a free and democratic society"***.

34. The Commissioner justified the publications in terms of the public interest that offenders be apprehended and brought to justice. He relied on the related general powers conferred by sections 5 and 17 of the Police Act 1965. The Court accepted that there was a public interest as such and that in an appropriate case, it will be a valid exercise of the Commissioner's statutory powers, and a legitimate pursuit of the public interest in question - to publish the names and details of a suspect.

35. However, the Court stressed that even if the Commissioner was validly exercising his statutory powers, and was acting in pursuit of a legitimate end in protecting the public interest at stake, the publication may still be violative of the right to privacy of the complainant. In other words, it is not enough in itself that the Commissioner was exercising his statutory powers in the pursuit of a legitimate end. The question which remained was - whether the publication was *"reasonable and justifiable in a democratic society"*.

36. In directing its mind as to whether the publication was *"reasonable and justifiable in a democratic society"*, the Court asked whether the means were proportionate to the legitimacy of the ends. In other words, while the Commissioner had a statutory duty to maintain law and order, to preserve the peace, to protect life and property, and to prevent and detect crime, and had a legitimate aim in publishing the respondent's picture and name, the Commissioner must still show that the publication was proportionate to that aim. Court of Appeal at paragraph 34 of the judgment stated that:

> [34] ….. It must be shown that the publication was proportionate to that aim. In simple terms, was it necessary, was it justifiable, was it a proportionate step to publish in this manner? The test of proportionality must be narrowly construed once an intrusion into privacy has been established.

37. The Court then went on to explain that proportionality entails balancing the means and the ends, the key question being - whether or not, in the pursuit of the legitimate aim of apprehending and bringing offenders to justice, there were other options open to the Commissioner which were less limiting in effect than publishing the respondent's details:-

> "[46] In each case, there must be a balancing of the means with the end, and necessarily with the rights and freedoms of others. Is it acceptable to limit due process rights to enforce the rights of many to life without crime? What of the rights of suspects in custody? <u>What is proportionate to a legitimate aim requires a careful balancing of the values and ideologies in a society. In the context of section 37 of the Constitution, it requires an assessment of what inroads can be made, in the public interest, into the rights of an individual to a private life.</u> And this assessment must be done by judges in a world of regular covert surveillance, intrusive computer technology and greater legislative police powers.
> [47] In this case, we find that the action of the Police Commissioner to be a disproportionate and unreasonable intrusion into the rights of privacy of the Respondent. Had the Police Commissioner explained why the intrusion was the only reasonable step in the circumstances, and that he had attempted other

means of locating the Respondent without intruding into his rights to privacy, his acts may have been held to be a proportionate step taken to further the legitimate aim of protecting the public from crime. He did not so explain and we find that the learned trial judge did not err in coming to the conclusion he did." (emphasis added)

38. What the above passage suggests is that the threshold question of proportionality must revolve around a balancing of the values and ideologies of society. The same emphasis appears to find expression in the general principles of interpretation provided in section 3(1) and in particular, section 7(1) of the 2013 Constitution. Section 3(1) provides:

> 3.— (1) Any person interpreting or applying this Constitution must promote the spirit, purpose and objects of this Constitution as a whole, and the values that underlie a democratic society based on human dignity, equality and freedom." (emphasis added).

39. Section 7 (1) provides:

> 7.— (1) In addition to complying with section 3, when interpreting and applying this Chapter, a court, tribunal or other authority— (a) must promote the values that underlie a democratic society based on human dignity, equality and freedom; and (b) may, if relevant, consider international law, applicable to the protection of the rights and freedoms in this Chapter." (emphasis added).

40. It appears that section 7(1) entails a value-laden and purposive approach which would require this court to consider the following when interpreting and applying Chapter 2 (Bill of Rights) of the Constitution.

(a) the spirit of the Constitution;
(b) the purpose and objects of the Constitution as a whole;
(c) the values and principles which underlie a democratic society based on human dignity, equality and freedom;
(d) consider the international law of human rights.

41. However, as Francois JSC cautions in **New Patriotic** (supra), this does not mean that the letter of the document has no place in Constitutional interpretation. Francois JSC stated as follows:

> A constitutional document must be interpreted *sui generis*, to allow the written word and the spirit that animates it, to exist in perfect harmony. It is interpreted according to principles suitable to its particular character and not necessarily according to the ordinary rules and presumptions of statutory interpretation: see **Minister of Home Affairs v Fisher** [1979] 3 All ER 21, PC. This allows for a broad and liberal interpretation to achieve enlightened objectives while it rejects hide-bound restrictions that stifle and subvert its true vision. In the celebrated case of **Tuffuor v Attorney-General** [1980] GLR 637 at 647, CA sitting as SC the court said:

> "A written Constitution such as ours is not an ordinary Act of Parliament. It embodies the will of a people. It also mirrors their history. Account, therefore, needs to be taken of it as a landmark in a people's search for progress. It contains within it their aspirations and their hopes for a better and fuller life. The Constitution has its letter of the law. Equally, the Constitution has its spirit. It is the fountain-head for the authority which each of the three arms of government possesses
> and exercises."
>
> My own contribution to the evaluation of a Constitution is that, a Constitution is the outpouring of the soul of the nation and its precious life-blood is its spirit. Accordingly, in interpreting the Constitution, we fail in our duty if we ignore its spirit. Both the letter and the spirit of the Constitution are essential fulcra which provide the leverage in the task of interpretation. In support of this, we may profitably turn to the Constitution, 1992 itself which directs that we accord due recognition to the spirit that pervades its provisions. (*emphasis added*)

Spirit, Purpose & Values That Underlie a Democratic Society

42. I start by saying that the values which underlie the Constitution inform the Constitution's 'spirit' and, by extension the 'spirit' informs the purpose of the Constitution. Francois JSC of the Supreme Court of Ghana sums this up well in **New Patriotic Party v Attorney-General** [1993-94] 2 GLR 35—192 where he said:

> Values, whether enumerated or not, animate the underlying spirit and philosophy of the Constitution. The idea of unenumerated values and rights implies that in constitutional interpretation there is a place for the unwritten in the written Constitution. These values represent the spirit of the Constitution.

43. The values of the Constitution are set out in section 1 which declares Fiji a sovereign and a democratic State *"founded on the values of"***,** inter alia**,** national unity, freedom, equality, human dignity, justice, democracy, respect for human rights and the rule of law:

> 1. The Republic of Fiji is a sovereign democratic State founded on the values of—
> (a) common and equal citizenry and national unity;
> (b) respect for human rights, freedom and the rule of law;
> (c) an independent, impartial, competent and accessible system of justice;
> (d) equality for all and care for the less fortunate based on the values inherent in this section and in the Bill of Rights contained in Chapter 2;
> (e) human dignity, respect for the individual, personal integrity and responsibility, civic involvement and mutual support;
> (f) good governance, including the limitation and separation of powers;
> (g) transparency and accountability; and
> (h) a prudent, efficient and sustainable relationship with nature.

44. The spirit of the Constitution is informed by, and finds expression in, the above values. As for the purpose and objects of the Constitution, this may be gleaned from inter alia, the fundamental rights protected in Chapter 2 and the declaration in section 6 that the instrument binds the legislative, executive and judicial branches of government at all levels, and every person performing the functions of any public office.

45. Furthermore, the Preamble to the Constitution outlines at the broadest the goals and purpose of the instrument. It acknowledges Fiji's settlement history and its multicultural character by recognising the indigenous people(s), the descendants of the indentured labourers from British India and the Pacific Islands, the descendants of [all other] settlers and immigrants to Fiji - and their respective own unique cultures, customs, traditions and language and then goes on to declare:

> …..that we are all Fijians united by <u>common and equal</u> citizenry….

46. This bold declaration cultivates a direction towards commonality and equality in pluralism, and the State's role in the pursuit of the democratic aspirations and ideals of the people of Fiji.

47. While the Preamble is not, by itself, an independent source of the rights protected in Chapter 2 of the Constitution, it gives a framework for interpreting the rights. In that sense, one might say that the rights and freedoms in Chapter 2 are informed by, and give effect to the vision in the Preamble.

48. For pluralism to work, the Constitution must be interpreted as the instrument to connect the different cultural and religious sectors which co-exist in Fiji, without undervaluing the uniqueness of each. The State must protect equality, human rights, secularism and democracy which includes religious liberty. These are all legitimate State goals in the pursuit of the vision which the Preamble sets.

49. As McLachlin J. noted in **<u>Adler v. Ontario</u>**, 1996 CanLII 148 (SCC), [1996] 3 S.C.R. 609 (dissenting in part):

> "[a] multicultural multireligious society can only work . . . if people of all groups understand and tolerate each other": para. 212.

Key Constitutional Provisions Which Give Effect to Spirit, Purpose & Values

50. Sections 4 and 5 of the Constitution give expression to the values which underlie the kind of democratic society that is envisioned for Fiji.

51. Section 4(1) pronounces that religious liberty is a **"*founding principle of the State*"**

> 4.— (1) Religious liberty, as recognized in the Bill of Rights, is a founding principle of the State.

52. Section 5 subsections (1) and (2) reinforce the notion of equality and common citizenry as follows:

> 5.— (1) All citizens of Fiji shall be known as Fijians.
> (2) Subject to the provisions of this Constitution, all Fijians have equal status and identity, which means that they are equally— (a) entitled to all the rights, privileges and benefits of citizenship; and (b) subject to the duties and responsibilities of citizenship.

53. In the context of the nation's diverse cultural, religious and traditional make up which the Preamble celebrates, these values must be understood, applied, and be balanced constantly against one another.

54. A purposive approach to interpretation must entail giving full effect to the fundamental rights and freedoms which are informed by and which give effect to the above values (see **Ali v State** [2002] FJLawRp 25; [2002] FLR 162 (21 March 2002) as per Prakash J). In **Ah Koy v Registration Officer for the Suva City Fijian Urban Constituency** [1993] FJLawRp 36; [1993] 39 FLR 191 (20 August 1993), this Court said:

> The courts must bear in mind that constitutional documents purport to state fundamental principles relating to its citizens and their primary role is to ascertain the intention of the constitutional framers with regard to the subject matter in question. This calls for a generous and a purposive approach in their interpretation. I bear these principles in mind in interpreting this provision.

Secularism - State Protects The Freedom To Practice Religion – Not Assist In The Practice of Religion

55. In the pursuit of religious liberty, secularism plays a key role. One of the aims of secularism is to safeguard freedom of religion from State interference. Section 4(3) of the Constitution seeks to achieve this by placing the following obligations and duties on the State and all persons holding public office:

> 4-(3) Religion and the State are separate, which means—
>
> (a) the State and all persons holding public office must treat all religions equally;
> (b) the State and all persons holding public office must not dictate any religious belief;
> (c) the State and all persons holding public office must not prefer or advance, by any means, any particular religion, religious denomination, religious belief, or religious practice over another, or over any non-religious belief; and
> (d) no person shall assert any religious belief as a legal reason to disregard this Constitution or any other law.

56. A key question raised in this appeal is the degree of imperativeness which section 4(3) imposes upon the executive decision making of the Permanent Secretary. Based on the following reasons, I am of the view that section 4(3) imports a mandatory obligation.

57. Firstly, it is hard to ignore that the words "*must*" and "*shall*" are used in section 4(3) (a) to (c) and in section 4(3) (d) respectively. In ordinary usage, these words import a mandatory obligation.

58. Secondly, section 163(12) of the Constitution would appear to support this:

> 163(12) For the avoidance of doubt, use of the word "must" in this Constitution imports obligation to the same extent as if the word "shall" were used".

59. Thirdly, the purpose behind section 4(3) is to safeguard the separation of religion and the State. The need to keep these institutions separate stems from the need to protect religious freedom from State interference. When religious freedom is protected, individuals and groups are free to express and maintain their different identities, world views, and ways of life. By protecting these, the Constitution is in effect acknowledging the equality and equal worth of all, despite their differences.

60. A person's religious beliefs, or non-beliefs, is a core element of his identity and world view. It shapes his actions, associations, and way of life. If religious liberty were not protected, then what is left is a system which denies an individual's identity and way of life on these accounts. This is not the kind of democracy that is desired in order for multiculturalism and pluralism to thrive in Fiji.

61. In that light, the State must protect the right and the freedom to practice religion but at the same time, must remain neutral and aloof in matters of religion. Otherwise, if the State were to outright forbid the practice of all religions, the State would be denying everyone their basic identity and worth. This is an extreme which is not anticipated by the framers.

62. Alternatively, if, the State were to be founded on a particular faith or religion, the State would be perceived to be marginalizing the world views and values of those persons who hold those other faiths or beliefs. That would be tantamount to a denial of their equal worth. Section 4(3) of the Constitution, in essence, is the beacon which steers the State clear of evolving in either of the above two directions.

63. In **Christian Youth Camps Limited v Cobaw Community Health Services Limited** (2014) 308 ALR 615, [560] (Redlich JA), the Supreme Court of Victoria said that religious belief is:

> a 'fundamental right because our society tolerates pluralism and diversity and because of the value of religion to a person whose faith is a central tenet of their identity'

64. In **Church of the New Faith v Commissioner for Pay-roll Tax (Vic)** (1983) 154 CLR 120, 130 (Mason CJ, Brennan J), said that freedom of religion is the:

> paradigm freedom of conscience' and 'of the essence of a free society

65. The Canadian Supreme Court in **Loyola High School v. Quebec (Attorney General)** [2015] 1 S.C.R. 613 cited Professor Moon's commentary on religious liberty which captures the importance of the fundamental nature of freedom of religion:

> As Prof. Moon noted:
>
> > Underlying the [state] neutrality requirement, and the insulation of religious beliefs and practices from political decision making, is a conception of religious belief or commitment as deeply rooted, as an element of the individual's identity, rather than simply a choice or judgment she or he has made. Religious belief lies at the core of the individual's worldview. It orients the individual in the world, shapes his or her perception of the social and natural orders, and provides a moral framework for his or her actions. Moreover, religious belief ties the individual to a community of believers and is often the central or defining association in her or his life. The individual believer participates in a shared system of practices and values that may, in some cases, be described as "a way of life". If religion is an aspect of the individual's identity, then when the state treats his or her religious practices or beliefs as less important or less true than the practices of others, or when it marginalizes her or his religious community in some way, it is not simply rejecting the individual's views and values, it is denying her or his equal worth. [Footnote omitted; p. 507.]

66. If the obligations on the State in section 4(3) were to be construed as non-mandatory, freedom of religion would be under immense threat.

Where To Strike The Balance

67. The issues in this case revolve around the tension between the right to freedom of religion and the right to be free from discrimination which are both fundamental. How should these two be balanced to ensure that neither of them is undervalued and that the spirit, purpose, values and principles which underlie a democratic society are not given up.

68. Article 18.3 of the International Covenant on Civil and Political Rights would allow a limitation on freedom of religion only to the extent that it is necessary in order to protect the fundamental rights and freedoms of others.

69. The Siracusa Principles which are a guideline on what sorts of limitations may be placed on the rights guaranteed in the ICCPR, provides the following at Article 11:

> 11. In applying a limitation, a state shall use no more restrictive means than are required for the achievement of the purpose of the limitation.

70. Drawing guidance from Article 20 of the Siracusa Principles, the burden is on the State to demonstrate that any limitation which the Permanent Secretary's action may cause to the SDA Church does not impair the democratic functioning of society. This is a question of proportionality which is essentially a question of reasonableness (see **Coetzee** below). The threshold question is whether the objective being pursued by the Permanent Secretary in the appointment of Mr. Raikivi, is legitimate (in **Yaya**). The following questions will need to be asked:

(i) if there is an interference with the SDA's right to religious liberty by the Permanent Secretary's appointment of Mr. Raikivi?
(ii) if so, is there a legal basis for the interference? Does the interference pursue a legitimate aim?
(iii) even if the interference pursues a legitimate aim, is the interference necessary in a democratic society? Whether the interference is **proportionate** to the aim pursued? Is there an **alternative less intrusive** course available to the Permanent Secretary to protect the public interest at stake?

71. In **Coetzee v Government of the Republic of South Africa, Matiso and Others v Commanding Officer Port Elizabeth Prison and Others** (CCT19/94 , CCT22/94) [1995] ZACC 7; 1995 (10) BCLR 1382; 1995 (4) SA 631 (22 September 1995), Kriegler J said as follows while considering section 35 of the South African Constitution which is similar in effect to Fiji's section 7(1):

> "In making the determination, especially with regard to a right as fundamental as the one in question, namely personal freedom, one really need not go beyond the test of reasonableness. This is made all the clearer by the criteria for interpretation of the Chapter 3 rights and limitations found in section 35 of the Constitution. Section 35(1) provides, inter alia:
>
> > 35. Interpretation. (1) In interpreting the provisions of this Chapter a court of law shall promote the values which underlie an open and democratic society based on freedom and equality....
>
> Clearly that provision applies to the interpretation of both the fundamental right protected and the evaluation of any limitation according to the criteria of section 33(1). In the case of the right and limitation at issue here such interpretation is perfectly simple. At the very least a law or action limiting the right to freedom must have a reasonable goal and the means for achieving that goal must also be reasonable." (emphasis added)

72. The Canadian Supreme Court decision in **Loyola High School *v.* Quebec (Attorney General)**, 2015 SCC 12, [2015] 1 S.C.R. 613 93 demonstrates how, even a well-intentioned Ministerial decision in pursuit of a statutory policy aimed at promoting understanding and tolerance in a plural society, was held to be unduly limiting of a faith-based school's right.

73. Loyola High School is a private Catholic school which has always been administered by the Jesuit Order since it was founded in the 1840s. Its students were mostly from Catholic families. In September 2008, the Minister of Education, Recreation and Sports introduced a subject which was to be part of the mandatory core curriculum in all schools across Quebec. The subject was called Ethics and Religious Culture (ERC).

74. The ERC was designed to teach students about the beliefs and ethics of different world religions from a neutral and objective perspective. Its objectives were, first, to foster the *"recognition of others"*, and, second, to advance the *"pursuit of the common good"*. The hope was to encourage students to be open to human rights, diversity and respect for others.

75. Teachers engaged in the ERC were required to be objective and impartial. They were not allowed to advance the truth of a particular belief system, or attempt to influence their students' beliefs. All they were required to do was raise awareness of the diverse values, beliefs and cultures.

76. The relevant statute provided that a school could be exempted from the ERC if it had an alternative option which the Minister deemed to be "equivalent".

77. Loyola had an alternative course which it wanted to teach from the perspective of Catholic beliefs and ethics. It wrote to the Minister to request an exemption. The Minister was of the view that Loyola's proposed alternative was not "*equivalent" because it taught the ERC Program from a Catholic perspective which was not "neutral"*.

78. On judicial review, the Superior Court of Quebec found that the Minister's refusal infringed Loyola's right to religious freedom. Accordingly, the Court quashed the Minister's decision, and ordered an exemption. On appeal, the Quebec Court of Appeal found the Minister's decision was reasonable and that it did not breach the Jesuit Order's religious freedom.

79. On further appeal, the Canadian Supreme Court held that the Minister's decision limited the Jesuit Order's freedom of religion more than was necessary given the statutory objectives. The decision of the Minister did not reflect a proportionate balancing and should be set aside. The appeal was allowed and the matter was remitted to the Minister for reconsideration.

80. The Canadian Supreme Court in **Loyola** (supra) as per LeBel, Abella, Cromwell and Karakatsanis JJ said:

> This Court's decision in *Doré v. Barreau du Québec*, 2012 SCC 12 (CanLII), [2012] 1 S.C.R. 395, sets out the applicable framework for reviewing discretionary administrative decisions that engage the protections of the *Charter* — both its guarantees and the foundational values they reflect. The discretionary decision-maker is required to proportionately balance the relevant *Charter* protections to ensure that they are limited no more than necessary given the applicable statutory objectives. The reasonableness of the

> Minister's decision in this case therefore depends on whether it reflected a proportionate balance between the objectives of promoting tolerance and respect for difference, and the religious freedom of the members of the Loyola community. (*my emphasis*)

COMMENTS

81. The respondents submit as follows in their written submissions:

> .....specific fundamental rights should not be read down by general provisions contained within the Constitution, otherwise the conferral of such specific rights would be subordinated to more general provisions and could be rendered illusory. What is required is the careful and precise identification of the rights and actions in question, the area of potential conflict (if any) and a careful examination to see, if in fact or law, there is an actual conflict and how it can be resolved. The approach and jurisprudence of the Supreme Court of the United States on the First Amendment (freedom of religion) may be a useful reference source. In the context of invalidity of a law, the approach of the Supreme Court is to subject to strict scrutiny the laws said to be invalid and to consider whether the law passes a three-stage test. For example, in the context of whether federal laws regarding discrimination apply to the treatment of employees in religious schools, in *Hosanna-Tabor Evangelical Lutheran Church and School v. Equal Employment Opportunity Commission*, 565 U.S. 171 (2012) the court unanimously ruled that federal discrimination laws do not apply to religious organizations' selection of religious leaders because of the First Amendment. Here, we are not concerned with the invalidity of a law but the appointment (of a civil servant) by the State under a general provision of the *Constitution* and defended by the State on the grounds that the College and the Church are required to accept appointments made by the State. Such State action should be subject to the same strict scrutiny and consideration as occurs in the United States.

And furthermore:

> .....even if the State chooses to provide financial assistance to a school, it cannot make it a condition of such assistance that the school must accept *any* appointment made by the government as, to do so, would have the effect of undermining the separation of religion and State enshrined in section 4 of the Constitution.

82. In my view, the US Supreme Court decision in **Hosanna-Tabor Evangelical Lutheran Church and School v. Equal Employment Opportunity Commission**, 565 U.S. 171 (2012) is hardly persuasive in the particular circumstances of this case for two reasons as I will explain further below. Firstly, Fiji's laws already provide adequate protection in favour of religious bodies in terms of exempting and insulating them from being accountable under

the anti-discrimination provisions of the Constitution. Secondly, this case is not concerned about a religious exemption.

Religious Exemption

83. Section 26(2) of the Constitution lays down the ground rule for equality and equal opportunity for all the people of Fiji. Section 26(3), in furtherance of that goal, prohibits unfair discrimination directly or indirectly on a prohibited ground including religion. Needless to say, this binds the State as well as religious bodies.

84. Section 26(7) of the Constitution provides that it is not "discrimination" if it can be established that the difference in treatment is **not unfair in the circumstances"**:

> (7) Treating one person differently from another on any of the grounds prescribed under subsection (3) is discrimination, unless it can be established that the difference in treatment is not unfair in the circumstances.

85. For the definition of what is "*not unfair in the circumstances*", I am guided by the Human Rights Anti-Discrimination Act 2009. Section 19(1) of the Act provides that it is unfair discrimination when one who is involved in an "area", directly or indirectly differentiates adversely any other person, by reason of a prohibited ground of discrimination which includes religion.

86. The "areas" set out in section 19(3) includes "employment".

> 19.— (3) The areas to which subsection (1) applies are—
>
> (a) the making of an application for employment, or procuring employees for an employer, or procuring employment for other persons;
> (b) employment;
> (c) participation in, or the making of an application for participation in a partnership;
> (d) the provision of an approval, authorisation or qualification that is needed for any trade, calling or profession;
> (e) the provision of training, or facilities or opportunities for training, to help fit a person for any employment;
> (f) subject to subsection(4), membership, or the making of an application for membership, of an employers' organisation, an employees' organisation or an organisation that exists for members of a particular trade, calling or profession;
> (g) the provision of goods, services or facilities, including facilities by way of banking or insurance or for grants, loans, credit or finance;
> (h) access by the public to any place, vehicle, vessel, aircraft or hovercraft which members of the public are entitled or allowed to enter or use;
> (i) the provision of land, housing or other accommodation;
> (j) access to, and participation in, education.

87. Section 20(1) of the Act provides that it is **not unfair discrimination** if the "prohibited ground of discrimination" is a *genuine occupational qualification*.

88. Section 20(2) limits the application of *genuine occupational qualification* to where a position is for the purposes of an organised religion and the differentiation complies with the doctrines, rules or established customs of the religion:

> 20.—((2) For the avoidance of doubt, adverse differentiation by reason of a prohibited ground of discrimination is a genuine occupational qualification where a position is or the purposes of an organised religion and the differentiation complies with the doctrines, rules or established customs of the religion.

89. Hence, these provisions would operate to exempt religious bodies from the broad prohibitions on discrimination in employment, "where a position is for organized religion and the differentiation complies with the doctrines, rules or established customs of the religion".

Why This Is Not A Religious Exemption Case!

90. In this case, the religious exemption is not engaged because the SDA is not the employer whose recruitment or employment policies are under scrutiny. Rather, the State, as employer, is under scrutiny. While the SDA Church, as a private employer, may be allowed the benefit of the exemption under sections 20(1) and 20(2) of the Human Rights & Anti-Discrimination Commission Act 2009, and also under section 22(4) and (5) of the Constitution, the State is bound by the HRAD Act by virtue of section 3 of the Act and is not exempted under section 20 because the post in question is a civil service position and the issues raised concern the State as a public-sector employer.

Does The "Condition" Set by the Permanent Secretary Undermine the Separation of the State & Religion?

91. As for the suggestion in the respondents' submission that the **"condition"** set by the Permanent Secretary undermines the separation of religion and the State in section 4 of the Constitution, I find this hard to accept for the following reasons. As I have said, the separation of the State and religion means that, while the State must protect the right and the freedom to practice religion, the State must at the same time, remain neutral and aloof in matters of religion. If the State were to concede to the SDA Board's demands, the State would thereby involve itself in assisting the SDA Church in exercising its rights under section 22(4) of the Constitution. I find further support in the following points.

92. Firstly, as the respondents concede, a choice resides with any religious community or denomination under section 22(4) of the Constitution as to whether or not to receive financial assistance from the Permanent Secretary. The fact that this choice is exercisable in law, in my view, weakens any alleged or perceived intrusiveness of the Permanent Secretary's decision on the rights of the SDA Church.

93. Secondly, the pursuit of secularism is a valid constitutional and State objective. The Permanent Secretary's "*condition*" was made in pursuit of that objective. The OMRS system, is a purely "*secular*" method of selecting the most meritorious candidate for a position in the Fiji civil service. It is "*secular*" because it does not propose any religious criteria in the selection process. Rather, it is designed to level the field so to speak and to ensure that candidates vying for a position in the civil service are screened, selected, and appointed on merit and on the expectation that they will go on to perform and fulfill the secular objectives of the State. Needless to say, fulfilling the religious expectations of an aided faith-based school cannot be a lawful criterion for the Permanent Secretary, nor can it be part of the lawful job description of any teaching position in the civil service as these would offend the principle of secularism espoused under section 4(3) of the Constitution.

94. Thirdly, the Permanent Secretary was not insisting on the appointment of Mr. Raikivi as a "*condition*" of State assistance. To describe the appointment as a "*condition*" suggests that the Permanent Secretary was setting it as a leverage for something she wants to happen next, or for something she expects in return from the SDA College or Church.

95. The reality is that the Permanent Secretary is in no position to retract on the appointment. Again, unlike the Board, she does not have a choice but to follow the mandate of section 4(3) of the Constitution. If she were to accede to the Board's insistence, she would thereby be in breach of that mandate and be accountable for discriminating unfairly against Mr. Raikivi on a prohibited ground. While the Permanent Secretary has no discretion between appointing a secular candidate and a candidate selected on religious grounds, the law, on the other hand, reserves a right of choice to the SDA Board to either (i) accept the secular appointment, in which case, the State as employer will have to bear the emoluments of the appointee, or (ii) reject the appointment and in lieu thereof, appoint and employ its own "religious" candidate without expense to the State.

96. All the above, I say on the premise that section 4(3) is peremptory in effect and must import a mandatory obligation on the State and all State officials.

97. It is because of secularism, coupled with the State's duty to promote equality and protect against unfair discrimination, that the Permanent Secretary must insist on a secular appointee. On the other hand, it is because of freedom of religion and religious liberty, that the law must reserve to the SDA Church the freedom to choose between accepting the Permanent Secretary's secular appointee, or rejecting it by proceeding to employ its own "religious" appointee at no expense to the State.

WHETHER THE PERMANENT SECRETARY'S DECISION LIMITED THE SDA'S RIGHT TO FREEDOM OF RELIGION?

Freedom of Religion & The Right to Establish, Maintain & Manage Places of Education & to Provide Religious Instruction as Part of Education - Fundamental

98. Section 4(1) of the Constitution, as I have said, describes religious liberty, as recognised in the Constitution, as "*a founding principle of the State*".

99. Section 22 places an obligation on the State to give every person the freedom, individually or in community with others, to practice their religion, conscience and belief.

> 22. —(1) Every person has the right to freedom of religion, conscience and belief.
> (2) Every person has the right, either individually or in community with others, in private or in public, to manifest and practice their religion or belief in worship, observance, practice or teaching.
>
> (3) Every person has the right not to be compelled to—
> (a) act in any manner that is contrary to the person's religion or belief; or
> (b) take an oath, or take an oath in a manner, that—
>
> (i) is contrary to the person's religion or belief; or
> (ii) requires the person to express a belief that the person does not hold.

100. Section 22(4) and (5) extend the above right and give a religious community or denomination a right to establish, maintain and manage a school, whether or not the community or denomination receives financial assistance from the State, and, a right to provide religious instruction as part of any education that it provides.

> (4) Every religious community or denomination, and every cultural or social community, has the right to establish, maintain and manage places of education <u>whether or not it receives financial assistance from the State, provided that the educational institution maintains any standard prescribed by law.</u>
>
> (5) In exercising its rights under subsection (4), a religious community or denomination has the right to provide religious instruction as part of any education that it provides, whether or not it receives financial assistance from the State for the provision of that education.

101. The following questions may be raised from the above. Does the State owe an obligation to the SDA Church, or to any other religious body for that matter, to provide funds to enable the religious body to fully exercise its rights under section 22(4)? In appointing a teacher to an aided faith-based school, is the State obligated in law to take into account the religious character of the school, or, as the case may be, that the Principal's duties as prescribed under

the school's governing instrument, entail organising and leading in religious activities? Is it relevant that the school's governing body desires an appointee of the same faith? Does the SDA Church have a right to teach religious subjects in its schools?

Whether The State Owes An Obligation To The SDA Church To Provide Funds To Enable The Church To Exercise Its Rights Under Section 22(4)?

102. In the court below, the learned Judge recorded the Respondent's position as follows at paragraphs 9 and 10.

> *The affidavit in opposition*
>
> The Church does not have access to sufficient funds to achieve full compliance with its educational philosophy and fundamental principles. It is critical that its students are educated in a manner that conforms with the Adventist ethos, philosophy, principles and values. It is not enough to have a religious teacher. All other SDA schools have Heads of their faith. The Church requested the Ministry to consider a number of suitable **SDAs**. A list was submitted. (emphasis added).

103. Whether or not the State provides assistance to any aided school is a matter of discretion for the Permanent Secretary. This is clear from the wording of Regulation 2 of the Education (Grants and Assistance to Non-Government Schools) Regulations 1966 which applies to assistance to primary schools[i] and also from the wording of Regulation 3 which applies specifically to assistance to secondary schools. Regulations 2 and 3 provides as follows:

Regulation 2:

2. The Permanent Secretary may, in his discretion, make grants to schools **other than secondary schools** for the building or extension of such schools and, in addition, where such a school has been registered, may make provision for all or any of the following forms of assistance: —

(a) the secondment of Government teachers;
(b) assistance towards the salaries of certificated teachers reserved for the service of the controlling authority;
(c) the issue of tools and equipment designed to promote the teaching of craft subjects;
(d) he issue of books and other educational materials and equipment;
(e) such other forms of assistance as may from time to time be deemed desirable by the Director.

Regulation 3:

3. The Permanent Secretary may make grants to secondary schools for all or any of the following purposes:—

(a)new buildings or the extension of existing buildings;

(b) the secondment of Government teachers;
(c) assistance towards the salaries of non-Government teachers;
(d) assistance towards other recurrent expenses considered by the Permanent Secretary to be necessary;
(e) the issue of tools and equipment designed to promote the teaching of craft subjects;
(f) the issue of books and other educational materials and equipment;
(g) such other forms of assistance as may from time to time be considered necessary by the Director because of the nature of the subjects or courses provided in a school.
(Amended by Regulations 2nd June, 1977.)

104. Where, as in this case, the exercise of that discretion and power engages two competing fundamental constitutional rights, the Permanent Secretary is charged under section 3(1) of the Constitution to strike a balance at a point which best promotes "*the spirit, purpose and objects of this Constitution as a whole, and the values that underlie a democratic society based on human dignity, equality and freedom*". The aim of this balancing exercise is to ensure that any intrusion into any rights at stake is proportionate *vis a vis*, the ends (see **Yaya** (supra) and **Loyola** (supra)).

105. In **Bishop of Roman Catholic Diocese of Port Louis & Others v Tengur & Others** [2004] 3 LRC 316, the Privy Council, on appeal from the Mauritian Supreme Court, had to consider *inter alia* whether section 14(1) of the Mauritian Constitution entitled the Catholic Colleges to State funding. Section 14(1), though slightly different in wording, in my view, is similar in effect to Fiji's section 22(4). Section 14(1) provides:

> No religious denomination and no religious, social, ethnic or cultural association or group shall be prevented from establishing and maintaining schools at its own expense.

106. **Tengur** concerned the discriminatory admission polices into some Catholic Colleges which were established and controlled by the Archdiocese. For convenience, I refer to these colleges simply as the "*Catholic School*".

107. For decades after decades since its establishment, the Catholic School was fully maintained and managed through private funds collected from fees. It had an admission policy into first year studies which heavily favoured Catholic students. Because the school was maintained purely on private funds, no one really questioned the discriminatory admission policy of the school.

108. However, as a result of a series of legislative developments and policy changes over the years, the State gradually assumed more responsibility and control over the educational system in Mauritius. Key amongst these was a decision by the government in 1976 to make secondary education free. This applied to all students in government as well as private schools.

109. Pursuant to that free-education policy, the government would pay all fees by direct grant to all schools. This meant that even schools like the Catholic School in question was now being

run and maintained by public funds provided by the government and was no longer maintained through private funds which the school used to receive as fees from parents.

110. At some point around the time when the free education program was just starting, government entered into an arrangement with the Catholic School about the admission of students into first year studies.

111. The arrangement was that the Catholic governing body would retain a 50% quota to fill with students of the Catholic faith, while the remaining 50% quota was to be filled by the government. Pursuant to that arrangement, the government filled its quota on an open merit system regardless of a student's faith. This meant that a Catholic applicant seeking admission to first year studies will first compete for a place in the government quota. If he or she was unable to secure a place on merit in the government quota, he or she could still compete with other Catholic students in the Catholic quota.

112. The father of an eleven-year-old Hindu girl felt that this arrangement would prejudice his daughter if she did not score a high enough mark in the qualifying examination to win a place on merit in the government quota, and yet scored above those Catholic students who would be admitted through the Catholic quota. He argued that the admissions scheme gave preference to Catholic pupils and discriminated unfairly against his daughter. By being a party to that arrangement, government had breached its duty under section 16 of the Constitution to protect against unfair discrimination. The scheme was therefore unconstitutional.

113. The Supreme Court of Mauritius upheld the father's claim.

114. On appeal, the Privy Council upheld the finding that the arrangement was in breach of section 16 of the Constitution. Section 14 of the Constitution gave freedom to a religious organisation to establish, manage and maintain a school at its own expense. The Catholic School had been self-funded for many years without expense to the State. However, at the time in question, the school was being maintained by public funds provided by the State. The State was therefore accountable to ensure that the admission system did not offend section 16. The State's accountability stemmed ultimately from the fact that it had made available public money towards the admissions arrangement with the Catholic authorities.

115. Lord Bingham considered section 14(1) together with section 3(b) which guaranteed freedom of religion, and stated as follows at paragraph 12:

> "Sections 3(b) and 14(1), read together, make it plain that denominational groups are entitled, without discrimination between one group and another, to establish and maintain schools <u>but it is a limited right, protected only if the schools are maintained and established without expense to the State</u>..."

And further at paragraph 21:

> "If, as originally established and maintained, the Catholic colleges were still entirely self-financing, the appellants' admission policy would not attract the operation of section 16(2) since although some potential pupils would still be treated in a discriminatory manner such treatment would not be "by any person acting in the performance of any public function conferred by any law" or "otherwise in the performance of the functions of any public office or any public authority". The appellants would be exercising their right under sections 3(b) and 14(1) to maintain denominational schools at their own expense, and they would be free in running private schools, independent of the State, to give preference to Roman Catholic pupils. As section 16(2) makes clear, it is discrimination in the public domain, through the involvement of the State, which brings the prohibition on discriminatory treatment into play..." (emphasis added)

116. I agree with the appellant's submission that the philosophy which underpins the current constitutional arrangement in Fiji is similar to the principle in **Tengur**.

117. The right under section 22(4) to establish, maintain and manage schools is not guaranteed simpliciter. It is "*protected only*" if the school is established, maintained and managed without expense to the State.

118. If the Permanent Secretary were to consider only SDA candidates to fill the position of Principal at the College, and make an appointment only from that pool, she would be unfairly discriminating against the candidature of other applicants on the basis of their religious beliefs or non-beliefs, and would be mobilising public funds towards supporting such discriminatory practice. This would offend section 26 and section 4(3)(b) of the Constitution.

119. While section 5 of the Education Act confers a discretion on the Permanent Secretary to provide public funds to assist a religious community or denomination in exercising its right under section 22(4), that discretion may only be exercised if the assistance to be rendered is "*secular*" in nature.

120. Accordingly, there is no discretion to entertain a request from a religious body such as the SDA. Following from that, in my view, there is nothing in section 22(4) of the Constitution or in the Education Act which imposes upon the Permanent Secretary or the Minister a positive duty to provide public funds to enable any religious community or denomination to exercise its rights under section 22(4) or 22(5).

Whether The State Is Obligated In Law To Take Into Account The Religious Character Of The School, The Fact That The Principal's Duties Entail Organizing & Leading In Religious Activities, & That The School's Governing Body Desires An Appointee Of The Same Faith?

121. This Court had opportunity to consider these questions in **Reddy v Permanent Secretary for Education** [2007] FJCA 24, Civil Appeal No. ABU 0043 of 2005.

122. **Reddy** also involved an aided religious (Hindu) school which had resisted the appointment by the Permanent Secretary of a Principal who did not belong to the same faith. The Court in that case adopted a reasoning which suggested that, in assessing the merits of a candidate for the position of Head Teacher in an aided faith-based school, the usual criteria, namely, the *"qualifications of the candidates, their work experience, their general skills and their ability to perform at the required level*", although important, were not enough.

> [22] Mr. Lewaravu's submissions to us were brief and to the point. The school now accepted that the Principal was a public officer. It followed therefore that the appointment of the officer had, in accordance with the 1997 Constitution and the Public Service Act, to be made on the basis of merit. A merit assessment had been undertaken which had revealed that Mr. Takirua was the more meritorious candidate. To refuse to allow Mr. Takirua to take up the position to which he was legally entitled would not only result in chaos but would also amount to unfair discrimination against him on the grounds of his religious beliefs.
>
> [23] When we asked Mr. Lewaravu how he suggested that the merits of candidates should be assessed he referred us to the requirements of the advertised post and the Ministry's conclusion that Mr. Takirua "edged Mr. Nand in terms of seniority in grade and years of service." The most important factors, Mr. Lewaravu suggested, were the qualifications of the candidates, their work experience, their general skills and their ability to perform at the required level.
>
> [24] While we agree that seniority in grade and in years of service and the other factors listed by Mr. Lewaravu are important matters to be taken into account, we do not agree that they are necessarily themselves determinative of the merits of the competing candidates.

123. The court then went on to say that other factors such as the "*relative suitability*" of the candidates, "*work – related qualities genuinely required for the duties*" and the "*ability to contribute to team performance*" should also be considered, as set out in Regulation 5 (2), 5(3) and 5(4) of the Public Service (General) Regulations 1999 (LN 48/99) (now called the Civil Service (General) Regulations 1999).

> [29] In our view the manner in which the Ministry approached the assessment of the competing candidates on this occasion and the general approach advocated before us by Mr Lewaravu placed undue emphasis upon the technical achievements of the candidates and paid insufficient regard to such other factors as the "relative suitability" of the candidates, "work – related qualities genuinely required for the duties" and the "ability to contribute to team performance."

124. The court opined that in assessing the suitability of the candidates, it is pertinent to take into account the religious character of the school, the fact that the Principal's duties entailed

organising religious ceremonies, and that the school's governing body desired an appointee of the same faith. Court at paragraph 30 stated as follows:

> [30] ……. We think that the fact that the school is a Hindu school, that the Principal's duties have always involved the organization of Hindu ceremonies and that the school committee very much want the Principal to be a Hindu are important considerations to be borne in mind when assessing the suitability of candidates for the position. With respect, we do not agree with the Judge that the school has "no role or function" in the making of the appointment. The overall aim of the assessment is to find the candidate most suited to the particular position and most likely to make a success of it. This may not necessarily be the candidate whose gradings are the highest or whose years of experience are the longest. It may well be that a candidate who does not score so highly in those areas may demonstrate that, for cultural and religious reasons, he or she is more likely to attract the support of the school, the parents, and the pupils.

125. The court then concluded simply:

> [30] ……. We are unable to accept Mr. Lewaravu's suggestion that there is anything unfair, discriminatory or unconstitutional in approaching the assessment in this way.

126. Mr. Sharma points out that **Reddy** was decided in the context of the 1997 Constitution which did not have any equivalent to section 4(3) of the 2013 Constitution. Mr. Bennet QC on the other hand, urges this Court to follow the precedent set by **Reddy**.

127. There is no indication in the reasoning in Reddy that the Court did engage a balancing exercise similar to that which the Court adopted in **Yaya**. However, while **"***relative suitability*", "*work – related qualities genuinely required for the duties*" and "*ability to contribute to team performance*" are still relevant in the assessment of merit, section 4(3) of the Constitution would operate to preclude the Permanent Secretary from applying a broad brush approach to these criteria as to enable her to take into account the religious character of an aided school, or the desires of the school's religious Board, or the governing instrument of the school, as a criteria relevant for preferring an applicant of a certain faith over another of a different faith or non-faith.

Does The SDA Church Have A Right To Choose Only Teachers Of The SDA Faith To Teach Religious Subjects?

128. Section 22(5) answers this question in part. It provides that a religious community or denomination is entitled to teach religious subjects in exercising its right under section 22(4).

> In exercising its rights under subsection (4), a religious community or denomination has the right to provide religious instruction as part of any education that it provides, whether or not it receives financial assistance from the State for the provision of that education.

129. Section 22(4) is qualified by the words:

> "..whether or not it receives financial assistance from the State, provided that the educational institution maintains any standard prescribed by law*"*

130. The above words literally mean that the right to establish, maintain and manage a school and the right to provide religious instruction that comes with it, do exist independently of the State. Such an interpretation is reinforced by the relatively high importance which the Constitution places on religious liberty and secularism.

131. Secularism means that the State is neutral to religion. This means that the State cannot assume the role of benefactor of any particular religion, or even religion in general. The State simply has no business in religion. Its role is only to protect the free exercise of the right to those who want to engage in religion. This philosophy underpins section 4(3)(b) of the Constitution.

132. Having said that, the words "… *provided that the educational institution maintains any standard prescribed by law"* as they appear in section 22(4)*,* in my view, are added to give effect to the reality that the State must retain some regulatory control over the "secular" aspects of a faith-based school.

133. For the above reasons, I am of the view that the SDA Church has a right to choose teachers of the same faith to teach religious subjects at its schools, at its own expense. However, the Church does not have a right which it may enforce to compel the State to appoint to it, and pay for, a teacher of the same faith to teach religious subjects.

Does The SDA Church Have A Right To Choose Only Teachers Of The SDA Faith To Teach Secular Subjects – Or To Engage Only A Teacher Of The Same Faith To Fill Or Act In The Position Of School Principal?

134. In almost all faith-based schools, the school's governing instrument will stipulate that the Principal or Head of School should always be of the same faith and be required to carry out religious duties and protocols in addition to their normal "secular" duties. In **Reddy** (supra), this Court rejected the argument that, because the school's private constitution required the principal to be of the Hindu faith, section 3 of the Education Act was thereby engaged to confer a right on parents, and an obligation on the Ministry, to have a Hindu appointed as Principal of the school in question. I agree with this part of that judgment.

> [21] In our view, none of the matters raised by Mr Ram give an Aided School the right, on the basis of its own private constitution, to over- rule the appointment by the Ministry of a public officer as the Principal of the school. At the same time, we take the view that the approach taken by the Ministry on this occasion and the submissions of counsel for the Ministry call for some further comment.

135. **Tengur** (supra) would suggest that a faith-based school is free to engage a teacher of the same faith to teach secular subjects, or even to occupy the position of School Principal, so long as the engagement entails no expense to the State.

136. In my view, that freedom is based ultimately on an interplay between the doctrine of freedom of contract and the fundamental right to religious liberty. The former confers upon a private employer some latitude to hire and fire anyone at its whims and caprices, subject to such limitations placed by the law which prohibit the employer from making hiring and firing decisions which discriminate unfairly on a prohibited ground. The latter would exempt a religious body which hires only staff of the same faith, from any accountability under the anti-discrimination provisions of the Constitution and under the Human Rights & Anti-Discrimination Commission Act 2009.

Conclusions

137. I am of the view that the Permanent Secretary's decision does not violate the SDA's rights under section 22(4) of the Constitution.

138. While the right under section 22(4) is a protected right, the Board may choose to yield to the State's secular appointment in Mr. Raikivi in order to receive State assistance in the provision of a College Principal who will be selected, appointed, and paid by the State.

139. However, as I have said, the Board retains a right of election over whether to accept or reject Mr. Raikivi's appointment.

140. While the Board retains that right of choice, the Permanent Secretary on the other hand, has no choice. By operation of section 4(3)(c) and section 26 of the Constitution, a mandatory duty is imposed upon her as an officer of the State to *"not prefer or advance, by any means, any particular religion, religious denomination, religious belief, or religious practice over another, or over any non-religious belief"*. In other words, the Permanent Secretary has no discretion as to whether or not to accede to the Board's request, nor does section 4(3) confer any power on her to compel the Board to accept any secular appointment she offers in assistance, against the Board's wishes.

141. The mere fact that a right of choice exists in law for the SDA Board, in my view, should work to mitigate against any potential or perceived violative effect of the appointment.

142. The Board is free to reject Mr. Raikivi. In choosing that option, the Board may lose the State assistance offered by the Permanent Secretary. However, even though the Board may forfeit State assistance, its rights under section 22(4) or section 22(5) remain intact. This is because the Board's right to "maintain or manage" the College, or to teach religious subjects in the College, exists irrespective of whether or not it receives any assistance from the State.

SUPPOSING THE PERMANENT SECRETARY'S DECISION LIMITED THE SDA'S RIGHT TO FREEDOM OF RELIGION, WOULD THE LIMITATION BE JUSTIFIABLE?

143. If, supposing, the decision does limit the SDA Board's freedom in any way, whether the limitation is justifiable will depend on whether the limitation is proportionate to the aim being pursued? Is there an alternative course open to the Permanent Secretary which is less limiting in effect? Has a proper balance been struck between the Board's rights under section 22 subsections (4) and (5) of the Constitution and Mr. Rakivi's rights under section 26 of the Constitution? What about the public interest at stake?

144. As **Aharon Barak** observes, proportionality is really about reasonableness (see **"Proportionality", in The Oxford Handbook of Comparative Constitutional Law** (2012), Michel Rosenfeld and András Sajó, eds., 738, at p. 743).

> Reasonableness in [a strong] sense strikes a proper balance among the relevant considerations, and it does not differ substantively from proportionality"

145. I reiterate for emphasis the opinion of LeBel, Abella, Cromwell and Karakatsanis JJ in **Loyola High School *v.* Quebec (Attorney General)**, 2015 SCC 12, [2015] 1 S.C.R. 613 93. A discretionary decision-maker must proportionately balance the relevant Constitutional protections to ensure that they are limited no more than necessary given the applicable statutory objectives. "Reasonableness" in this balancing exercise depends on whether the decision reflects a proportionate balance between the statutory objectives and the religious freedom at stake in that case.

146. Article 10(c) and (d) of the Siracusa Principles on the Limitation and Derogation of Provisions in the ICCPR provides:

> 10. Whenever a limitation is required in the terms of the Covenant to be "necessary", this term implies that the limitation:
> (c) pursues a legitimate aim, and
> (d) is proportionate to that aim.
> Any assessment as to the necessity of a limitation shall be made on objective considerations

147. In Fiji, section 22(7)(a)(i) makes provision for the limitation of religious freedom as such:

> (7) **To the extent that it is necessary**, the rights and freedoms set out in this section may be made subject to such limitations prescribed by law— (a) to protect— (i) the rights and freedoms of other persons

148. As I have said, I am of the view that the Permanent Secretary's decision to appoint Mr. Raikivi does not limit the SDA Board's freedom or right under section 22(4) or section 22(5) of the Constitution in any way.

149. If assuming the appointment had a limiting effect on the SDA's rights in any way, the limitation would be justified by the secular goals of the State which, in this instance, is personified in the OMRS provisions of section 127(8)(b) of the Constitution and the anti-discrimination provisions in section 26.

150. Generally, in appointing a teacher to any vacant position in the Ministry, the Permanent Secretary's aim would be to select the most qualified candidate under the OMRS. The OMRS, as I have said, is based on section 21 of the Civil Service Act which, in turn, is based on the values set out in section 123 of the Constitution. These include the values of "objectivity, impartiality and fair competition".

151. As I have said, the OMRS is designed to level the field to ensure that candidates applying for a position in the civil service are screened, selected, and appointed on merit without discrimination on a prohibited ground. Mr. Raikivi was identified and appointed on that "*secular*" basis.

152. Secularism is a legitimate State goal and a founding principle of the multi-cultural and plural democratic society of Fiji. It (secularism) entails a normative commitment on the part of the State to remain neutral toward religious affairs. Hence, and again I say this, under section 4(3)(b), the State will neither favor, disfavor, promote, or discourage any particular religious belief or practice.

153. Because section 4(3)(b) of the Constitution now forbids the Permanent Secretary in simpliciter from taking these things into account, the SDA College's religious character, or the wishes of the SDA Board or the private Constitution of the SDA College, are no longer factors within the Permanent Secretary's purview when exercising her authority to determine the qualification requirements for appointment for appointment into her Ministry.

154. The Board has the option to either accept the secular appointment of Mr. Raikivi, or, refuse it and in lieu thereof, appoint and employ its own Head Teacher at its own expense. The Permanent Secretary has no other option. On balance, only the Board is placed in a position to mitigate any limiting effect of the appointment. This, as I have said, is the very reason why I am of the view that the appointment of Mr. Raikivi has no limiting effect on the SDA Church or Board.

WHETHER A RELIGIOUS ENTITY'S RIGHT TO ESTABLISH, MAINTAIN, AND MANAGE PLACES OF EDUCATION HAS, CONCOMITANT TO IT, THE RIGHT TO CLOSE THE PLACE OF EDUCATION.

Religious Body Which Establishes School Has Right To Maintain & Manage School

155. The Board desires to close the aided-College and "re-open" it as a fully private institution. It wishes to follow suit with all its other aided schools. This planned course of *privatisation* is driven by a vision and a concept of education which places a relatively high emphasis on a child's religious and moral development.

156. Clearly, *privatisation* will entitle the Board, as a private employer, to favour candidates of the same faith who will serve as instruments in the pursuit of these goals. The Board may appoint teachers of the same faith, and "heads" who will run and manage its schools in accordance with the SDA's ethos and principles. This is all perfectly within the Board's rights under section 22(5) of the Constitution.

157. It is common ground between the parties that the freedom to establish schools under section 22(4) of the Constitution must include the right to maintain and manage those schools. In other words, the right to maintain and manage the school resides with the body or entity which established the school. It does not reside with anyone else.

158. I agree.

159. I also agree that a religious or denominational body's right under section 22(4) to maintain and manage any school which it has established, includes the right to manage and maintain the school in whatever management form or governing structure deemed suitable by the religious body for its purpose, so long as the right is not exercised at any expense to the State, and subject to the regulatory control of the State, which must not place any unnecessary limitation on the right under section 22(4).

160. This must include *inter alia* a right to *convert* its school(s) from an aided institution to a fully-fledged private institution.

Converting From "Aided Faith-Based School" To "Private Faith-Based School"

161. Both the appellant and the respondents appear to be laboring on the presumption that, before the SDA Board can fully privatise its schools, it must first close all its current schools.

162. The respondents submit:

> 3. The respondents contend that, because they have the right to establish, maintain and manage places of education, and because they established, maintain and manage the College, it is also their right to convert the college to a private college and they rely upon section 22(4) of the Constitution to enable them to do so – whether by the exercise of those rights or the non-exercise of those rights by dis-establishing, not maintaining or not managing it as a non-fee paying public college or as a fee paying private college.
>
> 4. The conversion from public college to private college does not involve the complete closure of the college as a place of education, but principally a change in the financial arrangements between pupils and the college. Although this has been perceived in some quarters as a complete "closure" of the college (wrongly, with respect), such perception does not in fact recognise the true state of affairs namely, that the college would remain open, albeit as a privately funded place of education.

163. The Education Act does not expressly define or even mention the term "private school" in any of its provisions or Regulations. In fact, the Act only mentions "government schools" and "aided schools". From the definition of these terms in section 2 of the Act, it would appear that the two are distinguished by (i) the fact that one is controlled by the Department and the other is not, and (ii) the extent to which they are maintained out of public funds (see section 2).

164. Having said that, there is nothing in the Act that forbids a religious body which has been maintaining and managing a faith based- school by way of a recurrent grant out of public funds, to henceforth, proceed "privately" and independently without any funding whatsoever from the State.

165. There is also nothing in the Act or in any Regulation under the Act that makes it compulsory that every private school must accept a state-appointed teacher who is to be paid by way of a recurrent grant out of public funds. Again, the right under section 22(4) and section 22(5) provide that these rights exist "whether or not [the faith-based school] receives financial assistance from the State".

166. Furthermore, there is no express provision in the Act or in any Regulation under the Act, which requires an aided school which wishes to, henceforth, operate as a fully independent "private" school, to first close the aided school and then "re-establish" or "re-register" the school, before re-opening it as a fully private school. The only provision in the Act where a school may have to be "re-registered" or "re-recognised" is set out under section 16(2), which, when read together with section 16(1) and section 15, and Regulation 3 of the Education (Establishment & Registration Of Schools) Regulations, has the following effect:

    (i) section 15 of the Education Act and Regulation 3 of the Education (Establishment & Registration Of Schools) Regulations provide that schools may be classified as kindergartens, primary schools, intermediate schools, middle schools, secondary schools, technical schools, craft centers, vocational schools, or teachers colleges.
    (ii) section 16(1)(a) provides that any person desirous of establishing any such school must apply to the Permanent Secretary for approval.
    (iii) if the Permanent Secretary grants approval, the applicant must then apply for a certificate of recognition or registration (section 16(1)(b)).
    (iv) if a person is desirous of providing education in any nature or form, in any school, which nature or form is "*different from the nature or form of education falling within the classification in which the school is, for the time being, classified",* then this change in *nature or form of education* shall be deemed to be an act of "establishment of a school".
    (iv) this means that the person, or the controlling authority of the school, will then have to apply to the Permanent Secretary for approval under section 16(1)(a) to "re-establish" the school and once approval is given, the person or controlling authority must then apply for a certificate of recognition or registration of the school in its new classification under section 16(1)(b).

167. The above provisions would apply where, for example, a school currently classified as a primary school, wishes to teach subjects at secondary school, or where a kindergarten wishes to teach subjects at primary school level, or where a secondary school wishes to teach subjects at tertiary or vocational level, and so on. Neither of these is the case here with the SDA Board.

Can The Board Close College In Any Event?

168. The respondents submit:

> ....the *choice to* exercise of a right resides with the rights holder. A rights holder may choose to exercise or not exercise a right and cannot be compelled to do so. If the religious community chooses not to maintain a school as a partially government funded place of education then it has the right to do so.

169. I agree that the choice to exercise a right resides with the rights holder. As I have said above, under section 22(4) of the Constitution, the Board's right to establish, manage and maintain a place of education exists irrespective of whether or not it receives financial assistance from the State.

170. This means that, although the Board's section 22(4) right is protected, the Board may choose to yield to the State's general and wider secular agenda, so to speak, in the appointment of Mr. Raikivi. The choice to yield or not resides with the Board. To yield is not an imperative which the State can impose on the Board. The State's role is merely to ensure that the Board remains free at all times to exercise its right.

171. In this case, the Board wishes to close the College and all its other aided schools in Fiji. The ultimate goal is to convert them all to fully independent private institutions. The respondents submit:

> The right to "*manage*" in section 22(4) of the Constitution includes the right to close a school, *a fortiori* the right to convert it to a private school

172. I accept the above, although, I prefer to describe it as a "freedom" rather than a "right" to close a school. Hence, the Board has a right to establish, maintain and manage a school and concomitant to that right, is a freedom to desist from exercising it once it has exercised it.

173. However, the right to establish a school under section 22(4) is subject to the State's regulatory control. This is envisaged by the proviso in section 22(4) that "…*the educational institution maintains any standard prescribed by law"*. This proviso works to reserve to the State a measure of regulatory control over the "secular" aspects of a faith-based school's operations to ensure that the school is maintained according to law.

174. As Lallah ASPJ of the Mauritian Court of Appeal said in **Government Teachers Union v Roman Catholic Education Authority** [1987] MR 88, 94:

> "Further our State being secular in character, even where the Constitution in section 14(1) confers a fundamental right on religious denominations or religious, social, ethnic or cultural associations or groups to establish and maintain schools at their own expense, the responsibility of regulating such schools is reserved to the State, by section 14(2), in the interests of students to an extent reasonably justifiable in a democratic society."

175. A fortiori, the freedom to de-establish or close a school must also be subject to the regulatory function of the State. This is re-enforced by section 19(2) of the Education Act which gives the controlling authority of any school the freedom to, at any time, request the Permanent Secretary to close such a school:

> Closing of schools
>
> 19.— (2) The controlling authority of any school may, at any time, request the Permanent Secretary to close such school and, in such event, the Permanent Secretary may order the manager of such school to close the school.

176. That the State has regulatory control in a religious body's exercise of the right to establish a faith-based school under section 22(4), and the freedom to de-establish such a school, is further reinforced by section 16 of the Education Act.

177. Hence, to answer the question, while the Board is free to close all its schools, it must first seek an order of the Permanent Secretary under section 19(2) of the Education Act.

Exercising The Section 19(2) Discretion

178. Clearly, section 19(2) confers a discretion on the Permanent Secretary. This discretion becomes exercisable when the Permanent Secretary receives a request from the Board. There is no evidence that the Board has ever written such a letter of request to the Permanent Secretary.

179. A discretion:

> .....implies power to make a choice between alternative courses of action. If only one course can lawfully be adopted, the decision taken is not the exercise of a discretion but the performance of a duty. To say that somebody has a discretion presupposes that there is no uniquely right answer to his problem.
> SA de Smith and JM Evans (eds), *De Smith's Judicial Review of Administrative Action* (4th ed, 1980) 278.

180. In my view, the discretion open to the Permanent Secretary when a controlling authority seeks her sanction under section 19(2), is to either order the closure of the school, or postpone the order pending some conditions - which condition(s) must be lawful and justifiable in a democratic society. Any condition she sets cannot be so harsh or unreasonable as to undermine the religious body's right or freedom under section 22(4).

181. In the Canadian Supreme Court case of **Congrégation des témoins de Jéhovah de St-Jérôme-Lafontaine v. Lafontaine (Village)**, 2004 SCC 48 (CanLII), [2004] 2 S.C.R. 650) McLachlin C.J. said:

> As Rand J. has made clear in *Roncarelli v. Duplessis*, 1959 CanLII 50 (SCC), [1959] S.C.R. 121, at p. 140, no discretion casts a net wide enough to shield an arbitrary or capricious municipal decision from judicial review:
>
> > In public regulation of this sort there is no such thing as absolute and untrammeled "discretion", that is that action can be taken on any ground or for any reason that can be suggested to the mind of the administrator; no legislative Act can, without express language, be taken to contemplate an unlimited arbitrary power exercisable for any purpose, however capricious or irrelevant, regardless of the nature or purpose of the statute.

Respondents' Further Submissions

182. The respondents submit as follows:

> 35. The observations that we would make about s.19 are set out below.
>
> 36. First, it is trite to observe that the section is located in an Act that is not part of the Constitution. In other words, the right or power of the Permanent Secretary exercises is not a constitutional right and should not be considered as overriding a constitutionally conferred right (assuming, as we argue, that one exists) for the reasons given above.
>
> 37. Secondly, the Permanent Secretary has to be "satisfied" of a certain State of affairs as a result of an inspection carried out pursuant to s.18 of the Act or otherwise before the Permanent Secretary can act under s.19(1)(g) to order the manager to close a school. In other words, the power of the Permanent Secretary under s.19(1)(g) is not an unconstrained general power conferred so that the Permanent Secretary may act whenever he or she sees fit to do so. Instead, it is constrained by the operation of the opening words of s.19 that require that an inspection have taken place under s.18 of the Act and by the categories of acts referred to in the several sub-sections of section 19.
>
> 38. Thirdly, the words of section 19(1) do not give the Permanent Secretary the exclusive power to close a school. Yet, that was the finding by the trial judge {TJ[27]}. In the absence of the express conferral of an exclusive power, it may be asked whether there is anything in s.19 that would suggest that the power is exclusive to the Permanent Secretary.
>
> 39. The learned trial judge relied upon s.19(2) as an indication that the power of the Permanent Secretary is exclusive {TJ[26]}. However, s.19(2) is a permissive sub-section. It enables the controlling authority of any school to request that it be closed. It does not impose upon the controlling authority an obligation to do so, nor does it

provide any consequences if the controlling authority does not make any such request. In context, s.19(2) should be understood as relying upon the subject matters/events identified in s.19(1)(a) to 19(1)(g) of the Act for the purposes of a request.

183. The respondents further submit:

> The conversion from public college to private college does *not* involve the complete closure of the college as a place of education, but principally a change in the financial arrangements between pupils and the college. Although this has been perceived in some quarters as a complete "*closure*" of the college (wrongly, with respect), such perception does not in fact recognise the true State of affairs namely, that the college would remain open, *albeit* as a privately funded place of education.

184. With regards to the first point above, had the Board lodged a request under section 19(2) of the Education Act, and the Permanent Secretary had decided to postpone her sanction to allow her time to find an alternative suitable arrangements for students and teachers – the issue would have turned on whether the exercise of the discretion is reasonably justifiable in a democratic society.

185. With regards to the second point, I am of the view that a school may be closed by the Permanent Secretary either through a section 19(1) closure which she may order after an inspection carried out by Ministry officials under section 18, or, through a section 19(2) closure, which she may order after a request by the controlling authority. The former, I imagine, would cover such situations where, for example, an inspection has revealed that the school's buildings and infrastructure are in such a state of derelict and that the Permanent Secretary has heeded professional advice that it would expose the safety and health of students and teachers if the school were to remain open. The latter, I should think, would cover situations where the controlling authority simply wishes to desist from running the school for whatever reason.

186. As I have said, there is no evidence in this case that the SDA Board had ever requested the Permanent Secretary for an Order to close the school. There is no evidence either as to whether the closing of the aided SDA schools, and their re-opening as non-aided private schools, are to happen simultaneously, or whether the "*re-opening*" is intended to happen after a lapse of sometime of further planning, preparation and strategizing. The respondents however submit that:

> "[t]he conversion from public college to private college does *not* involve the complete closure of the college as a place of education, but principally a change in the financial arrangements between pupils and the college" and "..the college would remain open, albeit as a privately funded place of education".

187. Again, since the SDA Board wishes to "close" its schools, it must apply to the Permanent Secretary for her sanction. It would appear to me that this issue as to whether or not it is necessary to "*close*" the school first before re-opening as a fully private school - could have been easily resolved between the Permanent Secretary and the Board.

188. As regards the third point, I am of the view that it would be a rather misguided exercise if this court were to embark on an inquiry as to whether or not the power under section 19(1) or section 19(2) are exclusive to the Permanent Secretary. I say this because those provisions are clear in conferring a regulatory authority on the Permanent Secretary in terms of the closing of a school. It would lead to such an absurdity if the sections were to be acknowledged on the one hand as conferring regulatory powers on the Permanent Secretary and yet, on the other hand, the Act as a whole were to be interpreted as allowing a fragmentation of that very scheme such as to allow the SDA Board to close its schools on its own unregulated whims and caprices.

189. In any event, as I have said, the Permanent Secretary does not have an "absolute and untrammeled" power under section 19(2). Her discretion cannot be exercised to sanction her unreasonable withholding of a consent so as to undermine the SDA's freedom or rights under section 22(4).

190. In my view, section 19(2) is "*permissive*" only in the sense that it gives a controlling authority the freedom to, at any time, make the decision to close its school. However, once that decision is made, the controlling authority must then write to the Permanent Secretary to seek her sanction to close the school. What section 19(2) does not give the controlling authority is an option between seeking the Permanent Secretary's sanction or, to proceed in any event on its whims and caprices.

191. In other words, the Permanent Secretary's discretion under section 19(2) cannot be exercised in such a manner so as to limit the Board's right under section 22(4) no more than is necessary. Again, the relevant question to ask is whether a refusal or delay in sanctioning a closure is justifiable in a democratic society?
Conclusion

192. Since Board insists on closing its schools before reopening them, which seems a superfluous exercise, the Board must write a request to the Permanent Secretary pursuant to section 19 (2) of the Education Act to seek her sanction to close the school. The Permanent Secretary, upon receiving a request, must review it and either sanction the proposed closure or postpone such her sanction subject to some conditions as she thinks fit, provided that no condition can be set which will work to prejudice the Board's right under section 22(4).

Costs

193. Both parties filed comprehensive submissions in addition to making oral submissions during hearing of the Appeal.

194. The issues raised in this appeal deals with the interpretation of significant provisions of the Constitution and raises important questions of law and matters of public importance.

195. Under the circumstances it is just and fair that each party bear their own cost of the appeal.

ORDERS

1. The appellant's Appeal is allowed.

2. The respondents' Cross-appeal is dismissed.

3. Declarations and orders made by the High Court are set aside.

4. In lieu of the declarations made by the High Court, the following declarations are made:

   a) Every religious community or denomination, and every cultural or social community, which has established a place of education under section 22(4) of the Constitution, has the right to appoint, at their own expense and without any expense to the State, their own employees as teachers to teach at the place of education established by them, including the appointment of religious instructors/teachers.

   b) Under section 4 (3) of the Constitution of the Republic of Fiji, the Permanent Secretary for Education, or any teacher appointed by the Permanent Secretary, must not, as a public officer, prefer or advance any religion or any religious belief by any means whatsoever, including the appointment of public servants as teachers, or the grant of public funds (including any education grant), to any educational institution. Consequently, any public officer sent to teach in schools cannot be required to promote or advance any religion or religious belief at any such school.

   c) If, in the exercise of her discretion, the Permanent Secretary decides to assist any school through the provision of teachers, then the State, through the Permanent Secretary, must select and appoint such teachers only on merit without regard to or preference for any religion or religious belief(s).

   d) Any religious community or denomination or any cultural or social community which receives assistance from the State in the form of teachers cannot interfere with the appointment of such teachers by the Permanent Secretary, nor, can they refuse to accept the appointment of any teacher, on the grounds of religion or religious belief or on any other prohibited ground of discrimination.

   e) Any religious community or denomination, or any cultural or social community, which has established an educational institution, and which institution is duly registered or recognized under the Education Act 1966, has the right to close that educational institution. However, such a right is subject to the regulatory sanction of the Permanent Secretary as required under section 19 (2) of the Education Act, in order to allow the Permanent Secretary to ensure that the right to education of the students is not undermined or affected, or to ensure that any disruption to education is minimized, provided that such sanction must not be unreasonably withheld or delayed.

f) Further to paragraph 3(d) above, the Permanent Secretary for Education, Heritage and Arts has the lawful right to appoint any teacher and/or any Head of School to any acting position in any aided school of the Seventh Day Adventist Church, without any interference by the Board or Trustees of the Seventh Day Adventist Church or the first respondents.

5. In lieu of the Order made at paragraph 50 of the High Court judgment, it is ordered that the Board members or Trustees of Seventh Day Adventist Church and the first respondents and the second respondents shall not in any way interfere with the Ministry of Education, Heritage and Arts' right to appoint any teachers including Head of Schools and any acting appointments for the first respondent.

6. Each party is to bear their own costs of this Appeal.

COURT OF APPEAL FIJI

HON MR JUSTICE S. LECAMWASAM
JUSTICE OF APPEAL

HON MR JUSTICE A. TUILEVUKA
JUSTICE OF APPEAL