

IN THE SUPREME COURT OF FIJICIVIL JURISDICTION

No. 178 of 1981

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

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

AND

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

Between: The Director of Public Prosecutions Plaintiff

And: The Attorney-General Defendant

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

J U D G M E N T

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

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

" FIJI INDEPENDENCE ORDER, 1970

ASSIGNMENT OF MINISTERIAL  
RESPONSIBILITIES

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

The Attorney-General

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

Dated the 28th day of January 1981.

By Command

I.Q. LASAQA  
Secretary to the Cabinet

SCHEDULE

Column 1

(Business of the Government)

Criminal law and procedure;  
Evidence;

Column 2

(Ministry and departments of the Government)

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

Section 76 reads :

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

307

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

Relevant parts of section 85 read :-

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

.....  
.....

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

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

.....

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

.....  
.....

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

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

Section 82 of the Constitution reads :

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

Provided that -

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

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

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

307

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

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

The plaintiff contends that, because of the words "subject to the provisions of this Constitution" appearing in section 76(1), the assignment of responsibility under that section should be read subject to section 82 which requires that the assignee "shall exercise general direction and control over that department". That being so, says he, the assignment contravenes section 85(7) which specifically excludes any direction or control over the plaintiff in the exercise of the powers conferred upon him by section 85(4).

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

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

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

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

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

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

The plaintiff contends further that the 'Office' of the Director of Public Prosecutions created by section 85 is not a department of the Government envisaged by section 76. He, however, does have an

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

Apprehension and prosecution of persons accused of crimes is, and has always been, an important Governmental function. Protection from interference conferred by the Constitution to ensure impartiality cannot alter that. Like any other department of the Government the "Office of the Director of Public Prosecutions" employs public officers, assesses budgetary requirements and must find ways of procuring money from the same source as any other department. Its future requirements must find a place in any projected development plan. The Constitution, quite understandably, makes no provision for any separate machinery to accomplish that for this office. What is clear is that a great deal of work, completely unconnected with the powers conferred by section 85(4), must be done in order that those powers might be effectively exercised. The assignment made by the Governor-General covers this work, and this work alone, section 85 being specifically excluded from the scope of the assignment.

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

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



the assignment itself.

We accept the plaintiff's contention that a great many functions he has to perform, though not specifically included under section 85(4), must, by necessary implication, be regarded as incidental to a proper exercise of his powers under that section. To give one example, he must call for police dockets prepared by the Criminal Investigation Department. He must be able to give them directives on matters relating to investigation and prosecution of crimes. If the Minister in charge of the Police Force, or the Commissioner of Police himself, interferes with these functions this Court would, no doubt, regard such action as interference with powers conferred by section 85(4) and, consequently, unconstitutional. The assignment in question does not and cannot, in our view, cover functions necessarily incidental to the exercise of powers conferred by section 85. There is, however, outside such functions, a substantial area of administrative activity requiring cabinet consideration and parliamentary approval over which general control and direction may be exercised without violating the provisions of section 85.

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

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

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

There will be no order for costs.

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

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

Constitution proclaims to be one of its major objectives.

  
( G. Mishra )  
JUDGE

Suva,

10th April, 1981