IN THE HIGH COURT OF SOLOMON ISLANDS

Civil Appeal No.1 of 1984

KENILOREA

v

ATTORNEY-GENERAL

Solomon Islands Court of Appeal
(Sir John White P, Connolly and Pratt JJA)
Civil Appeal No.1 of 1984

3rd October 1984 at Honiara
Judgment delivered 21st December 1984

Constitution - separation of powers - independence of the judiciary - powers of National Parliament - retrospective legislation - effect of - jurisdiction of the High Court S 77(1) of the Constitution.

Facts:

On the 9th March 1982 the National Parliament passed the Price Control of Act 1982 which Act was never brought into force even though steps were taken under it and orders made as though it had been brought into force. In September 1983 Orders were purported to be made under the Act controlling the retail and wholesale price of butane gas. The companies affected by the purported orders commenced proceeding against the Attorney-General for a declaration that, the Act never having been brought into force, the said orders were invalid. On the 23rd November 1983 while the proceedings were pending the National Parliament passed the Price Control (Retrospective Operation and Validation) Act 1983. The 1983 Act contained provisions retrospectively validating orders made and acts done under the 1982 Act and by ss 4 and 5 making provision that the validity of certain act and orders under the 1982 could not be called into question before the court and directing the court as to how to dispose of actions already in court. When the matter was debated in the National Parliament the Appellant who was Leader of the Official Opposition objected to ss. 4 and 5 of the 1983 Act on the grounds that they were in effect changing the constitution by interfering with the jurisdiction and powers of the judiciary and therefore the procedure for altering the Constitution should have been complied with.

After the Act was passed the Appellant applied pursuant to s. 83 (.1) of the Constitution for a declaration that ss 4 and 5 of the 1983 Act ware void as being unconstitutional and contrary to and repugnant to s. 77(1) of the Constitution. The High Court (Daly C.J.) refused the declaration requested and the Appellant appealed arguing the further and wider ground that the sections not only infringed on s. 77(1) of the Constitution but also the independent power of the judiciary implicitly enshrined in the Constitution.

1. that the Constitution in its terms makes a clear separation of powers between the legislature, the executive and the judicature and the judicial power could not be usurped or infringed by the legislature or executive without the Constitution being amended.

2. that legislation which is not passed for the generality of citizens but is clearly aimed at particular known individuals is a transgression of the judicial power by the legislative power particularly if directed at a particular pending litigation. (Hinds v. The Queen [1977] AC 195 and Liyanage v. The Queen [1967] AC 259 approved and followed.)

3. that in view of s. 10(8) of the Constitution the court cannot be subject to control or direction by some other authority and although the legislature may define certain jurisdictional matters they cannot direct the judge or magistrate what to do in a particular case.

4. that whether or not there has been a transgression of the judicial power must in each case depend on the particular facts of that case. In the instant cases ss 4 and 5 (a)(b) and (c) of the 1983 Act did not amount to such a transgression being general in terms and not directed at identifiable persons or existing litigation, s. 5(d) and (e) of the 1983 Act were a transgression

being the judicial power in that they were directory to the court as to the manner in which the court was to deal with pending litigation and how it should exercise its jurisdiction and upon what grounds it should do and it was for the court and the court alone to determine what the legal consequences of legislation were.

Accordingly the judgment of the High Court was set aside and judgment entered in favour of the appellant on the basis that ss 5 (d) and 5(e) of the 1983 Act were invalid as being beyond the power of the National Parliament.

Cases referred to:

Hinds -v- The Queen [1977] AC 195, [1976] 1 All ER 353
Liyanage -v- Reginam [1967] AC 259, [1966] 1 All ER 650
Minister of Home Affairs -v- Fisher [1980] AC 319
Ong Ah Chuan -v- Public Prosecutor [1981] AC 648
Bribery Commissioners -v- Ranasinghe [1965] AC 172

Kenneth Brown, Public Solicitor, for the appellant
Frank Kabui, Attorney-General, in person

White P: This is an appeal from a judgment of Daly CJ delivered in the High Court on 16 March 1984.

The appellant, applicant in the court below, sought a declaration under s. 83 of the Constitution that ss 4 and 5 of the Price Control (Retrospective Operation and Validation) Act 1983 were void.

In 1982 the Price Control Act 1982, which I shall describe as "the 1982 Act" as it was described in the High Court, was passed, to come into force "on such day as the Minister by notice in the Gazette appoint". That action was not taken by the Minister. Nevertheless, certain actions purporting to be pursuant to the 1982 Act were taken. There is no dispute that action had been commenced in the courts in relation to those actions and that, as a result, the Price Control (Retrospective Operation and Validation) Act 1983 (which I shall describe as "the 1983 Act") was passed.

Two matters which troubled the Court at the Outset were the question of a special interest of an applicant as a requirement of s. 83(1) and the question of abstract questions being posed for the opinion of the Court under that section.

I respectfully agree with the reservations expressed by the other members of the Court.

The issue in the present appeal as presented by Mr. Brown was based on the separation of powers as an essential part of the Constitution and the submission made was that the 1983 Act was "an impermissible intrusion of the legislative into the judicial power". This contention was based on cases determined in the Privy Council which were not cited during the hearing in the High Court. On the present appeal the question of "unlimited original jurisdiction" of the High Court under s. 77(1) was not the issue and no question of ouster of the jurisdiction arose.

The interpretation of s. 77(1) was discussed and I share the view expressed by Connolly JA that the section should not be interpreted in strict conformity with the situation as it has developed in the United Kingdom. This question was considered by the Privy Council in Liyanage v. Reginam [1967] AC 259, [1966] 1 All ER 650, at pp 288 and 658 Lord Pearce said: -

> "During the argument analogies were naturally sought to be drawn from the British Constitution. The British Constitution is unwritten whereas in the case of Ceylon their Lordships have to interpret a written document from which alone the legislature derives its legislative power."

On the other hand, I consider that it is clear the position existing before the adoption of a written Constitution in Solomon Islands has an important bearing. As was pointed out by Lord Diplock in Hinds v. The Queen [1977] AC 195, [1976] 1 All ER 353 at pp. 213 and 359:

> "The new constitutions ... evolutionary not revolutionary… provided for continuity of government through successor institutions, legislative, executive, and judicial, of which the members were to be selected in a different way, but each institution was to exercise powers which, although enlarged, remained of a similar character to those that had been exercised by the corresponding institution that it had replaced."

Returning to the Liyanage case (supra), it was stated categorically that in Ceylon "there exists a separate power in the judicature which under the Constitution as it stands cannot be usurped or infringed by the executive or the legislature". Referring to the power of the Ceylon Parliament "to make laws for the peace, order and good government of the Island" and to "amend the constitution on a two-thirds majority" their Lordships concluded that they could not read the power "to make laws for the peace, order and good government" as entitling Parliament to pass legislation which usurps the judicial power of the judicature - e.g. "... instructing a judge to bring in a verdict of guilty against someone who is being tried - if in law such usurpation would otherwise be contrary to the Constitution." (See p. 659E). It was held that any such Act is ultra vires.

Thus, this Court has a duty to see that the judicial power is not altered except by- amendment pursuant to s. 61 of the Constitution. The principle is stated in a sentence by Lord Diplock in Hinds case (supra) at pp. 214 and 360:-

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

I respectfully agree with the views expressed by Connolly JA as to whether either ss 4 and 5 of the validating Act of 1983 amounts to "an unwarranted legislative intrusion into the area allotted to the judicial power," and with the conclusions reached by him and by Pratt JA. As has been pointed out, it is not suggested that there was any intention on the part of the legislature to cross the borderline between the legislative power and the judicial power. I would add that in my view the unusual drafting adopted in the statute may well have been the reason for the addition of sub-sections (d) and (e) of s. 5 which had no purpose as far as the particular object of the legislation was concerned. I agree with the other members of the Court, for the reasons given, that the subsections should be declared invalid.

I agree that the appeal should be allowed and with the order proposed by Connolly JA.

Connolly JA: The Price Control Act 1982 was passed by the National Parliament on 9th March, 1982 and received the Royal Assent on 17th March. By s. 1(2) it was to come into force on such day as the Minister might by notice in the Gazette appoint. It was not brought into force in that manner but various steps were taken under it as if it had been brought into force.

Thus the chairman and the four members of the Price Control Committee were appointed and a series of price control orders was made between 20th April, 1983 and 23rd September, 1983. By orders of 9th September published in the Gazette on 23rd September the Minister of Finance purporting to act under the provisions of the Price Control Act ordered that price control apply to butane gas and restricted the wholesale and retail prices of butane gas. Shortly thereafter Boral Gas Solomons Limited a wholesale supplier of butane gas and Melanesian Traders Limited which carries on the business of retail seller of the same substance initiated proceedings against the Attorney-General for a declaration that, the Act never having come into force, the relevant price control orders were invalid. The statement of claim complains of various other defects in the implementation of the Act by reason of non compliance with ss.3 (2), 4(5), 6(6) and 10(3). It is unnecessary for the purposes of this judgment to state the nature of the non-compliance in more detail. This action has never come to trial and it is in fact still pending in the High Court. It was so pending when, on 23rd November, 1983 the National Parliament passed the Price Control (Retrospective Operation and Validation) Act 1983 which was assented to on 7th December, the method of validation chosen was to amend the principal Act.

It is not disputed that the effect of this provision was to cure any defect in the orders consequent upon the Act not having been duly brought into effect. If one may judge by the pleadings there may well not have been very much substance in the other complaints made in the statement of claim but, be that as it may, for good measure, the draftsman of the validating Act of 1983 included two further provisions, ss.4 and 5, the terms of which have given rise to these proceedings. It is convenient to set them out in full. They read as follows:-

> "4. The principal Act is hereby amended, by inserting immediately after section 10, the following section as from 26th March 1982 –

‘11. The validity or operation of an order made under section 4 or section 6 shall not be affected by non-compliance or inadequate compliance of the provisions contained in section 3(2), or section 4(5) or section 10(3), nor the validity or operation of any such order shall be called in question by or before any court or public officer merely on the grounds of the non-compliance or inadequate compliance with any such provision.’

5. Notwithstanding the enactment of the commencement provision or of any directory provision of the principal Act -

“(a) all actions shall be deemed to have been taken and continued in operation as validly and effectively as if they were taken and continued under the principal Act as amended by this Act;

(b) the validity and continued operation of no such action shall be called in question, nor shall be deemed ever to have been questionable, by or before any court or any public officer, merely on the ground that the principal Act was not brought into operation on the date of that action, or on the ground of non-compliance or inadequate compliance of any directory provision;

(c) no court shall entertain any legal proceeding hereafter in this section referred to as impugned legal proceeding -

(a) questioning the validity and continued operation of any action; or

(b) claiming any compensation for loss, if any, founded on any action and its continued operation,

merely on the ground that when the action was taken the principal Act had not come into operation, by appointing the date of its operation by notice published in the Gazette, as required by commencement provision, or on the ground of non-compliance or inadequate compliance of any directory provision;

(d) where any impugned legal proceeding instituted on any such ground be pending in any court, on the commencement of this Act, the court shall, exercise its jurisdiction pursuant to section 77, or section 85 of the Constitution, or any other law, by deciding that impugned legal proceeding in accordance with the principal Act as amended by this Act,-

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

(b) by rejecting the claim for compensation founded on that action or its continued operation, as the case may be,

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

(e) where any impugned legal proceeding instituted on any such ground is decided, before the commencement of this Act, by any court, by its judgment, decree or order, holding any action to be invalid or inoperative or unenforceable on any such ground, and such judgment, decree, or order has become, upon the commencement of this Act, the court shall exercise its jurisdiction referred to in paragraph (d) above, in relation to such judgment, decree or order -

(a) by giving effect to the amendments made to the principal Act by this Act; and

(b) by refusing to enforce the judgment, decree or order holding that it has become ineffective, to the extent of such inconsistency or repugnancy, as a result of those amendments;

and no such judgment, decree or order shall, to the extent of such inconsistency or repugnancy, have effect, nor shall be deemed ever to have had effect accordingly."

An understanding of these provisions requires that s.2 which defines certain of the expressions used also be set out. It reads:-

"2. In this Act, unless the context otherwise requires:

'action' means an action specified in the Schedule, and taken under the Price Control Act, 1982 (hereafter called the principal Act) before commencement of this Act, and includes all things done under or in pursuance of such action;

'commencement provision' means the provision contained in section 1(2) of the principal Act as it stood before its amendment by this Act;

'directory provision' means the provisions contained in section 3(2), or section 4(5), or section 6(6), or section 10(3) of the principal Act."

There is no doubt that it was the pending action which led to the passing of the validating Act and it is clear enough also that during its passage through the National Parliament the opposition objected to ss 4 and 5 on the broad ground that it constituted an unwarranted invasion of the judicial power. Objection to the validity of the validating Act was taken in the High Court however, not by the plaintiffs in that action but by the Leader of the Opposition the appellant in the proceedings before us. The appellant brought proceedings by motion before the High Court for a declaration under s.83 of the Constitution that ss 4 and 5 of the validating Act were void as being contrary to and repugnant to s. 77(1) of the Constitution.

Section 83(1) under which the application was made provides, with certain exceptions which are presently immaterial, that if any person alleges that any provision of the Constitution (other than Chapter II) has been contravened and that his interests are being or are likely to be affected by such contravention, then, without prejudice to any other action with respect to the same matter which is lawfully available, that person may apply to the High Court for a declaration and for relief under the section. Daly CJ was of the view that the appellant in these proceedings, as a citizen, was a person whose interests were being or were likely to be affected by the contravention which he alleged. In so doing the learned Chief Justice was applying an earlier decision of his own Kenilorea v. Attorney-General [1983] SILR 61. Upon the opening of this appeal the court raised the question whether the application had been competent in the first place; but as the Attorney-General was not disposed to question the correctness of the decision to which I have referred the court entertained the appeal. For my part I must say that I have considerable reservations. The requirements of s.83 (1) include that the interests of the applicant are being or are likely to be affected by the alleged contravention. If this be correct then any citizen of Solomon Islands has the necessary interest in ensuring maintenance of the constitution and the phrase to which I have referred in s.83(1) is mere surplusage. The point was however not fully argued and I express no concluded opinion. At some future time the Court of Appeal must doubtless resolve the question.

A related problem, which indeed became apparent in the court of the argument of this appeal, lies in the nature of the material which is to be put before the court when an application under s. 83(1) is made. If it is to be treated as an abstract question then the court is really being asked for an advisory opinion. As to this I am far from persuaded that it was the intention of the framers of the Constitution that the court should be asked for such an opinion. If the applicant had a personal interest which was being or was likely to be affected then the circumstances of the detriment or likely detriment could easily be put before the court and it would have a concrete case to consider. The problem was overcome in this case by the presentation of an agreed statement of facts and it was possible therefore for the court to continue with the hearing of this appeal, not as a hypothetical question, but as a question arising in an identified matrix of facts.

I turn then to s.77 (1) of the Constitution, which, it was the appellant's case in the High Court, had been contravened.

It reads:-

> "77 (1) There shall be a High Court for Solomon Islands which shall have unlimited original jurisdiction to hear and determine any civil or criminal proceedings under any law and such other jurisdiction as may be conferred on it by this Constitution or by Parliament."

As I understand the judgment of the learned Chief Justice s.77 (1) uses language which has been traditionally used to describe the jurisdiction of the High Court in England and indeed of other courts of general jurisdiction. From that point his Lordship concluded that there is power in the Parliament to oust the jurisdiction and that the validating Act was therefore competent. This was the view advanced by the Attorney General before us.

The power of the Parliament at Westminster to restrict the jurisdiction of the High Court is beyond question. See e.g. vol. 10, Halsbury's Laws of England (4th ed.) para. 720.

None the less, as the Attorney-General in a forceful argument pointed out, this is not thought to make the description of the High Court as a High Court of unlimited original jurisdiction inappropriate. See Halsbury loc. cit, para. 847. From this position the Attorney-General argues that there is nothing incompatible with s.77 (1) in the Parliament having power under s.59(1) in the exercise of its general law making authority, to oust or restrict the jurisdiction of the High Court of Solomon Islands. In my judgment however, it is one thing to continue to describe the High Court in England as a court of unlimited jurisdiction. For almost all purposes it has indeed unlimited original jurisdiction. As a description of the jurisdiction it is natural enough and accurate enough for most purposes. It does not follow however that an express provision such as that contained in s.77 (1), in a Constitution of which the separation of powers is an essential feature should be cut down to conform to the situation which obtains in England The limited value of analogies drawn from the British constitution is pointed out by Lord Pearce in Liyanage v. Reginam [1967] AC 259; [1966] 1 All ER 650 at pp. 288 and 658 respectively. I am conscious that Lord Diplock in Hinds v. The Queen [1977] AC 195; [1976] 1 All ER 353 at pp. 213 and 359 respectively spoke or the general law making power as extending to the transfer from the existing courts of the whole of part of their jurisdiction (although subject to the safeguards established by the Constitution with respect to appointment and tenure for courts exercising the type of jurisdiction in question). This however was said in the absence of a specific provision such as s.77 (1). For reasons which I am about to give the question does not fall for decision on this occasion. It is sufficient to say that to give full effect to s.77 (1) would not mean that as and when it becomes convenient, the National Parliament may not establish additional courts, e.g. intermediate courts such as the County Courts of England and the County and District Courts of Australia, or specialized courts such as the Family Court of Australia, Revenue Courts and the like with concurrent jurisdiction with the High Court. The unlimited jurisdiction of the High Court would be preserved but as a matter of convenience the jurisdiction would ordinarily be exercised by the newly established courts. This is indeed the current situation in respect of the criminal jurisdiction as between the Supreme Courts of the States of Australia and the District and County Courts in that country.

In my view however there is no question of ouster of jurisdiction in this case. The High Court retains jurisdiction over the suit which gave rise to the amending legislation. The court has been required by the amending legislation to treat as valid Acts which were, at least, arguably invalid. The question whether the effect of s.77 (1) is that the High Court not only had, at the passing of the Constitution, unlimited original jurisdiction but must forever have such jurisdiction must await another day. This no doubt became apparent when the case was being prepared for appeal. The Public Solicitor Mr. Brown to whom the court is indebted for a very careful argument, developed a much wider and more far-reaching argument. In its essentials it was that the principle of separation of powers is an essential part of the Constitution of Solomon Islands and that the legislation in question was an impermissible intrusion of the legislative into the judicial power. It should be noted that this argument was not raised before the learned Chief Justice.

For the first of these propositions he relied on the decision of the Privy Council in Liyanage's case (supra). Their Lordships were there concerned with the Constitution of Ceylon and their examination of the place of the judiciary in that constitution started with a citation from Bribery Commissioners v. Ranasinghe [1965] AC 172 at p. 190:-

> "But the importance of securing the independence of judges and maintaining the dividing line between the judiciary and the executive [and also, one should add, the legislature] was appreciated by those who framed the constitution."

The judgment, which then sets out provisions of the Constitution of Ceylon which provided for the various organs of Government, continued at pp. 287-8 and 658 respectively:-

> "And although no express mention is made of vesting in the Judicature the judicial power which it already had and was wielding in its daily process under the Courts Ordinance, there is provision under Part 6 for the appointment of judges by a judicial service commission which shall not contain a member of either House but shall be composed of the chief justice and a judge and another person who is or shall have been a judge. Any attempt to influence any decision of the commission is made a criminal offence. There is also provision that judges shall not be removable except by the Governor-General on an address of both Houses.
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> These provisions manifest an intention to secure in the judiciary a freedom from political, legislative and executive control. They are wholly appropriate in a constitution which intends that judicial power shall be vested only in the judicature. They would be inappropriate in a constitution by which it was intended that judicial power should be shared by the executive or the legislature. The constitution's silence as to the vesting of judicial power is consistent with its remaining, where it had lain for more than a century, in the hands of the judicature. It is not consistent with any intention that henceforth it should pass to or be shared by, the executive or the legislature.
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> During the argument analogies were naturally sought to be drawn from the British constitution; but any analogy must be very indirect, and provides no helpful guidance. The British constitution is unwritten whereas in the case of Ceylon their lordships have to interpret a written document from which alone the legislature derives its legislative power."

The reference to the absence of a provision vesting the judicial power in the court should be explained. The pattern adopted in relation to Ceylon when it obtained its independence was simply to continue the Supreme Court and to continue the ordinances which had established it and defined its jurisdiction. The Constitution of Solomon Islands in terms, as has been seen, describes the High Court as a court with unlimited original jurisdiction to hear and determine both civil and criminal proceedings. Moreover the provisions of the constitution of Solomon Islands indicate even more strongly the intention to secure in the judiciary freedom from political, legislative and executive control. Thus the Chief Justice and the puisne judges are appointed by the Governor-General with the advice of the Judicial and Legal Service Commission: s.78. This is composed of the Chief Justice, the Attorney General and the Chairman of the Public Service Commission and one additional member appointed by the Governor-General: s.117. The qualification for appointment to the court is to have held judicial office or to have been qualified for not less than five years as a barrister or solicitor: s.78 (3). The judges are to hold office until they attain the age of 60: s.80 (1). They are removable from office only for inability or misbehaviour and the procedure for such removal is very carefully laid down. The Governor-General must appoint a tribunal consisting of three persons selected by him from among persons who hold or have held high judicial office and in making such appointments the Governor-General is required to act on his own deliberate judgment: s.80(8). The judge is removable only if that tribunal advises the Governor-General that he ought to be removed for inability or misbehaviour. By s.77 (2) the office of a judge shall not be abolished while any person is holding that office unless he consents to its abolition.

The conclusion of their Lordships in Liyanage's case was that there exists a separate power in the judicature which under the Constitution of Ceylon as it stood could not be usurped or infringed by the executive or the legislature. They said of the power of the legislature to make laws for the peace, order and good government of Ceylon that, although these words have habitually been construed in their fullest scope, they cannot be read as entitling Parliament to pass legislation which usurps the judicial power of the judicature e.g. by passing an Act of attainder against some person or instructing a judge to bring in a verdict of guilty against someone who is being tried if in law such usurpation would otherwise be contrary to the Constitution. Their final conclusion was that an Act passed without recourse to the provisions of the Constitution for the amendment of that instrument which purported to usurp or infringe the judicial power would be ultra vires. The Constitution of Solomon Islands contains similar provisions. The legislature has the same law making power: s.59 (1) and s.61 provides for the alteration of the Constitution by an appropriate majority of the National Parliament. An examination of the provisions to which I have referred indicates, in my judgment that the Constitution of Solomon Islands does indeed provide for a separation of powers and that the separate power in the judicature under the Constitution cannot be usurped or infringed either by the executive or the legislature. Under the Constitution as it stands the judicial power cannot be absorbed by the legislature and taken out of the hands of the judges. It is the duty of this court to ensure that there is no erosion of the judicial power without the machinery for the amendment of the Constitution being employed.

Liyanage's case was considered by a subsequent Board in Hinds' case supra). Lord Diplock, delivering the judgment of the majority, discussed the form of constitution granted by the Imperial Parliament or by Imperial Order-in-Council to what were formerly colonial or protected territories of the Crown. At pp. 211-2 and 359 respectively his Lordship said:-

> "Nevertheless all these constitutions have two things in common which have an important bearing on their interpretation. They differ fundamentally in their nature: from ordinary legislation passed by the parliament of a sovereign state. They embody what is in substance an agreement reached between representatives of the various shades of political opinion in the state as to the structure of the organs of government through which the plenitude of the sovereign power of the state is to be exercised in future. All of them were negotiated as well as drafted by persons nurtured in the tradition of that branch of the common law of England that is concerned with public law and familiar in particular with the basic concept of separation of legislative, executive and judicial power as it had been developed in the unwritten constitution of the United Kingdom. As to their subject-matter, the peoples for whom new constitutions were being provided were already living under a system of public law in which the local institutions through which governments was carried on, the legislature, the executive and the courts, reflected the same basic concept. The new constitutions, particularly in the case of unitary states, were evolutionary not revolutionary. They provided for continuity of government through successor institutions, legislative, executive and judicial, of which the members were to be selected in a different way, but each institution was to exercise powers which, although enlarged, remained of a similar character to those that had been exercised by the corresponding institution that it had replaced. As respects the judicature, particularly if it is intended that the previously existing courts shall continue to function, the constitution itself may even omit any express provision, conferring judicial power on the judicature. Nevertheless it is well established as a rule of construction applicable to constitutional instruments under which this governmental structure is adopted that the absence of express words to that effect does not prevent the legislative, the executive and the judicial powers of the new ,state being exercisable exclusively by the legislature, by the executive and by the judicature respectively... What, however, is implicit in the very structure of a constitution on the Westminster model is, that judicial power, however it be distributed from time to time between various courts, is to continue to be vested in persons appointed to hold judicial office in the manner and on the terms laid down in the chapter dealing with the judicature, even though this is not expressly stated in the constitution (Liyanage v. R.)."

I turn then to the question whether either s.4 or s.5 of the validating Act of 1983 amounts to an unwarranted legislative intrusion into the area allotted to the judicial power. The statements of principle which I shall endeavour to state are founded almost entirely on the judgment of Lord Pearce in Liyanage's case. I take as a point of departure the undoubted proposition that the legislature may legislate for the generality of its subjects, by the creation of crimes and penalties or by enacting rules relating to evidence or as is recognized by the Constitution of Solomon Islands by enacting retrospective legislation. See 5.59(3) which is however expressed to be subject to s.10 (4). It is when the legislation ceases to be general in character and is directed at a particular person and even more so when it is founded upon past acts that the difficult question arises whether the line between the legislative and the judicial power has been transgressed. No attempt will be made in this judgment to trace where the line is to be drawn between what will and what will not constitute such a transgression. Indeed Lord Pearce described this as an almost impossible task. It should however be noted that it is not every enactment which can be described as ad hominem and ex post facto which will infringe or usurp the judicial power. Instances of legislation which is plainly beyond the power of the legislature are given by Lord Pearce and they include the passing of an Act of attainder against some person or legislation which instructs a judge to bring in a verdict of guilty against someone who is being tried, if in law such usurpation would otherwise be contrary to the Constitution. I take this qualification to mean that unless the usurpation is authorized by the Constitution it will amount to a clear transgression of the line between the legislative and the judicial power. It is not profitable to examine the facts of Liyanage's case in this judgment. What is clear however is that legislation which is not passed for the generality of the citizens but which is clearly aimed at particular known individuals, the alterations in the law not being intended for the generality of the citizens or designed as any improvement of the general law and in particular, I would add, directed at particular pending litigation and to have no effect once that litigation is terminated will amount to such a transgression. Each case however must be decided in the light of its own facts and circumstances, including the true purpose of the legislation, the situation to which it was directed and the extent to which the legislation affects, by way of direction or restriction, the discretion or judgment of the judiciary in specific proceedings.

In the light of these principles I turn to the provisions of s.4 and s.5. I should say immediately that s.11 which is inserted in the principal Act by s.4 seems to me not to be objectionable. Not only is it framed in general terms but it is plainly of general application. The concession by the appellant that s.3 is valid was in my judgment properly made. The only objection which can be raised to s.11 is that it is directed in terms to the court. However it is a commonplace of this type of legislation and indeed of others that the law may be specifically directed to the courts. To take a well known instance, laws of evidence commonly require the courts and the judges to take judicial notice of a variety of matters. Section 5 however is on a different footing. Paragraphs (a), (b) and (c) appear to me to be within the same principle as governs s.4. They are general in terms, they are not directed at identifiable persons and they are not directed at existing litigation. However paras. (d) and (e) must, in the circumstances of this case have been directed at the action instituted by Boral and Melanesian Traders. It was conceded not only that it was this action which led to the passing of the validating Act but that no other action was pending when the validating Act passed into law. It is to my mind not to the point that the object of the Parliament will have been fully achieved by the provisions of the Act apart from paras. (d) and (e) of s.5. In terms they direct the High Court as to the manner in which it is to deal with litigation presently pending in that court and they forbid the court to execute its own judgment even though that judgment should have been one given in accordance with law at the time when, it was handed down. While fully appreciating that in all the circumstances of this case, a judgment invalidating these two provisions is unlikely to have any practical effect, it is to my mind important that the relation between the two great branches of government in Solomon Islands, the legislature and the judicature be made crystal clear. In saying this I turn for the last time to Lord Pearce's judgment in Liyanage's case. I am echoing his Lordship when I say that if such provisions as these were valid the judicial power could be wholly absorbed by the legislature and taken out of the hands of the judges. It is proper to say as it was in Liyanage's case that obviously the legislature had no such general intention and that it was faced with a serious situation due to an omission to bring an Act of the Parliament into legal effect which may fairly be described as a technical omission. But as Lord Pearce observed, what is done once, if it be allowed, may be done again and in less serious circumstances; and thus judicial power may be eroded. Such an erosion is contrary to the clear intention of the Constitution.

I would therefore allow this appeal and order that the judgment of the learned Chief Justice be set aside. In lieu thereof I would order that judgment be entered in the proceedings in the High Court declaring that paras. (d) and (e) of s.5 of the Price Control (Retrospective Operation and Validation) Act 1983 are beyond the power of the National Parliament and invalid. The appellant should have his costs of the proceedings before the High Court and of this appeal to be taxed, limited, as was conceded, to moneys actually outlayed.

Pratt JA: The appellant had sought from High Court a declaration under s.83 of the Constitution, that ss.4 and 5 of the Price Control (Retrospective Operation and Validation Act 1983) were void as being contrary to and repugnant to s.77 (1) of the Constitution. In a detailed judgment of the 16th of March 1984, Daly C.J. set out his reasons for refusing the application. The appellant now appeals to this Court on the same grounds. However, a further ground emerged during argument and leave was granted for this ground to become part of the appeal. In effect the ground is that the two sections, ss.4 and 5 of the Act are void because they are repugnant to the provisions of s.10 (8) of the Constitution, a section which ensures the right to fair trial of citizens before an independent and impartial court.

No point was taken by the learned Attorney-General either before Daly C.J. or in this Court as to the locus standi of the appellant. We are aware of course that the learned Chief Justice ruled on the matter in Kenilorea v. Attorney-General [1983] SILR 61 and accordingly the appellant undoubtedly has locus standi in the Solomon Islands on certain constitutional matters until the Court of Appeal rules otherwise.

However, it should be remembered that the judgment of the Supreme Court of Papua New Guinea S.C.R. 4 of 1980 In re: M T Somare [1981] PNGLR 265 referred to by Daly CJ depends upon a Constitution which contains a number of sections which find no counterpart in the Solomon Islands Constitution. It is also debatable whether that part of the judgment of Kapi, J. relied upon by Daly C.J. can be said to form a part of the ration decidendi of the Supreme Court decision. Whilst therefore this Court has made no ruling on the matter it must not be taken that it has accepted the locus standi of the appellant. As the point was not argued, no ruling has been given. I think, however, it is important the courts should exert great care to avoid giving any impression that they have become some sort of extension to the floor of Parliament, where politicians may continue to press their opposition to legislation. Any appearance of political, involvement is obviously undesirable.

It is not suggested that any motive other than the most worthy lies behind the institution of the present proceedings. I am sure we are all most conscious of the high principles laid before us by the learned

Attorney General which underlie the present application. As shall be emphasized a little later on, however, there is a clear division between the legislative, executive and judicial under the Solomon Islands Constitution and the Court should be chary indeed of any procedure which may lead to a blurring of those divisions.

Another matter upon which I wish to comment was the absence of facts in this case. It was only at the invitation of this Court that a set of agreed facts became available to us. Once again we were not called upon to hear submissions or to rule on this aspect. In my view, it would need a considerable amount of persuasion before I became satisfied that s.83 of the Constitution implies a power in the High Court to hand down some form of advisory judgment on constitutional matters. The section makes reference specifically to any person whose interests are affected or likely to be affected by an alleged contravention if it is anything other than an application by a person who would come before the Court as a result of certain facts emerging which he claims adversely affected him when conjoined with the challenged legislation. I agree, therefore, that this Court is not to be taken as accepting in principle applications made to the High Court or to this Court in a vacuum. In, my view, the facts giving rise to a particular application should be in one way or another brought up in the Court of First Instance.

The relevant surrounding circumstances have already: been set out in detail in the judgment of Connolly, J.A. I shall not traverse these again other than to state in brief form the following: As a result of a failure to enact properly I certain price control legislation, it was necessary for Parliament to pass an amending Act which had retrospective effect in order to legitimise certain areas and omissions in the earlier legislation. A large number of retailers had reduced their prices when in fact there was no legal necessity so to do.

The Public Solicitor has explained to us how he became involved in the affair and we have no observations to make on that. As with the Attorney-General we are most indebted for the well researched submissions placed before us by Mr. Brown. It is a little unfortunate that both counsel did not have greater time available in which to formulate the arguments arising unders.10 (8) of the Constitution.

Section 77(1) of the Constitution states as follows:-

> "There shall be a High Court for Solomon Islands which shall have unlimited original jurisdiction to hear and determine any civil or criminal proceedings under any law and such other jurisdiction and powers as may be conferred on it by this Constitution or by Parliament."

The appellant maintains that "unlimited original jurisdiction" means unlimited in scope and extent whereas the Attorney-General has pressed the more traditional meaning upon us as adopted by Daly C.J. in the judgment under appeal. Mr. Brown has contended that to limit the meaning of the word in such a way is a somewhat slavish following of traditional concepts of interpretation of English law. It seems to me however that the term has a well-settled meaning and there is no reason to suppose that the person who originally drafted the constitutional section implied into the body of that term a meaning other than the one which he himself would have connected with it after years no doubt of association with the language of the English common law. The terminology of this section may be found in the Constitutions of a number of newly emerged independent nations over the last several decades. As Lord Diplock says on p. 212 of the Hinds v. The Queen [1977] A.C. 195; [1976] 1 All ER 353 at 359: "Such Constitutions were negotiated as well as drafted by persons nurtured in the tradition of that branch of the common law of England that is concerned with the public law ….".

It is said that Parliament through ss.4 and 5 of the amending Act has endeavoured to restrict the jurisdiction of the High Court. In common with a number of other Constitutions of the "Westminster model" the intention to create a strict separation of powers between executive, legislative and judicial was made clear. Such powers are dealt with under different chapter headings and in addition, as Lord Diplock points out in Hinds' case the more recent ones, including that of the Solomon Islands spell out in clear terms the basic rights and freedoms. Sections 4 and 5 of the retrospective Act have been set out in full at the beginning of the judgment of Connolly JA so I shall not repeat them here. In relation to both sections however I must say I remain unconvinced that-the legislation interferes with the unlimited jurisdiction of the High Court in any way whatsoever. Certainly it affects certain rights to compensation and prohibits certain areas of action from being entertained. Retrospective legislation will obviously affect rights and obligations which previously vested in the citizens of the country. For this reason alone the Constitution makes special provision for the enactment by Parliament of such legislation, as part of the law-making process vested in it "for the peace, order and good government" of the country (s.59). The general law makes it quite clear that in order to be validly retrospective such legislation must be

formulated in precise and definite terms. Indeed that is what has happened in the present case. Perhaps too much so. It seems to me however that the legislation or more particularly the two sections under dispute do not concern themselves with reducing, taking away, detracting from or invading the realm of general jurisdiction, which is after all what s.77 is about. The sections do have an effect however on particular courses of action under certain circumstances which may be open to the public at large. There is certainly nothing here in the nature of the individual victimisation which was the clear object of the legislation in the case of Liyanage v.Reginam [1967] 1 AC 259; [1966] 1 All ER 650. Nor is there any evidence that specific individuals were the avowed object of the legislation or that anyone other than the general public or-a general class within the general public were affected. All wholesalers and retailers in the country were brought within the legislation. Of course Liyanage concerned itself very much with infringement of basic rights and freedoms and factually bears little or no relationship to the situation before us. Nevertheless there are a number of very important observations made by the Privy Council which have been properly relied upon by both sides in the present contest.

In the proceedings taken before the High Court the parties were claiming a declaration, injunction, and damages. Nothing has been done to the Court's area of jurisdiction in the field of equitable and common law jurisdiction. What has been done is to give a legal basis to certain acts which heretofore had none. As the result of a failure of that original legality certain citizens may have acquired a right to a cause of action which may now well fail because the basis upon which such cause is established now no longer exists by virtue of the retrospective amending Act. I am unable to see how that can be said to affect the jurisdiction of the Court, or to enlarge or diminish such jurisdiction within the terms of the principles laid down in either Liyanage's case or Hinds' case, even accepting the more radical approach urged upon us by Mr. Brown which he claims is laid down by Lord Wilberforce speaking on behalf of the Privy Council in the Minister of Home Affairs v. Fisher [1980] AC 319 at 329; [1979] 3 All ER 22 at 26. It seems to me however that the Privy Council in Fisher is stating nothing more than the now established principle that one does not limit the interpretation of the Constitution of a country by applying the ordinary legal canons but rather a broader and more liberal approach (see also Lord Diplock both in Hinds (supra) at p. 212 (p. 360), and Ong Ah Chuan v. Public Prosecutor [1981] AC 648 at 669. See also an unpublished judgment of the Fiji Court of Appeal sub. nom. The Attorney-General v. D.P.P. No. 18 of 1981 delivered 5 August 1981 at p. 34 kindly brought to my attention by the learned President.

During his submissions, Mr. Brown mentioned on several occasions words to the effect that Parliament cannot direct through its legislation what the Court shall and shall not do. I think it is clear enough however that the Parliament within limits can certainly direct which matters go into what courts. Indeed this was accepted as quite permissible in that part of the judgment of Lord Diplock in Hinds' case (dealing with the divisions of the courts). Putting it in another way, Mr. Brown says that there has been an attempt here to oust the jurisdiction of the Court or to control the manner in which such jurisdiction would be exercised. Whilst I have rejected such submission in relation to the application of s.77 of the Constitution, I believe the submissions are very pertinent to the question of whether or not the legislature has contravened the provisions of s.10 (8).

Section 10(8) reads as follows:-

> "Any court or other adjudicating authority prescribed by law for the determination of the existence or extent of any civil right or obligation shall be established and recognised by law and shall be independent and impartial;…"

In the context of the present matter I do not think it is necessary to attempt any definition of the term "independent and impartial". Whatever else may or may not be covered, it must certainly mean that the courts, in the exercise of their jurisdiction, will not be subject to control or direction by some other authority. This is not to say that the legislature may not define certain matters as being within the jurisdiction of one court or another court or may not bring specific new matters within the jurisdiction of the High Court or the Magistrate's Court. That, however, is an entirely different thing from telling the Judge or Magistrate what he must do in a particular case which comes before him. In the present circumstances it is impossible to believe that the legislature was unaware of two causes of action in the High Court which had been instituted some weeks ahead of the Parliament bringing down the retrospective legislation (and almost two months before the retrospective legislation was brought into effect).

It seems to me that what the legislative draftsman has done in this case is to spell out quite unnecessarily within the body of the legislation some of the consequences which must of necessity flow from any retrospective legislation, unless certain exemptions are made in respect of actions already instituted in the courts before the legislation becomes operative. In so doing, I am of the view he has

transgressed into the judicial power and has intruded the guiding hand of Parliament into an area where it has no right to be in any country which enjoys the benefits of a strict division of powers. It certainly seems difficult to sustain the proposition that the independence of the legal process has not been interfered with when the legislation says, as in the amending s.4 of the retrospective Act, that a court shall not call into question the validity or operation of any order made under particular sections of the original Act, if it is a necessary part of a citizen's case to do that very thing. However, the direction is rather as to what the parties are prohibited from doing in particular circumstances, and not how the tribunal shall deal with the issues. I am mindful moreover of an aspect raised by Connolly J.A. during argument which indicates a certain degree of caution is called for, otherwise one would end up postulating the absurdity that Parliament cannot direct for example what matters may or may not be admitted into evidence at a trial and the manner in which they, may be admitted - in short an enactment dealing with the law of evidence. In its present form therefore I am inclined to take the view that s.4 does not amount to a breach of s.10 (8) of the Constitution.

It is when we go to s.5 however, that we find a quite blatant interference with the independence of the judiciary. An analysis of paragraphs (d) and (e) of s.5 very quickly reveals the control which the legislature is purporting to exercise over the courts. If I might paraphrase para. (d) this way; it says the court shall exercise its jurisdiction by deciding certain matters in accordance with the principal Act and shall uphold the validity of certain actions or reject certain claims for compensation. Not only is the court to decide these matters in the way directed, but it shall so decide on the specific ground that the principal Act was valid and effective from the beginning.

Likewise in paragraph (e) the legislature directs the court to exercise its jurisdiction in relation to any judgment, decree or order which it has made by doing so in a way which will give effect to the amendments. What is more, the court shall refuse to enforce any judgment, decree or order already made under circumstances which are covered by the retrospective Act. Once again, I think it is only necessary to state the gist of the paragraph in the way I have done in order to demonstrate the obvious. Not only has legislation been drafted which is to be demonstrably retrospective, but it has been drafted to make it clear that certain consequences will flow from such retrospectivity. It may be the case that such can be done without specifically directing the court to act in any particular fashion or manner, but I find it somewhat difficult to imagine. What the draftsman should have done was simply draft the legislation and leave the consequences alone. If it had been properly drafted then the court itself would no doubt spell out the legal consequences of the retrospective Act in the very terms which the Parliament has sought to direct the Court to do. In some ways then what has been done is an attempt to spell out what one would think would be an invariable consequence of the retrospective legislation in any case.

The learned Attorney General has drawn our attention to certain legislation passed in the United Kingdom, namely, the Wireless Telegraphy (Validation of Charges) Act 1954. It is said this is a retrospective Act which clearly directed the courts to disregard certain orders which had been made before the retrospective legislation came into effect. For several reasons I cannot agree with this submission. In the first place the Act specifically exempted proceedings which had been commenced before a judgment involving a citizen in a claim for reimbursement of fees had been handed down, and before a statement was made in the House of Commons by the Assistant Postmaster General. (See 35 Halsbury's Statutes (3rd ed.). Secondly, whatever the position in the United Kingdom, we are dealing with a clear cut division of powers under a written Constitution.

It is also said that s.5(e) before this Court adopts the same technique but in a different way, and gives the High Court discretion to say whether or not that effect should be given to the original 1983 Act. However, I again cannot agree. The legislature has deprived the Court entirely of discretion and has simply directed the Judge as if he were some clerk applying a rubber stamp to some form of Court order. The legislation has set down the order and all that is required to be done is for the Court to sign and seal it. Paragraph (e) sets out the exact terms of the Court order. Once again I believe it is important to remember as does the Privy Council itself in both Hinds' case and Liyanage's case, that the separation of powers although stemming from the United Kingdom practice is after all in that country basically a matter of practice and is certainly not enshrined in a written Constitution. The position is quite otherwise in many newly emergent nations including the Solomon Islands, where the people have chosen to put it down quite in black and white that there shall be such separation. Thus they have underscored the principle of a division of powers and an independent judiciary.

In my view therefore, this appeal must be upheld on the basis that it is an attempt to direct the Court in the exercise of its judicial discretion and to direct the Court as to how it shall order its decisions.

In my opinion the judgment in the High Court should be set aside and a final judgment be entered in favour of the appellant on the basis that ss.5 (d) and 5(e) of the Price Control (Retrospective Operations and Validation) Act 1983 are invalid. As I find for the appellant I would therefore grant costs in his favour. I understand he is claiming for disbursements only.