[2018] CCJ 17 (AJ)

IN THE CARIBBEAN COURT OF JUSTICE
Appellate Jurisdiction

ON APPEAL FROM THE COURT OF APPEAL OF GUYANA

CCJ Appeal No GYCV2017/008
GY Civil Appeal No 45 of 2015

BETWEEN
THE ATTORNEY GENERAL OF GUYANA **APPELLANT**

AND
CEDRIC RICHARDSON **RESPONDENT**

Before The Rt Honourable and The Honourables
Sir Dennis Byron, President
Mr Justice Adrian Saunders
Mr Justice Jacob Wit
Mr Justice David Hayton
Mr Justice Winston Anderson
Mme Justice Maureen Rajnauth-Lee
Mr Justice Denys Barrow

Appearances:

Mr. Basil Williams, S.C., MP, Mr. Hal Gollop, Q.C, Mr. Ralph Thorne, Q.C., Ms. Kim Kyte, Ms. Judy Stuart-Adonis and Ms. Utieka John for the Appellant.

Mr. Douglas L. Mendes, S.C., Mr. Devesh Maharaj and Ms. Kandace Bharath for the Respondent.

JUDGMENTS
of

The Right Honourable Sir Dennis Byron and The Honourable Mr Justice Adrian Saunders and the Honourable Mr. Justice Jacob Wit: The Honourable Justices Hayton, Rajnauth-Lee and Barrow concurring

Delivered by The Right Honourable Sir Dennis Byron

And

JUDGMENT

of

The Honourable Mr Justice Winston Anderson

Delivered on the 26th day of June 2018

JUDGMENT OF THE RIGHT HONOURABLE SIR DENNIS BYRON

[1] This action was started by Mr. Cedric Richardson, a Guyanese citizen who complained that his right to choose whomsoever he wanted to be President, impliedly conferred by Articles 1 and 9 of the Constitution, had been diluted when Article 90 of the Constitution was altered to disqualify a person who had already served two terms as President. He applied for orders that would invalidate that alteration to the Constitution.

[2] The Constitution of the Cooperative Republic of Guyana was promulgated in 1980 after it had been approved by referendum. Article 90 of the Constitution established the qualifications for election to the position of President. The Constitution (Amendment) (No. 4) Act 2000, also referred to in the court below as Act No. 17 of 2000 (hereinafter referred to as the Act) altered Article 90 of the Constitution to disqualify three additional categories of persons from holding the position of President.[1] These categories are (i) citizens by registration, (ii) citizens not resident in Guyana for 7 years prior to the date of nomination and (iii) citizens who have already served 2 terms as President. No evidence was given regarding the extent of the effect of these changes, but it would be reasonable to conclude that there would be many persons in the first two categories. In relation to the term limit disqualification, there was only one person affected at the time the application was filed, and even now, and that was the former President Bharrat Jagdeo. In the affidavit in support of his application, Mr Richardson testified that he wanted to nominate, and vote for, the former President Jagdeo to be President in upcoming elections.

[3] The trial judge, Chang CJ (ag), found in favour of Mr Richardson and his judgment was affirmed by a majority of the Court of Appeal (Chancellor Singh (ag) and Roy JA). They concluded that an essential feature of a sovereign democratic state is the freedom which should be enjoyed by its people to choose whom they wish to represent them. They held that the amendment to Article 90, by excluding many persons as contenders for the Presidency, diluted the opportunity of the people of Guyana to elect a President of their own choice which would have been inherently present in Articles 1 and 9. Cummings-Edwards CJ (ag), as she then was, dissented because she did not consider

[1] See section 2 of Act No. 17 of 2000 Constitution (Amendment) (No. 4) Act 2000.

that the amendment diminished the democratic right of the electorate in electing a person of their choice as President. The Attorney General has appealed against the majority ruling to the CCJ.

[4] There was common ground on the factual and many of the legal issues. The remaining issues for resolution before us were narrowed to two questions: (a) could Articles 1 and 9 be altered by implication, and if so (b) did the additional disqualifications for eligibility of the position of President change or dilute the sovereignty of the people and democracy in Guyana as prescribed by those Articles?

[5] It is legally permissible to alter the Constitution of Guyana. The Constitution is the supreme law, and the method of altering it is regulated to ensure that it is more difficult to do so than to pass ordinary legislation. This is referred to as entrenching the provisions in the Constitution. There is another value that is relevant. The Constitution cannot be immutable, there must be sufficient flexibility for change to meet the evolving needs of Guyanese citizens. The Constitution itself envisages this as Article 1 declares that Guyana is "in the course of transition from capitalism to socialism." Article 13 further declares that the "principal objective of the political system of the State is to establish an inclusionary democracy by providing increasing opportunities for the participation of citizens and their organizations in the management and in the decision-making processes of the State." Article 66 specifically states that "subject to the special procedure set out in Article 164, Parliament may alter this Constitution." This Article is specially entrenched at the deepest level and cannot be altered without a referendum. These are clear expressions of the intention for the Constitution to evolve and change. The concept is also consistent with the traditional view that Constitutions are "living instruments." This was explained by the Supreme Court of Canada when it noted that

> "The task of expounding a Constitution is crucially different from construing a statute. A statute defines present rights and obligations. It is easily enacted and as easily repealed. A Constitution, by contrast, is drafted with an eye to the future. Its function is to provide a continuing framework for the legitimate exercise of governmental power and, when joined by a Bill or a Charter of Rights, for the unremitting protection of individual rights and liberties. Once, enacted, its provisions cannot easily be repealed or amended. It must, therefore, be capable of growth and development over time to meet new social, political and historical realities often unimagined by its framers."[2]

[2] *Hunter v Southam Inc* (1984) 2 S.C.R. 145 (SC Can) at 156 as cited in *Khan v The State* [2003] UKPC 79.

[6] Article 164 regulates the method of altering the Constitution. It entrenches every Article of the Constitution. There are three levels of entrenchment allowing the degree of difficulty in making alterations to be proportionate to the importance of the Article to be changed. Articles enjoying the shallowest level of entrenchment require the votes of an absolute majority of the National Assembly for their alteration. This is described in Article 164 (1) which prescribes that "… a Bill for an Act of Parliament to alter this Constitution shall not be passed by the National Assembly unless it is supported at the final voting in the Assembly by the votes of a majority of all the elected members of the Assembly." This is more difficult than the passage of ordinary legislation which only requires a simple majority, being a majority of those who voted.

[7] The deepest level requires a referendum. Article 164(2)(a) identifies those Articles which are given this level of protection as Articles 1, 2, 8, 9, 18, 51, 66, 89, 99 and 111. It is to be noted that only 10 Articles out of the 232 Articles and four Schedules are subject to this procedure, making it applicable only in exceptional circumstances which go to the fundamentals of the State. It provides that a Bill to alter any of these provisions,

> "shall not be submitted to the President for his assent unless the Bill, not less than two and not more than six months after its passage through the National Assembly, has, in such manner as Parliament may prescribe, been submitted to vote of the electorate and has been approved by a majority of the electors who vote on the Bill."

[8] The second or intermediate level is regulated by Article 164(2)(b) which identifies those Articles which enjoy that level of entrenchment. They are numerous and include Article 90. It prescribes that alteration requires a two-thirds (2/3) majority of all elected members of the National Assembly in the following terms:

> "Provided that if the Bill does not alter any of the provisions mentioned in subparagraph (a) and is supported at the final voting in the Assembly by votes of not less than two-thirds of all the elected members of the Assembly it shall not be necessary to submit the Bill to the vote of the electors."

[9] Article 90 was altered in full compliance with Article 164(2)(b) as prescribed by the Constitution. This much is agreed by all parties to the litigation and all the judges in the courts below. The issue in dispute arises from the decision of Chang CJ (Ag) in the trial court, upheld by a majority in the Court of Appeal, when he concluded that the changes

to Article 90 by implication altered or contravened Articles 1 and 9 of the Constitution, by changing and diluting the nature of the democracy of the State and the sovereignty of the people, by adding restrictions to the right of the voter to choose a President, and limiting the categories of persons who could offer themselves to be President. If he was right, then the method by which the alteration was made needed to have been regulated by Article 164(2)(a) and required the approval of a referendum. This too is agreed by all parties.

[10] The text of Articles 1 and 9 are as follows:

> Article 1
>
> "1. Guyana is an indivisible, secular, democratic sovereign state in the course of transition from capitalism to socialism and shall be known as the Co-operative Republic of Guyana."
>
> Article 9
>
> "9. Sovereignty belongs to the people, who exercise it through their representatives and the democratic organs established by or under this Constitution."

[11] The wording of these Articles does not address or regulate the qualifications of the President. It must be considered that by referring to the representatives of the people and the democratic organs of the State, Article 9 was referring to the institutions of Parliament and not the office of the President, thus making its relevance to these proceedings at least debatable. Neither of the Articles is directly affected by any alteration of the qualifications for election of the President. The premise that they imply an unlimited right to choose the Head of State is not obvious. The establishment of qualifications for the position of President is normal in Constitutions and does not necessarily diminish substantive voter choice. The concept of qualifications for office is not open ended. It would include matters of age, citizenship, residence and term limits. In Guyana only those issues, excluding age were addressed. Attempts to introduce unusual considerations to mask as qualifications would require different principles for adjudication. This is not the situation here.

[12] What is obvious, is that the Constitution could have made the Articles which deal with the qualifications to be elected as President subject to the Article 164(2)(a) level of

entrenchment. By providing different levels of entrenchment for Articles 1 and 9 on the one hand and Article 90 on the other, Article 164 of the Constitution placed different values on them. The failure to give them the same level of entrenchment is an indication of the intentions of the framers of the Constitution. If it were intended that alterations to Article 90 were to be enacted in the same way as alterations to Articles 1 and 9 they would have been given the same level of entrenchment. The inescapable conclusion is that the framers of the Constitution did not envisage that altering the qualifications to be President would necessarily impact on democracy or the sovereignty of the people in Guyana for which provision was made in Articles 1 and 9.

Alteration by implication

[13] The State challenged the power of the court to conclude that Articles 1 and 9 had been amended by implication because the Court had a limited role and could not enquire into the propriety of the amending legislation nor place any limitation on the Parliamentary power to amend Article 90. Instead, it was submitted that the Court should apply the "presumption of constitutionality" principle, legitimising the amendment unless it could be shown that Parliament was acting either in bad faith or had misinterpreted the provisions of the Constitution under which it purported to act. These contentions could not be supported. It is an accepted principle that courts should be generous in their interpretation of Constitutions. The court should not be overly literalistic and restrictive but should give effect to the meaning of the Constitution. We have accepted the case law to mean that provisions in a Constitution could be amended by implication even when the legislature did not so intend.

[14] Two of the cases cited to us exemplify that proposition. In the case of *The State of Mauritius v Khoyratty*,[3] Article 1 of the Constitution declared that Mauritius should be a sovereign democratic state. Parliament enacted legislation to alter the Constitution to permit the passage of legislation to deny bail in certain cases. The amending legislation was passed without satisfying the requirements of the entrenchment provisions for amending the Constitution in relation to amending Article 1. When legislation was passed to restrict the granting of bail under the amendment, the court was called upon to enquire whether Article 1 had been amended by implication. The Privy Council supported the ruling of the court below that the restrictions on bail necessarily infringed

[3] (2007) 1 AC 80.

principles of a democratic state, particularly the separation of powers doctrine, and struck down the amendment.

[15] In the case of *Kariapper v Wijesinha*,[4] a case from Ceylon, the Privy Council found that an ordinary law, not expressed to amend the Constitution, nevertheless impliedly altered the Constitution. The Civic Disabilities (Special Provisions) Act, No. 14 of 1965 purported to disqualify from Parliament for a period of 7 years any person with respect to whom a "relevant commission in its reports found that any allegations of bribery had been proved." This was not a ground for disqualification in the Constitution of Ceylon, which notably had as one ground for disqualification; an adjudication by a competent court or by a Commission appointed with the approval of the Senate or the House of Representatives. The Board concluded that although this was not an express amendment of the Constitution, the Act, being inconsistent with the Constitution, was to be regarded as amending the Constitution unless there was some provision denying constitutional effect such as the constitutional restrictions placed on the power of amendment. Thus, a Bill, which upon its passage amends the Constitution, could amend the Constitution irrespective of whether it states that as its express purpose.

[16] In this case the law that was held to alter the Constitution by implication was expressed to be an alteration to a provision of the Constitution itself. We are not assessing the propriety of the alteration. Our role is to determine whether the correct procedure was followed in the passage of the law, given the level of entrenchment of the provision that was altered. But that task cannot be satisfactorily performed without clear analysis of the import of the amendment and its impact on the Constitution. This necessarily includes considering whether there was an (unintended) alteration of Articles 1 and 9. There could be no principle which would make it improper to conduct such an analysis and to give effect to our findings. The presumption of constitutionality, is generally rebuttable. In this case it would be rebutted if the language and import of the amendment do in fact make the alleged alterations, whether it was intended to do so or not.

[17] In this case there are two mechanisms which diminished the risk of alteration by implication. The first is Article 164 itself. This Article sets out the provisions that enjoy each level of entrenchment in detail. It makes a clear distinction between the concepts

[4] [1968] AC 717.

of democracy and sovereignty in Articles 1 and 9 on the one hand and the qualifications and powers of the President on the other hand by giving them different levels of entrenchment. The proposition that altering the qualifications for President in Article 90 could require satisfaction of the procedure for altering an Article entrenched at a deeper level would itself change the structure of the Constitution. However, the court must be astute in applying this principle to ensure that any such alterations fall properly within the category of qualifications for the position.

[18] This principle is borne out in the case of *AG v McLeod*.[5] Section 49(1) of the Constitution of Trinidad and Tobago provided that "every member of the House of Representatives shall vacate his seat in the House at the next dissolution of Parliament after his election." Section 49(2) listed other circumstances under which a member must vacate his seat. Section 54(3) of the Constitution entrenched section 49(1) but not section 49(2). The court had to decide whether the provisions that applied to the level of entrenchment of 49(1) should also apply to 49(2) because it altered the circumstances under which members must vacate their seat set out in 49(1) and should be infected by the same degree of entrenchment. The argument had been that 49(2), before the purported amendment, served to modify 49(1). The Privy Council rejected the contention. Lord Diplock in delivering the judgment of the Privy Council pointed out that it was irrational to consider that section 49(2) should be entrenched even though it was conspicuously omitted from the list of entrenched provisions. He went on to explain

> "…the draftsman's selection for entrenchment of specific provisions … appears to their Lordships to follow a coherent and logical pattern. Broadly speaking it is those provisions of the Constitution that deal with the institutional characteristics of Parliament as the organ of the State in which by section 53 is vested the plenitude of the legislative power of the sovereign Republic of Trinidad and Tobago, that are protected by entrenchment; those provisions that deal with the qualifications of individuals for membership of either House and with the internal procedure of either House are not." [6]

[19] *McLeod* identifies irrationalities in implying that the amending legislation in relation to Article 90 should have been passed using the mechanism reserved for effecting amendments to Articles 1 and 9. It must be noted that in Article 164(2)(a) only 10 Articles, including 1 and 9 were designated to enjoy the deepest level of entrenchment.

[5] [1984] 1 WLR 522.
[6] ibid, p. 528.

These Articles addressed the state and its democracy, the definition of the territory of Guyana, the supremacy of the Constitution, mandating land usage to benefit the people, the establishment of Parliament and the power to amend the Constitution; and then there were three provisions relating to the President, dealing with the fact that there must be a President, that executive authority is vested in the President and finally that the President acts independently. There is a rational and logical coherence to this. In the context that the Constitution has 232 Articles and 4 Schedules, the effect is that a referendum would only be required for the approval of alterations to the Constitution in regard to those exceptional cases which go to the root of the fundamental principles on which the state is founded.

[20] Article 164(2)(b) is a clear indication that alteration of Article 90 is not considered to fall within such a category. Neither the language nor the operation and effect of the amending legislation does any violence to the fundamental principles of democracy (in Article 1), the sovereignty of the people or the institutional arrangements established for the exercise of that sovereignty through elected representatives and the democratic organs established by the Constitution (in Article 9). The alteration of the qualifications for the President by Article 90, does not imply that the specified procedure or mechanism for altering Articles 1 and 9 should apply, because the alteration of the qualifications does not alter the constitutional provisions relating to the democracy and sovereignty of the people, just as the qualifications relating to membership of the House in *McLeod* did not require satisfying the deeper entrenchment provisions, for similar reasons.

[21] The second, though admittedly less powerful, factor is the statement of the purpose for which the alteration is proposed. In his work *Changing Caribbean Constitution*,[7] Dr Alexis at 3.31 propounds that "some of the Constitutions cannot be changed by an Act which fails to state that its purpose is to alter the Constitution." This is not a feature in the Constitution of Guyana. But the statement of the purpose for which the Act was passed, at the least minimized the risk of an inadvertent alteration by implication as it allowed any errors of purpose to be dealt with during the legislative process. In this case the law which effected the alteration declared that its purpose was to alter Article 90. It

[7] (Second Edition, Caribbean Research & Publications Inc, 2015).

did not state that its purpose was to alter Articles 1 and 9. The Act was passed unanimously and was thereafter assented to by the President with the affirmation of all of the relevant institutions of the State.

Limitations on the electorate's right to choose the Head of State

[22] Mendes SC, on behalf of the Respondent, submitted that a core feature of a sovereign democratic State is that the people should be free to choose who should represent them in government without any constraint. He said that the exercise of sovereignty was not limited to freedom to select those people who would act as representatives of the people in government but also includes freedom of the people to offer themselves to be selected as a representative of the people and to participate directly in the affairs of the State. He contended that this view was supported by the political theories of John Locke and the work of American philosopher Johnathan Mansfield in his article *Choice Approach to Constitutionality of Term Limits*.[8] The proposition seemed to be unsupportable extensions of their philosophies.

[23] The underlying thrust of Locke's theories was a consensual basis for government. He had an abhorrence for absolute monarchical power and as his theories evolved he expressed the need to limit the power of rulers. It could be argued quite persuasively, contrary to the thesis of the Respondent in support of which they were cited, that Locke's theories were more aligned to the justification urged upon the Court by the Appellant that term limits were introduced in Guyana as an antidote to tyranny. This too is a value or ideal that fully accords with Articles 1 and 9 of the Constitution. It is an accepted canon of interpreting Constitutions that the preamble can provide guidance on its meaning. It is at least arguable that there is consistency between the idea of term limits and the aspirations declared in the 4th recital in the Preamble to the Constitution: - that the People of Guyana are concerned to "forge a system of governance that promotes concerted effort and *broad-based participation in national decision making* in order to develop a viable economy and a harmonious country based on democratic values, social justice, fundamental human rights and the rule of law." This value implies that democracy may benefit from increased opportunities for ascendancy to the highest leadership by limiting the tenure of the Presidency to two terms.

[8] 78 Cornell L. Rev. 966 (1993).

[24] Mansfield never supported the view that the right to choose was absolute, he advocated substantive voter choice.[9] He went so far as to explain "Completely unrestrained choice, however, poses enormous practical difficulties. For example, a Presidential general election with a thousand candidates could provide too much choice."[10] His work explained, that the qualifications for office of this nature would include matters of age, citizenship, residence and term limits. His examination of the US Constitution showed that qualifications as to age, citizenship and residence are "standing qualifications" which could have been addressed even without constitutional entrenchment. He explained

> "…the standing qualifications are definitions necessary for establishing and preserving a representative legislature. The goal of the Framers in setting the standing qualifications was not to limit substantive voter choice, but rather to establish minimum standards for representation in Congress."[11]

[25] Examination of Constitutions in countries which are accepted as being democracies reveal the consistency with which these are applicable in their Constitutions. These do not undermine voter choice in an undemocratic manner nor detract from the sovereignty of the people. Mansfield, however, did draw a distinction with term limits and concluded that the term limits could limit voter choice and should be introduced through constitutional measures. The philosophy of Mansfield, if accepted as a guide in this matter as the Respondent would have it, suffers no slight on the facts of this case, because the alterations to Article 90 regarding the standing qualifications of citizenship and residence as well as the term limitation were introduced by constitutional amendments that satisfied the procedure for alteration required for an Article at this level of entrenchment.

[26] Mendes SC also relied on two decisions of the U.S. Supreme Court; *U.S Term Limits Inc. v. Ray Thornton*[12] and *Powell v Mc Comack.*[13] These decisions weighed heavily on the decisions in the courts below. There was powerful language in these cases which affirmed the importance of the rights of the electorate and the limitations of the power of the Parliament in limiting the voter's rights. But the context of those comments did

[9] ibid, p. 975.
[10] ibid, p. 975.
[11] ibid, p. 980.
[12] 514 U.S 779115 S. Ct (1995).
[13] 395 U.S. 486.

not support the main argument of the untouchable voter choice. In *Thornton's case,* the court had to strike down the attempt of a State legislature to impose qualifications on election to the Federal Government holding that no individual state could impose restrictions that were more severe than those imposed in the Federal Constitution. In *Powell's case* the court ruled that Congress could not prevent a person elected from taking his seat on the ground of a disqualifying factor that was not set out in the relevant constitutional legislation. These cases, therefore, provide no useful answer to the real issue in dispute in this case.

[27] The reality in this appeal is that the Respondent has not been able to show that the right to an unlimited choice of a Head of State was enshrined or even existed anywhere. One only had to look at the countries where democratic traditions are universally accepted. In Great Britain, the head of state is a hereditary monarch and the people have no right of choice whatsoever. In America the US Constitution imposes qualifications as to age, citizenship, residence and term limitations. These qualifications are more stringent than in the altered Article 90 of the Guyana Constitution.

> **"US Constitution, Article II, Section 1**
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> "No person except a natural born citizen, or a citizen of the United States, at the time of the adoption of this Constitution, shall be eligible to the office of President; neither shall any person be eligible to that office who shall not have attained to the age of thirty-five years, and been fourteen years a resident within the United States."
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> **Term limit amendment - US Constitution, Amendment XXII, Section 1**
>
> **"**No person shall be elected to the office of the President more than twice, and no person who has held the office of President, or acted as President, for more than two years of a term to which some other person was elected President shall be elected to the office of the President more than once."

[28] It is generally accepted that the U.S. is a sovereign democratic Nation and that the people exercise sovereignty through their representatives and the democratic organs established by the Constitution. These are also the pith of Articles 1 and 9 of the Constitution of Guyana. Yet, in the U.S. the choice of a head of state, the President, is limited to people who are natural born citizens – no citizens by registration can be President of the U.S. - to people who have attained a minimum age of 35 and have been

resident in the US for 14 years; a much more stringent residence qualification than that imposed by Article 90.

[29] Looking closer in the Caribbean to the Republic of Trinidad and Tobago, an Electoral College consisting of all the Members of the Senate and all the Members of the House of Representatives elects the President by secret ballot. This is a country where it is also generally accepted that the State is a sovereign democratic State, and that the people exercise sovereignty through their representatives and the democratic organs established by the Constitution. In terms of qualifications, it is provided that

> "A person is qualified to be nominated for election as President if he is a citizen of Trinidad and Tobago of age thirty-five years or upwards who, at the date of his nomination as President has been ordinarily resident in Trinidad and Tobago for ten years immediately preceding his nomination."[14]

[30] The premise that there is an unlimited right to choose the Head of State implied in Articles 1 and 9 is not accurate. These Articles do not depend on the qualifications of electors and person who can be elected. It is obvious that the Constitution could have made the Articles which deal with the qualifications to be elected as President and the powers of the President, once elected, subject to the Article 164(2)(a) level of entrenchment if it was considered they warranted that degree of entrenchment.

The evolution of democracy in Guyana

[31] The best way of extracting the relevant meaning of "democracy" and the sovereign "power of the people" in Guyana is through an analysis of the internal discussion and struggles in Guyana as it relates to these concepts rather from the importation of concepts from outside. The idea of the democracy and sovereignty of the people has been extensively in the public domain for the last three-quarters of a century. These are recent and modern concepts in Guyana, because prior to 1953 they could not be applied to Guyana under the British colonial regime that governed it. In looking at the history of democracy in Guyana this Court was assisted by the report of the Constitutional Reform Commission presented to the National Assembly of Guyana on 17 July 1999 which was tendered. It and its contents were not challenged, and we have regarded it as an authoritative source of the facts stated in it.

[14] See s. 23 of the Constitution of Trinidad and Tobago.

[32] The Commission noted that in 1953 there was a significant change in the democratic rights of Guyanese citizens with the introduction of the "Waddington Constitution" which introduced universal adult suffrage in Guyana. In the 1953 general elections, which immediately followed, the mass-based, *multi-racial* organization, the original People's Progressive Party (PPP), was elected with a landslide victory but after less than five months in office the British Government suspended the Waddington Constitution and ousted the legally-elected government. The Commission said this was "under the guise that it posed a Communist threat."[15] In its place emerged an Interim Constitution and Government. By the mid 1950's, the PPP had split into two factions, paving the way for a political landscape largely dominated by the two main parties, the People's Progressive Party (PPP) and the People's National Congress (PNC) whose membership reflected a political division that was largely based on race.

[33] With universal adult suffrage in 1953, on the first opportunity the people of Guyana had to express themselves in the choice of their political representatives, they came together in a multi-racial party. Who knows what the history of Guyana could have been, had the colonial intervention not taken place. Certainly, concepts of democracy and the power of the people got severely set back under the colonial governance strategies.

[34] In the next few years Guyana experienced numerous Constitutional changes. Under proportional representation and independence in 1966 a coalition of the Peoples National Congress and the United Force (UF) emerged to form the government. On 20 February 1970 Guyana became a Cooperative Republic. The Constitution (Amendment) Act 1978 was approved by referendum on 10 July 1978 and the Constitution came into effect on 6 October 1980.

[35] The Commission noted the several criticisms in relation to the People's National Congress' successive election to office for almost three decades coupled with questions pertaining to the powers of the President and the relevance of the 1980 Constitution. The Commission said that

> Between 1968 and 1992, the People's National Congress ruled Guyana on its own, retaining power via a succession of elections and forms of governance

[15] See para. 1.29 of the Report of the Constitutional Reform Commission presented to the National Assembly of Guyana on 17 July 1999.

> that were widely criticised by Opposition parties and other observers as undemocratic. In 1992, facing intense internal and external pressure, it conceded significant electoral reforms for the December 15, 1992 general elections which resulted in the emergence of the People's Progressive Party/Civic in government. But it can be argued that Guyana had never been allowed to begin to develop a tradition of democracy …
>
> The Constitution to emerge from the present reform process will be the first to be written by Guyanese for Guyanese. The [1980] Constitution now in force, euphemistically called the "People's Constitution," was imposed after a controversial referendum process in 1978. This followed a Constituent Assembly which, most observers say, ignored the representations made to it. The odium generated by the Constitution has dogged it since it was promulgated and there have been repeated calls for it to be repealed or, at a minimum, extensively amended, particularly with respect to the provisions on the powers of the Presidency. These calls have been sometimes reinforced by extra-parliamentary agitation (emphasis added). [16]

[36] The Commission said that Constitutional review remained on the "front burner and by the 1992 elections, all the major political parties included the issue in their election manifestos."[17] In 1994 the National Assembly passed a resolution to appoint a Special Select Committee to review the Constitution and make proposals for its reform. The Committee undertook consultations between 7 May and 18 October 1997 before the process came to a premature end because of the dissolution of Parliament on 29 October 1997 for elections that year. The Committee had conducted 50 meetings, 26 of which were devoted to public hearings in Georgetown and around the country. It received 68 memoranda and 112 individuals and organisations gave oral evidence before it. A panel of experts appointed by the Committee also submitted a preliminary report of the memoranda and verbatim oral presentations. All this information was passed to the 1999 Commission.

[37] After the 1997 elections there was a month of civil unrest in Guyana as, according to the Commission, "ethnic tensions and ethnic violence escalated."[18] This led to the intervention of CARICOM which resulted in an agreement known as the Herdmanston Accord, signed on 18 January 1998 between the major political parties, the PNC and the coalition of the People's Progressive Party and Civic (PPP/Civic). The Accord

[16] See pages 25-26 of the Commission's Report.
[17] See para. 1.38 of the Commission's Report.
[18] See para. 2.2 of the Commission's Report.

provided for a Menu of Measures which the CARICOM Mission felt could contribute significantly to the resolution of the existing problems.[19] In an addendum to the Accord known as the St. Lucia Statement, the government of Guyana agreed to complete the process of constitutional reform in accordance with the timetable set out in the Accord.

[38] With the establishment of the Commission in 1999, the reform process commenced. The Commission took measures to ensure the widest possible consultation. These included (a) extracting written and oral submissions from the previous Select Committee; (b) inviting the public to send written submissions; (c) extracting submissions from newspaper articles; (d) establishing special public hearings as a result of special requests from persons and organisations; (e) taking individual Commissioner's views and submissions; and (f) providing internet information to stimulate responses from Guyanese residing overseas. The Commission also established a Public Education Unit which arranged a daily radio link with the Voice of Guyana in order to provide information on Public Hearings.

[39] The Commission noted that the most frequent recommendation from individuals as well as political parties, related to the Presidency, the Prime Ministership and the electoral system.[20] Recommendations in relation to the President and the Prime Minister were also the second most suggested recommendations made by interest groups. The Commission said that these individuals and bodies expressed the need to curtail the wide powers of the President. In particular, as it related to submissions from members of the public, it was noted that,[21]

> Some of the submissions received by the Commission proposed an Executive Presidency while others called for a Ceremonial Presidency. However, in the case of the submissions endorsing an Executive President, a number of matters were raised. There were suggestions that the President must be born a Guyanese, while others allowed for naturalised Guyanese. Most persons who addressed the issue said that dual citizenship should not be allowed. In either instance, it was proposed by some that there be a residency requirement. Proposals were made for an age limitation or qualification to be stated.
>
> The powers and immunities of the President as stated in the Constitution should be reviewed and reduced, especially if the Executive Presidency is retained. In particular, the President should not have the power to dissolve a Parliament that

[19] See page 29 of the Commission's Report.
[20] See pages 55 and 56 of the Commission's Report.
[21] See paras. 7.3.2.1 to 7.3.2.3 of the Commission's Report.

> has begun the process of investigating his or her conduct. There should be provisions for the impeachment of the President. However, there should be protection from frivolous suits. Parliament should have the power to override the veto power of the President by a qualified or weighted majority. The President should be directly answerable to Parliament.
>
> The President should be elected in separate elections and should gain at least 51 percent of the vote. One submission suggested that he or she should only be elected on gaining two-thirds of the votes cast. Other submissions proposed that Parliament should elect the President. Many submissions proposed that a President should be limited to two terms in office. Some added that a person should not be allowed to run for two consecutive terms.

[40] After reviewing the recommendations from a host of sources, the Commission recommended several changes to the Constitution. These included that Article 90 be amended to include a two-consecutive term limit for the position of President and that "the President should be Guyanese by birth, "soil or blood" and should be continuously residing in Guyana for a specified period before elections."[22] There were a number of other recommendations relating to the President which were aimed at reducing the powers of the President.

[41] The recommendations were addressed by the Constitution (Amendment) (No 4) Act of 2000. This was a comprehensive Act which altered some 11 Articles of the Constitution addressing the qualifications and powers of the President. The amendment of all of these provisions was regulated by Article 164(2)(b), the second level of entrenchment. The Act was passed with not just a two-thirds majority, but in fact a unanimous vote of all members of the Assembly. Section 2 of the Act altered Article 90 having regard to the Commission's recommendations. This amendment reflected compliance with a widespread community demand. It could be argued that it is not obvious that the referendum necessarily imposes a higher degree of difficulty than getting a two thirds majority of Parliament. The referendum only requires a simple majority in Parliament and a simple majority of those who vote. Although political outcomes are not easily predictable, there is the implication that the political party which has majority support ought to be able to get approval on a referendum. Whereas, where there is fairly even distribution of seats between the governing and opposing political parties, getting a two thirds majority in Parliament would be very difficult in the absence of national

[22] See para. 9.6.3.1 of the Commission's Report.

consensus. In this situation where the legislation was passed unanimously in a multi-party Parliament, the court must conclude that it had national consensus. The Respondent has not shown justification for frustrating that consensus.

[42] It is clear, moreover, the Act did not emerge from the desire of any political party to manipulate the candidacy for the Presidency according to its agenda. It represented the considered opinion of the Commission after extensive national consultation of the national view on what was required to enhance democracy in Guyana, make the Constitution more relevant to the needs of citizens and reduce racial and political tensions in the country, and it had national support. It addressed a broad package of reduction of the powers that the President had previously enjoyed. In relation to the present litigation, there could be no suggestion that the provisions regarding the term limits and citizenship and residency requirements were derived from any machinations of the incumbent government to frustrate the opposition. The Act was also a single item of a whole suite of Constitutional amendments designed to reflect the evolving democracy in Guyana.

[43] It is a historical fact that this reform process was undertaken during the PPP government. Ironically, it is now a PNC government that wishes to uphold these constitutional amendments. After the death of the late former President Cheddi Jagan, the late Janet Jagan became President and she signed the Herdmanston Accord and the related instruments constituting the constitutional reform process. Former President Bharrat Jagdeo was the President who signed the laws into force. As President and, presumably, with the good faith desire to quell disturbances, enhance the democracy of the country and improve the sovereignty of the people, he surrendered powers that he was currently enjoying as President, including the right to continuous re-election. In light of the Presidential powers he had in relation to signing and bringing the alteration into force, this may be seen as a 'self-imposed term limitation.'[23]

[44] Mansfield addressed this type of action in his paper in this way.[24] "The simplest solution is self-imposed term limitation."[25] He gave an interesting historical anecdote which is

[23] Supra (n 8), p. 994-995.
[24] ibid, p. 994.
[25] ibid, p. 994.

relevant to the evolution of the process in Guyana. "An historical example of this (in the presidential context) is the Twenty-Second Amendment. Before Franklin D Roosevelt's tenure, two four-year terms was the voluntary "term limit" for Presidents. George Washington established this precedent by refusing to seek a third term. Roosevelt's decision to seek two additional terms led to the adoption of the Twenty-Second Amendment, which limits a president to two terms."[26]

[45] However, it must be noted that former President Jagdeo is not a party to this litigation. He complied with the new constitutional provisions as he served two terms and in the two succeeding elections he did not offer himself as a candidate. It is also a historical fact that the spectre of post-election ethnic violence has not reared its head in the elections that have occurred since these changes to the Constitution. Democracy and people power have evolved. It may be concluded that Article 13 has also been applied so that the people have a greater sense of inclusion with increased opportunities for participation in the decision-making process. With all things considered, we are satisfied the case is not made out to disturb the will of the people expressed through the Act, considering as we do that it did not dilute democracy in, nor undermine the sovereignty of the people of, Guyana.

JUDGMENT OF THE HONOURABLE MR JUSTICE SAUNDERS

Introduction

[46] In the Year 2000, the National Assembly of Guyana amended Article 90 of the Constitution. Article 90 deals with the qualification for election to be President of the country. Before it was amended, the only qualification to be President was that the candidate must be a citizen of Guyana and be otherwise qualified to be elected as a member of the National Assembly.

[47] The amendments in 2000 added further qualifications. They required that the candidate be a Guyanese by birth or parentage as defined in Articles 43 and 44; be residing in Guyana on the date of nomination for election; be continuously resident in the country for a period of seven years before nomination date; and be eligible to serve as President for two terms and no more.

[26] ibid, p. 995.

[48] When Article 90 was amended in 2000, no one in Guyana apparently had any difficulty with the legality of the amendments. After their passage, the amendments were faithfully honoured by everyone. Mr Cedric Richardson now contests their lawfulness. He is particularly concerned with the provision for presidential term limits. It is fair to state, however, that the other restrictions also concerned him. Mr Richardson felt sufficiently aggrieved that he launched this action. He states that the failure to have the amendments approved at a referendum renders them void. Both courts below agreed with him. But, in the Court of Appeal, the then Acting Chief Justice, Cummings-Edwards JA, issued a passionate dissent.

[49] Mr Richardson's complaint is rooted in certain intricacies of the Constitution. The Constitution specifically empowers the National Assembly to amend Article 90 by a vote of at least two thirds of its members, but only as long as Article 90 is amended in a way that does not "*alter*" Articles 1 or 9 of the Constitution.[27] If the amendment has the effect of subverting either Article 1 or 9, the National Assembly's efforts ***must*** be supported by a popular referendum before the enactment can validly be enacted. The logic of this is that Articles 1 and 9 are very deeply entrenched in the fabric of the Constitution. The National Assembly may not "*alter*" either of those Articles unless a referendum is held.[28]

[50] In the preceding paragraph, the italicised word "*alter*" is used twice. On each occasion its usage bears a slightly different meaning. On the first occasion, the word means "impair", "dilute", "subvert", "water down". The actual text of the Article (whether 1 or 9) is untouched, but the effect of the amendment upon it is to weaken its potency. On the second occasion, the word "alter" means "change", "adjust", "modify", "revise". Here, there is a tampering with the words of the Article. In these proceedings we are concerned with the first meaning.

[51] When it amended Article 90, the National Assembly made no attempt to provide for the holding of a referendum. Clearly, the members of the Assembly were confident that the amendment did not water down, or *alter*, Article 1 or 9. The amendment was considered

[27] See Article 164(2)(b) at [7] above.
[28] See Article 164(2)(a) at [7] above.

duly enacted as it received more than the requisite two thirds majority sufficient to amend Article 90 when Articles 1 and 9 are not diminished.

[52] In the Judgment of the President above at [10] Articles 1 and 9 are set out. The Articles capture paramount constitutional principles. These include the fact that Guyana is a democratic and sovereign State and that sovereignty belongs to the people. And the people exercise that sovereignty through their representatives and the democratic organs established by the Constitution. Mr Richardson's complaint is that the amendments have undermined these principles. The question in the appeal, therefore, is whether it is fair to state that, because of the amendments, Guyana can no longer properly be regarded as a democratic, sovereign state or a state in which sovereignty belongs to the people. This question prompts the further issue as to the interplay between Articles 1 and 9 on the one hand and Articles 90 and 155 on the other. Article 155 is in play because it is that Article that sets out the qualification to be elected as a member of the National Assembly. Article 155 is therefore incorporated into Article 90 because, even before the amendments, to be qualified for election as President, a person needed also to be qualified to be elected as a member of the National Assembly.

[53] In a very carefully prepared and logically constructed argument on behalf of Mr Richardson, his counsel made the following submissions:

a) Articles 1 and 9 embrace "a constitutional right" that the people are entitled to "freely" choose their representatives without prior constraint on the categories of persons from which they can choose. It is an affront to the people's sovereignty to presume to pre-select for them the types and the qualifications of those persons best suited to the task of acting as representatives of the people or to eliminate from their consideration those considered to be wanting. The effect of the amendments to Article 90 was to create further restrictions as to the persons whom the people of Guyana could choose to elect as President, even though the people may consider any such restricted persons suitable to be so elected as President of Guyana. The exclusion of restricted candidates compromised the sovereignty of the people to freely choose whom they wish to govern them and this therefore created, as the Court of Appeal majority suggested, "a different democratic state to that envisaged in Articles 1 and 9." The amendments therefore violated Articles 1 and 9 and they should be declared void as they were not supported by a referendum;

b) When originally enacted, Articles 1 and 9 prohibited any restrictions upon the persons who the people might choose to be their representatives. Although, theoretically, that would also exclude the disqualifications originally contained in Article 90, because the 1980 Constitution resulted from the work of a Constituent

Assembly, the people themselves, as a sovereign entity, consented to so limiting their freedom to freely choose their representatives. Article 90 cannot be held to be inconsistent with Articles 1 and 9 because it is contained in the same instrument establishing Guyana's constitutional arrangements. Other than the restrictions already provided in Article 90, therefore, and other than any restrictions necessary "for the safety of society", Articles 1 and 9 mandate that the freedom of the people to choose their representatives may not be limited by the addition of further disqualifications, unless altered with the approval of the electorate; and

c) Once the court finds that the right to freely choose one's representatives is a core principle of a sovereign democratic state in which sovereignty vests in the people, Articles 1 and 9 are breached whenever an additional disqualification is added, *whether or not it is felt that the disqualification may improve democracy as a whole*, (my emphasis) unless of course the additional disqualifications receive the support of a majority of electors voting in a referendum.

[54] In accepting these submissions, the courts below relied on three cases in particular. Two of these cases, *Powell v McCormack*[29] and *US Term Limits Inc v Thornton*,[30] are United States cases. The third, *State of Mauritius v Khoyratty*,[31] is from Mauritius.

[55] For the reasons that follow, I do not believe that the amendments to Article 90 thwarted the ability of the Guyanese people to continue to exercise their sovereignty through their representatives and the democratic organs established by the Constitution. In my view, after the amendments of 2000 were enacted, Guyana continued to be an "indivisible, secular, democratic sovereign state" in which sovereignty belonged to the people. For my part, the amendments did not undermine that description of Guyana.

[56] In setting out my reasons for these views, I propose to comment on the provisions of the Constitution that are most relevant to these proceedings (Articles 1, 9, 90 and 155); analyse briefly the United States and Mauritius cases referred to above; discuss the context in which the amendments to Article 90 were made; and express the bases for rejecting Mr Richardson's complaint.

Articles 1 and 9

[57] The Constitution vests in Parliament the power of constitutional amendment. But Articles 1 and 9, and the extent to which they have been deeply embedded in the

[29] 395 US 486.
[30] 514 US 779.
[31] [2007] 1 AC 80.

Constitution, are prophylactics against abuse of this amendment power. The Constitution is crafted in this way because these two Articles express foundational values which Parliament, acting on its own, is not permitted to undermine. Indeed, what is stated in Articles 1 and 9 is so intrinsic to Guyanese constitutionalism and to the wellbeing of the Guyanese people that one may wish to go so far as to suggest that, referendum or no referendum, a court may well have grave difficulty in countenancing any amendments that would egregiously subvert Articles 1 and 9. I find it inconceivable that one half of the members of the National Assembly, supported by a bare majority of the population, could be entitled to transform Guyana into, or set it on a road to become, a nation that is, for example, oligarchic, or one where insuperable obstacles are placed on the exercise by the people of their sovereignty. The real issue in this case is whether in 2000 the National Assembly committed this kind of heresy; whether the effect of the amendments to Article 90 has resulted in Guyana no longer being the democratic and sovereign state that it was prior to the passage of the amendments in 2000.

[58] Articles 1 and 9 simultaneously describe overriding constitutional principles that govern Guyana and, as well, they express the country's lofty aspirations. There is no contradiction in this duality. Democracy is not a state of bliss that a society effortlessly attains and in which it then forever basks. Democracy must continually be struggled for and nurtured and ennobled if it is to retain its efficacy. Similarly, maintaining sovereignty requires ongoing vigilance and an appreciation of and appropriate response to threats that seek to dilute it.

[59] Neither of the two Articles stipulates any particular method of guaranteeing the principles they propound. As counsel himself notes:

> "The phrase 'sovereign democratic state' appearing in Article 1 is not defined. Neither is the phrase 'sovereignty' appearing in Article 9. Like all such other guarantees expressed in broad and general language, the task therefore falls to the judiciary to flesh out their true meaning."[32]

In seeking a "true meaning" of the two Articles it would be presumptuous for any one generation to believe that its understanding of their content exhausts the dynamic concepts comprehended by them.

[32] Record of Appeal, Submissions of the Respondent, p. 1393 at [56].

[60] The two Articles express normative values. Interpreting them requires the court to adjudge their content in the round, in a holistic way. Any assessment of whether and if so how they are implicated by an Act of Parliament *must* take into account the historical and surrounding context. I do not accept the Court of Appeal's view that, in relation to Guyana, there is or could be a range of different democratic states so that the court must determine whether an amendment to Article 90 by Parliament creates "a different democratic state to that envisaged in Articles 1 and 9." In my view, the republic is either adjudged to be worthy of the description "democratic and sovereign" or else the amendment has taken it outside that classification. And as long as the country is governed by a Constitution based on the rule of law, that Constitution will require impartial and independent courts ultimately to make that judgment.

[61] At the debates to craft the United States federal Constitution, James Madison had expressed the fear that investing in Parliament a power to alter the qualification of persons to serve can lead by degrees to the subversion of the Constitution.[33] Counsel for Mr Richardson drew the court's attention to Madison's fears as a way of highlighting the supposed danger in allowing the National Assembly to do what it did without a referendum. In relation to Guyana, these fears are grossly exaggerated. Two circumstances in Guyana provide an effective check on their realization. Firstly, there is the existence of the very deeply entrenched Articles 1 and 9 which Parliament by itself cannot override. Relatedly, there is, in any event, the court's power of judicial review consequent upon the doctrine of supremacy of the Constitution.

Articles 90 and 155

[62] Counsel for Mr Richardson suggests that any interference with Articles 90 and 155 automatically weakens Articles 1 or 9; that Articles 90 and 155 are for all purposes entrenched by infection at the same level as Articles 1 and 9. I disagree. A plain reading of the Constitution refutes that notion. The Constitution ostensibly gives Parliament the power, without having to resort to the formidable referendum process, to alter Articles 90 and 155 and thereby impose reasonable restrictions on the qualification whether to be President or a member of the National Assembly. The Constitution allows the National Assembly to do so by the vote of two thirds of its members, provided always that the effect of the alteration is not to reduce Articles 1 and/or 9.

[33] See *Powell v McCormack* 395 U.S. 486 (1969) at pages 533-534.

[63] If the Constitution's framers had considered that Article 90 or 155 was utterly incapable of alteration by the National Assembly without a referendum, it would have been easy enough so to prescribe. These Articles would then have been placed in the list of sacrosanct provisions whose alteration absolutely and always requires a referendum in addition to a majority of the votes of members of the National Assembly. That is not the case. Articles 90 and 155 are, quite deliberately, only conditionally placed in that hallowed list. The Constitution recognises that it is possible for and it actually empowers Parliament to alter Article 90 without impairing Articles 1 and/or 9.

[64] As previously indicated, even before the amendments were passed in 2000, Article 90 stated that to be qualified to be President a candidate had to be qualified to be elected as a member of the National Assembly. The qualification requirements for election as a member of the National Assembly are set out in Article 155. That Article stipulates a range of restrictions on who may be so qualified. These include persons under any acknowledgment of allegiance, obedience or adherence to a foreign power or state; persons certified to be insane or adjudged to be of unsound mind; persons under sentence of death and persons occupying a range of public offices, like judges, for example. The suggestion therefore that sovereignty means that the people must be able freely to choose whomsoever they wish to govern them, and that prior to the 2000 amendment that was the case, is unsupported in constitutional theory and practice. Democratic governance allows for, indeed requires, reasonable restrictions to be placed on the qualifications to be a member of the National Assembly and hence also to be President.

The United States Cases

[65] The United States cases advanced by counsel were unhelpful to me. The statements in them that were relied upon were taken out of context. In *Powell v McCormack*, Congressman, Adam Clayton Powell, complained about his exclusion from Congress by a House Resolution passed by majority vote. The House's action followed charges that Powell had misappropriated public funds and abused the process of the New York courts. The Supreme Court held that Congress had no authority to exclude any person who was duly elected by his constituents and who met all the requirements for membership expressly prescribed in the Constitution.

[66] Counsel for Mr Richardson was very impressed with a passage in *Powell* where the court referred to a speech by Alexander Hamilton at the New York Convention during the debates on the making of the United States Federal Constitution. Hamilton is said to have emphasised then that, "[T]he true principle of a republic is, that the people should choose whom they please to govern them. Representation is imperfect in proportion as the current of popular favor is checked. This great source of free government, popular election, should be perfectly pure, and the most unbounded liberty allowed."[34]

[67] These statements were cited by the Supreme Court in *Powell* in the context of a discussion as to whether Congress could impose qualifications for membership of the House in clear disregard of the qualifications prescribed by the United States Constitution. *Powell* was a case where the acts of the Congress were in competition with the provisions of the Constitution. The situation here is different. The National Assembly here was exercising the power it undoubtedly had to amend the Guyana Constitution to alter the qualifications to be President, provided the amendment did not impair Articles 1 and 9. The National Assembly was well within its right to exercise such power. What currently precludes a former two term Guyanese President from standing for a third term is not some arbitrary act of the National Assembly. It is a duly enacted provision of the Constitution of Guyana.

[68] *US Term Limits Inc v Thornton* is similarly inapposite. This was a case where the Arkansas Constitution was amended purportedly to prohibit the name of an otherwise eligible candidate for Congress from appearing on the general election ballot if that candidate had already served three terms in the House of Representatives or two terms in the Senate. The case is essentially about whether a *State legislature* has the power to impose congressional qualifications additional to or at variance with those specifically enumerated in the federal Constitution.

[69] *Thornton* stands for the proposition that qualifications for congressional office set out in the federal Constitution are fixed, that is to say, they are unalterable by individual States. The Supreme Court made it clear that State imposition of term limits for

[34] New York Ratifying Convention. First Speech of June 21 (Francis Childs's Version), [21 June 1788].

congressional service would effect such a fundamental change in the constitutional framework that it needed to come through a constitutional amendment properly passed under the procedures set forth in the Constitution. Absent such an amendment, allowing individual States to craft their own congressional qualifications would erode the structure designed by the Framers to form a 'more perfect Union.'[35] The judgment of the majority could not be clearer than when it stated –

> "…Any such change must come not by legislation adopted either by Congress or by an individual State, but rather - as have other important changes in the electoral process - through the amendment procedures set forth in Article V." [36]

[70] It is all well and good that the cases from the United States make reference to phrases such as "the people should choose whom they please to govern them"[37] and "sovereignty is vested in the people, and that sovereignty confers on the people the right to choose freely their representatives to the National Government."[38] The circumstances surrounding the application of these pithy observations must, however, be borne in mind. Context is everything. The discussion in these cases has to be seen against the backdrop of the attempt by Congress (in *Powell*) and by a single State (in *Thornton*) to impose qualifications or restrictions that were in violation of the Constitution of the United States. In neither case was there any endeavour to amend the Federal Constitution to cater for the proposed restrictions. In the case here of Mr Richardson's complaint, as was the case with the 22nd Amendment to the US Constitution, it is the Constitution itself that has been amended to impose the impugned restrictions.

The Mauritius case – State of Mauritius v Khoyratty[39]

[71] *Khoyratty* is a helpful case. It addresses issues similar to those that engage us here, namely the circumstances when it might be said that a country like Mauritius, or Guyana for that matter, may no longer be referred to as a democratic state.

[72] Like Guyana's, the Mauritius Constitution declares at Article 1 that the country shall be a sovereign democratic state. That Article is so heavily entrenched that it is practically unamendable. The Parliament of Mauritius cannot, expressly or impliedly,

[35] *US Term Limits Inc v Thornton* 514 US 779 at 781.
[36] ibid, p. 837 (reference omitted).
[37] ibid, p. 795.
[38] ibid, p. 794.
[39] [2007] 1 AC 80.

alter Article 1 unless the Bill for the proposed alteration has first been approved by 75% of the electorate at a popular referendum and *all* the members of the Assembly support its passage. Article 1 is naturally engaged whenever an amendment seriously infringes the fundamental tenets of liberal democracy. Save that the Mauritius Article 1 is more deeply entrenched than its Guyana counterpart there is a rough similarity between the text of the two provisions of each of these states and the intendment of the Constitution's framers.

[73] In 1994 the Mauritius Constitution was amended to entitle Parliament by a three-fourths majority to enact legislation that would deny bail pending trial to certain categories of persons charged with an offence related to terrorism or drug related offences. Parliament later enacted the Dangerous Drugs Act 2000 (No 41 of 2000) that contained restrictions of bail in certain classes of cases.

[74] The courts were required to examine the constitutional amendment to determine whether it infringed Article 1. For this purpose, Lord Steyn, writing for the Privy Council, noted that (a) Mauritius is a democratic state based on the rule of law; (b) the principle of separation of powers is entrenched; and (c) one branch of government may not trespass on the province of any other. These propositions, it was noted, are all hallmarks of the sovereign democratic state the Mauritius Constitution proclaims that country to be. Article 1 encompassed further important principles, namely that the people must decide who should govern them; that fundamental rights should be protected by an impartial and independent judiciary and that, in order to achieve a reconciliation between the inevitable tensions between these ideas, a separation of powers between the legislature, the executive, and the judiciary is necessary.

[75] It was the violation of the separation of powers principle by the 1994 constitutional amendment that impelled Lord Steyn to endorse the decision of the Supreme Court on the amendment. That latter court had held that "the imperative prohibition imposed on the judiciary to refuse bail in the circumstances outlined therein amounts to interference by the legislature into functions which are intrinsically within the domain of the judiciary."[40] Lord Steyn supported his opinion with references to such cases as *Director*

[40] ibid at [8].

of Public Prosecutions of Jamaica v Mollison;[41] *R (Anderson) v Secretary of State for the Home Department;*[42] and *A v Secretary of State for the Home Department.*[43]

[76] Lord Rodger agreed with Lord Steyn. He provided some context, pointing out that historically, the grant or withholding of bail was a matter for the judges of Mauritius. From 1986, however, there had been attempts by the Mauritius legislature to exclude the grant of bail in relation to certain offences. An initial attempt was made in 1986 but was declared void by the courts. The 1994 constitutional amendment was an attempt to get around the earlier decision by the courts. It was designed to remove completely any power of the judges to consider the question of bail, however compelling the circumstances of any particular case might be. The Mauritius constitutional amendment therefore altered one of the well-understood components of a democratic state as envisaged by section 1, namely, the separation of executive and judicial powers.

[77] In finding that section 1 had been watered down, the Privy Council in *Khoyratty* concerned itself with the substance of the amendment; with its deleterious effects on such inviolable principles as the separation of powers and the observance of individual human rights.

Historical and surrounding context

[78] The amendments to Article 90 by the Guyana National Assembly were not flippantly made. They were not instigated by partisan or sectional interests. They were preceded by a careful, thoughtful, thorough, nation-wide process. Their passage represented the culmination of broad national and regional efforts *consciously to improve democracy in Guyana*.

[79] One need not here recount the political history of Guyana from the dying stages of colonial rule in the 1950s up to the time of the passage of the amendments. Suffice it to say, as it was said with some euphemism, that the country has throughout that time laboured under "the strain of divisive tendencies which have had adverse consequences on social relations, ethnic accord and economic activity."[44]

[41] [2003] 2 AC 411 at [13].
[42] [2003] 1 AC 837, 890—891 at [50].
[43] [2005] 2 AC 68.
[44] See Report of the Constitution Reform Commission to the National Assembly (July 19, 1999) at page 4.

[80] These "strains" reached a point where the Caribbean Community (CARICOM), out of genuine concern for a valued member of its family of states, felt compelled to become actively involved. Guyana is a crucial member of CARICOM and the site of its headquarters. In 1998, a CARICOM mission met with Guyana's political leaders. These deliberations resulted in "the Herdmanston Accord" being signed on 17 January 1998. The parties to the Accord agreed a menu of measures to address issues arising from the 15 December 1997 elections. The parties also agreed that there should be established a Constitutional Reform Commission "with a wide mandate and a broad-based membership." The Terms of Reference of the Commission were to be determined by the Guyana National Assembly after a process of consultations with the political parties. The Accord was reinforced, in July 1998, with "The Saint Lucia Statement" in which Guyana's political leaders and CARICOM reaffirmed their commitment to the Accord and its urgent implementation.

[81] In January 1999 the National Assembly enacted the Constitution Reform Commission Act. This Act established the Constitution Reform Commission and provided for its membership, terms of reference and other related matters. The Commission was a broad-based body consisting of representatives from the political parties in Guyana along with other representatives from among farmers, indigenous people, women's organisations, youth, the Bar, religious bodies and the Labour Movement.

[82] The Commission members did the work assigned to them. They did so assiduously and within the relatively short time frame they were given. Their report was presented to the National Assembly on 17 July 1999. The report comprises some 241 pages not including several Appendices. The Commission Chairman's accompanying letter to Parliament stated, among other things:

> "The Commission received 4,601 proposals which were carefully considered in extensive debates both at committee and plenary levels. In addition, we received the invaluable views and opinions of seven foreign and seven Guyanese experts.
>
> Our debates were lengthy, intensive, frank and stimulating. Commissioners successfully sought every opportunity to resolve differences by debates and discussions which were always characterised by mutual respect and an atmosphere of cordiality. Much common ground was found by Commissioners whenever it was possible to reflect on issues outside of plenary sessions. Commissioners have formed from this process bonds of commitment to a

> common purpose and a significant amount of mutual understanding for the basis of the point of view which they might not have found it possible to support…
>
> The Commission is of the view that the public had a reasonably adequate opportunity to submit views to the Commission. Our view is that they took advantage of that opportunity."[45]

[83] The report makes for fascinating reading. The Commissioners made a thorough review of every facet of the 1980 Constitution. In many instances they came up with specific proposals for improving the Constitution. Each such proposal was voted on. Article 90 was dealt with at Paragraph 9.6.3.1 of the report. Concrete recommendations were made in relation to the revision of that Article. The members of the Commission voted on those recommendations. By a 12 – 4 majority the members resolved that the 1980 provision should be amended as follows:

> "Article 90 - Qualifications for election
> (1) A person shall hold the office of President for a maximum of two (2) terms and those two terms shall be consecutive.
> (2) The President should be a Guyanese by birth (soil or blood) and should be continuously residing in Guyana for a specified period before elections."[46]

[84] It was in these circumstances that Article 90 was amended by the National Assembly in 2000. The National Assembly was faithfully responding to the views of the Commission and the people as to measures which should be taken to strengthen Guyana's democracy in light of "the strain of divisive tendencies" the country had experienced in the past.

Analysis and Conclusions

[85] Mr Richardson has contrived to premise his case on the following progression. Firstly, he extrapolates from Articles 1 and 9 an individual fundamental right similar to the enforceable Rights and Freedoms contained in Part 2 Title 1 of the Constitution; secondly, he takes it upon himself to define this "right" as his opportunity "freely" to elect a President of his choice; and thirdly, he seeks redress for what he asserts is a fetter that has been placed on this new found "right". Each of these premises is wrong. To

[45] ibid at pages ii - iii.
[46] Report of the Constitution Reform Commission to the National Assembly (July 19, 1999) at [9.6.3.1].

interpret the Constitution in this way defeats its structure and intendment. Worse, it contradicts the plain text itself.

[86] The "Principles and Bases of the Political, Economic and Social System" laid out in Part 1 of the Constitution (of which Article 9 is a part), and their inclusion in the Guyana Constitution, were for the most part a constitutional feature borrowed from or at least similar to what is found in the Indian Constitution. There is no more authoritative source as to the approach one should take to these instructional principles than to cite Dr Ambedkar, the venerable scholar and principal author of India's Constitution.

[87] At the Indian Constitution Conferences, in referencing these Principles (in India called "Directive Principles") Dr Ambedkar noted:

> "…whoever captures power will not be free to do what he likes with it. In the exercise of it, he will have to respect these instruments of instructions which are called Directive Principles. He cannot ignore them. He may not have to answer for their breach in a court of law. But he will certainly have to answer for them before the electorate at election time."[47]

[88] It is expressly stipulated in Article 39(1) of the Constitution that Guyana's Principles are not enforceable as such in a court of law unless Parliament so specifically provides.[48] It is true that Articles 1 and 9 do have "juridical relevance" and are not merely "idealistic references with cosmetic value only."[49] Those Articles, however, are not intended to confer *individual* rights. They are intended to guide governments, the courts, state and public bodies in the implementation of policy and the discharge of their functions. Mr Richardson is misguided in seeking to found his case on the breach of a right contained in Articles 1 and 9 that supposedly inures to him as an individual.

[89] The second major flaw in counsel's argument lies in the submission that "Articles 1 and 9 are breached whenever an additional disqualification is added, *whether or not it is felt that the disqualification may improve democracy as a whole*" (my emphasis). Consistent with this notion, unsurprisingly, counsel for Mr Richardson pointedly

[47] Cited by the President of India, Shri Pranab Mukherjee delivering Dr. B.R. Ambedkar Memorial Lecture 2014 on 'vision of India in 21st century, as envisaged by Dr. Ambedkar', http://pib.nic.in/newsite/PrintRelease.aspx?relid=109313.
[48] See also *AG v Mohamed Alli* (1987) 41 WIR 176
[49] ibid, at 205(B).

avoided making any evaluation of the character of the amendments to Article 90. The submission therefore elevates form over substance. It specifically equates measures that lead to democratic decay with measures that strengthen democracy. It invites the court to disregard historical and surrounding context when assessing a possible violation of the normative statements contained in Articles 1 and 9.

[90] It cannot be the case that any and every new qualification or disqualification the National Assembly imposes on candidacy for public office automatically abridges democracy. Nor does the removal of an existing qualification inevitably expand democracy. It would be quite remarkable if democracy or sovereignty could be measured in such a manner. The status of Guyana as a sovereign and democratic state may be but is not necessarily implicated by an alteration of the qualifications established for election to the Presidency. True, a particular kind of amendment to Article 90 (whether to add or remove a qualification) *may* undermine the democratic and sovereign nature of the state. During the course of the hearing I gave this trite example. If Article 90 were amended to state that to be qualified to be a candidate for President a person must first show that s/he has ten million dollars in the bank, then that amendment will surely diminish Articles 1 and 9. The amendment will produce elitism, not to mention the obvious retreat away from "the transition from capitalism to socialism."

[91] Let us take an example of a different kind. Currently, the combined effect of Articles 90(1)(c) and 155(1)(d) disqualifies sitting judges from being presidential candidates. Guyana's National Assembly will never do this but, for the sake of argument, if perchance it foolishly amended the Constitution to remove that disqualification, such an amendment will expand the pool of persons eligible to serve in the post of President, from which pool Mr Richardson can then select. All the sitting judges would then become potential presidential candidates. But, despite this expansion of the pool, the amendment will surely undermine Articles 1 and 9 because the separation of powers principle will be seriously violated for a sitting judge also to be President.

[92] In each of the two examples above, to assess whether Articles 1 or 9 has been breached, we do not start with the mantra that "the people of a country should have the opportunity freely to elect representatives of their choice" or that "sovereignty is vested in the

people" and then simply calculate whether the amendment in question expands or reduces the pool of persons eligible to be elected as President. Such an approach perfectly fits Professor de Smith's disparaging description of "tabulated legalism."[50]

[93] Successive parliaments are entitled to adopt measures to satisfy themselves that Guyana remains worthy of the designation "sovereign and democratic." These measures will always be prompted and conditioned by the lived and past experiences upon which contemporary generations can draw. Ultimately, if Parliament enacts an amendment to Article 90 (or to Article 155) and no referendum is held, as stated earlier, the Constitution reposes in the court the responsibility to assess whether to strike down the amendment if it implicates Articles 1 and/or 9 because it dilutes democratic governance. The court must form a judgment on the matter.

[94] How will a court determine whether a particular amendment establishing new qualifications was within or outside the power of the National Assembly acting on its own without a referendum? In any such review exercise a court will look to the history, substance and practical consequences of the amendment, to the reasons advanced for it and to the interests it serves. The court may also consider, albeit of lesser importance, whether it was passed by a bare two thirds majority with one third of the members being vigorously opposed to it or whether it was instead passed unanimously.

[95] The court is also entitled to look outside Guyana. The country is a member of the Caribbean Community, all of whose members subscribe to the tenets of liberal democracy. Is the disputed Act entirely out of sync with what obtains throughout the Community? Beyond the Caribbean Community, Guyana is part of the wider international community. In a case such as this, is there a clear consensus among states that are regarded as sovereign and democratic that amendments of this kind are to be eschewed? In this regard, a court may wish to draw on "the collective wisdom and experience of courts the world over."[51] Transnational constitutionalism may provide guidance as to whether a particular constitutional amendment is abusive or consistent with what should obtain in a sovereign and democratic state.

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[50] See S A de Smith, *The New Commonwealth and its Constitutions* (1964) at p 194, cited by Lord Wilberforce in *Minister of Home Affairs v Fisher* (1980) AC 319 at 328.

[51] See *R v Spence* Criminal Appeal No 20 of 1968, St Vincent and the Grenadines, unreported, 2 April 2001 at [214].

[96] Ultimately, in a case such as this, the court must ask itself whether the new qualifications are reasonably justifiable in a democratic society. That is the litmus test. It is a test that constitutional courts invariably adopt each time they are called upon to balance the rights or interests of the individual against the public good. If these amendments are reasonably justifiable in a democratic society, then there can be no sound basis for concluding that Articles 1 and/or 9 have been undermined.

[97] In its review exercise the court is entitled to receive evidence and materials that bear on the matters alluded to in the previous three paragraphs. It is a matter of considerable regret that the parties in this case appeared not to appreciate that such evidence and materials were relevant to the inquiry. It was only upon this Court's insistence that we were favoured with copies of the Herdmanston Accord and the Saint Lucia Statement to which reference has been made.

[98] Quite apart from the very commendable internal and regional processes that produced the amendments to Article 90, judicial notice may be taken of the fact that apart from Guyana, only two other CARICOM States have Executive Presidents, Suriname and Haiti. In Haiti, the President may not serve for a third term.[52] The Dominican Republic is not part of CARICOM, but together with CARICOM states it forms part of CARIFORUM. A 2015 amendment to the Constitution of the Dominican Republic states that the President may opt for a second consecutive constitutional term but may never again run for the same office or for the Vice Presidency of the Republic.[53]

[99] Outside the Caribbean, there is no clear consensus that term limits for Heads of State or Heads of Government weaken democracy or sovereignty. Indeed, many states in Africa, the Americas, Europe, Asia and Oceania impose term limits on such Heads in the belief that such limits actually *strengthen* democracy. Admittedly, some states do not impose such limits, but there is nothing to suggest that Guyana's sovereignty or democracy will be negatively affected if the National Assembly chooses to impose reasonable presidential term limits.

[52] See Article 134 of the Haitian Constitution.
[53] See Article 124 of the Constitution of the Dominican Republic.

[100] In the same vein, there is nothing so harmful about requiring the President, in the words of the Constitution Commission, "to be a Guyanese by birth (soil or blood)" and to be "continuously residing in Guyana for a specified period before elections", such that these amendments render the country undemocratic or violate the country's sovereignty. These restrictions are to be found in many States that are liberal democracies. For what it is worth, and quite ironically, given the heavy emphasis placed on United States jurisprudence by the courts below, the comparable provisions of the United States Constitution establish *more* restrictive qualifications to be President of that country than the amendments to Guyana's Article 90. Article 2 section 5 of the United States Constitution states:

> "No Person except *a natural born Citizen*, or a Citizen of the United States, at the time of the Adoption of this Constitution, shall be eligible to the Office of President; neither shall any Person be eligible to that Office who shall not have attained to the Age of *thirty-five Years*, and been *fourteen Years a Resident* within the United States" (emphasis added).

Article 22 (the 22nd Amendment enacted in 1951) of the US Constitution goes on to provide that "*No person shall be elected to the office of the President more than twice…*"

[101] The logical extension of Mr Richardson's claim is that when, for example, the United States enacted the 22nd Amendment, that country's democracy and the concept that sovereignty resided in the people of that country were undermined. I disagree with any such conclusion. Similarly, here, the alteration of Article 90 did not subvert Guyana's democratic and sovereign status and therefore the amendments did not require a referendum.

[102] The Constitution specifically empowers Parliament to alter Article 90 without recourse to a referendum. When Parliament does so, its notion that it has not subverted Articles 1 and/or 9, while not of course binding upon the court, should nevertheless be accorded a reasonable margin of appreciation. After all, the Parliament is one of the supreme organs of democratic power.

[103] If the members of the National Assembly considered that term limits and the other amendments made to Article 90 did not dilute Article 1 or 9, the courts should look for

some evidence to the contrary before concluding that such a view was wrong-headed. Where such evidence exists, courts will not shrink from deciding that the amendment is invalid unless affirmed by a referendum. But here, no such evidence whatsoever is put forward by Mr Richardson. Indeed, he takes the view that even if Article 90 (or 155) is amended so as to strengthen democracy, then a referendum is required.

[104] In relation to Article 155, there is an important principle at stake in permitting the National Assembly, on its own, to be able to alter that Article without resort to the vagaries of a popular referendum. Westminster and the Parliaments that have been inspired by or evolved from the Westminster tradition have, since 1689, asserted and been granted (even in written Constitutions) a certain amount of latitude in determining their internal procedures. In particular, unless a constitutional text goes out of its way to determine otherwise, the qualification of members of Parliament has always been a matter strictly for Parliament. Courts take great care to respect this "parliamentary privilege" and to distinguish between its exercise and matters concerning the institutional characteristics of parliament over which the members of parliament have less control.[54] Of course, no exercise of a parliamentary privilege can undercut constitutional values.[55] Considerations such as these would have informed the decision of Guyana's Constitution framers to permit the National Assembly to alter Article 155 provided the alteration did not diminish Articles 1 and 9.

[105] No true comparison can be made between the amendments to Article 90 and what occurred in *Khoyratty.* In Mauritius, Article 1 was diminished because the fundamental right to liberty and the important principle of the separation of powers were gravely imperilled. By contrast, no fundamental right is prejudiced here. No essential constitutional norm is impaired. The amendments are not out of sync with what obtains in other democratic countries. Far from being indicative of a weakening of democracy, the entire process that culminated in the passage of the amendments was a credit to democratic governance in Guyana. All of this was fully appreciated by the members of the National Assembly and the President at the time. The amendment to Article 90 did not just garner the requisite two thirds majority of the members. It was so well received, every single member of the Assembly voted in favour of it.

[54] See for example *AG v McLeod* [*1984*] 1 WLR 522, PC.
[55] See for example *Toussaint v AG* [2007] 1 WLR 2825; *Hughes v Rogers* AI 2000 HC 1 (Justis).

[106] These amendments do not dilute or impair Articles 1 and/or 9. I agree that the decision of the Court of Appeal must be set aside. In my opinion, Mr Richardson's complaint lacks merit.

JUDGMENT OF THE HONOURABLE MR JUSTICE WIT

[107] This is a remarkable case. Article 90 of the Constitution of Guyana prescribes that a President of the Republic can only be elected twice. That as such is not remarkable. Most States with a presidential or semi presidential system have these limits. What happens regularly, though, is that sitting Presidents or members of their political party seek the lifting of those limits[56]. In this case, however, it is a supporter of the current Leader of the Opposition, who is a former two term President, who seeks to achieve that. And that is what makes it remarkable.

[108] The supporter's line of attack is not directed against Article 90 of the Constitution. It is a difficult hurdle to overcome if one wants a Court to declare a provision of the Constitution itself unconstitutional[57]. If one wants the Court to declare that the provision is null and void one needs to attack the constitutionality of the Act purporting to amend the Constitution. This is what counsel for Mr Richardson, who is the supporter in question, did.

[109] Before December 2000, when the amendment entered into force, the only eligibility requirements to be President were that the person was a citizen of Guyana and that he or she was otherwise qualified to be elected as a member of the National Assembly. Since the amendment entered into force, it is now further required (1) that the person is not only a citizen but a citizen by birth or parentage (excluding naturalized citizens), and (2) that he or she is residing in Guyana on the date of nomination for election and, continuously, for a period of seven years immediately before that date. Where a President could first be re-elected indefinitely, it is now stipulated that a President can only be re-elected once. It is particularly this last requirement that prompted Mr Richardson to file this case.

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[56] This was, for example, successfully, and controversially, achieved in Honduras (2015) and Bolivia (2017).
[57] Or inapplicable, as was decided by the Constitutional Division of the Supreme Court of Honduras in its judgment of 22 April 2015, a controversial decision, see Francisco Zuñiga Urbina and Roberto Carcamo Tapia, *Inconstitucionalidad de Normas Constitucionales? Un Caso de "Constitucionalismo Abusivo"*, https://dialnet.unirioja.es/descarga/articulo/5586080.pdf

[110] He reasons as follows: The Bill to alter article 90 was unanimously adopted by the Assembly but this was not good enough. For it to be constitutional it should also have been approved in a referendum by a majority of the (qualified) electors because it altered both Article 1 and Article 9 of the Constitution (see Article 164). Article 1 requires Guyana to be a democratic sovereign state and Article 9 states that sovereignty "belongs to the people, who exercise it through their representatives and the democratic organs established by or under this Constitution."

[111] The reference to Article 9 is somewhat obscure, in my view. In a proper democratic state sovereignty belongs to the people and according to article 9 the people of Guyana decided to exercise that sovereignty through their representatives and democratic organs. In this case the people's representatives exercised the power to amend the Constitution on the people's behalf[58]. The question is whether they did so in accordance with the Constitution. The answer to that question depends on whether the amendment altered, diluted or watered down the concept of Guyana as a democratic state. If it did not, the constitutional procedure that was followed was correct. If it did, the procedure was flawed and the amendment null and void.

[112] The crucial question in this case is what are we to understand by a democratic state in the context of Article 1. It does not help to say, as the Court of Appeal did, that this is a democratic state as envisaged in Articles 1 and 9 because we do not know what these provisions "envisage" and I don't think there is any material before us that would be helpful in this respect. Moreover, such an exercise might lead judges to read their own values and predilections into the constitutional text. For a proper analysis it is necessary to focus on objective, international standards of what a democratic state entails.

[113] These standards can be found in the following texts:

- Article 3 of the Inter-American Democratic Charter:

> Essential elements of representative democracy include, inter alia, respect for human rights and fundamental freedoms, access to and the exercise of power in accordance with the rule of law, the holding of periodic, free, and fair

[58] In most countries, Parliament serves both as ordinary legislator and as the constitutional legislator. The latter function is almost always, as it is in Guyana, subject to special procedures and requirements (see European Commission for Democracy through Law (Venice Commission), Report on Constitutional Amendment, CDL-AD (2010)001, 19 January 2010 p 8).

elections based on secret balloting and universal suffrage as an expression of the sovereignty of the people, the pluralistic system of political parties and organizations, and the separation of powers and independence of the branches of government.

- Article 25 of the International Covenant on Civil and Political Rights:

  Every *citizen* shall have the right and the opportunity, without any of the distinctions mentioned in article 2 [race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status] and without unreasonable restrictions:

  (a) To take part in the conduct of public affairs, directly or through freely chosen representatives;

  (b) To vote *and to be elected* at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors;

  (c) To have access, *on general terms of equality*, to public service in his country.

- Article 23 of the American Convention on Human Rights:

  1. Every *citizen* shall enjoy the following rights and opportunities:

     a. to take part in the conduct of public affairs, directly or through freely chosen representatives;

     b. to vote and *to be elected* in genuine periodic elections, which shall be by universal and equal suffrage and by secret ballot that guarantees the free expression of the will of the voters; and

     c. to have access, under general conditions of equality, to the public service of his country.

  2. The law may *regulate* the exercise of the rights and opportunities referred to in the preceding paragraph only on the basis of age, nationality, residence, language, education, civil and mental capacity, or sentencing by a competent court in criminal proceedings.

[114] One of the core characteristics (but certainly not the only one) of a democratic state is that the citizens of that state must have the right to participate in government, to vote and to be elected and stand for office on an equal and non-discriminatory footing and that any restriction of these rights, although possible, should be based and must be justifiable on objective and reasonable criteria. As the Inter-American Court of Human Rights stated: "the power of States to regulate or restrict rights is not discretional, but

is limited by international law, which requires compliance with certain obligations that, if they are not respected, make the restriction unlawful."[59]

[115] According to the Inter-American Court, the conditions and requirements that must be fulfilled when regulating or restricting these rights are (a) the restrictive measure must be lawful, meaning that the restriction must be clearly established by law, (b) the cause invoked to justify the restriction should be among those permitted, for example to protect the public order, the rights of others or the just demands of the general welfare in a democratic society, and (c) the restriction should be necessary in a democratic society and it should be proportional.[60]

[116] Once restrictions on these rights or changes therein remain within these boundaries, the state is and remains a democratic state. In such a case, its status as such is not altered. If the restrictions appear to transgress these boundaries, however, there is a case to be made that there is an alteration which needs to be put before and decided by the population of Guyana.

[117] According to international standards, residence requirements are allowed provided they are reasonable. I have seen no grounds to conclude that the seven-year residency requirement in Article 90 is unreasonable. However, the restriction that only citizens by birth or parentage qualify for the presidency of Guyana would at first blush seem discriminatory or at least controversial[61] This aspect of the case has not been fully developed, however, and has never been the focus of this case, so I do not think a definitive conclusion should be drawn at this point.

[118] The main issue is clearly the term limit for the president. Did its introduction at the time dilute or water down the democratic status of Guyana? Obviously, the President of this Court and Justice Saunders have given their reasons explaining why that was not the case and I agree with them *grosso modo*. Interestingly, there is a very recent report on

[59] Judgment of 6 August 2008, *Castañeda Gutman v Mexico*, at [174]
[60] Ibid [176]-[186]
[61] CCPR General Comment No. 25: Article 25 at [3]. It does not assist in this respect to refer to the Constitution of the USA, where only a "natural born citizen" can become President, which made sense at the beginning of the new Republic but nowadays is seen as controversial, see Sarah Helene Duggin and Mary Beth Collins, *'Natural Born' in the USA: The Striking Unfairness and dangerous Ambiguity of the Constitution's Presidential Qualifications Clause and Why We Need to Fix It*, Columbus School of Law, 2005

term-limits for presidents (March 2018) issued by the respectable European Commission for Democracy Through Law (the "Venice Commission"). The report was written at the request of the Secretary General of the Organisation of American States (OAS) "against the background of a recently observed bad practice of modification of presidential terms through a decision of constitutional courts rather than through a reform process."[62]

[119] The Commission concluded that there is no specific and distinct human right to re-election.[63] It further stated that "term limits on the office of the President … are a check against the danger of abuse of power by the head of the executive branch. As such, they pursue the legitimate aims to protect human rights, democracy and the rule of law". The Commission concluded that, without more, term limits "do not unduly limit the human and political rights of aspirant candidates."[64]

[120] The question whether term limits unduly limit the human and political rights of voters, was also answered in the negative. The Commission stated: "It is true that term limits may inhibit voters from choosing the incumbent or former president again as president. However, this is a necessary consequence of the need to restrict the right to re-election of the incumbent or former president." As argued above, limits on re-election pursue the aim of preserving democracy and protect the human right to political participation. They contribute to guaranteeing that periodic elections are "genuine" in the sense of Article 25 ICCPR and Art. 23(1b) ACHR, and to ensuring that representatives are freely chosen and accountable."[65] The Commission was even of the view that "abolishing limits on presidential re-election represents a step back in terms of democratic achievement."[66]

[121] In a passage which almost seems written with this particular case in mind, the Commission remarks: "Nevertheless, it should be underlined that the people may vote freely, but only for those candidates who appear on the ballot. The citizens' ability to hold those in power accountable is always limited by legal conditions related to suffrage

[62] Report on Term-Limits Part I – Presidents, CDL-AD (2018))010, 20 March 2018, para 1
[63] Ibid para 117
[64] Ibid paras 119-121
[65] Ibid para 123
[66] Ibid para 124

regulations, such as age, citizenship, legal capacity, among others, and by the rules that regulate the right to stand for office and access to the ballot or nomination rules. Still, the right to vote for a preferred candidate is only one, though an essential one, of a large scope of political rights and activities related to political participation. Therefore, limitations on access to the ballot or re-election cannot be seen as an obstruction to exercise those rights and to participate in politics. Therefore, in general, restrictions to the human right to political participation and to choose leaders are allowed within a constitutional democracy, although from the subjective rights perspective they should be justified and deemed necessary." [67]

[122] Of course, whether the term limits set out in Article 90 of the Constitution were justified and necessary must be judged against the situation in 2000 when the Act amending the Constitution was introduced. Given the totality of the evidence before us, there can be little doubt that at that point in time it was broadly considered to be so. If it is now felt by many Guyanese citizens that these term limits are no longer justified or necessary because society has developed and matured, that change in national consciousness cannot retroactively make the Act invalid or unconstitutional. In such a case, if the people should wish to see these limits lifted, as the Venice Commission makes clear, "a constitutional amendment needs to be sought according to the relevant constitutional rules." [68]

JUDGMENT OF THE HONOURABLE MR JUSTICE ANDERSON

Introduction

[123] In these proceedings the Attorney General of Guyana appeals the decision of the Court of Appeal which held that section 2 of the Constitution (Amendment) (No 4) Act of 2000 was invalid for inconsistency with Articles 1 and 9 of the Constitution of the Co-operative Republic of Guyana.[69] Section 2 of the Act, sometimes referred to as Act No. 17 of 2000, amended Article 90 of the Constitution by disqualifying certain categories of persons from being elected to the post of President of the Republic, which persons were previously qualified to be so elected. The Act was passed unanimously in the

[67] Ibid para 103
[68] Ibid para 124
[69] Cap 1:01.

National Assembly; however, it was not put to, and therefore not approved by the majority of electors voting in, a referendum. Accordingly, in consequence of Article 164 (2) of the Constitution, Act No. 17 of 2000 stood to be invalidated unless it did not alter specified provisions of the Constitution including Articles 1 and 9.

[124] The High Court and a majority of the Court of Appeal held that section 2 of the Act did, in fact, alter Articles 1 and 9 which proclaim Guyana to be a democratic sovereign state in which sovereignty belongs to the people who exercise it through their representatives. Those courts held that an aspect of that sovereignty was the right of the people to freely choose who would represent them as President. As the Act had deprived the people of this right by debarring them from electing as their President any person falling within the categories newly prescribed by section 2, it meant that the Act was invalid *pro tanto*.

[125] The critical issue for decision by this Court is whether the Court of Appeal erred in holding that the declarations in Articles 1 and 9 guarantee to the people of Guyana the right to freely choose their President. If it is found that the people enjoy this freedom, it then falls to be decided whether the disqualifications legislated by section 2 of the Act infringed that right and if so, whether such an infringement may nevertheless be excusable. To give context to these determinations, it is necessary to first consider in more detail how the Act attempted to amend the Constitution and the decisions on that attempt by the courts below.

The Constitution (Amendment) (No 4) Act of 2000

[126] The Act, which was enacted by the National Assembly on December 15, 2000 and which entered into force upon receipt of the Presidential assent on December 29, 2000, was stated to be enacted "to alter the Constitution in accordance with Articles 66 and 164." These are the provisions specifying the power and procedures for altering the Constitution. I shall return to them shortly. Section 2 of the Act provides for the repeal and re-enactment of Article 90 of the Constitution.

[127] Prior to the enactment of the Act, Article 90 provided that:

> "90. A person shall be qualified for election as President and shall not be so qualified unless he-

(a) is a citizen of Guyana; and
(b) is otherwise qualified to be elected as a member of the National Assembly.

Provided that a person holding the office of President or otherwise discharged the functions of that office shall not on that account be disqualified for election as President."

[128] Section 2 of the Act provides for the re-enactment of Article 90 as follows:

"90. (1) A person shall be qualified for election as President and shall not be so qualified unless he or she –

(a) is a citizen of Guyana and is Guyanese by birth or parentage as defined in articles 43 and 44;
(b) is residing in Guyana on the date of nomination for election and was continuously residing therein for a period of seven years immediately before that date; and
(c) is otherwise qualified to be elected as a member of the National Assembly.

(2) A person elected as President after the year 2000 is eligible for re-election only once.

(3) A person who acceded to the Presidency after the year 2000 and served therein on a single occasion for not less than such period as may be determined by the National Assembly is eligible for election as President only once."

[129] Section 2 therefore disqualified the following five categories of persons, over and above those previously disqualified by Article 90, from being elected to the post of President: (i) any citizen of Guyana who obtained his or her citizenship otherwise than by birth or through parentage (such as by marriage or residency); (ii) any citizen not resident in Guyana at the date of nomination; (iii) any citizen of Guyana, who though resident in Guyana at the date of nomination, was not resident in Guyana for seven continuous years prior thereto; (iv) a citizen of Guyana who, after the year 2000 has served as President for two terms; and (v) a citizen of Guyana who after the year 2000 served as President by accession for such period as may be determined by the National Assembly and who was subsequently elected to the post of President.

[130] As a practical matter, it is evident that these five categories probably render hundreds and possibly thousands of persons who were previously eligible for election to the presidency ineligible for such election. In this way, it was argued, the Act trenches in a very substantial way on the pre-existing right of the people of Guyana to choose their

President free of constraints not imposed by them and therefore had to be approved by them in a popular referendum as mandated by Article 164(2).

Articles 66 and 164 of the Constitution

[131] The Act expressly stated in its Preamble that it was enacted to alter the Constitution in accordance with Articles 66 and 164. Article 66 empowers Parliament to alter the Constitution by providing that: "Subject to the special procedure set out in Article 164, Parliament may alter this Constitution." This underscores the point that the power of Parliament to alter the Constitution is expressly subject to parliamentary compliance with the procedure set forth in Article 164, including referral to a referendum where that is required. Parliament is not supreme. The Constitution is.

[132] So far as is relevant, Article 164 provides as follows:

> "164. (1) Subject to the provisions of paragraphs (2) and (3), a Bill for an Act of Parliament to alter this Constitution shall not be passed by the National Assembly unless it is supported at the final voting in the Assembly by the votes of a majority of all the elected members of the Assembly.
>
> (2) A Bill to alter any of the following provisions of this Constitution, that is to say-
>
> (a) this article, articles 1, 2, 8, 9, 18, 51, 66, 89, 99 and 111; and
>
> (b) articles 3, 4, 5, 6 and 7, 10 to 17 (inclusive), 19 to 49 (inclusive), 52 to 57 (inclusive), 59, 60, 62, 63, 64, 65, 67, 68, 69, 70, 72, (in so far as it relates to the number of regions), 90 to 96 (inclusive), …
>
> shall not be submitted to the President for his or her assent unless the Bill, not less than two and not more than six months after its passage through the National Assembly, has, in such manner as Parliament may prescribe, been submitted to the vote of the electors qualified to vote in an election and has been approved by a majority of the electors who vote on the Bill:
>
> Provided that if the Bill does not alter any of the provisions mentioned in subparagraph (a) and is supported at the final voting in the Assembly by the votes of not less than two-thirds of all the elected members of the Assembly it shall not be necessary to submit the Bill to the vote of the electors.
>
> (3) In this article –
>
> …
>
> (b) references to altering this Constitution or any particular provision thereof *include* references to repealing it, with or without re-enactment thereof or the making of different provision in lieu thereof, to modifying it and to suspending its operation for any period." (Emphasis added).

[133] As indicated earlier, Act No. 17 of 2000 was enacted to alter Article 90; this is an Article mentioned in Article 164(2)(b). As such, Article 164(2) prescribes that the Act ought not to have been submitted for Presidential assent until it had been approved by the electors in a referendum, unless, that is, the proviso applies. The proviso applies and avoids the obligation to go to a referendum if (but only if) the Act does not also alter any of the provisions of Article 164(2)(a), specifically, in this case, Articles 1 and 9. Put simply, there was a need to obtain the votes of a majority of the electors in a referendum if the Act, having obtained the vote of a majority of the elected members of the Assembly, altered Article 90 and also altered Articles 1 and 9; contrarywise, if it was passed by a two-thirds majority and, whilst altering Article 90 did not also alter Articles 1 and 9, it would be valid notwithstanding it had not been approved by a majority of electors in a referendum. The essential issue for decision in the courts below therefore was whether in altering Article 90, the Act also altered Articles 1 and 9 of the Constitution thus triggering the need for a referendum.

High Court Proceedings

[134] In the proceedings before the High Court, the applicant, Mr Cedric Richardson, a citizen of Guyana, argued that the effect and consequence of the purported alteration by Act No. 17 of 2000 was to curtail or delimit the electorate's choice of Presidential candidates by rendering ineligible for such candidature any person who had been re-elected once as President. In this way, he argued, the Act restricted the choice of the electorate to vote for former President Bharrat Jagdeo who had served two terms as President. It is of interest to note that Act No. 17 of 2000 had been signed and brought into force by Mr Jagdeo during his presidency. Nevertheless, Mr Richardson argued that the statutory prescriptions to which President Jagdeo had assented violated Articles 1 and 9 by preventing Mr Jagdeo from running for the presidency after serving two terms.

[135] In a judgment delivered on July 9, 2015, acting Chief Justice Chang noted that although the challenge of the applicant was only to the constitutionality of Article 90 (2) and (3), perhaps hundreds of persons who had acquired citizenship of Guyana by registration and perhaps thousands of non-resident citizens of Guyana by birth or descent would also be rendered ineligible to stand for the post of President. The acting Chief Justice considered Mr Richardson's submission that while Act No. 17 of 2000 had been enacted

in procedural compliance with Article 164(2)(b) in so far as it purports to alter the original Article 90 by way of a two-thirds majority in the National Assembly, the Act was, nevertheless, unconstitutional because it had the "indirect effect or consequence of diluting, diminishing or restricting the pre-existing democratic right of the electorate to elect a person as President" embedded in Articles 1 and 9.[70] He considered cases from India and Belize which suggested that the Constitution had "not just a procedural element but also a normative element as part and parcel of its basic structure and that the procedural element cannot be used for the purpose of altering the Constitution in disregard and nullification of that normative element":[71] *Golaknauth v State of Punjab;*[72] *Kesavada Bharati v State of Kerala;*[73] and *British Caribbean Bank Ltd. v The Attorney-General of Belize.*[74] Other commonwealth decisions asserted the power to review the content of constitutional amendments for violation of certain implied limits: *Premier of Kwazuly Natel v President of South Africa;*[75] *National Newspapers Pty Ltd v Willis;*[76] *Jackson v AG;*[77] and *Axa General Insurance Ltd. v Lord Advocate*[78].

[136] Acting Chief Justice Chang cited *US Term Limits Inc. v Ray Thornton*[79] and *Powell v Mc Cormack*[80] to support his view that representative or parliamentary democracy could not trump constitutional democracy, that Parliament could not under the guise of an 'alteration' diminish or destroy the fundamentals of a Constitution from which its own power had been derived. As such, the Parliament of Guyana did not have untrammeled power to reconstitute the political foundation of the nation: *State v Khoyratty,*[81] and *Independent Jamaica Council for Human Rights Ltd v Marshall-Burnett.*[82] The acting Chief Justice emphasized that Parliament could enact legislation that altered and further restricted democratic sovereignty but held that a referendum would be necessary to secure the legal validity and efficacy of such legislation. It would

[70] *Cedric Richardson v The Attorney General of Guyana and Raphael Trotman* (High Court of Guyana, 9 July 2015) p13.
[71] ibid, p15.
[72] AIR 1967 SC 1643.
[73] AIR 1973 SC 1461.
[74] Claim No. 597 of 2011.
[75] CCT 36/95.
[76] (1992) ALR 681.
[77] (2005) UKHL 56.
[78] (2011) UKSC 46, 50.
[79] Supra (n 12).
[80] Supra (n 13).
[81] Supra (n 3).
[82] [2005] UKPC 3.

have been otherwise if the alterations were directed to the removal of a pre-existing disqualification rather than to the imposition of further disqualification on persons for Presidential candidature. Since the alterations effected by Act No 17 of 2000 to Article 90 also dilute and diminish democratic sovereignty under Articles 1 and 9, the holding of a referendum was required to achieve legal validity and efficacy. None was held. Accordingly, the acting Chief Justice held that "…Act No. 17 of 2001 (*sic*), in so far as it seeks to trench on and to dilute the pre-existing democratic rights of the electorate to elect as President a person of their own choice, needed a referendum and is invalid and without legal effect …"[83]

Court of Appeal

[137] The appeal against the decision of the acting Chief Justice was dismissed by a majority decision in the Court of Appeal on February 22, 2017. The learned acting Chancellor, with whom Roy JA agreed, considered that the focus of the appeal was "on the question whether the people of Guyana in whom sovereignty resides are entitled to choose whom they wish to govern them."[84] He answered that question in the affirmative. He said:

> "I believe in this appeal, the focus of the Court should be on the concepts of 'sovereignty' and 'democracy' as those words are used in Articles 1 and 9 of the Constitution. Should we confine ourselves to a consideration, that those concepts relate to the Constitution of a legal and political collectivity? I do not think so. The Constitution must be interpreted as I earlier pointed out in a broad, liberal, purposeful and holistic way. Those concepts should, in keeping with that approach be interpreted with a clear understanding of the role of the citizens of Guyana in the exercise of their democratic entitlements and what is conferred upon them by virtue of the sovereignty that is vested in them.'"[85]

[138] The acting Chancellor referred to the cases of *Powell v McCormack*,[86] *US Term Limits Inc. v Thornton*,[87] and *State of Mauritius v Khoyratty*,[88] and stated:

> "What clearly emerges from the authorities is that an essential feature of a sovereign democratic state is the freedom which should be enjoyed by its people to choose whom they wish to represent them. A corollary to this is the

[83] *Cedric Richardson v The Attorney General of Guyana and Raphael Trotman* (High Court of Guyana, 9 July 2015) p 36.
[84] *Attorney General of Guyana and Raphael Trotman v Cedric Richardson* Civil Appeal No. 45 & 45'A' of 2015 (Court of Appeal of Guyana, 22 February 2017) (*Singh* C (ag)), 12.
[85] ibid.
[86] Supra (n 13).
[87] Supra (n 12).
[88] Supra (n 3).

> freedom of the people to offer themselves to be selected as representatives of the people. This much is evident in the words of the preamble earlier referred to, which conveyed the aspiration of the people of Guyana towards a system of governance that promotes concerted effort and broad-based participation in national decision 'making'.
>
> The effect of the amendment to Article 90 of the Constitution by Act No. 17 of 2000 was to create further restrictions as to the persons whom the people of Guyana could choose to elect as President, even though the people may consider any such restricted person suitable to be elected the President of Guyana. Therefore, by excluding those persons from consideration by the people for election to the office of president that exercise of sovereignty of the people to freely choose whom they wish to govern them is suppressed …
>
> The freedom of the people of Guyana to choose their representatives, captured in the concepts of sovereignty and democracy in Articles 1 and 9 of the Constitution cannot be limited by the addition of further disqualifications unless approved by the electorate.
>
> In sum, therefore, the further restrictions on the people's choice for President, occasioned by the Amendments to Article 90 of the Constitution, created a different democratic state to that envisaged in Articles 1 and 9."[89]

[139] By the time the appeal was heard, Justice Cummings-Edwards had become the Acting Chief Justice. She dissented and upheld the constitutionality of Act No. 17 of 2000 on three grounds. First, the Act was to be presumed to be constitutionally compliant and the burden fell to the Respondent to prove that the Act violated the Constitution and that it was not passed in the manner or form required by the Constitution. Citing *Hinds v R*,[90] she held that the presumption of constitutionality could be rebutted if the Respondent established that when Parliament purported to amend Article 90, it was acting either in bad faith or had misinterpreted the provisions of the Constitution. No evidence had been adduced to rebut the presumption of constitutionality.

[140] Second, the learned judge considered that the people had bestowed upon Parliament the power to expand the categories of persons who were disqualified from running for President. The importance of Article 164 was that it provided and recognized the devolution from the people of Guyana, of sovereign power of a constituent nature and quality to the Parliament of Guyana to alter the Constitution. The exercise of this

[89] *Attorney General of Guyana and Raphael Trotman v Cedric Richardson* Civil Appeal No. 45 & 45'A' of 2015 (Court of Appeal of Guyana, 22 February 2017) (*Singh* C (ag)), 14 – 15.
[90] [1977] AC 195.

parliamentary power in passing the Act was "democracy at work: the sovereign people conferring certain rights on Parliament with restrictions…"[91]

[141] Third, the judge considered that the right of the people to choose their President remained unaffected by Act No 17 of 2000 because the people remained free to choose their President from among the remaining qualified candidates. As such, the Act did not alter Articles 1 and 9 either directly or indirectly. She said that, "[t]he right of the people to select the President remains unaltered….".[92] Further, "[i]mposing a limit on the tenure of the president,"[93] or in other words, "saying that the person cannot serve as President for more than two (2) terms is not changing…the fundamental character of the text of the Constitution or the right of the people to select their President. The rights of the people or the people's choice remains intact…"[94]

[142] These grounds for upholding the validity of the Act were adopted by the Appellant in his submissions before this Court. The argument that the Act could not be judicially reviewed because it had been passed in the manner and form dictated by the Constitution was the central plank in the submissions of the learned Attorney General. I will return to these grounds in due course, as appropriate.

Articles 1 and 9 and the freedom of the people to choose their President

[143] The core question in this appeal is whether the proclamation in Articles 1 and 9 that Guyana is a democratic sovereign state in which sovereignty belongs to the people, guarantees to the people the right to freely choose their President. The precise wording of these provisions follows:

> Article 1
> "1. Guyana is an indivisible, secular, democratic sovereign state in the course of transition from capitalism to socialism and shall be known as the Co-operative Republic of Guyana."
>
> Article 9

[91] *Attorney General of Guyana and Raphael Trotman v Cedric Richardson* Civil Appeal No. 45 & 45'A' of 2015 (Court of Appeal of Guyana, 22 February 2017) (*Cummings-Edwards CJ* (ag)) at [90].
[92] ibid, [93].
[93] ibid, [92].
[94] Record of Appeal, Transcript of the delivery of the Judgment of the Court of Appeal, p 358. See also *Attorney General of Guyana and Raphael Trotman v Cedric Richardson* Civil Appeal No. 45 & 45'A' of 2015 (Court of Appeal of Guyana, 22 February 2017) (Cummings-Edwards CJ (ag)) at [92].

> "9. Sovereignty belongs to the people, who exercise it through their representatives and the democratic organs established by or under this Constitution."

[144] Articles 1 and 9 are deeply entrenched in the Constitution. They can only be altered with the approval of a majority of electors voting in a referendum, after the proposed alteration is sanctioned by the National Assembly. Deep entrenchment emphasizes the normative character and centrality of these Articles to the fabric of the Constitution as the supreme law of the land.[95] They provide substantive provisions and protections on the nature of the Republic and the sovereignty of the people of the Republic. This deep entrenchment also underlines the constitutional imperative for involvement of the people in any restriction in their democratic sovereignty apart from those agreed in 1980 when they approved their new Constitution by popular referendum.

[145] In my view, the starting point in determining whether Articles 1 and 9 confer freedom upon the people of Guyana to choose their representatives (and by extension their President) must be acceptance of the fact that for the purposes of interpretation, these provisions are akin to human rights provisions and are therefore to be given a generous, liberal and purposeful construction. Thus, Article 154A of the Constitution confers upon the citizens of Guyana the human rights enshrined in the international treaties to which Guyana has acceded and which are set out in the Fourth Schedule. These rights must be respected and upheld by the executive, legislature and, very importantly, the judiciary. Among the treaties listed in the Fourth Schedule is the International Covenant on Civil and Political Rights.[96] Article 25 of the Covenant affirms the right and opportunity of every citizen (a) to take part in the conduct of public affairs, directly or *through freely chosen representatives*; and (b) to vote and be elected at genuine periodic elections guaranteeing the free expression of the will of the electors. Similar expressions are to be found in Article 20 of the American Declaration of the Rights and Duties of Man 1948[97] and Article 23 of the American Convention on Human Rights 1969.[98]

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[95] Constitution of the Co-operative Republic of Guyana Cap 1:01, Article 8.
[96] (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR).
[97] OAS Res XXX adopted by the Ninth International Conference of American States (1948) reprinted in Basic Documents Pertaining to Human Rights in the Inter-American System OEA/Ser L V/II.82 Doc 6 Rev 1 at 17 (1992).
[98] OAS Treaty Series No. 36, 1144 U.N.T.S. 123, entered into force July 18, 1978, reprinted in Basic Documents Pertaining to Human Rights in the Inter-American System, OEA/Ser.L.V/II.82 doc.6 rev.1 at 25 (1992).

[146] The judiciary has long accepted that in interpreting human rights provisions the language of the Constitution should not be construed in a narrow and legalistic way but broadly and purposively so as to give effect to the spirit of the provisions and to avoid what has been called "the austerity of tabulated legalism."[99] This guiding tenet has been enunciated in several cases not least of which are *Minister of Home Affairs v Fisher*[100] and *Matthew v State of Trinidad*.[101] In *Matthew*, Lord Bingham noted that the Privy Council had "…brought to its task of constitutional adjudication a broader vision, recognizing that a legalistic and over-literal approach to interpretation may be quite inappropriate when seeking to give effect to the rights, values and standards expressed in a Constitution as these evolve over time."[102] Caribbean judges adhere to similar principles in their approach to construction of the Constitution. In *Attorney General v The Grenada Bar Association*,[103] Chief Justice Byron (now President of this Court) spoke for that approach when he said that the "…nature of a Constitution requires that a broad, generous and purposive approach be adopted to ensure that its interpretation reflects the deeper inspiration and aspiration of the basic concepts on which the Constitution is founded."

[147] The implications of giving a generous and liberal interpretation to Articles 1 and 9 that reflects their founding and deeper inspiration and aspiration, are as significant as they are self-evident. A sovereign democratic state in which sovereignty belongs to the people describes a state in which the people have supreme power or authority to govern themselves. It implies the right to self-determination, or as the Preamble to the Constitution states, it affirms the sovereignty and independence of the people. These pre-existing rights may be enlarged but cannot be constricted by the executive, legislative or judicial organs of the state; organs which derive their legitimacy from the sovereignty of the people as expressed in their Constitution.

[148] A core feature of a sovereign democratic state in which sovereignty belongs to the people is that the people must be free to choose the persons who will govern and

[99] *Minister of Home Affairs v Fisher* [1980] AC 319, 328; *Attorney General of Trinidad and Tobago v Whiteman* [1991] 2 AC 240, 247.
[100] [1980] AC 319, 328.
[101] [2005] 1 AC 433.
[102] *Matthew v State of Trinidad and Tobago* [2005] 1 AC 433 at [34].
[103] (Court of Appeal of Grenada, 21 February 2000) GD 2000 CA 2, 7.

represent them, especially as their President. Free, that is, of any constraints that they themselves have not approved at the founding of their Constitution or by the processes specified for their involvement in defining such constraints. There is an irrebuttable presumption that the people know who would best represent their interests in government. They are the ones to decide upon the suitability and categories of qualifications of persons to stand for office. The imposition of restrictions that disqualify large numbers of persons from standing for election as President, which restrictions are not sanctioned by the people in the constitutionally authorized manner, necessarily trenches on their freedom to choose their representatives and is concomitantly a fetter upon their sovereignty.

[149] It is to be emphasized that it is not for the executive, the legislature or the judiciary to decide the universe of candidates from which the people can choose their President. That would usurp sovereignty from the people and relocate it to subservient organs of the state. Any temptation presented to these organs of state to refashion the democratic sovereignty of the people in a way that whittles away that sovereignty, ought to be resisted. It may well be true that certain modern notions are thought to be more conducive to democracy than older notions. And that may well be so. However, unless these notions have attained the status of *jus cogens* they cannot be determinative. As regards temptation to the court, the words of Lord Hoffman speaking for the majority in *Boyce v The Queen*[104] are apt, when he said that it was, "… not… for the judges to give effect to [these modern notions] by purporting to give an updated interpretation to the Constitution. The Constitution does not confer upon the judges a vague and general power to modernize it… the power to make a change is reserved to the people …, acting in accordance with the procedure for constitutional amendment. That is the democratic way to bring a constitution up to date."

[150] In a sovereign democratic society, the people give expression to their democratic will through the process of voting. This is evident from a generous reading of the Covenant to which Guyana is a party and of other treaties, cited earlier, with similar provisions. That democratic sovereignty, which includes the freedom to choose through the voting process, has also been affirmed time and again in the legal literature. In *Choice*

[104] [2005] 1 AC 400 at [29].

Approach to the Constitutionality of Term Limitation Laws,[105] Johnathan Mansfield writes that "Elections, which authorize representatives to exercise power, are the principal way by which the people exercise their sovereignty."[106] He continues: "Because sovereignty means complete and supreme authority, when a voter's choice of a representative is diminished, her sovereignty is reduced as well. In the political realm, this means that a voter should be able not just to select a representative from among a slate of government-approved candidates, but to vote for the particular person she wants."[107] Similarly, Professor Simeon McIntosh in *Fundamental Rights and Democratic Governance: Essays in Caribbean Jurisprudence* was of the view that: "…the power to make laws for the governance of a community … is the most awesome aspect of sovereignty. The right to vote, then, that is, the right of the people to determine who their political rulers would be is arguably the most critical democratic right that people have – or at least are morally entitled to."[108]

[151] The plenary entitlement of a people in a democratic sovereign state to free choice of their representatives has also been affirmed in judicial authorities on both sides of the Atlantic. Two United States Supreme Court cases affirmed this freedom in the context of legislative encroachment. In *Powell v McCormack*,[109] Powell, a senior member of the US House Representatives, who was embroiled in scandal, was re-elected in the 1966 elections to the 90th Congress. In January 1967, the House resolved by a vote of 307 to 116 to exclude Powell from taking his seat and created a Select Committee to investigate Powell's misdeeds. Following the Committee's investigation and hearings, the House resolved to exclude Powell from Congress and declare his seat vacant. Whilst the subsequent suit brought by Powell was making its way through the court system, he was re-elected in the 1968 election and re-seated in the 91st Congress. As he was seated when his appeal came to the Supreme Court, the defendants argued that the case was moot, an argument that found favour with the lone dissentient, Justice Stewart. The majority judgment of the court was delivered by Chief Justice Warren who cited James

[105] (1993) 78 Cornell Law Review 966.
[106] ibid, 975 (citation omitted).
[107] ibid (citation omitted).
[108] Simeon CR McIntosh, *Fundamental Rights and Democratic Governance: Essays in Caribbean Jurisprudence* (The Caribbean Law Publishing Company, 2005) 46.
[109] Supra (13).

Madison, one of the founding fathers of the American Constitution, as suggesting that the vesting of power in Congress to impose qualifications for membership would vest:

> "an improper & dangerous power in the Legislature. The qualifications of electors and elected were fundamental articles in a Republican Govt., and ought to be fixed by the Constitution. If the Legislature could regulate those of either, it can by degrees subvert the Constitution. A Republic may be converted into an aristocracy or oligarchy as well by limiting the number capable of being elected as the number authorised to elect … It was a power also which might be made subservient to the views of one faction agst. another. Qualifications founded on artificial distinctions may be devised by the stronger in order to keep out partizans of [a weaker] faction." [110]

[152] The court considered the history of the House, and the role of the states and their voters in choosing their representatives and concluded that the US Constitution, the weight of history and the federal structure of the government required that the sovereign will of the people, as expressed in the democratic process, and the coordinate role of their states was supreme in the creation of candidate members for the Congress. The people, by their Constitution, affirmatively posited, defined, and delimited all qualifications for standing in elections for membership in the Congress. The people and the states together had the sole authority for the creation, production, and generation of candidate members of the US Congress. Congress was a creation and subordinate of that authority. The Chief Justice concluded:

> "A fundamental principle of our representative democracy is, in Hamilton's words, 'that the people should choose whom they please to govern them.' As Madison pointed out at the Convention, this principle is undermined as much by limiting whom the people can select as by limiting the franchise itself. In apparent agreement with this basic philosophy, the Convention adopted his suggestion limiting the power to expel. To allow essentially that same power to be exercised under the guise of judging qualifications would be to ignore Madison's warning, borne out in the Wilkes case and some of Congress' own post-Civil War exclusion cases, against 'vesting an improper & dangerous power in the Legislature." [111]

[110] ibid, p. 533-534.
[111] ibid, 547 - 548 (citation omitted).

[153] In *US Term Limits Inc. v Thornton*,[112] the Supreme Court held that states could not impose qualifications for prospective members of the Congress stricter than those specified in the Constitution. States could not impose additional term limits. Writing for the majority, Justice Paul Stevens reasoned that sovereignty is vested in the people and that sovereignty confers the right on the people to choose freely their representatives to the National Government. The Justice stated:

> "The people are the best judges who ought to represent them. To dictate and control them, to tell them whom they shall not elect, is to abridge their natural rights… The true principle of a republic is, that the people should choose whom they please to govern them. Representation is imperfect in proportion as the current of popular favor is checked. This great source of the free government, popular election, should be perfectly pure, and the most unbounded liberty allowed."[113]

[154] Justice Stevens then concluded:

> "Finally, state-imposed restrictions, unlike the congressionally imposed restrictions at issue in *Powell*, violate a third idea central to this basic principle: that the right to choose representatives belongs not to the States, but to the people... Following the adoption of the Seventeenth Amendment in 1913, this ideal was extended to elections for the Senate. The Congress of the United States, therefore, is not a confederation of nations in which separate sovereigns are represented by appointed delegates, but is instead a body composed of representatives of the people."[114]

[155] *State of Mauritius v Khoyratty*[115] was a decision of the Privy Council delivered by Lord Steyn. A constitutional amendment of 1994 sought to curtail the jurisdiction of the court to grant or withhold bail in respect of offences related to terrorism or drug trafficking. The respondent was charged with possession of heroin for the purpose of selling. The police objected to the motion for bail on the ground that under the constitutional amendment the court had no power to grant bail. Lord Steyn held that the amendment was invalid for breaching the separation of powers doctrine. A critical provision which supported the separation of powers was Article 1 of the Mauritius Constitution, which in language reminiscent of Articles 1 and 9 of the Guyana Constitution, provides that,

[112] Supra (n 12).
[113] ibid, p. 794-795.
[114] Supra (n 12), p. 820 – 821.
[115] Supra (n 3).

"Mauritius shall be a sovereign democratic State which shall be known as the Republic of Mauritius." Commenting on this provision Lord Steyn stated as follows:

> "… section 1 of the Constitution is not a mere preamble. It is not simply a guide to interpretation. In this respect it is to be distinguished from many other constitutional provisions. It is of the first importance that the provision that Mauritius 'shall be … a democratic state' is an operative and binding provision. Its very subject matter and place at the very beginning of the Constitution underlies its importance. And the Constitution provides that any law inconsistent with the Constitution is pro tanto void: section 2."[116]

[156] In dictum more directly relevant to the present case, Lord Steyn accepted that the idea of democracy involves, as the first principle, the concept that "*the people must decide who should govern them.*"[117] For his part, Lord Rodger of Earlsferry was of the view that having regard to the specially entrenched status of section 1, "it would be wrong to say that the concept of the democratic state to be found there means nothing more than the sum of the provisions in the rest of the Constitution…Rather, section 1 contains a separate, substantial, guarantee."[118]

[157] In the premises, I am persuaded that the recognition in Articles 1 and 9 that sovereignty belongs to the people who exercise it through their representatives necessarily entails the corollary that the people are free to choose who their representatives will be, free that is, from any constraints not imposed by the people themselves.

Do the disqualifications legislated by Act No. 17 of 2000 infringe Articles 1 and 9 rights?

[158] Act No. 17 of 2000 was enacted to alter the text of Article 90 and was passed in accordance with the article 164(2)(a) requirements to alter Article 90. It did not purport to amend Articles 1 and 9. These agreed premises form the central plank of the appeal by the Attorney General. The Appellant argues that as the Act had been passed in the manner and form prescribed for amending Article 90, it could not be invalidated for simultaneously amending other provisions in the Constitution. The manner and form of alterations to the Constitution were said to enjoy a sacred status.

[116] *State of Mauritius v Khoyratty*, supra (n3), [15].
[117] ibid, [12] (Emphasis added).
[118] ibid, [29].

[159] This argument, and its weaker form based upon the presumption of constitutionality, is unconvincing. It misrepresents the Article 164 amendment requirements. Article 164(2)(a) does specify requirements for altering Article 90. But there are further 'manner and form' requirements. Article 164(2)(a) requires a referendum where legislation alters Articles 1 and 9. Importantly, Article 164(2)(b) also mandates a referendum where Article 90 is altered unless it is shown that Articles 1 and 9 are not also altered. Article 164 (2) (b) therefore suggests that alteration of Article 90 may have the indirect effect of altering Articles 1 and 9, even though the text of Articles 1 and 9 remains untouched. This is so because if the text of Articles 1 and 9 is expressly changed, such changes would automatically fall under Article 164(2)(a); Article 164(2)(b) therefore necessarily refers to indirect changes. The 'manner and form' requirements for an Act caught by Article 164(2)(b) include the requirement for a referendum.

[160] It is well established that a provision in a constitution may be altered even though the wording in the text remains intact: *Khoyratty, Hinds, Independent Jamaica Council for Human Rights*. It has been accepted, without the need for serious argument, that a statute may alter the constitution by implication: *Kariapper v. S.S.Wijesinha.*[119] This is entirely in line with the non-exhaustive definition of 'altering' the Constitution in article 164(3) indicated above at [116]. I therefore accept the submission of Mr Mendes SC for the Respondent that the alteration of a constitutional provision includes the making of a provision inconsistent with it or which provides for a circumstance expressly or implicitly prohibited or excluded by that provision. In deciding on whether implicit alteration has occurred, what is required is a careful construction of the relevant provision of the constitution and an assessment of the impact on those provisions of the impugned statute.

[161] These propositions are borne out by the judgment of the Privy Council in *Khoyratty*. The effect of the amendment was to deprive the court of the quintessential judicial power to grant bail, albeit in respect of limited cases, and to vest that power in the executive. It was held that section 1 had thereby been altered. The new regime was not consistent with section 1.

[119] Supra (n 4).

[162] Act No. 17 of 2000 disqualifies five categories of persons from standing for the post of President who were not previously so disqualified. As mentioned earlier, as a practical matter, the new categories of disqualification probably result in the exclusion of a large number of otherwise eligible Guyanese citizens from being elected as President of the Republic. The freedom of the Guyanese people to elect as their President the person whom they consider best able to do the job is clearly substantially curtailed. Respectfully, it is no answer to say that the people are free to choose from those persons not excluded by the Act. The sovereignty of the people requires that any such restrictions be approved by them in a referendum in accordance with Article 164.

[163] Nor is it an answer to say that Guyana remains a democratic sovereign state after the passage of the Act. In *Khoyratty*, it was conceded that the impugned Act did not result in Mauritius ceasing to be a democratic state; however, the restriction on the power of the judiciary to grant bail in a limited number of cases made "a fundamental, albeit limited change to this component of the democratic state envisaged by section I of the Constitution."[120] The question is not, therefore, whether Guyana remained a democratic sovereign state; rather, it is whether the passage of the Act diminished or watered down the rights vested in the people as recognized in Articles 1 and 9. If it did, and I am persuaded it did, it matters not that Guyana remained a democratic sovereign state as a matter of political theory or classification. The destruction of democratic sovereignty is not required for there to be an infringement. There is an infringement if the sovereign democratic rights of the people were diminished or watered down, as I considered they were in this case.

Exercise of sovereignty by Parliament

[164] The contention that sovereignty may be exercised by Parliament to add new qualifications restricting the persons who may stand for Presidency of the Republic, derives apparent support from the wording of Article 9 that sovereignty is exercised by the people "through" their representatives and the democratic organs established under the Constitution. The Acting Chief Justice considered that the people had bestowed upon Parliament the power to expand the categories of persons who were disqualified from running for President. Parliament was clothed with the necessary power to

[120] *State of Mauritius v Khoyratty* supra (n3) at [30]. See also [16], [36].

prescribe the qualifications for terms of office. This led the judge to posit that the people themselves gave Parliament the power, under Article 164, to make the necessary amendments in keeping with the various levels of entrenchment.

[165] I consider that the learned judge was entirely correct in noting, elsewhere in her judgment, that the power given to Parliament to amend the Constitution must be exercised within the limits and constraints set by the Constitution. Whatever the levels of support garnered for legislation in Parliament, the sovereignty that the Constitution vests in the people remains beyond the reach of the legislature as a representative body. That sovereignty cannot be diluted or diminished without the constitutionally ordained procedure of obtaining the approval of the people in a referendum.

Proportional representation

[166] The Attorney General argued that the system of proportional representation and the paramountcy of political parties established by the Constitution had the effect of diluting or diminishing or restricting any pre-existing right of the electorate to elect a President of their choice. That system does not allow the electorate *ab initio* a chance to decide who should be offered to them for election as President. It was argued that this was a greater limitation to the sovereignty of the people than the electorate's inability to control the number of terms for which the President could serve. If this limitation was acceptable, Articles 1 and 9 rights were already circumscribed so that legislating further restrictions on persons eligible to stand for the office of President did not infringe these rights.

[167] There are difficulties inherent in this argument. Act No. 17 of 2000 not only disqualifies from candidacy for the presidency the necessarily limited number of Guyanese citizens who have served two terms as President. It also disqualifies a large number of other Guyana citizens on other grounds. Further, a restriction on the number of persons who are eligible to stand for President necessarily limits the number of persons who may be offered by the political parties for that position.

Delay

[168] The Attorney General frankly acknowledged that the issue of delay was not raised in the Supreme Court or in the Court of Appeal. It was also acknowledged that there was no time limitation in the Constitution on the bringing of constitutional claims and in

seeking constitutional relief. Nonetheless, this Court was invited to dismiss the constitutional motion as an abuse of its processes because Mr Richardson had delayed for 14 years in bringing his motion.

[169] Great reliance was placed on the dissenting opinion of acting Chief Justice Cummings-Edwards who quoted Dr Francis Alexis in his book, *Changing Caribbean Constitutions,*[121] as recording that the civil disturbances in Guyana following its 1997 general elections led to the CARICOM Commission to Guyana which brokered the Herdmanston Accord (or "CARICOM Agreement") of 1998 between the Government and the Opposition. That Accord was the foundation for the passage of the Act of 2000 instituting term limits for the President, various independent commissions and several other changes. The acting Chief Justice considered that to uphold the unconstitutionality of Act No. 17/2000 would be to destroy the will and intent of the people, of the Legislature and of the Constitution and to annul the various constitutional Commissions formed by virtue of the amendments in keeping with the Act. The Commissions said to be at risk included Ethnic Relations Commissions, Human Rights Commissions, Women and Gender Equality Commissions, Indigenous People's Commission and the Rights of the Child Commission.

[170] Mr Mendes SC for the Respondent correctly pointed out that the constitutional challenge instituted by his client was directed to section 2 of the Act dealing exclusively with the qualifications for standing for the office of President and not any other provisions concerned with the validity of the several Commissions or other matters. If this Court was to uphold the decision of the Court of Appeal, section 2 would be struck down and severed, leaving the other provisions of the Act operational and valid. He also drew attention to the useful distinction between the constitutional motions for personal redress where delay was conceded to be relevant and constitutional motions for declaration of the invalidity of an Act of Parliament, where, he argued, delay was immaterial.

[171] Inordinate delay has indeed been a reason for denying personal constitutional relief. In *Somrah v The Attorney General of Guyana and The Police Service Commission*,[122] this

[121] Francis Alexis, *Changing Caribbean Constitutions* (2nd edn, Caribbean Research & Publications Inc, 2015).
[122] [2009] CCJ 5 (AJ) at [28].

Court asserted that litigants are not permitted to sit idly by for many years before seeking redress for violations of their constitutional rights. However, there does seem to be an important distinction where the motion challenges the validity of an Act. In this circumstance, the court is invited to pronounce that what purported to be a law was never a law at all. The mere passage of time by itself cannot make valid that which was void *ab initio* nor constitutionalize a law that never was.[123]

[172] This proposition would seem to be supported by the decision in *Khoyratty* where the Constitution of Mauritius (Amendment) Act 1994 was held to be invalid some 10 years after its passage in proceedings which did not once suggest that delay was at all relevant. There does remain the thorny issue of rights that may accrue in the interim between the passage and the striking down of the Act. Happily, the matter does not arise in this case, but I would hazard the view that in fashioning the private remedy the court must do the best it can, taking into account all the circumstances of the case, including all relevant conduct of the parties, not least of all the alacrity demonstrated in asserting constitutional rights.

[173] I am not to be understood as accepting the argument that delay can never be relevant in determinations concerned with the validity of an Act of Parliament. The circumstances, including the conduct of the parties, are always important. It could be that the length and nature of the delay is such that no one has the standing to bring the constitutional challenge. In this way, delay could act as a barrier to judicial examination of the validity of the Act.

[174] These considerations do not arise in this case because delay was never identified as a ground on which the motion was defended. The Attorney General, representing the State, sought to defend the claim on the merits. Delay was raised at the eleventh hour and in this Court for the first time. The Respondent was not given a chance to provide any explanation he may have had for not bringing his motion before and to have that explanation evaluated by the fact-finding tribunal. It would therefore be unfair to deny Mr Richardson's claim on this ground. Moreover, the courts below, having struck down the purported constitutional amendment introducing new disqualifications to the post

[123] *BCB Holdings Ltd and The Belize Bank Ltd v The Attorney General of Belize* [2013] CCJ 5 (AJ). See in particular paragraph [68].

of President, such disqualifications do not now exist. To leapfrog these decisions, go backwards in time through a kind of time capsule and dismiss the original motion on the ground of delay whilst ignoring the existing judicial decisions which strike down the challenged legislation, would be illogical and contrary to the rule of law.

[175] The Attorney General, quite rightly, did not purport to assimilate the Herdmanston Accord with the constitutional requirement for the approval of electors in a referendum. Herdmanston was the culmination of concerted and undoubtedly laudable efforts at political consensus and it is clearly inconvenient to strike down an important legislative fruit of the agreement that was reached on that occasion. But inconvenience is neither the test, nor an exception to the test, of the constitutional requirement. The Court is required to guard the constitutional requirement for the holding of the referendum as prescribed by the framers of the Constitution whatever the degree of inconvenience.

The court as arbiter of reasonableness of disqualifications

[176] Towards the end of the oral proceedings, in interaction with the Bench, the Attorney General offered the view that the Court could be the arbiter of whether the limitations imposed by Parliament were reasonable. Presumably, if the limitations were considered by the judiciary to be reasonable, their imposition would not represent an encroachment on the democratic sovereignty of the people. On the other hand, unreasonable limitations would represent an unconstitutional imposition.

[177] As a procedural matter, it must be said that this issue was not pleaded or even sustained in oral argument and the Respondent was therefore not afforded an opportunity to address it. Nevertheless, it seems fair to say that there may be room for a court to judge *de minimis* matters as not diluting or undermining the core rights of articles 1 and 9; matters, for example, relating to administrative requirements for registration of candidacy, or mechanisms relating to nominating systems or the like.[124] But beyond evaluating such practical necessities, a court cannot properly go. To accept the role of arbiter of the reasonableness of substantive limitations on the right of the people to choose their representatives would have the effect of removing sovereignty from the people and relocating it to the courts. Instead of being the guardians of the Constitution,

[124] Johnathan Mansfield, *Choice Approach to the Constitutionality of Term Limitation laws* (1993) 78 Cornell Law Review 966, 975-976.

the courts would become its master reading their own values and predilections into the constitutional text. This, no less than improper legislative or executive action, would undermine the Constitution.

Disposal

[178] For the foregoing reasons, I would have made the following orders:

(a) The appeal is dismissed.
(b) Section 2 of Act No. 17 of 2000 is contrary to the Constitution and is null and void.
(c) Section 2 is severable and is hereby severed from the other provisions of the Act.
(d) All provisions of the Act aside from section 2 continue in effect and operation.

ORDERS OF THE COURT

[179] Having regard to the judgments above, this Court, by a majority decision, makes the following orders:

(a) the appeal is allowed;
(b) the orders of the courts below are set aside;
(c) section 2 of the Constitution (Amendment) (No 4) Act of 2000, also referred to as Act No. 17 of 2000 in the Court of Appeal and Act No. 17 of 2001 in the High Court, is a constitutional amendment to Article 90 of the Constitution of Guyana having been validly enacted; and
(d) no orders as to costs.

/s/ CMD Byron

The Rt. Hon Sir Dennis Byron (President)

/s/ A. Saunders

The Hon Mr Justice A. Saunders

/s/ J. Wit

The Hon Mr Justice J Wit

/s/ D. Hayton

The Hon Mr Justice D. Hayton

/s/ W. Anderson

The Hon Mr. justice W. Anderson

/s/ M. Rajnauth-Lee

Mme Justice M Rajnauth-Lee

/s/ D. Barrow

Mr Justice D. Barrow