IN THE EASTERN CARIBBEAN SUPREME COURT

IN THE HIGH COURT OF JUSTICE

ANTIGUA AND BARBUDA

(CIVIL)

CLAIM NO. ANUHCV 2005/0628

IN THE MATTER OF THE CONSTITUTION OF ANTIGUA AND BARBUDA

and

IN THE MATTER OF THE CONTRAVENTION OF SECTIONS 15 (1) ,15 (2) (e) OF THE CONSTITUTION OF ANTIGUA AND BARBUDA

and

IN THE MATTER OF THE MAGISTRATE'S CODE OF PROCEDURE (AMENDMENT) ACT NO. 13 of 2004

BETWEEN:

HILROY HUMPHREYS

Claimant

and

THE ATTORNEY GENERAL OF ANTIGUA AND BARBUDA

Defendant.

Appearances:

Dr. Henry Browne and Mr. Arthur Thomas for the Claimant

Mr. Justin Simon, Q.C. with Mr. Kendrickson Kentish and
Ms. Bridgette Nelson for the Defendant

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2006: October 11 December 21

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JUDGMENT

Judicial review of legislation – whether legislation alters vested rights and rights guaranteed by the constitution to a person charged with a criminal offence – whether a preliminary inquiry is a hearing within the meaning of section 15 (1) of the Constitution-whether amending legislation is inconsistent with section 15 of the constitution – whether legislation respecting retrospective criminal procedure permitted by the Constitution – whether impugned legislation complies with the prescribed procedure for alteration of the Constitution.

[1] Thomas J: By way of an amended Fixed Date Claim Form filed on 8th March, 2006, pursuant to Part 56.7 of CPR 2000 with supporting affidavit of the Applicant sworn to and filed on 14th December, 2005, the following reliefs are sought:

1. A Declaration that the Magistrate's Code of Procedure (Amendment) Act, No. 13 of 2004 is unconstitutional, null, void and of no effect.

2. A Declaration that the said Magistrate's Code of Procedure (Amendment) Act, No. 13 of 2004 violates – Sections 15 (1) and 15 (2) (e) of the Constitution of Antigua and Barbuda.

3. A Declaration that to apply the said Magistrate's Code of Procedure (Amendment) Act, No. 13 of 2004 to offences allegedly committed before 23rd September, 2004, impairs the vested rights of the Claimant under the partly repealed Magistrate's Code of Practice Act, Cap. 255 and is thus in violation of his rights under sections 15 (1) and 15 (2) (e) of the said Constitution of Antigua and Barbuda.

4. A Declaration that since the offences allegedly committed by the Claimant occurred on or before the 7th May, 1999, and on or before the 15th day of October, 1999, the law applicable to Preliminary Inquiry Proceedings now styled "Committal Proceedings" in relation to offences allegedly committed prior to the Magistrate's Code of Procedure (Amendment) Act, No. 13 of 2004 was repealed is the Magistrate's Code of Procedure Act, Cap. 255 of the Laws of Antigua.

5. A Declaration that the Magistrate's Code of Procedure (Amendment) Act, No. 13 of 2004 purportedly amends sections 15 (1) and 15 (2) (e) of the Constitution of Antigua and Barbuda in violation of the said Constitution.

6. An injunction restraining the conduct of any committal proceedings against the Applicant under the provisions of the Magistrate's Code of Procedure (Amendment) Act, No. 13 of 2004.

7. Such further or other … remedies as the Court sees fit.

8. Costs to the Claimant.

AFFIDAVIT IN SUPPORT

[2] The Claimant's affidavit in support was sworn to and filed on 14th December, 2005. In this affidavit the Claimant deposes that on 27th June, 2001, His Excellency the Governor-General on 27th June, 2001, appointed a Commission of Inquiry ("the Commission") to enquire into the conduct and management of the Medical Benefits Scheme from the coming into operation of the Medical Benefits Act, Cap. 271 on 1st October, 1978, and to report and make recommendations no later than 31st October, 2001. This was later extended to 31st July 2002.

[3] The deponent says that he received a Witness Summons to appear before the Commission to show cause why the Commission ought not to comment adversely on him in its report with respect to certain criminal allegations. The deponent says that he did appear before the Commission.

[4] According to the deponent, the Commission was critical of him in its Report and one of the recommendations contained therein was that the allegations levelled against him should be further investigated by the Director of Public Prosecutions in order to ascertain whether a basis existed for charging him with fraud or other appropriate offences.

[5] The Claimant further deposes that on or about 19th June, 2003, in keeping with the recommendations contained in the Report, the Commissioner of Police laid a number of complaints[1] against him before the Magistrate's Court. That with other persons named in the complaints he appeared before the Magistrate on or about 26th May, 2005.

[6] At paragraphs 9, 10, and 11 of his affidavit the Claimant says that:

> "9. At that sitting of the Magistrate's Court my counsel along with counsel for others named in the said Complaints submitted to the Magistrate that the Magistrate Code of Procedure (Amendment) Act, No. 13 of 2004 under which the purported Committal Proceedings would be governed is unconstitutional, null, void, and of no effect and in particular contravenes

[1] These are Complaints Nos. 524/03, 522/03, and 535/03

my constitutional rights provided for under sections 15 (1), (15 (2) (e) of the Constitution of Antigua and Barbuda and requested of the Magistrate that this question be referred to the High Court within the terms of the said Constitution.

10. On 30th June, 2005, in a written ruling the Magistrate determined that the question raised was 'vexatious and frivolous' and refused to refer same to the High Court for determination.

11. I respectfully state and contend that the said Magistrate Code of Procedure (Amendment) Act, No. 13 of 2004 offends the Constitution of Antigua and Barbuda 1981 and was not passed in compliance with section 47 of the said Constitution."

AFFIDAVIT IN RESPONSE

[7] The Defendant's affidavit in response was sworn to and filed by Jo-Anne Walsh on 3rd January, 2006. In the affidavit the deponent says that she is attached to the Chambers of the Director of Public Prosecutions and that she acted as counsel for the prosecution in the matter of COMMISSIONER OF POLICE v HILROY HUMPHREYS.

[8] The deponent denies that the Report referred to by the Claimant accused him of wrongdoing but accepts that the Commissioners recommended that their findings should be passed to the Director of Public Prosecutions for further action, including investigation and prosecution. She says further that she is aware that the Report was passed to the Director of Public Prosecution who in turn passed it to the Commissioner of Police. According to the deponent a team of police officers to investigate the several matters raised and after consultations with the office of the Director of Public Prosecutions it was determined that there was sufficient evidence to initiate criminal proceedings against the Claimant, being complaints 522, 504, and 535 of 2003.

[9] The deponent also says that on 24th March, 2004, a new Attorney General, in the person of Justin Simon, Q.C., was appointed and that at a later date he began a programme of reform in respect of criminal procedure. One such area being with respect to criminal proceedings and preliminary inquiries.

[10] At paragraphs 11, 12, 13, and 15 the deponent deposes as follows:

> "11. Act number 13 of 2004 was enacted to give effect to some of these reforms. This legislation provided for, inter alia, the creation of 'paper committals'. Essentially, the prosecution was obliged to file witness statements together with exhibits. The Defence was at liberty to adopt the same procedure. While neither party could cross-examine witnesses the Defence could nonetheless make a no-case submission at the conclusion of the case for the prosecution.
> 12. Before the enactment of Act No. 13 of 2004, the pace of preliminary inquiries in the Magistrate's Court in this jurisdiction was laborious and time-consuming. The Magistrate [was] obliged to take longhand notes of the proceedings and the proceedings were not recorded electronically. In cases such as those involving the Claimant which involve several accused and counsel together with several documentary exhibits, the hearing would be protracted. This protraction would typically put a strain on the resources of the police and the courts.
> 13. Such problems caused a backlog of cases in the Magistrate's Court especially when there were adjournments and aborted hearings.
> 15. If the accused is indicted, he will enjoy a right to cross-examine all witnesses for the prosecution at his trial in the criminal assizes. It is this fact which ensures that the accused enjoys a fair trial before a judge and jury."

[11] The reliefs sought raise issues in relation to provisions of the Constitution of Antigua and Barbuda ("the Constitution") the Magistrate's Code of Procedure Act, Cap. 255 ("the Act") and the Magistrate's Code of Procedure (Amendment) Act, No. 13 of 2004 ("the Amending Act"). These must be outlined in some detail or summarized, as the case may require.

CONSTITUTIONAL AND STATUTORY BACKGROUND

THE CONSTITUTION

[12] The Constitution is the supreme law of Antigua and Barbuda. This is enshrined in section 2 of the instrument in these terms: "This Constitution is the supreme law of Antigua and Barbuda and, subject to the provisions of this Constitution, this Constitution shall prevail and the other law shall, to the extent of its inconsistency, be void."

[13] Sections 3 to 17 of the Constitution guarantee certain rights and freedoms. These rights are entrenched and as such cannot be altered except in accordance with the manner and from prescriptions of the Constitution.

[14] These rights are not new. What the Constitution has done is to give them protection. Therefore, in some instances the right is granted and there is nothing more to be done to give effect to the right for the time being. On the other hand, in some instances although the right speaks to or "is co-extensive with existing law" the Constitution itself contemplates the enactment of law by Parliament in order to give effect to that right. In any event, Parliament is empowered to alter these rights and freedoms so long as there is compliance with the prescriptions in this regard.

[15] In terms of the enforcement of these rights and freedoms, section 18 (1) of the Constitution grants to "any person" a right to seek redress, if any of the rights and freedoms in sections 3 to 17, has been, is being or is likely to be contravened "in relation to him ….".

[16] In this instance it is the contention of the Claimant that Parliament has, by enacting the Amending Act, violated his right enshrined in section 15 of the Constitution.

[17] In terms of the power of Parliament to make law, sections 19, 46, and 47 of the Constitution are relevant and will be analyzed at a later stage.

THE PRESUMPTION OF CONTITIUTIONALITY

[18] The challenge to the constitutionality of legislation faces the presumption of constitutionality and the burden to displace the presumption lies on he who raises the issue. The rule applies in this case and was recently restated in GRANT v THE QUEEN [2006] UKPC 2 that the burden is a heavy one.

PART III OF THE ACT PRIOR TO AMENDMENT

[19] Part III of the Act bears the caption: "PRELIMINARY INQUIRIE" and encompasses sections 41 to 72.

[20] Under this Part a preliminary inquiry in respect of an offence brought against a person which is not triable summarily is mandatory.[1] The Magistrate is therefore given special powers to deal with offences that are triable either on indictment or summarily;[2] including the circumstances in which an adult may be tried summarily; including also the circumstances in which an adult may be tried summarily; where an adult pleads guilty may be dealt with summarily;[3] and the power to reduce a charge from an indictable offence to a summary offence.[4]

[21] In the circumstances where a person is tried summarily in specified circumstances he may be committed for sentencing in the High Court[5] on the receipt of certain information by the Magistrate.

[22] Sections 49 to 61 are specific in terms of preliminary inquiries. Section 51 requires the evidence at a preliminary inquiry to be taken on oath, witnesses are to be examined in the presence of the accused and his counsel or solicitor shall be entitled to cross-examine the witnesses upon all the facts relevant to the charge, but, not, except with leave of the Court, upon matters relevant only as affecting his credit.[6]

[23] Section 53 provides for the evidence by the Magistrate, read over to the witness, signed by the witness and the Magistrate. When the evidence is so recorded, read over and signed it is deemed to be a deposition and the accused is entitled to a copy of the deposition.[7] The Magistrate is also required to take notes in all other cases, other than the criminal cases to which section 53 applies.

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[1] Section 42 of the Act
[2] Section 45 of the Act
[3] Section 46, 47 of the Act
[4] Section 48 of the Act
[5] Section 49 of the Act
[6] Section 52 of the Act
[7] Section 69 of the Act

[24] The Magistrate is further empowered to dismiss a charge against an accused person upon hearing all witnesses for the prosecution.[1] In the event that the charge is not dismissed the procedure for calling witnesses for the accused is prescribed.[2] At this time the accused or his counsel may show why the Magistrate should not commit the accused for trial and in this regard the accused may call witnesses in his defence.[3]

[25] At the end of the witnesses for the prosecution the Magistrate is empowered either to dismiss the change or commit the accused for trial.[4] In the event of the latter circumstance the prosecution witnesses are to be bound over for the trial in the High Court together which certain other administrative duties to be performed by the Magistrate.[5]

[26] Sections 60 to 69 of the Act deal with the question of bail including the right of the accused to bail. And where bail is granted by the Magistrate the obligation of the accused to enter into recognizances with or without sureties to appear at the time and places specified in the recognizance.[6]

[27] Section 67 empowers a High Court Judge to grant bail to a person committed to trial upon application to the Judge and upon notice of the application to the Director of Public Prosecutions and to the committing Magistrate.

[28] Under section 70 of the Act a Magistrate conducting a preliminary inquiry on a charge for an indictable offence is empowered, on the basis of written statements tendered to the Court, to commit a person for trial without consideration of the content of the written statements, subject to certain conditions being: if the Defendant or one of them is not represented by counsel or if there is a submission by counsel for one of the Defendants to consider whether the evidence is sufficient to put the Defendant on trial.

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[1] Section 55 of the Act
[2] Section 56 of the Act
[3] Section 57 of the Act
[4] Section 58 of the Act
[5] Section 59 of the Act
[6] Section 66 of the Act

[29] Section 71 prescribes the conditions for the admission of written statements in committal proceedings. Section 72 requires notice to be given of the result of committal proceedings.

SUMMARY OF THE AMENDING ACT

[30] The Claimant's case is centered on PART III of the Act and for this reason the summary will at this stage merely identify the amendments made to this Part and related provisions of the Amending Act.

[31] As noted before, Part III of the Principal embodies section 41 to 72 inclusive. In brief these are the amendments in outline: section 41 is repealed and replaced, section 42 is amended by substituting the words "committal proceedings" for the words "a preliminary inquiry"; new sections 42 A, 42B and 42 C are inserted; in sections 43 and 44 the word "guardian" is substituted for the words "or an adult next of kin"; sections 45 and 46 are repealed, a new section is inserted after section 48; section 49 is repealed; section 50 is repealed and replaced; section 51, 52, 53, 54 55, 56 and 57 are repealed; section 58 is repealed and replaced; section 62 is amended to modify the Magistrate's power to grant bail, section 69 is amended by deleting certain words, section 70 is repealed and section 71 is amended to permit, upon application to the Magistrate, the filing of additional documents in addition to the documents referred to in the new sections 42A(1) and 42B(1). One related provision is section 1(2) of the Amending Act which specifies its application.

CRITICAL FACTS/EVENTS

[32] The offences with which the Claimant is charged are alleged to have been committed on or before 7th May 19999, on or before 7th May 1999 and on or before 15th October 1999. On account of these date aforementioned the following facts and events are considered by the Court to be of critical importance to the entire case. Accordingly, on or before 7th May 1998:

1. The Constitution in section 15 guarantees a right to persons charged with a criminal offence in order to secure protection of the law.

2. The Magistrate's Code of Procedure Act, Cap. 255 made specific provisions, being (sections 41-61) to govern the conduct of preliminary inquiries.

3. These provisions provided for, *inter alia,* witnesses to be examined in the presence of the accused and his counsel and the right of counsel to cross-examine such witnesses.

4. On 27th June 2001 His Excellency the Governor-General appointed a Commission of Inquiry to inquire into the management of the Medical Benefits Scheme as established under the Medical Benefits Act Cap. 271.

5. The Commission so appointed submitted its Report to the Governor-General on 25th July 2002.

6. Consequent on certain recommendations made by the Commission complaints were laid in the Magistrate's Court against the Claimant.

7. The complaints, Nos. 524/03, 522/03, and 535/03 relate to events which are alleged to have occurred on or before 7th May 1998 and up to 15th March 2001.

8. On 4th November,2004 the Magistrate's Code of Procedure (Amendment) Act No. 13 of 2004 became part of the law of Antigua and Barbuda.

9. The Amending Act amended many of the provisions aforesaid which prescribe a certain procedure respecting the conduct of a preliminary inquiry.

10. The Amending Act states in section 1(2) states that it applies to pending and future criminal proceedings.

[33] The issues for determination are:

1. Whether the content of Part III of the Act give rise to rights, and, if so, the nature of such rights.

2. Whether the Amending Act is in conflict with section 15 of the Constitution.

3. The legal and constitutional consequences, if any, of section 1 (2) of the Amending Act.

ISSUE NO. 1

WHETHER THE CONTENT OF PART III OF THE ACT TO RIGHTS, AND IF SO, THE NATURE OF SUCH RIGHTS

[34] Part III of the Act is concerned with preliminary inquires conducted in the Magistrate's Court in respect of persons charged with a criminal offence.

[35] Essentially, what these provisions do is to prescribe various procedures to be followed at such hearings. There are also certain entitlements for persons charged. Some of the procedures and entitlements include: the taking of evidence on oath, the examination of witnesses in the presence of the accused and the cross-examination of witnesses by the accused in person or through his counsel.

[36] In BLACK'S LAW DICTIONARY (6th ed.) at page 1324 in relation to "right" the following is stated. "…. giving to the term a juristic content right is well defined as a capacity residing in one man of controlling with assent and assistance of the state, the actions of others." Further, "A legally enforceable claim of one person against another, that the other shall do a given act, or shall not do a given act."

[37] The foregoing definitions leave little doubt that the mandatory procedures and the entitlements of an accused person, in the circumstances of a preliminary trail, all constitute rights.

[38] While it is common ground that these rights exist, there is variance between the parties as to the nature of these rights. For the Claimant it is argued that they are substantive rights which make up the rights in section 15 of the Constitution and that by virtue of section 19 of the said Constitution they cannot be altered except by the procedure prescribed by the Constitution itself. On the other hand, the learned Attorney General submits that these rights are merely procedural and as such can be altered by the ordinary law-making process.

[39] Substantive and procedural rights are equivalent to primary and secondary rights. In this regard the following definition in BLACK'S LAW DICTIONARY, *supra,* at page 1324 is on point: "Rights may be described as either primary or secondary. Primary rights are those which can be created without reference to rights already existing. Secondary rights can only arise for the purpose of protecting or enforcing primary rights."

[40] The distinction between procedural and substantive rights is brought to life by dicta in THE STATE V. CLARKE (1976) 22 WIR 249 and TNT NECOS CENTRE LTD V ATTORNEY GENERAL (1996) 51 WIR 342, 344.

[41] In the former a preliminary inquiry was described as "…. only a procedural step which leads ultimately to the trial of an accused person." In the latter case Sealy J spoke of the "…. rights of the applicants to the necessary procedural provisions for the purpose of giving effect to the protection of their rights and freedoms in section 5 (2) (c) (ii) [of the Constitution of Trinidad and Tobago]."

[42] Therefore, it is the determination of the Court that Part III of the Act does contain rights but while these rights are procedural or secondary rights which exist to give effect to the primary or substantive rights which, in this instance, are contained in section 15 of the Constitution.

IS THERE A RIGHT TO A PRELIMINARY INQUIRY

[43] The more immediate question to be determined in these circumstances is whether an accused person has a right to a preliminary inquiry. Given the legal basis of a right and the legislative provision in issue, the matter must be analysed. The Claimant has no doubt that he has but the Defendant thinks otherwise and submits as follows:

> "It is readily apparent that on its face, section 15 of the Constitution of ANTIGUA AND BARBUDA does not afford accused persons a right to a preliminary inquiry, nor to any analogous procedure. The Constitution allows Parliament to enact or to amend the law relating to criminal procedure, but only to the extent that the procedural safeguards enumerated in section are maintained.

Under sections 55 and 58 of the Magistrates Code of Procedure Act Cap 255 the Examining Magistrate was empowered, after consideration of the evidence, to either dismiss the charges or to commit the accused for trial in the Assizes. Section 16 and 17 of Act No. 13 of 2004 have repealed section 55 and repealed and replaced section 58 of the

Magistrates Code of Procedure Act Cap 255 respectively. Section 17 of the Act No. 13 of 2004 specifically empowers the Examining Magistrate to dismiss the charge, commit the accused for trial, or make any other order in relation to the case, the charge or the accused as provided for under any law.

The Claimant asserts an absolute right to cross-examine witnesses for the prosecution during a preliminary inquiry and rests his contention on section 15 of the Constitution. However, the Defendant asserts that in keeping with international covenants, the Constitution of Antigua and Barbuda does not vest in the Claimant a right to trial in a particular and defined procedure stamped as a Preliminary Inquiry. The International Covenant on Civil and Political Rights guarantees accused persons that rights and obligations will be determined by a tribunal characterized by fairness, impartiality and trial within a reasonable time.

Since as has been shown that the executive process of the Preliminary Inquiry is not determinative of criminal obligation, it cannot be classified as a tribunal in the course of which an accused person must be afforded facilities to cross-examine potential witnesses for the prosecution. Having regard to the provisions of Section 17 of the Act No. 13 of 2004 it is the Defendants respectful submission that the nature and purpose of Committal Proceedings is similar to, though not the same as that of Preliminary Inquiries.

Preliminary Inquiries and Committal Proceedings are essentially screening process to determine whether there is sufficient evidence to put the accused on trial (see below). However the processes are not the only screening processes known to the Common Law.

The Grand Jury is another such screening process but it is not a trial. As observed by the United States Supreme Court in HANNAH v LARCHE, 363 U.S. 420, 490 (1960):

> "Having considered the procedures traditionally followed by executive and legislative investigating agencies, we think it would be profitable at this point to discuss the oldest and, perhaps, the best known of all investigative bodies, the grand jury. It has never been considered necessary to grant a witness summoned before the grand jury the right to refuse to testify merely because

> he did not have access to the identity and testimony of prior witnesses. Nor has it ever been considered essential that a person being investigated by the [*44] grand jury be permitted to come before that body and cross-examine witnesses who may have accused him of wrong doing. Undoubtedly the procedural rights claimed by the respondents have not been extended to grand jury hearings because of the disruptive influence their injection would have on the proceedings, and also because the grand jury merely investigates and reports. It does not try."

The latter decision was followed in R v EX PARTE GUARDIAN NEWSPAPERS [1998] EWCA Crim 2670 (at para. 10)."

[44] Whether or not there exists a right to a preliminary inquiry cannot be determined by reference to the labels placed on the proceedings in the Magistrate' court in relation persons charged with indictable offences. Rather it depends entirely the content of the relevant legislation. Section 42 of the Act provides that: "Whenever any charge has been brought against any person of an offence not triable summarily a preliminary inquiry shall be held as hereinafter provided." The provision does not allow a discretion on the part of the Magistrate. It is an obligation enforceable against this functionary. This is made clear in the case of PUBLIC PROSECUTOR V. TENA [1973] 2 WLR 1053 which involved legislation that was as unambiguous as section 42.

[45] The TENA case is concerned with the Malaysian Criminal Code of Procedure of which section138 enacted that no person could be tried before the High Court unless previously committed for trial after a preliminary inquiry pursuant to Chapter XVII of the Code. Section 417 of the Code however gave a judge certain discretion in relation to the holding of preliminary inquiries. This was done in the case of the Respondent who on appeal argued that his conviction was a nullity in the absence of a preliminary inquiry. The Privy Council agreed and held that: "The words in section 138 'no person shall be tried before [the High Court] unless he shall have been committed for trial after a preliminary inquiry under the provisions of this chapter' were clear and unambiguous and of general application and there was no reservation in respect of a trial before the High Court following an order made under section 417 and, accordingly, the trial was a nullity."

[46] Specifically with respect to the question of rights Lord Salmon spoke in these terms at page 1057: "It does not seem likely that the legislature intended that the Public Prosecutor should be enabled to deprive a Defendant of these valuable rights by changing his mind and asking at a later stage for a trial to be transferred to the High Court. Had this been the intention of the legislature it would have been clearly stated."

[47] The nature of the rights in Part III of the Act is to be determined by reference to the statute and the Constitution. Accordingly being contained in an ordinary statute they may appear to be ordinary rights but when the Bill of Rights is brought into the equation, they assume the character of being in existence to give effect to certain provisions of the Constitution.[1]

ISSUE NO. 2

WHETHER THE AMENDING ACT IS IN CONFLICT WITH SECTION 15 OF THE CONSTITUTION

SUBMISSIONS

[48] The following are the written submissions on behalf of the Claimant:

1. Criminal Offences allegedly committed on or before the 7th May, 1999 and on or before the 15th day of October, 1999 respectively alleging *inter alia* conspiracy to defraud have been brought against the Claimant.
2. At the time of the alleged commission of these offences the law applicable to Preliminary Inquiry Proceedings was the Magistrate's Code of Procedure Act Cap. 255 of the Laws of Antigua and Barbuda.
3. The Complaints Without Oath in relation to the above-mentioned charges were reduced into writing on the 19th day of June, 2003.
4. On the 23rd day of September, 2004 the Parliament of Antigua and Barbuda passed the Magistrate's Code of Procedure (Amendment) Act No. 13 of 2004. This Act amended several sections of the said Magistrate's Code of Procedure Act Cap. 225. Additionally, certain sections of the said Cap. 255 were repealed and new sections substituted therefore. A consequence of these amendments both radically altered and or took away a number of substantive rights to which the Claimant Humphreys, was entitled at the time the offences with which he is now charged were allegedly committed.
5. Under this "Amending Act" what was hitherto described as a Preliminary Inquiry" is now described as "Committal Proceedings". Despite the change in nomenclature the exercise means "proceedings for the committal of a person accused of an indictable offence for trial by jury."

[1] In AG of T&T v Mc Leod [1984] 32 WIR 450,454 the Board analyzed the proposition of infectious entrenchment in relation to an entrenched and an unentrenched provision of the Constitution.

6. In these "Committal Proceedings" the primary function of the magistrate is to determine from the evidence presented by the Prosecution and if applicable to a Defendant, whether a prima facie has been established, sufficient to convince a reasonable jury properly directed, to find the accused person guilty as charge.
7. Under the original or unamended Magistrate's Code of Procedure Act, Cap. 255 the procedure governing the conduct of a Preliminary Inquiry was provided for in Sections 41-61 of the said Act.
8. A perusal of these sections 41-61 highlights a plethora of substantive rights accorded a Defendant at the Preliminary Inquiry Stage.
12. In so far as the Amending Act No. 13 of 2004 divests the Claimant of substantive right provided for in Cap. 255 and the protection of the law, which he enjoyed at the time, the offences were allegedly committed these Amendments are unconstitutional in relation to "him". As such it would be unconstitutional to apply these amendments to the Committal Procedures, which should govern the Committal Proceedings in this matter, have been repealed. There is no transitional or savings provision in the Amending Act No. 13 of 2004, to properly and unconstitutionally govern inquiry into these indictable offences. This Court is therefore left with one remedy and that is the dismissal or quashing of all these charges against the Claimant. Once this Court accepts the Amending Act No. 13 of 2004 is an ex post facto law with no Savings Provision it is axiomatic, that offences allegedly committed, on a date anterior to the Amending Act no. 13 of 2004 became law, cannot be covered or comprehended under its provisions. This assertion is further justified on the basis that "Committal Proceedings" are an integral part of a criminal trial in our criminal justice system. The Court of Appeal has so ruled see HALSTEAD v COMMISSIONER OF POLICE (19780 25 WIR 522, 524 paragraph "H" per Peterkin JA.
13. This ruling by the Court of Appeal remains good law in this jurisdiction. The Magistrate Court like the High Court and the Court of Appeal itself is bound by it. There can therefore be no question as to whether or not the Defendant is being tried. See also RAPHAEL GREGGUIORIO VICTOR JULIO SANCHEZ AND THE ATTORNEY GENERAL OF ANLLA Claim No. AXA HCV-2002/18 per Edwards J, and R v WILLIAMS SALISBURY 28 WIR 133.
14. Given all the foregoing the Defendant specifically contends that Section 15(2) (a), 15 (2) (d), 15 (2) (e) and 15 (7) of the Constitution of Antigua and Barbuda are being violated by the Magistrate Court Proceedings.
15. The Claimant also contends that the intended Magistrate Court proceedings constitute an abuse of the Courts' process and are contrary to fundamental justice and the protection of the law to which he is entitled.
16. It is palpably obvious that the question raised as to the contraventions of the Claimants' rights under Section 15 (1) (2) (a) (d) (e) and (7) of the Constitution can hardly be characterized as being "frivolous and vexatious".
17. The Committal Proceedings sought to be proceeded with in relation to the complaints referred to above cannot lawfully be proceeded with under the Amending Act thus rendering the Complaints inadmissible as against the Claimant.
18. Finally the Claimant contends that the Legislature in passing the Magistrate's Code of Procedure (Amendment) Act No. 13 of 2004 sought to amend the Constitution in

particular Section 15 (7) thereof without complying with the requisite provisions of the Constitution of Antigua and Barbuda.

[49] In addressing the Court the following additional submissions were made:

1. In terms of the right enjoyed by the Claimant when the alleged offences were committed, the time element is importance. These rights are hemmed in by the Constitution.
2. Prior to the Amending Act the Magistrate was required to take evidence on oath which is part of the fair hearing requirement of the Constitution.
3. Sections 51, 52, and 53 of the Code Cap. 255 are recognizable in section 15 (2) (a) and (e) of the Constitution. Even if they are not they are to be read as fundamental rights contemplated by section 19 of the Constitution.
4. It is conceded that a preliminary inquiry is not a full trial but it is a hearing contemplated by section 15 (1) of the Constitution. It results from charges against a citizen.
5. The requirement of a fair hearing is informed by the ancient rules of common law.
6. Even if it is argued that the Act could co-exist with the Constitution regard had to be had to its retrospectivity and the relevant substantive rights.
7. The retroactivity of the law could not apply as it is contrary to fundamental justice founded on the ancient common law and statue.
8. Requiring the Defendant to put his defence on paper, it is a round about way of requiring him to give evidence against himself.
9. In the Amending Act there are no savings or transitional provisions in relation to the law in existence prior to such amendment. The result would be the abridgement of the substantive rights which the Applicant enjoyed when the acts were committed.
10. Prior to the amendment an accused had a right to make a submission at the end of the Crown's case merely to give him a right to make a written submission puts him at a disadvantage because he is unable to test the truth of the paper evidence.
11. There are exceptions to retrospectivity but no such exceptions should relate to the liberty of the suspect.
12. Section 1 (2) of the Act No. 43/2004 can be severed in that it only applies to matters occurring after the commencement of the Amending Act.

[50] The following written submissions were made on behalf of the Defendant:

1. " Introduction

In this cause, the Applicant, Hilroy Humphreys, a former Minister of the Crown is attempting to seek refuge in the bosom of the Court.
The *fons et origo* of Mr. Humphreys' complaints lie in certain criminal charges which were laid against him consequent upon recommendations contained in the Report of a Commission of Inquiry dated 25th July, 2002. After these charges were laid and after the formal commencement of the preliminary inquiry, certain amendments were made to the law concerning preliminary inquiries in the Magistrates Court.

The Magistrates Code of Procedure [(Amendment)] Act No. 13 of 2004 essentially provided for a new scheme of preliminary inquiries which are now styled as "Committal Proceedings". The prosecution is obliged to file all of its witness statements in the examining Court together with a list of exhibits. The Accused is entitled, though not obliged to do the same.

The most significant departure from the traditional procedure in preliminary inquiries is that the Magistrate is not empowered to consider any oral evidence; he must determine whether to commit the accused to trial by considering solely, the written statements and exhibits tendered by the parties together with the legal arguments made before him. In other words, there is no cross-examination of any witnesses for the prosecution or defence.

In these proceedings the Claimant has confined his claim for relief to constitutional redress. In particular, the Claimant contends that the legislative amendments outlined above contravene sections 15(1) and 15(2) (e) of the Antigua and Barbuda Constitution. The essence of the Claimant's complaint is that his right to a Fair Trial, and his right to cross-examine the witnesses of the prosecution at trial have been abrogated by the State. There is a residual contention that the retrospective effect of the legislation also infringes section 15(1) of the Antigua and Barbuda Constitution.

It is submitted therefore that the right to a fair hearing is a separate and enforceable right which the Applicant enjoys.

The Right to cross-examine Witnesses for the Prosecution

That ultimate submission has been heralded in the illuminating work, COMMONWEALTH CARIBBEAN CRIMINAL PRACTICE AND PROCUDURE by Seetahal (at p. 233):

"The provisions for written statements in these jurisdictions, which are based on the English law, seek essentially to avoid the long drawn out preliminary enquiry process … the practice of tendering written statements in lieu of, or along with, oral evidence at a preliminary enquiry, may be more successfully utilized. It shortens the process without denying the Defendant the right to make a no case submission or to have the evidence considered by the magistrate. The practice may in time replace oral hearing entirely as has been done in England."

In order to effect such a change in Antigua and Barbuda, Parliament has enacted Act No. 13 of 2004 which has *inter alia*, removed the right of both the prosecution and the defence to cross-examine each other's witnesses in Committal Proceedings.

Section 15(2)(e) of the Constitution of Antigua and Barbuda as outlined above provides accused persons with a right to be afforded facilities to cross-examine witnesses for the prosecution, during the course of the trial.

In HALSTEAD v THE COMMISSIONER OF POLICE (1978) 25 WIR 522 (a decision relied upon by the Claimant) Peterkin JA held that a Preliminary Inquiry is part of a trial and that the rights granted by section 8(1) of the Constitution of the Associated State of Antigua and Barbuda) apply to the Preliminary Inquiry. His Lordship held:

> "The provisions for written statements in these jurisdictions, which are based on the English law, seek essentially to avoid the long drawn out preliminary enquiry process … the practice of tendering written statements in lieu of, or along with, oral evidence at a preliminary enquiry, may be more successfully utilized. It shortens the process without denying the Defendant the right to make a no case submission or to have the evidence considered by the magistrate. The practice may be in time replace oral hearings entirely as has been done in England ….".

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It must be noted that at issue in HALSTEAD was whether the Accused enjoyed the right to a fair hearing, a feature which characterizes any tribunal from its inception. What was not engaged was whether the right to be afforded facilities to cross-examine was complied with and as has been submitted, this issue must be looked at from the standpoint of fairness in the round.

Accordingly, a distinction must be drawn to the approach in Halstead and new analysis and evaluation of the full context and scope of Halstead must be undertaken in light of the developing jurisprudence on three aspects of criminal proceedings, namely the right to a fair trial, the right to trial within a reasonable time and the right to trial by an independent tribunal.

The Defendant submits that the dicta in HALSTEAD must be looked at through the new prisms of our developing jurisprudence, especially as the right to a fair trial in the round was not the contextual issue of engagement in Halstead's case, which therefore warrants to be distinguished.

In dissecting the reasoning of Peterkin JA the nature and purpose of a Preliminary Inquiry, now known as Committal Proceedings must be borne in mind.

In CHAN TIT SHAU v SECRETARY FOR JUSTICE HCAl000206/2002 (a decision from the High Court in Hong Kong) Hon Chu J observed (at para. 18)

> '18. IN GRASSY v. THE QUEEN 168 CLR 1 at 15, a judgment of the High Court of Australia, Dawson J stated the purposes of a preliminary inquiry to be as follows: '… It enables the person charged to hear the evidence against him and to cross-examine the prosecution witnesses. It enables him to put forward his defence if he wishes to do so. It serves to marshal the evidence in deposition form. And notwithstanding that it is not binding, the decision of a magistrate that a person should or should not stand trial has in practice considerable force so that the preliminary hearing operates effectively to filter out those prosecutions which, because there is insufficient evidence, should not be pursued. Indeed, the significance of the magistrate's decision is clearly reflected in the requirement now contained in s.41 (6) of the Justices Act that the magistrate should discharge a Defendant if he is of the opinion that, having regard to all the evidence, a jury would not be likely to convict.'
> 19. The power of a magistrate in a preliminary hearing is confined to determining whether the accused should be discharged or committed for trial. Even then, the decision is not binding nor conclusive with regard to whether the accused is to stand trial. It is also plain that the magistrate does not determine the question of guilt. Neither does he make any findings of fact or law.'

In a similar vein of reasoning is Mdm. Justice L'Heureux-Dube delivering the majority judgment of the Supreme Court of Canada in R. v POWER, [1994] 1 S.C.R. 601, 1994 CanLII 126 (S.C.C.):

> "With respect to the preliminary inquiry, the observation of de Grandpre J. in CACCAMO v THE QUEEN, 1975 CanLII 11 (S.C.C. [1976] 1 S.C.R. 786, at pp. 809-10, that 'the sole purpose of the preliminary inquiry is to satisfy the magistrate that there is sufficient evidence to put the accused on trial and that, therefore, the Crown has the discretion to present only that evidence which makes out a prima facie case,' is appropriate. Moreover, as Judson J. emphasized in PATTERSON v THE QUEEN, [1970] S.C.R. 409, at p. 412: The purpose of a preliminary inquiry is clearly defined by the Criminal Code - - to determine whether there is sufficient evidence to put the accused on trial."

It is not a trial and should not be allowed to become a trial. [emphasis added]

In POTTER v TURAL & ANOR; CAMPBELL v BAH & ANOR [2000] VSCA 227 (6 December 2000) the Court of Appeal of Victoria, Australia considered, *inter alia*, the amenability to review by the Supreme Court of decisions refusing to allow cross-examination on certain issues during a preliminary Inquiry. In the course of his judgment, Batt JA observed that (at para. 20):

> "It is established by a long line of authority in Victoria that a magistrate's order committing for trial or refusing to commit is ministerial and not judicial and also is not amenable either to certiorari (as I shall for convenience call relief in the nature of certiorari to quash) [12] or to appeal under statutory appeal procedures replacing certiorari."

This ratio supports the proposition that Preliminary Inquiries and Committal Proceedings are not trials but merely executive acts designed to determine the sufficiency of the evidence to put an accused upon trial. In that regard, the enquiring magistrate is exercising administrative functions as *persona designata* and does not exercise a judicial power.

More on point is Justice David McDonald in LEGAL RIGHTS IN THE CANADIAN CHARTER OF RIGHTS AND FREEDOMS 2nd ed. (at p. 508):

> "Even when a proceeding is in court and concerns an alleged criminal offence, the courts have not regarded s.11(d) as being applicable except to a trial ... Thus the right to a fair hearing has been

> held not to be applicable to a preliminary inquiry; the committing judge does not determine guilt or innocence. Consequently s.11 (d) could not be relied on by the defence who complained that many of the Crown's witnesses were not called at the preliminary inquiry and therefore could not be cross-examined – this did not affect the accused's right to a fair trial."

It is also significant that neither a Preliminary Inquiry, nor Committal Proceedings (in contradistinction to a trial) result in an acquittal or a verdict of guilty. A dismissal of committal proceedings cannot give rise to a plea of *autre fois acquit* (per Lord Widgery CJ in R v MANCHESTER CITY STIPENDIARY MAGISTRATE [1977] 1 WLR 911 at 912.

In Tonner (1985) 1 WLR 344 the Court of Appeal was called to determine when a criminal trial commenced. The Court followed the reasoning of the Supreme Court of Canada:

> 'Until a full jury is sworn there can be no trial, because until that is done there is no tribunal competent to try the prisoner. The terms of the juryman's oath seem to show this. And as is to be inferred as we have seen even from what Lord Campbell says that all that takes place anterior to the completion and swearing of the jury is preliminary to the trial ….". That expresses more aptly and clearly than we think we could what we deem to be the true position. We go further and say that our experience as judges in the criminal courts leads us inevitably to the conclusion unassisted by the authorities to which we have referred in the course of this judgment, that it would be wholly insensible to speak of the commencement of a trial as being other than when the jury have been sworn and take the prisoner into their charge, to try the issues and having heard the evidence, to say whether he is guilty or not of the charge against him; always remembering that it is inevitably a trial by jury, not by a judge.'

THE EFFECT OF HALSTEAD

In any event, though the decision in Halstead is binding on this court, it may be properly distinguished from the case at bar. It is respectfully submitted that Act No. 13 of 2004 still affords the Claimant and all other accused persons the facility to cross-examine witnesses for the prosecution, albeit at another part of the hearing, the trial in the Assizes. In this regard, the issue for the court remains whether the procedure for the trial as a whole will be fair. As Lord Bingham held in A-G v SHIMIZU PRIVY COUNCIL APPEAL No. 40 of 2004:

11. Equality of arms is an aspect of procedural fairness, protected by section 8 and article 6. It seeks to ensure that the Defendant does not suffer an unfair procedural disadvantage: DE HAES AND GIJSELS v BELGIUM (1997) 25 EHRR 1, para 53. It does not require that the situations of the prosecutor and the Defendant should be assimilated. In practice those positions are necessarily different: the prosecutor is not liable to be detained pending the trial and is not liable to punishment if the prosecution fails. Neither Mr. Shimidzu nor Mr. Berllaque was able to show that he had suffered any procedural disadvantage in the conduct of the trial from inability, after the verdict in his favour, to recover costs against the prosecutor.

12. Mr. Leighton Williams placed heavy reliance on the constitutional right to protection of the law. But this expression has been held by the Board to cover he same ground as the entitlement to due process: LEWIS v ATTORNEY-GENERAL OF JAMAICA [2001] 2 AC 50, 84-85; KHAN V STATE OF TRINIDAD AND TOBAGO [2003] UKPC 79 [2005] 1 AC 3764, para 9. It is a procedural, not a substantive, right.

It is significant that in Halstead, the court was concerned with the right to a fair hearing and did not specifically address the right to facilities to examine the witness of the prosecution. Further, while the court should give a generous interpretation to section 15 of the Constitution, respect must still be accorded to the language used therein, in accordance with the strictures set out in Fisher. The word facilities in this context, connotes opportunities or chances. It is this facility or opportunity to examine the witnesses of the prosecution which has now been limited to the trial in the Assizes.

It is accordingly submitted that the Claimant's right to facilities to examine the witnesses of the prosecution has not been violated".

[51] In their addresses to the Court the learned Attorney General and Junior Counsel made the following additional submissions:

1. A Code is merely procedural in nature notwithstanding the fact that it contain rights akin to those in the Constitution. In any event the rights were initialed by the ordinary law-making process. On the basis Art No 13/2004 does not infringe the Claimant's rights either prospectively or retrospectively.
2. A preliminary inquiry is not in the nature of a judicial hearing and further the Defendant is on trail one the question is raised as whether the procedure laid down goes to the root of the rights of a person charged with a criminal offence.
3. Section 41 of the Code does not require the hearing to be in open court which means that it is not a trail so that guilt or innocence is not in issue.

4. The magistrate merely functions to gather the evidence and to make a determination as to whether or not the Defendant should stand trail.
5. The Amending Act takes the right to cross examination but this is merely procedural.
6. The questions are: whether the elimination of the preliminary inquiry would render the trail unfair and whether such removal would constitute a blow to guaranteed rights of an accused.
7. There is nothing in the Amending Act which affects a Defendant's trail procedure.
8. There is nothing to prevent Parliament from taking away procedural provisions as they do and affect the trail.
9. It does not matter whether the Amending Act is prospective or retrospective as there is nothing in it which calls for compliance with section 47 (2) of the Constitution. The substantive rights are unaffected only the procedural.
10. There can be no constitutional exception in the circumstances because the alleged offences took place before the enactment of the Amending Act.
11. The process is in the Magistrate Court so that it is not a case cross-examination being started and then the law came into being.
12. There can be no constitutional exception on the part of the Applicant that because the offence was allegedly committed prior to the Act that he can cry foul and say his rights were infringed.
13. It is accepted that the Halstead case is good law to the extent that at was held that a preliminary inquiry is part and parcel of the trail process.
14. The right to a fair hearing is a separate right from the right to be afforded facilities.
15. There is no right to a preliminary inquiry.
16. The right to cross examination is not an ancient right codified by the Constitution. It is a creature of statute.
17. It is competent for the legislature to provide for a screening process.
18. The functions performed by the Magistrate at a preliminary inquiry is not Judicial it is administrative.
19. The accused has a right to cross-examine their trials.
20. If there is no constitutional right to a preliminary inquiry then the question of cross-examination does not arise at a preliminary inquiry.
21. None of these safeguards have been abrogated and when the matter is considered in this round it cannot be said that there was an infringement.

INTERPRETATION OF THE CONSTITUTION

[52] Learned Counsel for the Claimant cited a number of authorities on the matter of the interpretation of the Constitution. They include: ATTORNEY GENERAL OF THE GAMBIA v MOMODOU JOBE (1984) 3 WLR 174,183, and MINISTER OF HOME AFFAIRS v FISHER (1979) 2 WLR 889.

[53] The following dicta were also cited. Lord Diplock in the MOMODOU JOBE case, *supra*, said:

> "A constitution and in particular that part of it which protects and entrenches fundamental rights and freedoms to which all persons in the state are to be entitled, is to be given a generous and purposive construction."

[54] Lord Wilberforce in the FISHER case, *supra,* said at page 895:

> "A constitution is a legal instrument given rise, among other things, to individuals rights capable of enforcement in a court of law. Respect must be paid to the language which has been used and to the traditions and usages which have given meaning to that language. It is quite consistent with this, and with recognition that rules of interpretation may apply to take as a point of departure for the process of interpretation a recognition of the character and origin of the instrument, and to be guided by the principle of giving full recognition and effect to those fundamental rights and freedoms with a statement of which the constitutions commences."

[55] In REYES v THE QUEEN [2002] 2 WLR 1034,1045 at paragraph 26 Lord Bingham of Cornhill re-stated the doctrine of generous and purposive construction:

> "A generous and purposive interpretation is to be given to constitutional provisions protecting human rights. The court has no licence to read its predilections and moral values into the Constitution."

[56] Therefore the conclusion must be that the doctrine of generous and purposive interpretation, as enunciated at the highest level, is the order of the day.

COMMON GROUND

[57] At the commencement of his address to the Court, the learned Attorney General indicated to that he had no quarrel with the authorities cited on behalf of the Claimant with respect to the interpretation of the Constitution. This included, according to him, section 18 of the Constitution in terms of the redress sought and the Claimant's standing under the said provision.

[58] When it was the turn of learned counsel for the Defendant to address the Court, he also indicated his acceptance of the HALSTEAD case as good law in so far as it establishes that section 15 of the Constitution applied to preliminary hearings.

SECTION 15 OF THE CONSTITUTION

[59] Section 15 of the Constitution is extensive in the creation of rights and responsibilities in terms of the individual and the State. The marginal note speaks of provision to secure protection of the law. And although it is weighed heavily in favour of a person charged with a criminal offence it also makes provision for persons civil rights and obligations.

SECTION 15 (1)

[60] Central to the Claimant's case are section 15 (1) and 15 (2) (e) of the Constitution.

[61] The three guarantees contained in section 15 (1) in relation to a person charged with a criminal offence are: 1. fair hearing, 2. within in reasonable time, 3. by an independent and impartial court, established by law.[1]

[62] It may be said that a fair hearing is now a universal requirement as it is not only contained in national constitutions also in conventions on human rights such as the European Convention for the Protection of Human Rights and Fundamental Freedom.[2]

[63] Learned Counsel for Claimant has submitted that a preliminary inquiry is a hearing contemplated by section 15 (1) of the Constitution. This submission rests on a ruling of the Court of Appeal in HALSTEAD v COMMISSIONER OF POLICE (1970) 25 WRL 522[3] in which the issue was whether or not the numerous adjournments infringed the appeal of fair hearing

[1] See: DARMALINGUN v THE STATE [2000] UKPC 30 at para. 14.
[2] Article 6(1) of the Convention provides: In the determination of his civil rights or any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law."
[3] At issue was section 8(1) of the then Constitution of Antigua and Barbuda.

with reasonable time. On the other hand, learned counsel for the Defendant submits that the right to a fair hearing is a separate and enforceable right which the Applicant enjoys.

[64] Generally the fair hearing provision in the Bills of Rights is followed by a number of subsections which are taken in this chapter to constitute the elements of a fair trail. The question immediately posed is whether the rights spelled out are exhaustive.

[65] Fair hearing implies procedure and the authorities both at the judicial and academic levels point in this direction. In this connection learned counsel for the Defendant advances the following: It is submitted therefore that the right to a fair hearing is a separate and enforceable right which the Applicant enjoys.

THE ELEMENTS OF A FAIR TRIAL

[66] According to learned counsel for the Defendant, judicial and academic opinion are of one accord in suggesting that even if a rule of criminal procedure standing alone is unfair, it will not be held to contravene the constitutionally guaranteed right to a fair trial unless taken in an unfair hearing. In other words, the impugned procedure must be so fundamental to the proceedings as to vitiate the requisite ingredient of fairness.

[67] The submissions on both sides target different aspects of the right to a fair hearing and they are arguably both valid. This because the HALSTEAD case establishes that a preliminary hearing for the purposes of section 15 (1) of the Constitution. On the other hand, the authority of HINDS v ATTORNEY GENERAL AND SUPERINTENDENT OF GLENDAIRY PRISON [2000] UKPC 56 has said *inter alia* that the question of a fair trial depends on the question of degree and the facts of a particular case and the circumstances of a particular Defendant.

[68] In this instance the issue is narrowed to whether the Amending Act and action taken thereunder is in conflict with the Constitution in so far as a fair hearing is concerned.
Fair hearing implies essentially procedure and the authorities both at the academic and judicial levels point in this direction.

[69] Some indication as to what constitutes a fair hearing was given by Lord Bingham of Cornhill speaking for the Privy Council in HINDS V ATTORNEY GENERAL AND THE SUPERINTENDENT OF GLENDAIRY PRISON, *supra*, at paragraph 18:

> "The Board and Convention, the House of Lords, construing the European have observed that overall fairness of a criminal trial cannot be compromised and have described the right to a fair hearing as "absolute": BROWN v STOTT [2001] 2 Civil 817 et 836; R v FORBES [2001] Act 73 at 487. This does not mean that every legal error, every irregularity, every direction from good practice, every departure from procedural propriety in the course of a trial must deprive a Defendant of a fair hearing. Most of the constitutional rights within article 6 of the European Convention have been held not in themselves to be absolute: BROWN v STOTT, above at page 536. The questions of degree are relevant. In all the facts of the particular case and the circumstances of a particular Defendant. A case cannot properly be assessed objectively without taking account of the particular Defendant and the difficulties which he or she may face in cross-examining prosecution witnesses, seeking to exclude evidence, giving evidence, obtaining and calling any necessary evidence and advancing any available evidence. A Defendant in custody is likely to be at a disadvantage when preparing for trial particularly if his educational attainments are limited. In one case the lack of legal assistance may not deprive a Defendant of a fair hearing even if it would have been desirable that he be represented; in another the lack of legal representation may properly be held to deprive the hearing of its essential quality of fairness to the Defendant"[1]

[70] The Claimant's case is premised on some kind of infringement of the right to a fair hearing primarily by the legislature and implicitly by the Magistrate. But as noted above, unless the legislature modifies or abridges the substantive right, the infringement otherwise must be procedural. This in turn must come from evidence. The further point is that the Claimant is in reality seeking anticipatory review in view of the Amending Act. This narrows the evidential base in this regard. According to the Claimant, the complaints were laid against him on 15th June, 2003, and he appeared before the Magistrate to answer the complaints on 26th May, 2005. Further, that on that said date a submission was made under the Magistrate concerning perceived breaches of his constitutional rights. This is a period of

[1] In **WILLIAMS v THE STATE** [2005] UKPC 999 it was held that the granting of leave to withdraw an appeal is a necessary part of a fair hearing; while in **HURMAN v PARAEIN** [1998] 2 WLR 790 it was held that the refusal of the trial to permit a party appearing in person to address the court offended the right to a fair hearing as contained in section 10 (5) of the Constitution of Mauritius.

approximately eighteen months which brings into the equation the other aspects of the right within a reasonable time by an independent and impartial court established by law.

[71] A fair hearing, as noted above, speaks to the actual procedure at the hearing including any judicial actions taken against the backdrop of the hearing. In addition, the legislature may modify the right in some form which could give rise to an infringement. However, it is the determination of the Court that there is no evidence of any procedural irregularity on the part of the Magistrate on 26th May, 2005, when the hearing began to amount to a breach or contravention of section 15 (1) of the Constitution.

MAGISTRATE: JUDICIAL OR ADMINISTRATIVE

[72] It is an aspect of the Claimant's case that a Magistrate presiding at a preliminary inquiry is performing an administrative rather than a judicial function. The objective in this regard is to show in performing the function he is not governed by section 15 (2) (e) of the Constitution. In other words, whether or not the proceedings are part of the trial.

[73] The authorities[1] cited in the Defendant's written submissions indicate that the purpose of the Magistrate at a preliminary inquiry is to determine the sufficiency or insufficiency of the evidence against the accused person for a committal or discharge, as the case requires. The other part of the Defendant's submission reads as follows:

> "In POTTER v JURAL & ANOR; CAMPBELL v BAH & ANOR VSCA 227 (6 December, 2000, the Court of Appeal of Victoria, Australia considered, *inter alia*, the amenability to review by the Supreme Court of decisions refusing to allow cross-examination on certain issues during a preliminary inquiry. In the course of his judgment, Batt JA observed that (at para. 20): It is established by a long line of authority in Victoria that a Magistrate's order committing for trial or refusing to commit is ministerial and not judicial and also is not amenable either to certiorari (as I shall for convenience call relief in the nature of certiorari to quash) … or to appeal under statutory appeal procedures replacing *certiorari."*
>
> This ratio supports the proposition that preliminary inquiries and committal proceedings are not trials but merely executive acts designed to determine

[1] Chan Tit Shau v Secretary for Justice HCAL 000206/2002: HC of Hong Hong; R v POWER [1994] 1 S.C.R 601: SC: Canada; Hannah v Larche 363 U.S 420, 490 (1960) – Grand Jury.

> the sufficiency of the evidence to put an accused upon trial. In that regard, the enquiring magistrate is exercising administrative functions as *persona designata* and does not exercise a judicial power.
>
> Further authorities are also cited[1] relating to the time at which a trial begins. The cumulative effect of these authorities is the following submission by the Defendant: "a preliminary inquiry cannot mount nor bear all of the characteristics of a trial by which a person's guilt or innocence, criminal culpability or legal obligation to society can be determined. Although the preliminary inquiry is an essential pre-requisite as a form of fist ventilation, it cannot properly be described as part of a trial which determines guilt or innocence."

[74] The Court cannot accept these submissions for the following reasons. To begin with, a Magistrate is required to have certain qualifications in law in order to be appointed as such. Further, no other person, other than a person with the prescribed qualifications, can substitute. Generally criminal offences carry penalties whereby the accused may be deprived of his liberty. Specifically, in relation to indictable offences it is the Magistrate who must conduct the preliminary inquiry and make the determination as to whether or not there will be a committal. At the inquiry itself the Magistrate must know and apply a host of legal principles relating to procedural and substantive law and a failure to follow one or more of these principles may, depending on the circumstances, vitate the hearing. Therefore it matters not that the Magistrate is not concerned with guilt or innocence. What does matter is that the Magistrate performs a judicial function.

[75] The following learning from Wade and Forsyth, ADMINISTRATIVE LAW (7th ed.) at pages 47-48, when viewed in the context, especially of the liberty of the subject, further clarifies the matter, ***mutatis mutandis:***

> "A judicial decision is made according to law. An administrative decision is made according to administrative policy. A judge attempts to find what is the correct solution according to legal rules and principles. An administrator attempts to find what is the most expedient and desirable solution in the public interest. It is true, of course, that many decisions of the courts can be said to be made on grounds of legal policy and that the courts sometimes have to choose between alternative solutions with little else than the public interest to guide them. There will always be grey areas. Nevertheless the mental exercises of judge and administrator are

[1] See: Justice David McDonald, Legal Rights In the Canadian Charter of Rights and Freedoms 92nd ed.) at p. 508; TONNER [1985] WLR 344 which was followed in R. v Ex parte Guardian Newspaapers [1998] EWCA Crim 2670 at para. 10.

> fundamentally different. The judge's approach is objective, guided by his idea of the law. The administrator's approach is empirical, guided merely by expediency."

DOES THE RULING IN THE HALSTEAD CASE SURVIVE

[76] The decision in the HALSTEAD case was delivered in January 1978 at a time when the leading authorities on the interpretation of our constitution had not emerged. This is the manner in which Peterkin JA (as he then was) reasoned:

> "I regard a preliminary inquiry as part and parcel of a trial for an indictable offence. It may well, and quite often does, result in the discharge of the person accused. The same rules apply to the taking of evidence at the preliminary stage of the hearing into the charge brought against the accused person as in the final states in order to ensure that he gets a fair trial. It is precisely this which s. 8 (10 says he shall be afforded, and it is not difficult to call to mind instances in which his rights under the section could be infringed at the preliminary stage. In my opinion, the rights afforded by s. 8 to a person charged with a criminal offence apply to all stages of the hearing into that charge, and are enforceable by s. 15 in the event of an infringement."

[77] To his great credit Justice of Appeal Peterkin foreshadowed the doctrine of generous interpretation.[2] His concern was to ensure that this constitutional guarantees to a person charged with a criminal offence should begin at an early stage to ensure that he gets a fair trial.

[78] In the circumstances the authorities cited by learned counsel for the Defendant in this regard seeking to show a preliminary inquiry is not the trial or part of it are entirely misplaced. And it matters not whether the Magistrate's duties are characterized as administrative, ministerial, or judicial. What matters is the applicability of the constitutional obligations flowing from the right to the protection of the law.

[79] But not only does the Halstead ruling survive, it found support in the Guyana Court of Appeal in the case of IN THE MATTER OF AN APPLICATION BY NORRIS WILLIAMS AND CECIL SALISBURY [1978] 26 WIR 133.

[2] The citations for the two leading cases at the time are: FISHER [1979] 2 WLR 889 and MOMODOU JOBE [1984] 3 WLR 174.

[80] Among the issues to be determined in that case was whether a preliminary inquiry was a hearing within the meaning of article 10 (1) of the Constitution of the Republic of Guyana. This constitutional provision is the equivalent of section 15 (1) of the Antigua and Barbuda Constitution.

[81] Chancellor Haynes examined many authorities on the point and in the end came to this conclusion at page 147:

> "The argument that what happens at a preliminary inquiry is not a hearing within art 10 (1) is over-technical and unsupportable. Furthermore, the phrase 'a fair hearing' is not a term of art intended to predicate a type of proceeding. It is intended to relate to the conduct of a proceeding and generally connotes certain conditions to be satisfied in judicial proceedings and in many administrative ones also, such as full notice of the charge and a real and effective opportunity to meet it. I'm my judgment it is this notion that the constitution-makers had in mind in framing art 10 (1), and that its application to a preliminary inquiry cannot be excluded on the ground that it is not a 'hearing' of the 'case'."

[82] The learned Chancellor continued at page 148:

> "In my judgment the terms of art 10 (1) are reasonably capable of a allowing its application to proceedings at a preliminary inquiry, and should be so construed as its ordinary meaning, or, if necessary as a liberal one, unless the provisions of the rest of art 10 (2) to (14) compel a restricted application. I do not think they do. I think also that its provisions can be construed distributively, that is to say, as related to different stages in the judicial proceedings from the time a person is charged with an indictable offence to his acquittal or conviction."

SECTION 15 (2) (e) OF THE CONSTITUTION

SPECIFICS OF THE AMENDING ACT

[83] As noted above, the Amending Act, in relation to preliminary inquiries, repealed and replaced, section 41 amended section 42 of the Act, inserted new sections 42A, 42B, and 42C, the replacement of section 50, repeal of sections 51, 52, 53, 54, 55, 56, and 57, and the repeal and replacement of section 58 of the Principal Act.

[84] By virtue of section 4 of the Amending Act, Part III of the Act is given the new heading of "COMMITTAL PROCEEDINGS" and in the new section 41 "committal proceedings" and "deposition"

re-defined. The new sections 42A, 42B, 42C, and 58 are central to the Amending Act and provide as follows:

"Institution of committal proceedings.

42A. (1) All committal proceedings shall be instituted under the direction of the Director of Public Prosecutions by filing of –

(a) one or more written statements of witnesses in support of the charge; and

(b) a list of exhibits, if there are any exhibits which the prosecution intends to produce in connection with the proceedings.

(2) The Director of Public Prosecutions shall, as soon as practicable, cause the documents filed under subsection (1) to be served on the accused person.

Accused may file statements in reply.

42B. (1) After the documents under section 42A (1) have been served on the accused person and within such period as may be specified by a Magistrate, the accused may, in reply, file his own statement and any statement of his witnesses and a list of exhibits, if there are any exhibits which the accused person intends to produce in connection with the proceedings, but failure by the accused person to file any documents or the lack of any such documents shall not, in itself, affect the power of the Magistrate to proceed with and conclude the committal proceedings or to take any other action permitted by this Act.

(2) The Court shall cause the reply filed under subsection (1) to be served on the Director of Public Prosecutions.

Committal on written statements only.

42C. A Magistrate holding committal proceedings may commit an accused person for trial by jury on a charge of an indictable offence if he is satisfied that either the charge supported by the evidence in the documents filed under section 42A (1) alone or in conjunction with any documents filed under section 42B (1), establish or are likely to establish the indictable offence charged or an indictable offence of a like kind which is not otherwise within his jurisdiction to deal with summarily."

Final decision on committal proceedings.

58. (1) At the conclusion of the committal proceedings, the Magistrate may, subject to subsection (2), make any of the following orders:

(a) dismiss the charge an, if the accused person is in custody, make an order for his release;

(b) commit the accused person for trial by jury; or

(c) make any other order in relation to the case, the charge or the accused as provided for in this Act or in any other law.

(2) Before making an order under subsection (1), the Magistrate shall, on an application, give the prosecution or the accused person, as the case may be, an opportunity to show cause, by way of submission only, why the order should not be made."

[85] The relevant legal consequences of the Amending Act are:

1. Preliminary inquiries are abolished and replaced by Committal Proceedings.

2. Committal Proceedings are to be instituted by the Director of Public Prosecutions by the filing of witness statements and exhibits in support of the change;

3. These documents are to be served on the accused person as soon as practicable;

4. The accused person is entitled [not mandated] to file his own statements and exhibits within such time as the Magistrate orders.

5. A failure by the accused to file and document "shall not, in itself affect the power of the Magistrate to proceed with and conclude the committal proceedings."

6. In such proceedings the Magistrate has a discretion to commit the accused person on a charge of an indictable offence based on the documentary evidence, if he is "satisfied" therewith;

7. In such proceedings various orders may be made by a Magistrate at the end of the hearing.

8. The accused has a right to show cause, by way of submission only, why the order should not be made when examined against the background of section 41 to 61 of

the Act, there is absent form the new legislative matrix governing committal proceedings are the following:

1. The taking of evidence on oath by the Magistrate.

2. Reading over of the evidence by the Magistrate to the accused and the signing of the document containing the recorded evidence by the Magistrate and the accused.

3. The right of the accused to be present at the time of the evidence on oath.

4. The right of the accused to cross-examine the witnesses for the prosecution either by himself or through his counsel.

5. The creation of a deposition,[1] the containing sworn testimony and the right of the accused to receive a copy thereof on payment of the prescribed fee.

[86] The absence of these rights under the newly amended Act and having regard to section 15 (2) (e) of he Constitution, it is the contention of learned counsel for the Claimant that the accused went to the hearing "naked." The Court has not interpreted description literally. Rather, it was interpreted to mean that the Claimant went to the hearing devoid of his statutory and constitutional protections.

[87] Section 15 (2) of the Constitution grants certain rights to a person charged with a criminal offence of these the Claimant's thrust is on paragraph (e) which says: "…shall be afforded facilities to examine in person or by his legal representative the witnesses called by the prosecution before the court and to obtain the attendance and carry out the examination of witnesses to testify on his behalf before the court on the same conditions as those applying to witnesses called by the prosecution …"

[88] The rule is that a constitution is an instrument *sui generis* to which the rules respecting the interpretation of statutes cannot be appealed and instead must be given a purposive construction. Not only that, respect must be paid to the language which has been used and to the traditions and usages which have given meaning to that language.

[1] A deposition is now defined in section 41 (2) to mean any statement admitted in evidence in committal proceedings "under this Act."

[89] The HALSTEAD case is not only good law, it is binding on this Court on the point of the applicability of the then section 8 [now section 15] of the constitution to preliminary inquiries and more particularly the question of a fair hearing within a reasonable time.

[90] In the circumstances, the Claimant is saying that not only is section 15 applicable but also that many of the rights which hitherto were enjoyed by an accused person no longer exist in law. On the other hand, while the Defendant also agrees that the Amending Act repealed certain provisions of the Act, the residue of the contention is that these are merely procedural which were enacted by Parliament by the ordinary law-making process and thus can be repealed by the same procedure.

[91] On the point of rights or provisions being merely procedural an immediate response is required. And it is that procedural rights whether they be common law, statutory or constitutional, they are of equal force in terms of non-compliance therewith. In terms of natural justice or procedural *ultra vires* Lord Bridge of Harwich had this to say in LLOYD v MAHON [1987] AC 625, 702-703.

> "My Lords, the so called rules of natural justice are not engraved on tablets of stone. To use the phrase which better expresses the underlying concept, that the requirements of fairness demand when any body, domestic, administrative or judicial, has to make a decision which will affect the rights of individuals depends on the character of the decision-making body, the kind of decision it has to make and the statutory or other framework in which it operates. In particular, it is well established that when a statute has conferred on any body the power to make decisions affecting individuals, the courts will not only require the procedure prescribed to be followed, but will readily imply so much and no more to be introduced by way of additional procedural safeguards as will ensure the attainment of fairness."

THE APPROACH TO REVIEW OF LEGISLATION

[92] The matter of the review of legislation arose in the case of ATTORNEY GENERAL v THEOPHILUS, Civil Appeal No. 13 of 2005. On this occasion Rawlins JA articulated the approach in this way:

> "The manner in which the High Court is enjoined to exercise its power to review legislation was succinctly summarized by this court in ATTORNEY GENERAL v LAWRENCE in the following words:
> 'In determining the question of the constitutionality of a statute, what the court is concerned with is the competence of the legislature to make it, and not the wisdom or motives. The court has to examine its provisions in the light of the relevant provisions of the Constitution. The presumption is always in favour of constitutionality of an enactment, and the burden is upon him who attacks it to show that there has been a clear transgression of the constitutional principles."

[93] It has already been noted that section 15 (2) (e) gives a person charged with a criminal offence the right to be afforded facilities to examine in the person or by his legal representative the witnesses called by the prosecution. It is not new. It is a rule of great antiquity. Indeed in BLACKSTONE'S CRIMINAL PRACTICE 2004 at paragraph F7.1 it is said that: "As a general rule, an accused is entitled to cross-examine in person any witness called by the prosecution. The general rule is subject to common law restrictions and important statutory exceptions."

[94] Cross-examination of witnesses called by the prosecution is of such importance that it has been described as being basic to the administration of justice. In TAYLOR ON EVIDENCE (10th ed.) at page 1032 the following exposition is to be found:

> "The exercise of this right [of cross-examination] is one of the most efficacious tests for the discovery of the truth. But it, the situation of the witness with respect to the parties and to the subject of litigation, his interest, his motives, his inclination and prejudices, his character, his means of obtaining a correct and certain knowledge of the facts to which he bears testimony, the manner in which he has used these means, his powers of discernment, memory and description, are all fully investigated and ascertained and submitted to the consideration of the jury, who have an opportunity of observing his demeanour, and of determining the just value of his testimony. It is not easy for a witness, subjected to this test, to impose on the court or jury, for however artful the fabrication of falsehood may be, it cannot embrace all the circumstances to which cross-examination may be extended."

[95] The point is clear: "The right to cross-examine a prosecution witness as fully as the law permits is basic to the administration of justice."[1] Therefore when the court wrongfully

[1] **See***: LASALLE SHAH LAI LEUNG NORAY GUY v R [1972] 20 WIR 361,416 per Fraser JA.*

restricted the cross-examination of the brigader for no apparent lawful reason, this contributed to a miscarriage of justice and freeing of some of the appellants[1].

[96] The foregoing must to a substantial degree explain the inclusion of the right to examine witnesses called for the prosecution in the Bill of Rights with the constitutional status of an entrenched right. At this point the reasoning boils down to this: Whether by accident or design, section 52 prior to its repeal, provided that: "The evidence of every witness shall be given in the presence of the accused and he or his counsel or solicitor shall be entitled to cross-examine such witness upon all facts relevant to the charge …"

[97] This provision in reality avoids doubt as to the Claimant's contention. This arises from the fact that based on the holding in the Halstead case, 'hearing' in section 15 encompasses the preliminary inquiry and up to the trial. The other point is that the statutory right is co-extensive with a constitutional guarantee.

[98] Section 19 of the Constitution proscribes implied amendment but it does not say so in a bold and direct manner. Instead it says: " Except as is otherwise expressly provided in this Constitution, no law may abrogate, abridge or infringe or authorize the abrogation, abridgement or infringement of any of the fundamental rights and freedoms of he individual hereinbefore recognized and declared."[2]

[99] It is expressly provided by section 47 (2) of the Constitution that a Bill which seeks to alter Schedule 1 to the Constitution, which includes the Bill of Rights,[3] must attain certain requirements, including approval by referendum. And then section 47 (8) (b) introduces the matter of the certificate of the Speaker thus:

> "The certificate of the Speaker, or as the case may be, the Deputy Speaker under this subsection shall be conclusive that the provisions of subsections

[1] Ibid.
[2] This contrasts with section 49(6) of the Constitution of Barbados which provides as follows: "No Act of Parliament shall be construed as altering this Constitution unless it is stated in the Act that it is an Act fof that purpose."
[3] This is Chapter II of the Constitution itself and includes section 1 - 21. Barbados Constitution which provides that: "No Act of Parliament shall be construed as altering this Constitution unless it is stated in the Act that it is an Act for that purpose."

(2), (3), or (4) of this section have been complied with and shall not be enquired into any court of law."

[100] The reality is that the Amending Act purports to alter section 15 (2) of the Constitution but it does not even pretend to comply with the manner and form requirements of the Constitution as prescribed by section 47 (2). Above-all the certificates of the Speaker of the House of Representatives and of the President of the Senate do not appear *ex facie* as required by section 47 (8) (b).[2]

[101] In the case of IBRABLEBBE v R [1964] 2 WLR 76, 89, Lord Dilhorne, L.C. speaking for the Privy Council on an appeal from the Sovereign State then known as Ceylon[3] said this: "The words peace, order and good government connote, in British constitutional language, the widest law-making powers appropriate to a Sovereign. Apart from the fundamental reservations specified in section 29, the order only continued two qualifications on the full legislative authority of Parliament." Such a power is vested in the Parliament of Antigua and Barbuda by section 46 of the Constitution in these terms: "46. Subject to the provisions of this Constitution, Parliament may make laws for the peace order and food government of Antigua and Barbuda."

[102] In the celebrated case of COLLYMORE v ATTORNEY GENERAL OF TRINIDAD AND TOBAGO [1967] 12 WIR 5, 35 in delivering his decision in the Court of Appeal gave what must be regarded as one of the celebrated dicta in Caribbean public law. He warned: "No one, not even Parliament, can ignore the restrictions of the Constitution with impunity." Lord Diplock in HINDS v R [1976] 2 WLR 300, 386 said: "Parliament cannot evade a constitutional restriction by a colourable device."[4] And in BRIBERY COMMISSIONER v RANASINGHE, *supra*, Lord Pearce also warned that: "A Legislature has no power to ignore the conditions of law-making that are imposed by the instrument which itself regulates its power to make law." The common thread running through all of these dicta is that they speak to the supremacy of the constitution and compliance with the prescriptions for its alteration.

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[2] See BRIBERY COMMISSIONER v RANASINGHE [1964] 2 WLR 1301.
[3] Now known as SRI LANKA.
[4] Per Lord Diplock – HINDS v R [1976] 2 WLR, 386.

[103] In the language of legislative drafting "subject to …" warns of exceptions or restrictions. In her affidavit in response, Joanne Walsh deposed that the legislation was part of the reforms initiated by the new Attorney General. In this instance it was concerned with criminal proceedings and preliminary inquiries which were necessary because of the problems associated with the existing law. According to her, such problems caused a backlog of cases in the Magistrate's Court especially when there were adjournments and aborted hearings.

[104] The right to cross-examine witnesses for the prosecution received prominence because the right appears both in the Act and in section 15 (2) of the Constitution. The fact is, however, that all the procedural and other rights that were contained in Part III of the Act are part of the equation. This rests on the letter and spirit of section 15 (2) of the Constitution requiring an accused person to be afforded or given "facilities."

[105] Learned counsel for the Defendant makes this final submission on the issue of the alteration of the procedure.

> "… these alterations in procedure have freed a great deal of administrative magisterial time without impairing the fair balance and equal footing in which an accused and the State are necessarily engaged within the tensions of a constitutional environment which is protective of Fundamental Rights. The alterations in the new committal proceedings ensure that the accused and the prosecution can each present their case on an equal footing. This accords with the acknowledged tenets and proportionality in the early authorities of R v OAKES and the line of authority flowing therefrom."

[106] One of the authorities cited by learned counsel for the Defendant is Seetahal in COMMONWEALTH CARIBBEAN CRIMINAL PRACTICE AND PROCEDURE at page 233. But the reason for this is unclear. This is because the learned author merely describes the procedure for 'paper committals' which obtains in England and then expresses the hope that that practice may in time replace oral hearings in the Caribbean without even alluding to the fact that at issue is really two different legal systems: Parliamentary supremacy on the one hand and Constitutional supremacy (with an entrenched Bill of Rights) coupled with Parliamentary sovereignty, on the other hand.

[107] Placing the accused and the prosecution on an equal footing is laudable but the route by which it is sought to be achieved is of absolute importance and there can be excuse for non-compliance even within "the tensions of a constitutional environment." As it stands the only route is by way of section 47 (2) of the Constitution.

[108] The rule is that where the competence of Parliament to make a particular law is in issue, the wisdom or motives do not matter. Rather, it is compliance with the conditions of law-making that are contained in the Constitution itself that matters. Therefore, in so far as the Magistrate's Code of Procedure (Amendment) Act, No. 13 of 2004 purports to alter section 15 of the Constitution it is in conflict with the supreme law and thus *pro tanto* void.

ISSUE NO. 3

THE LEGAL AND CONSTITUTIONAL IMPLICATIONS, IF ANY, OF SECTION 1 (2) OF THE AMENDING ACT

[109] This issue brings section 1 (2) of the Amending Act into immediate focus. It is in these terms: "This Act shall apply to legal proceedings pending on the commencement of this Act and legal proceedings instituted on or after the commencement of this Act."

[110] The Bill for the enactment of the Magistrate's Code of Procedure (Amendment) Act 2004 was assented to by His Excellency, the Governor-General on 18th October, 2004, and the Amending Act was published in the Official Gazette Vol. XXIV No, 79 dated 4th November, 2004.

SUBMISSIONS

[111] The Claimant's basic submissions are that the amendments to the Act are intended to operate retrospectively and effectively constitute an *ex post facto* law. Further, that the Amending Act is unjust and oppressive. The cases brought against the Claimant do not constitute exceptions to the rule that law should not have retrospective effect. For the Defendant it is submitted that there is nothing in the Constitution against amending the procedure to be followed in a criminal hearing after the alleged commission of the offence.

[112] It will be recalled that in his affidavit in support, the Claimant deposed that three complaints, being 524/03, 522/03, and 535/03, were laid against him.[1] These complaints in turn related to events on or before 7th May, 1998, 15th March, 2001 and 15th October, 1999, respectively. These complaints and the dates attributed to the events upon which they rest were not in way contradicted by the affidavit in response of Joanne Walsh.

[113] Therefore it means that by virtue of the said section 1 (2) of the Amending Act the new committal proceedings applied to the Claimant. In fact, this is his allegation.

[114] Section 15 (4) of the Constitution proscribes retroactive criminal offences and practices. This means that there is a constitutional right preventing a person being charged with retroactive criminal offences or the imposition of retroactive criminal penalties. The provision reads as follows:

> "No person shall be held to be guilty of a criminal offence on account of any act or omission that did not, at the time it took place, constitute such an offence, and no penalty shall be imposed for any criminal offence that is more severe in degree or description that the maximum penalty might have been imposed for that offence at the time when it was committed."

[115] The Court readily appreciates that the Amending Act is entirely procedural but it has retrospective effect. The events therefore produce the following equation: Between May 1998 and March 2001 when certain criminal acts are alleged to have been committed the law which regulated the procedure respecting preliminary inquiries prescribed certain rights ("facilities") for an accused person. Those rights continued in force until 3rd November, 2004. Those said rights are no longer available with retrospective effect so that when committal proceedings commenced on 26th May, 2005, a new procedure applied.

[116] Section 15 (4) does not speak to the matter of procedure and this fact has caused the Defendant to submit that: "It is readily apparent that there is no constitutional injunction

[1] See para. 7 of the affidavit.

against amending the procedure to be followed in a criminal hearing after the alleged commission of the offence." With that said, the questions must be whether it is the purpose of he Constitution to leave lucanae in its provisions and which must then be applied at face value or whether the purpose of the Constitution is to speak in general terms and leave it to the courts to fill the gaps by way of interpretation so as to give rights when they are intended having regard to the language and other factors.

[117 In this regard the FISHER case is highly instructive. Under statute in Bermuda 'child' meant legitimate child but in that case their Lordships at the Privy Council were faced with the task of interpreting the same word as contained in section 11 (2) (a) of the Constitution of Bermuda.

[118] Lord Wilberforce in giving the decision of the Board reasoned, at page 896, in part as follows :

> "In their Lordships opinion, paragraph (a) in this context amounts to a clear recognition of the unity of family as a group and acceptance of the principle that young children should not be separated from a group which as a whole belongs to Bermuda. This would be fully in line with article 8 of the European Convention on Human Rights and Fundamental freedoms (respect for family life), decisions on which have recognized the family unit and the right to protection of illegitimate children. Moreover the draftsman of the Constitution must have had in mind (a) the United Nations' Declaration of the Rights of the Child adopted by resolution (1386 (XIV) on November 29, 1959, which contains the words in principle 6: "[the child] shall, whenever possible, grow up in the care and under the responsibility of his parents … a child of tender years shall not, save in exceptional circumstances, be separated form his mother"; and (b) article 24 of the International Covenant on Civil and Political Rights 1966 which guarantees protection to every child without any discrimination as to birth. Though these instruments at the date of the Constitution had no legal force, they can certainly not be disregarded as influences upon legislation policy. Their Lordships consider that the force of these arguments based purely on the Constitution itself is such as to compel the conclusion that 'child' bears an unrestricted meaning."

[119] It must also be recalled that in THORNHILL v ATTORNEY GENERAL OF TRINIDAD AND TOBAGO [1981] AC 61 it was held that "… in section 1 of the Constitution the rights declared to have

been enjoyed in Trinidad and Tobago referred not only to the *de jure* rights of the individual but to the rights enjoyed *de facto* as a result of settled executive policy or the manner in which administrative or judicial discretion has been exercised." Further in the RYAN case, *supra*, in addressing the power of Parliament to make law with respect to the make law pursuant to the Constitution by the ordinary law-making process it was said: "Those provisions of the Constitution which empowered Parliament by legislation passed by a simple majority to impose limitations on entrenched rights which the Constitution gave to the individual, were not to be construed expansively so as to enable Parliament to pass legislation which deprived the individual of the substance of his constitutional rights."

[120] In PINDER v R [2002] UKPC 46 Lord Millett provided a comprehensive statement concerning the Constitution, the individual fundamental rights, Parliament and what his Lordship termed the democratic rights of the majority:

> "15. A Constitution is an exercise in balancing rights of the individual against the democratic rights of the majority. On the one hand, the fundamental rights and freedoms of the individual must be entrenched against future legislative action if they are to be properly protected; on the other hand the powers of the legislature must not be unduly circumscribed if the democratic process is to be allowed its proper scope. A balance is drawn by the Constitution. The judicial task is to determine where the balance is to be drawn; and to substitute the judge's views where it should be drawn."

[121] The whole point about guaranteed rights is that the framers of the Constitution intended that they should inure to the benefit of all individuals subject to the restrictions on the ideal. Moreover the cases demonstrate the vigilance of the Courts to ensure that guaranteed rights are not whittled down.

[122] Lord Diplock's dictum in CHOKOLINGO v ATTORNEY GENERAL OF TRINIDAD AND TOBAGO [1981] 1 WIR 106, 111[1] must now be varied to read: The fundamental rights guaranteed by section 15 of the Constitution is not to a legal system that is infallible but to one that is fair. Therefore the question becomes: is it fair or logical to say that in the face of clear

[1] The dictum reads: " The fundamental human right guaranteed by section 1(a) and (b) and section 2 of the Constitution is not a legal system that is infallible but to one that is fair."

prohibitions against retroactivity regarding substantive criminal law, the framers intended that the procedural law was not included? Or is it usual to separate the substantive criminal law from the procedural law? If it is, then this leaves Parliament free to change, for example, indictable offences to summary offences with retroactive effect. This, at a very basic level, would be unfair and unjust. And in the sphere of the criminal law and the Constitution can it not be said that an accused person takes his criminal law and procedure with him. Put differently, and using a civil law concept, it may be said that an accused person takes his criminal law *talem* qualem. But there is yet another question to be asked which is this: Is it consistent with the tenets of the rule of law to have an accused person not knowing what law he has to face even if it is procedural? The answer must be in the negative. It is therefore the determination of the Court that section 15(4) of the Constitution includes procedural criminal law.

[123] In seeking to persuade the Court on the point, the dictum of Spigelman CJ in LODHI v REGINA [2006] NSWCCA 121 at the paragraph 35 was cited. It reads as follows:

> "The principle of legality so understood supports the reasoning in REID v REID and MOSS v DONOHOE that an overly retrospective statute which may have the effect of making past acts criminal will not be understood to be applicable to criminal proceedings that have already been instituted, unless the court can identify express words or a necessary intention that that is the intention of Parliament."

[124 The simple answer to learned counsel's proposition is section 1(2) of the Amending Act which conveys faithfully Parliament's intention that the enactment "… shall apply to legal proceedings pending at the commencement of this Act and proceedings instituted on or after the commencement of this Act."

[125] Section 15 (4) contains no express words which empower Parliament to enact retrospective law relating criminal procedures by the ordinary law making process. It means that the conditions of law-making or for altering the Constitution as prescribed by section 47(2) were not followed. In the view of the Court to say otherwise would clearly and utterly undermine the clear intent of the framers of the Constitution.

[126] In other legal systems, at least in the common law jurisdiction, it is accepted that there can be retroactive civil law but the same cannot be said with respect to retroactive criminal law[1]. The Court is mindful of the fact that the Amending Act is purely procedural but in the view of the Court, the effect of the law would be to subject the Claimant to a new criminal procedure after the alleged criminal acts and after the complaints had been filed in the court of competent jurisdiction.

[127] The jurisprudential basis of retrospective legislation is explained by Willes J in PHILLIPS v EYRE (1870) LR 6 QB1, 10 in these terms:

> "Allowing for the general inexpediency of retrospective legislation it cannot be pronounced naturally or necessarily unjust. There may be occasions and circumstances involving the safety of the state or even the conduct of individual subjects the justice of which prospective laws made for ordinary occasions and the usual exigencies of society for want of provision fail to meet, and in which the execution of this law as it stood at the time may involve inconvenience and wrong *summum jus summa injuria."*

[128] Sir Carlton Allen in his book, LAW IN THE MAKING (7th Ed.) at page 466 addressed the issue of retrospectivity in these terms:

> "Wise government will not lightly resort to retrospective legislation for the mere sake of expediency, since it realizes or should realize that in the last analysis justice itself is the highest form of expediency. At its peril, therefore, will it violate the average sense of justice which is undoubtedly hostile, in England at least to retroactive law. At the same time there may be occasions when public exigency compels a departure from general principles, and it is impossible therefore to say that retrospective legislation is in all the circumstances unjustifiable. As for public opinion, in this as in all other matters of legislation, it is impossible to generalize for all times and circumstances, but it is fairly safe to say that at least in democratic communities arbitrary legislation of retroactive effect is likely attend the average essence of fairness and justice and to arouse suspicion."

[129] Elmer A. Driedger in his book, THE COMPOSITION OF LEGISLATION (2nd ed.) at page 111 gives the bare parameters of a retrospective statute. He says:

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[1] See: BATA SHOE CO GUYANA LTD v CIR and AG [1976] 24 WIR 172, 195 per Crane JA.

> "Some text books on the interpretation of statutes define a retrospective statue as one that takes away or impairs any vested right acquired under existing laws, or creates a new obligation, or imposes a new duty, or attends a new disability in respect of transactions already passed."

[130] In terms of retrospective criminal law the case of LIYANAGE v THE QUEEN [1966] 2 WLR 682 is exceptional. Some of the aspects of the relevant law being the Criminal Law Act No. 31 of 1962 are as follows: The Act was expressed to be retrospective to cover an abortive *coup d'etat* on January 27, 1962 in which the appellants took part, and was to cease to have effect after the conclusion of all legal proceedings connected with or incidental to any offence against the state committed on or about the date of the *coup d'etat* or from one year after the commencement of the Act, whichever was later. The Act also substituted the Chief Justice for the Minister of Justice as the person to nominate the three judges before whom trial without jury might be ordered."

[131] Part of the holding in the case reads thus:

> "That the Acts, directed as they were to the trial of particular prisoners charged in the particular offences on a particular occasion, involved the usurpation and infringement by the legislation of judicial powers inconsistent with the written constitution of Ceylon."

[132] Lord Pearce speaking for the Board had this to say:[1]

> "As already indicated, legislation *ad hominem* which is thus directed to the course of particular proceedings may not always amount to an interference with the functions of the judiciary. But in the present case their Lordships have no doubt that there was such interference; that it was not only the likely but the intended effect of the impugned enactment; and that this is fatal to their validity."

[133] It is clear that the LIYANAGE case is for the most part distinguishable on the facts. The point is however made that the legislation in both instances was intended to apply to a particular point in time. In this case the Claimant is affected by the legislation. Further, the alleged offences relate to fraud and as such do not fall within any of the exceptional

[1] Op Cit. at page 696.

circumstances which may give rise to retrospective legislation as mentioned by Willes J in PHILLIPS v EYRE, *supra*.

[134] In the view of the Court what may be called the letter and spirit doctrine of the Constitution facts to be considered in view of the retrospectivity of the Amending Act and the Constitution itself especially section 15 (4) thereof.

[135] The preamble ends with these words: "… the provisions of the chapter shall have effect for the purpose of affording protection to the foresaid rights and freedom, subject to such limitations of that protection as are contained in those provisions, being limitations designed to ensure that the enjoyment of the said rights and freedom by any individual does not prejudice the rights and freedoms of others or the public interest."

[136] Section 15 itself exists to secure protection of the law and, in particular, section 15 (4), as part of its protection, proscribes retroactive criminal penalties and offences. In this connection the Court has already ruled that the criminal procedure cannot be excluded as it arises from the interpretation of the provision based on the accepted rules relating to the interpretation of the Constitution.

[137] The letter and spirit doctrine is derived from the case of AKAR v ATTORNEY GENERAL OF SIERRA LEONE (1969) 3 WLR 970. The case essentially concerned an attempt by the appellant to maintain his citizenship of Sierra Leone, being born of an indigenous Sierra Leone mother and a Lebanese father. At independence on 27th April 1961 he became a citizen by virtue of the Constitution. A subsequent amendment to the Constitution required a citizen to have a father of "negro African descent." It was given retrospective effect to the date of independence and thus deprived the appellant of his citizenship.

[138] The then Constitution of Sierra Leone contained a declaration of fundamental rights and freedoms of the individual to which every person in Sierra Leone was entitled. Section 23 of this Constitution afforded protection *inter alia* from discrimination on the grounds of race and provided that subject to certain exceptions " no law shall make any provision which is

discriminatory." Subsection 23 (4) excepted any law whereby persons "might be subjected to any disability or restriction … which, having regard to its nature and to special circumstances pertaining to those persons … is reasonably justifiable in a democratic society."

[139] After being unsuccessful in the Courts of Sierra Leone, the appellant further appealed to the Privy Council where his appeal was allowed. Speaking of the majority Lord Morris of Borth- y -Gest reasoned thus:

> "The only circumstance which was to exclude those who under the provisions of the subsection (1) of Section 1 had already became citizens was that they would not satisfy a description which was essentially a description of race. In their Lordships view Act No. 12 offends against the letter and flouts the spirit of the Constitution. Nor have their Lordships heard any reason assigned which could seem to justify the enactment. The circumstances pertaining to the appellant (or to any others similarly place placed) were as different on January 17, 1962 when Act No. 12 was passed, form the circumstances pertaining on April 27, 1961 nothing had changed. There was no reason why the appellant should be deprived of his citizenship. There were no special circumstances pertaining to the appellant or to other similarly placed."

[140] While AKAR'S case does not involve criminal law, it does involve the Constitution and legislative attempts to enact law that offended against the letter and flouted the spirit of the Constitution and which is simply wrong in principle. The Court determines that the Amending Act also falls under this doctrine.

SEVERANCE

[141] The test of severability was laid down ATTORNEY GENERAL FOR ALBERTA v ATTORNEY GENERAL FOR CANADA (1947) AC 503, 518: "The real question is whether what remains is so inextricably bound up with the part declared invalid that what remains cannot independently survive or, as it has sometimes been put, whether on a fair review of the whole matter it can be assumed that the legislature would survive without enacting the part that is *ultra vires* at all."[1]

[1] This test was applied in HINDS v R [1976] 2 WLR, 388

[142] As it stands sections 1 (2), 4, 5, 6, 7, 13, 15, 16, 17, and 19 of the Amending Act are in conflict in the sections 2, 15 (2) (e), 15 (4) and 47 (2) of the Constitution. The residue consists of sections 1(1), 10, 11, 12, 14, 18, 20, 21, 22, 23, 24, 26, 27, 28, and 29. This consists in many instances of repeals of provisions while in others there are references to committal proceedings.

[143] It is the determination of the Court that the provisions of the Amending Act were drawn to give effect to the new procedure of committal proceedings and as such are inextricably bound up with the provisions declared invalid.

[144] In the circumstances the entire Amending Act is declared to be unconstitutional.

ORDER

IT IS HEREBY ORDERED AND DECLARED AS FOLLOWS:

1. Part III of the Magistrate's Code of Procedure Act Cap. 255 prior to its amendment continued procedural or secondary rights which give effect to some substantive rights in the Constitution in relation to a person charged with a criminal offence.

2. Sections 4, 5, 6, 7, 13, 15, 16, 17, and 19 of the Magistrates Code of Procedure (Amendment) Act 2004 No. 13 are in conflict with sections 2, 15 (2) (e) and 47 (2) of the Constitution and are thus unconstitutional, null and void and of no effect.

3. Section 1 (2) of the Magistrate's Code of Procedure (Amendment) Act 2004 No. 13 is unconstitutional in that it offends the letter and flouts the spirit of Chapter II of the Constitution and in particular section 15 (4) thereof insofar as it gives that Act retrospective effect by reference to pending criminal proceedings and is therefore unconstitutional, null and void and of no effect.

4. Under the test of severance if the offending provisions of the Act are removed a meaningful enactment or residue will not survive and therefore the entire Act is declared unconstitutional.

5. The Defendant will pay the Claimant costs in the amount of $7000.

[145] This case is undoubtedly one of great complexity and importance. For this reason the wishes to record its deep and sincere appreciation to learned counsel on both sides for their erudition.

ERROL L. THOMAS

JUDGE