

In the Matter of Article 55 of the Constitution and In the Matter of a Resolution pursuant to Article 24(1) of the Constitution [of Nauru]: Adjudicating the Constitutionality of Parliamentary Change of Government

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Parliamentary government inherently comprises the search for political success and partisan advantage. Democratic parliamentarianism requires, however, that public life be conducted in accordance with the rule of law in both substantive and procedural respects. This is as true in micro-States as it is in greater powers which have historically well-established democratic traditions. Indeed, the small size and remote location of a State, as well as the lack of adequate reporting of its political law,^[1] should not deter acute observers from taking note of jurisprudence that both creates legal precedent and enlightens the path of democracy in parliamentary and political practice.

The World's Smallest Parliamentary Republic

Nauru is a microscopic island in the South-Western Pacific Ocean. After having been first a German, then a British colony, it became independent on January 31, 1968. The *Constitution of Nauru*,^[2] adopted on January 29, 1968, sets out in Article 2 that the Constitution is the supreme law and that any law inconsistent with it is void to the extent of the inconsistency. The country has a unicameral Parliament of eighteen Members to represent its roughly 12,500 people.^[3] The term of Parliament is three years. Suffrage is compulsory. After each election, Parliament elects a President from among its Members. The latest election was held on April 9, 2000 and the next one was scheduled for April 2003. Political parties exist only as loose alliances and Nauruan politics is somewhat fluctuating. Nauru is a member of the Commonwealth and follows the Common Law tradition. There is a Supreme Court, the Chief and only Justice of which is a barrister who otherwise lives and practices in Melbourne, Australia.^[4]

Elements of a Constitutional Stalemate

Mr. Bernard Dowiyogo had been President of Nauru several times, but after the election of 2000, Parliament elected Mr. Rene Harris, who then formed a government comprising seven Members of Parliament.

On December 31, 2002, Parliament voted down the Budget of the Harris Government. The precise combination of factors which led to this unusual situation is difficult to reconstruct. Notwithstanding the emergence of Nauru as a centre of money laundering through offshore banks the country's economy has performed rather weakly in recent times, . There were also allegations of corruption within the Harris Government. However, the most immediate catalyst seems to have been the controversy arising out of the establishment, on Nauru, by Australian authorities and in return for payment to Nauru, of detention camps housing political asylum seekers originally destined for Australia.

Thereafter, on January 8, 2003, at a time when neither President Harris nor any member of the Government was present in Parliament, one of the other MP's moved that the President and his Ministers

be removed from office. This motion was voted on and passed by 8 to 3. The Speaker immediately declared the Government defeated and removed from office. Later in the same sitting day, Mr. Dowiyogo was nominated to be President and elected without a recorded vote. The House was then adjourned.

Still on January 8, but after his divestiture from office, pursuant to the authority set out in Article 55 of the Constitution, Mr. Harris, in his capacity as President, ^[5] (5) submitted a Constitutional Reference containing six questions to the Supreme Court of Nauru. ^[6] The most important of these related to the legality of the vote dismissing the government. Specifically, it was grounded on the terms of Article 24(1) of the Constitution which states that in order for a vote of no confidence to be approved, it must be voted by at least one half of the total number of Members of Parliament. The Reference also addressed the question whether, as a result of the vote, the Speaker's ruling that the office of President was vacated, was sufficient to override the Constitution and allow the subsequent election of a new President. In essence, the Supreme Court was being asked to decide whether a parliamentary and political matter, namely the overthrow of the government by the opposition which had taken place within the House, was legal.

On January 9, the Secretary of Justice of the Harris Government applied ex parte for an interim injunction to prevent Mr. Dowiyogo from asserting that he was the lawful President of Nauru, from exercising powers that are the prerogative of the President, from appointing Members of Parliament to be Ministers, and from giving orders to the civil service and the police. That injunction was granted on the same day, to last 72 hours. Within that time, Mr. Dowiyogo applied for the injunction to be discharged. Adding to the confusion, on January 10, Mr. Dowiyogo was sworn in as President, as were the Ministers comprising his new Cabinet.

Discharge of the Injunction

The Supreme Court ruled on the matter of the injunction in an Order dated January 11. ^[7] It started by indicating that the pleadings pertained to a number of legal issues, mingled with a modicum of political invective. Given the partisan stakes of the conflict, this mixture of law and politics was to be expected. The Court's decision on the Application for Discharge was strictly based on law even though it did mention that it was cognizant of the political circumstances of the situation and indeed of the deep controversy. In respect of the injunction, the Court applied the standard criteria of balance of conveniences and seriousness of the issue. While it noted the absence of the entire Harris Government from the Chamber at the time of the January 8 proceedings, it upheld that Government's authority to seek a Constitutional Reference, given that this was filed very soon after the vote. Using its discretion with the aim of clarifying the confusion, the court also upheld the use of Article 55 of the Constitution, that which authorizes the Cabinet to seek a Constitutional Reference, as a vehicle for also seeking an interim injunction.

Mr. Dowiyogo pleaded that no injunction should have issued prior to the Opinion on the merits, but the Court held that the use of an injunction first, to maintain the status quo, was proper for the preservation of the rule of law. The Court also dismissed Mr. Dowiyogo's argument that it lacked jurisdiction to deal with the proceedings in Parliament. Contrasting Nauru, with its written Constitution, to the United Kingdom, the Supreme Court reaffirmed that it had authority to determine any question arising under, or affecting, the Constitution. However, the Court refused to give an opinion on Mr. Dowiyogo's political position that Mr. Harris had lost the confidence of Parliament.

In respect of the state of confusion in Nauruan politics, the Court indicated that its constitutional duty to receive the Reference did not constitute interference with the practices and procedures of Parliament. Given the state of confusion among civil servants as to adherence between two rival political forces, the Court believed it had been justified in issuing the injunction. The function of courts in clarifying the confusion which arises out of the thrust and parry of democratic politics is patent. The Court affirmed that