

# **Seychelles National Party v Michel**

**(2010) SLR 216**

Frank ALLY for the appellant  
Ronny GOVINDEN for the respondent

**Judgment delivered on 14 August 2010**

**Before MacGregor P, Hodoul, Domah JJ**

The appellant is a political party registered under the Registration of Political Parties (Registration and Regulations) Act. It complained to the Constitutional Court in a Petition (CC No 1/2007), that an amendment to the broadcasting legislation, namely, the Broadcasting and Telecommunications (Amendment) Act 2006, passed by the National Assembly and promulgated by the first respondent, has contravened and is likely to contravene its right to freedom of expression entrenched in article 22. The petition is supported by an affidavit of Roger Mancienne, Secretary General of the appellant who prayed the Constitutional Court for a declaration that the amendment, principally section 3(3)(c) of the Act, is null and void. The Court dismissed the petition with costs. Hence, this present appeal before us. The Attorney-General has been made a respondent to the petition pursuant to the Constitutional Court Rule (3) (2).

We propose to deal with the issues raised in this appeal in the following manner. In Part I, we shall consider whether the Constitutional Court was correct or not in accepting the main contention of the respondent that the limitation in spectrum was a valid justification in law for the ban provided for in the amendment. In Part II, we shall consider the broader question of such an amendment in its constitutional context. In Part III, we shall decide upon the orders that need to be made in the light of our decisions in Part I and Part II, pursuant to article 46 of the Constitution.

## **PART I**

### **Article 22 of the Constitution**

From the outset, we shall endeavour, for the sake of clarity - and the Constitutional Revision Commission should take notice - to extricate the various laws relevant and material to this appeal. The Constitution of the Third Republic entered into force on 21 June 1993. In article 22, it promulgates every person's "right to freedom of expression". The article reads:

Every person has a right to freedom of expression and for the purpose of this article this right includes the freedom to hold opinions and to seek, receive and impart ideas and information without interference.

The right to freedom of expression is not an absolute right. Nonetheless, any permissible derogation is still subject to constitutional limitations. It has to be (a) as prescribed by law; (b) necessary in a democratic society and (c) fall under each of

the heads specified therein. Thus, article 22(2) reads:

The right under clause (1) may be subject to such restrictions as may be prescribed by a law and necessary in a democratic society –

- (a) in the interest of defence, public safety, public order, public morality or public health;
- (b) for protecting the reputation, rights and freedoms or private lives of persons;
- (c) for preventing the disclosure of information received in confidence;
- (d) for maintaining the authority and independence of courts or the National Assembly;
- (e) for regulating the technical administration, technical operation, or general efficiency of telephones, telegraphy, posts, wireless broadcasting, television, or other means of communication or regulating public exhibitions or public entertainment; or
- (f) for the imposition of restrictions upon public officers.

### **The Impugned Broadcasting and Telecommunications (Amendment) Act**

In 2006, the Assembly brought about an amendment to the Broadcasting and Telecommunication Act 2000, which in fact is an Act passed in 1991, thus preceding the Constitution, and which came into operation on 23 October 2006 to its section 3. The effect of the amendment was to make provision, inter alia, for those who were entitled to be licensed under the Act and those who were not. The amendment as a whole is not challenged in this appeal. It is only that part which provides for the exclusion of all political parties and persons affiliated to such parties.

The amending Act is transcribed in the statute book as follows:

2. The Broadcasting and Telecommunication Act, 2000 is amended in section 3 by inserting the following subsections after subsection (2)

(3) Subject to section (4), a licence referred to in subsection (1) to provide a broadcasting service shall only be granted to a body corporate incorporated by or under an Act of Seychelles and shall not be granted to an applicant if the applicant-

- (a) already holds a licence or directly or indirectly controls or is controlled by a body corporate which already holds a licence;

- (b) is a religious organization or a body corporate which is affiliated to a religious organization,
  - (c) is a Political Party or a body corporate which is affiliated to a Political Party (emphasis is ours);
  - (d) has been adjudged bankrupt or declared insolvent or has been convicted of sedition or any offence involving fraud or dishonesty.
- (4) Subsection (3) shall not apply to any person holding a licence at the time of coming into operation of that subsection as regards the continuation of operations under the licence or the renewal of the licence.

Accordingly, we are principally concerned in this case with section 3(3)(c) which prohibits the licensing authority to grant a broadcasting licence to a political party or a body corporate which is affiliated to a political party. In the judgment of the Constitutional Court delivered by the then Chief Justice, with whom Karunakaran and Renaud JJ agreed, the amendment fell within the permissible derogations. This appeal rehashes the same questions which had been raised below. But the matter in our view goes well beyond as we shall indicate in due course.

### **The Broadcasting and Telecommunications Act**

Before we move on to substantive matters, we might as well iron out a couple of creases having to do with citations. First, the Broadcasting and Telecommunications Act (the Act) (Revised Edition 1991) was enacted in 1991 and in force before the Constitution was promulgated so that if the record refers to the year 2000, that cannot be taken to be the year of the enactment. The Judges of the Constitutional Court should have been duly enlightened on that aspect.

Second, in the 1991 edition of the Laws of Seychelles, there is an explanatory footnote which is intended to be for avoidance of doubt. We did not have much help with that inasmuch as whereas there is only one Broadcasting and Telecommunication Act, the footnote refers to two pieces of legislation: (i) a Broadcasting Act; and (ii) a Telecommunications Act. Be that as it may, of greater significance is the provision that:

All statutory instruments made and all licences issued under the Act (Cap 199 (sic), 1971 Ed) and in force on commencement of this Act are continued in force unless revoked or amended under this Act.

### **The argument of the respondents**

Now for the main thrust of the argument of the respondents. It rests principally on the content of the affidavit of Dr Georges Ah-Thew (deponent). His stand justifying the prohibition and/or restriction of the appellant's right of expression resides in the scientific and technical calculations. According to him, the prohibition and restriction essentially result from "scarcity of spectrum". In para 8 of his affidavit, he states –

*in the Seychelles due to technical limitations i.e. available frequencies, only a very limited number of broadcasters can co-exist in the field of FM broadcasting services, the one sought for by the Petitioner (which the latter contests). [emphasis is ours]*

Having accepted that the appellant has a prima facie case, as required under article 46(8) of the Constitution, the trial Judges in their judgment, at page 186, state -

... The State seeks to discharge the burden of disproving that there has been any contravention as alleged, on the basis of technical reasons given in an affidavit of Dr Georges Ah-Thew, ... The averments in that affidavit have not been contradicted by the petitioner by any counter affidavit of an expert -

The deponent admits that the reason for enacting the amendment was to exclude certain categories of persons, including political parties, from obtaining a broadcasting services licence. As may be noted, the amendment came 14 years after the Constitution came into force. The question that begs an answer is what prompted such a change in the law? The argument of the appellant is that it is a political party and a legal entity duly registered for its function in the democratic process so that like every person whose right is guaranteed under the Constitution, it has a

right of access to all information relating to that person and held by a public authority which is performing a governmental function and the right to have information rectified or otherwise amended, if inaccurate.

The Attorney-General quotes from the deponent's affidavit as follows:

I state that Seychelles can only have six FM broadcasting stations (sic) according to a scheme last approved by the International Telecommunications Union in 1996, some 14 years ago. Our kind remark on this matter is that whereas the ITU is involved in the elaboration of the scheme, it may not interfere with the allocation of the channels, a matter in respect of which the Republic exercises its sovereignty, without interference from any source, so that may not be regarded as a legal impediment.

Other than the technical impediment advanced, we do not find any serious legal objection advanced by the deponent in his affidavit. We have tried to find the reasons for the amendment and gone to the "Objects and Reasons" stated in the Bill. We have been none the wiser:

**BROADCASTING AND TELECOMMUNICATION (AMENDMENT) BILL,  
2006. (Bill No.9 of 2006)**

**OBJECTS AND REASONS**

This Bill seeks to amend the Broadcasting and Telecommunication Acts, 2000 to provide that a licence to provide a broadcasting service may only be granted to a company incorporated in Seychelles and to exclude

certain types of bodies from being authorized to provide broadcasting services.

The amendment will not affect existing licence-holders.

We take the view that had the Bill been more explicit about the bodies and the reasons rather than silent about it, the mischief that followed the amendment may have been well avoided. So much for the price the nation has had to pay for the lack of transparency in the matter. There is a good reason why a Bill contains an Explanatory Memorandum. Vaguely stated objects and reasons arouse suspicion and spoil an otherwise good case for the legislator.

Be that as it may, we shall now address the main ground of the prohibition as advanced by the deponent on behalf of the respondents. According to him, the three unallocated stations (see para [7] supra), should not be allocated at all "for fear of discriminating against future and eventual applicants", a reasoning which we do not comprehend. Even the Attorney-General seems perplexed:

I can't understand when (sic) Dr. Ah-Thew said ... I state that providing an FM broadcasting service licence to the petitioner would have led to discrimination if other political parties were to ask for a similar broadcasting service licence and had to be refused due to technical limitation.

We bear in mind that in the estimation of the Attorney- General, "...the main difficulty in this country is the limited number of frequencies" (page 7, para [14]).

### **The "scarcity of spectrum" argument**

We must now decide whether scarcity of spectrum is a valid argument in favour of the respondents. In its second ground of appeal, the appellant submits and argues that:

*... In any event the argument regarding the scarcity of airwaves as relied upon by the Constitutional Court is not a reasonable ground to justify the contravention of the Appellant's right to freedom of expression.[emphasis is ours].*

That, in our view, is correct and supported by technical, doctrinal and jurisprudential development in this area. We quote hereunder from the case of *Informationsverein Lentia et Autres c. Autriche* (Arret de 24 nov 1993, Serie A no 276) which had to consider the issue under article 10 of the European Convention on Human Rights, identical with article 22 of our Constitution:

1116. ... .. La Cour rappelle qu'elle a fréquemment insisté sur le rôle fondamental de la liberté d'expression dans une société démocratique, notamment quand, à travers la presse écrite, elle sert à communiquer des informations et des idées d'intérêt général, auxquelles le public peut d'ailleurs prétendre. Pareille entreprise ne saurait réussir si elle, ne se fonde sur le pluralisme, dont l'Etat est l'ultime garant . ... .. Grace aux progrès techniques des dernières

décennies, lesdites restrictions ne peuvent plus aujourd'hui se fonder sur des considérations liées au nombre des fréquences et des canaux disponibles. Ensuite, elles ont perdu en l'espèce beaucoup de leurs raisons d'être avec la multiplication des émissions étrangères destinées à un public autrichien et à la décision de la Cour administrative de reconnaître la légalité de leur retransmission par le câble. Enfin et surtout, on ne saurait alléguer l'absence de solutions équivalentes moins contraignantes; à titre d'exemple, il n'est que de citer la pratique de certains pays consistant soit à assortir les licences de cahiers des charges au contenu modulable, soit à prévoir des formes de participation privée à l'activité de l'institut national. Le gouvernement avançait aussi un argument économique: le marché autrichien ne serait pas de taille à supporter un nombre de stations privées suffisant pour éviter les concentrations et la constitution de «monopoles privés». Selon la Cour, ce raisonnement se trouve démenti par l'expérience de plusieurs États européens, de dimension comparable à celle de l'Autriche, où la coexistence de stations publiques et privées, organisés selon des modalités variables et assortie de mesures faisant échec à des positions monopolistiques privées, rend vaines les craintes exprimées. Bref, la Cour considère les ingérences litigieuses comme disproportionnées au but poursuivi et partant, non nécessaires dans une société démocratique. L'article 10 (art. 10) a donc été violé (unanimité).

See Vincent Berger, Chef de Division au Greffe de la Cour Européenne de *Droits de l'homme* (5th ed, 1996) p. 417, para. 1116.

More need not be said. We cannot ignore a judgment of the European Court of Justice on Human Rights. It concerns the inadmissibility of scarcity of spectrum as justification for restricting and/or prohibiting the right of expression. In their reference to comparable jurisdictions, the judges overlooked the latest and the salient features in this dynamic area where there have been so many technological, legal and judicial developments to which we shall come to in more detail in Part II.

Indeed, by reason of developments and progress in technology, namely, the possibility of switching from analogue to digital, developments through SAFE and satellite, the possibility of sharing the allocation of spectrum, its scarcity cannot or can no longer be invoked to justify an outright and blanket ban to restrict or deny a person's right of expression. The reasons, if any, have to exist elsewhere.

Our view, therefore, is that the spectrum argument does not hold. The Constitutional Court erred in accepting it as the argument which could have had the effect of determining the number of issues provoked in the application.

## **PART II**

Having decided the invalidity of the spectrum argument, we move on to consider whether the ban could otherwise be upheld in law.

It is the argument of the applicant that the ban against political parties owning a broadcasting station is an unjustifiable interference with the freedom of expression guaranteed under article 22 of the Constitution of the Republic of Seychelles.

The real issue in this appeal is the larger and crucial question whether the ban imposed against political parties is a restriction to freedom of expression which is "necessary in a democratic society."

With respect to caselaw in this area, the Constitutional Court relied on the same cases as it did for the spectrum argument with which it considered the interpretation of article 22 to be inextricably linked. The judges, for that reason, referred to the cases at their disposal interchangeably addressing the various issues involved: *AKGopalan v State of Madras* (1950) AIR SC 27 (restriction does not include prohibition); *Narendra Kumar v Union* (1960) AIR (SC) 430 and *Coovejee Bharucha v Excise Commissioner* (1954) AIR (SC) 220; *Supreme Court Reference No 2 of 1982* (1982) Papua New Guinea Reports 214 (restriction includes prohibition); *Indian Express Newspapers (Bombay) Private Ltd v Union of India* (1986) AIR (SC) 515 (content of freedom of expression); *Courtenay and Hoare v Belize Broadcasting Authority* 30 July 1985 Unreported (freedom to use television medium for expression); *Rambachan v Trinidad and Tobago Television Company Ltd* 17 July 1985 Unreported (use of television for political addresses); *Red Lion Broadcasting Co v FCC* (supra); *Cropper: Radio AG v Switzerland* (1990) 12 EHRR 321 (free and fair use of broadcasting media); *Ramesh Thapperv State of Madras* (1950) AIR (SC) 27 (meaning of public order); *Re New Brunswick Broadcasting Company Ltd and Canadian Radio-Television v Telecommunication Commission* (1984) 13 DLR (4<sup>th</sup>) 77 (use of public property for freedom of expression); *Secretary, Ministry of Information and Broadcasting v Cricket Association of Bengal* (1954) AIR (SC) 1236 (interests involved in private broadcasting).

We have noted that the citations of counsel for the appellant stop at 1998, when most of the relevant decisions on the matter are post-2000. If we agreed to follow the decisions counsel for the appellant cited, we would be arresting and freezing development of Seychelles law in a time tunnel, as at 1998 at that – a mischief we seek to spare all concerned in the name of the progress of the nation.

We have to state that a lot has happened in this area in comparative jurisprudence and the case which should stand out is *Regina (Animal Defenders International) v Secretary of State for Culture, Media and Sport* [2008] UKHL 15; [2008] 1 AC 1312, hereinafter referred to as *ADI*. This case is not one dealing with an outright blanket ban against political parties owning or operating from a broadcasting station but the lesser question of parties expressing political views through the media by advertisement or PPA (political party advertising). From the moment we accept that PPA is a lesser mischief than PPB (political party broadcasting station), the relevance of the decision strikes us. The principles applicable to the lesser would apply to the greater as well inasmuch as the mischief found in political advertising is many times more in a political party owning or operating from broadcasting media.

The Attorney-General did make reference to this case but, it would appear that the judges decided to clinch the case on the spectrum issue only.

The claimant in *ADI* was a non-profit-making company whose aims included the suppression, by lawful means, of all forms of cruelty to animals, the alleviation of suffering and the conservation and protection of animals and their environment. In 2005, it launched a campaign entitled: "My Mate's a Primate", with the object of directing public opinion towards the use of primates by humans and the threat presented by such use to their survival. The campaign was to include newspaper advertising, direct mailshots and a television advertisement. However, the Broadcast Advertising Clearance Centre, an informal body funded by commercial broadcasters, did not give clearance on the ground that it was in breach of the prohibition on political advertising in section 321(2) of the Communications Act 2003. It took the view that the claimant was a body with mainly political objects as defined in the Act.

The claimant, then, sought by way of judicial review a declaration that section 321(2) of the Communications Act 2003 was incompatible with article 10 of the Convention for the Protection of Human Rights and Fundamental Freedoms as it imposed an unjustified restraint on the right to freedom of political expression. The High Court declined to do so. The claimant appealed to the Court of Appeal which upheld the decision. The matter came up to the House of Lords.

The House of Lords, dismissing the appeal, held that -

- (a) protection of the right to freedom of expression included a right to be protected against the potential mischief of partial political advertising which Parliament had been entitled to regard as a real danger,
- (b) the prohibition was justified on account of the pressing social need against political advertising on television and radio by reason of the immediacy and impact of such advertising.

This case makes extensive reference to the history of political broadcasts with the relevant legislation and what may be considered to be the relevant live issues in present times. Fifty-four cases have been referred to or cited in argument. They may be traced to the years 1969 to 2007. Each case makes interesting reading in its own right. We would leave it to those concerned to read them at leisure.

We consider that our purpose would be better served if we distilled the propositions of law emerging from the cases by making reference to the cases which are from Commonwealth and European jurisprudence.

First, freedom of speech holds a privileged status in the hierarchy of human rights norms: see *R v Secretary of State for Home Department, ex p Simms*[2000] 2 AC 115 at 126.

Second, account taken of this privileged status, political expression enjoys a high-level protection as a distinct and special category: see *Lingers v Austria* (1986) 8



EHRR 407, para 42; *Haiderv Austria* (1995) 83-A DR 66, para 3b; *Malisiewicz-Gasiorv Poland* (2006) 45 EHRR 563, para 64; *Steel and Morris v United Kingdom* (2005) 41 EHRR 403, para 88 and *Lindon, Otchakovsky and July v France* (2007) 46 EHRR 761.

Third, it follows from the above that, it would be a violation of the Constitution if there is any interference with the above rights unless that 'identifiable right' is prescribed by law and the aim or aims of such interference is "necessary in a democratic society:" see *Lingens v Austria*(1986) 8 EHRR 407, para 35; *Stambuckv Germany* (2002) 37 EHRR 845, paras 38-39, 50 and *Malisiewicz-Gasior v Poland* (2006) 45 EHRR 563, para 58.

Fourth, what is necessary in a democratic society implies the existence of a "pressing social need": *Lingens v Austria*(1986) 8 EHRR 407, para 39; *Steel and Morris v United Kingdom*(2005) 41 EHRR 403, paras 87 and 88; *Malisiewicz-Gasiorv Poland*(2006) 45 EHRR 563, para 68; *Bowman v United Kingdom*(1998) 26 EHRR 1; *VgTVeringegenTierfabriken v Switzerland* (2001) 34 EHRR 159.

Fifth, national jurisdictions have a margin of appreciation in assessing this pressing social need but this is narrowly interpreted to allow political speech an important freedom of expression: *Murphy v Ireland* (2003) 38 EHRR 212, para 67; *Jersild v Denmark* (1994) 19 EHRR 1, para 37, and *Bowman v United Kingdom*(1998) 26 EHRR 1.

Sixth, as regards political expression of a political nature or undertone, law does not admit of freedom of political speech in the absolute: see *Castells v Spain* (1992) 14 EHRR 445, para 46. The scope is wide and the limits narrow. As such, one corollary of the narrowness of appreciation afforded to the national jurisdiction is that it is subjected to "careful scrutiny" or "rigorous examination" by the courts. This is tested by practical and factual realities in the state concerned.

Seventh, a wider margin of appreciation in this area is afforded to religious and commercial interventions as opposed to political interventions: *Murphy v Ireland*(2003) 38 EHRR 212, and *VgTVereingegenTierfabriken v Switzerland* (2001) 34 EHRR 159.

Eighth, with respect to the meaning of "expression" in the term "freedom of expression", that connotes ideas, information but also the form of the expression. It is no justification that the claimant has other modes of communication: *Groppera Radio AG v Switzerland* (1990) 12 EHRR 321, para 55, and *VgTVereingegenTierfabriken v Switzerland* (2001) 34 EHRR 159, para 77.

Ninth, article 10 – and by extension article 22 of our Constitution - does not guarantee the right of access to broadcast media: see *X v United Kingdom* 14 Yearbook of the European Convention on Human Rights 539, 544.

Tenth, what article 22 guarantees is a right to expression in the available media neither the right to advertise political views nor the right to own or operate a media platform: *Regina (Animal Defenders International) v Secretary of State for Culture, Media and Sport*[2008] UKHL 15; [2008] 1 AC 1312.

Eleventh, a blanket restriction on certain types of expression in the broadcast media is permissible, such as political advertising (*VgTVereingegenTierfabriken v Switzerland* (2001) 34 EHRR 159) or religious advertising: *Murphy v Ireland* (2003) 38 EHRR 212.

In sum, Strasbourg jurisprudence requires that any interference with article 10 must be "convincingly established by a compelling countervailing consideration, and the means employed must be proportionate to the end sought to be achieved." See *Reynolds v Times Newspapers Ltd* [2001] 2 AC 127,200. This jurisprudence reflects the position under article 19 of the International Covenant on Civil and Political Rights 1976. We need to say this on account of the fact that there exists now an international body to assist all those concerned with modern issues arising on the matter of free speech. The organization itself goes by the appellation of article 19 and works for setting the international standards required in this area: see article 19, International Standard Series, March 2002.

The issue of a political party owning a broadcasting station to air its political views is not strictly speaking, in our view, an issue limited to article 22 which guarantees freedom of expression to the citizen. It is a larger issue of the manner in which we wish to construct and survive in a democracy meant to recognize "the inherent dignity and equal and inalienable rights of all members of the human family as the foundation for freedom, justice, welfare, fraternity, peace and unity". See the Preamble of the Constitution.

Baroness Hale of Richmond at para 49 of the *ADI* case has put the matter directly:

So this case is not just about permissible restrictions on freedom of expression. It is about striking the right balance between the two most important components of a democracy: freedom of expression and voter equality.

None disputes the rights of political parties, either during election time or before or after, to air their views, to lobby, to take positions in national issues and disseminate them from public or private platforms. But their right to air and disseminate their party political ideas, opinions and views through their own privately-run broadcast station amounts to a negation of the democratic values enshrined in our Constitution. To the same extent, it amounts to a distortion of the free and fair electoral process by creating class divisions in the political rights of citizens. Such a system favours the advantaged against the less advantaged and the rich at the expense of the less rich in a system whose value is based on one person one vote.

At para 52, we read from her part of the judgment:

Important though political speech is the political rights of others are equally important in a democracy. The issue is whether the ban, as it applies to these facts, was proportionate to the legitimate aim of protecting the democratic rights of others.

The citation continues on the risk of creating two classes of citizens:

Nor in practice can we distinguish between small organizations which have to fight for every penny and rich ones with access to massive sums. Capping or rationing will not work, for the reasons Lord Bingham gives.

Lord Bingham of Comhill, at para 26, put it so bluntly: the problem was not to be resolved by interpreting statutes but by making a deliberate choice of our system of democracy:

The problem here is not one which can be resolved by exercise of the interpretative power given to the courts by section 3 of the 1998 Act. Yet the importance of this case to the functioning of our democracy is in my view such as to call for the rehearsal of some very familiar but fundamental principles.

Analogy between the printed press and the radio and television media in this area is treacherous misapprehension. The printed press impacts on the intellect of the citizen to make a choice. Radio and television impacts on the senses and in such an indiscriminate manner as to take over their lives and their thinking processes. At para 30 of Lord Bingham's judgment, we read-

The question necessarily arises why there is a pressing social need for a blanket prohibition of political advertising on television and radio when no such prohibition applies to the press, the cinema and all other media of communication. The answer is found in the greater immediacy and impact of television and radio advertising.

In the light of the above, we may only come to the conclusion that a ban on political parties owning and operating from a broadcasting media is an interference which is necessary in a democratic society and is permissible. To that extent and to that extent only the impugned amendment is not a violation of article 22. As the *ADI* decision clearly states at para 52:

While the right to freedom of expression is not absolute, and no one has a right of access to the airwaves.

### **PART III**

In Part I, we decided that the spectrum argument could not be a valid reason for challenging the constitutionality of the impugned provision in this appeal. In Part II, we have decided that the challenged amendment to the law is not a violation of article 22 of our Constitution. In the light of the above, one may take the view that this appeal should rest there and it is to be dismissed. That is not so.

Issues before a Constitutional Court transcend the pure question of interpretation of statutes. In this case, it involved the larger question of article 1 of the Constitution of the Republic of Seychelles. Accordingly, the nature of the order we make should be compatible with article 46(5)(c). This provision empowers the Court, in a Constitutional Court application, to –

make such declaration or order, issue such writ and give such directions as it may consider appropriate for the purpose of enforcing or securing the enforcement of the Charter and disposing of all the issues relating to the application.

One issue which obviously arose in the application below is the State's obligation in relation to article 168. This was left untouched by the Constitutional Court.

It is fairly obvious that with an outright blanket prohibition against all political parties owning or operating from its own media, there needed to be a balance created to enhance the citizens' exercise of free speech. That could only be achieved with the setting up of an independent regulatory body which will not only ensure but secure the "fundamental rationale of the democratic process" of "competing views, opinions and policies" so that they may be "debated and exposed to public scrutiny" and further that "given time the public will be able to make a sound choice when, in the democratic process, it has the right to choose." See Article 19, International Standard Series, March 2002.

As the International Standards recommend:

it is highly desirable that the playing field of debate should be so far as practicable level.

This application has highlighted an important lacuna in our media law. The power to ban is not a power to oust but an obligation to accommodate. Any power in a democratic state has to be exercised judiciously and not arbitrarily. The people in the Third Republic stated in article 1 that "Seychelles is a sovereign democratic Republic." One major incident of that is that every power given to everybody or institution should be exercised democratically and not capriciously. Capricious, for those not initiated in the law, in legal parlance is a legal term used in contradiction to judiciousness.

It is our view that the ban may be said to be an exercise in capriciousness unless it is effected in accordance with the constitutional obligation undertaken by the State to set up an independent media to regulate in this area where the issues are legion and specialized attention is needed with the assistance of other jurisdictions grappling with them.

### **The independent media – the constitutional context**

In article 168 of the Constitution, the people of Seychelles enjoined the State to set up such a broadcasting media herein referred to as the "independent media". The State, including the Attorney-General, has failed to comply with this obligation:

168. (1) The State shall ensure that all broadcasting media which it owns or controls or which receive a contribution from the public fund are so constituted and managed that they may operate independently of the State and of the political or other influence of other bodies, persons or political parties.

(2) For the purposes of clause (1), the broadcasting media referred to in that clause shall, subject to this Constitution and any other law, afford opportunities and facilities for the presentation of divergent views.

In our opinion, the creation of an independent authority to ensure that the citizen is kept adequately informed of important national issues touching the citizen is an obligation flowing from article 168 of the Constitution. In our view, there occurred a lop-sided development in the law when the State decided to bring about the 2006 amendment without due regard to its legal obligation to set up the independent body which should have regulated broadcasting in all its aspects. The only manner in which the amendment may be given effect to is by entrusting the responsibility to that independent body.

As may be seen, there was a positive constitutional obligation imposed by the people of Seychelles to do so. Those who took office to administer the public affairs had been bound when they took office on the day of the swearing in. We also note that there has been a whole period of some seventeen years that the Constitution has been in force. The benefits would be generalized by the creation just as the prejudice has been generalized by the omission.

It is worthy of note that Seychelles Broadcasting Corporation Act, Chapter 211A, enacted on 1 May 1992, before the Constitution came into force provides as follows:

The State shall, within twelve months of the coming into force of this Constitution, bring the Seychelles Broadcasting Corporation Act; 1992 into conformity with article 168. (Constitution, Paragraph 5, Schedule 7, Part 1).

All these omissions have caused the lop-sided development where the 2006 Amendment sits uncomfortably.

The right of the freedom of expression of the citizen includes the right of the citizen to be informed and the right to be informed is a right to be properly informed.

We are comforted in our view when we also read the following from the submission of the Attorney-General to the Court:

What my learned friend (FALLY, Esq) should be agitating for is an independent broadcasting station which should broadcast political views but not filing (sic) a broadcasting station for themselves that is all / have been saying, had no complaints my lords (sic). I am one who believes very strongly, I thought even he would disagree with him complete (sic), I thought he would disagree with that (sic) you say. But I would defend to the date (sic death?) the right to say it. So I am much up hold (sic) the view but the fact remains.

I have no complaint and that is why I keep on saying my lords that the struggle of my learned friend should be in fact not to have their own broadcasting station but an independent authority or SBC to air the

views of all political parties and I do not think anyone could deny them of their right(pages 134-135, record).

The State must have known, at the time of the 2006 Amendment, what the Constitution required of it, especially in the light of the statement of the Attorney-General. The manner in which other democratic institutions have proceeded to effect the blanket ban through a regulatory body which is the way to do it: see the Independent Broadcasting Act of Mauritius and the UK legislation on the matter. An independent media acts as a watch-dog to ensure that information in the public domain is diverse, accurate and impartial.

Before concluding, we thought of correcting the record on some of the comments that have been made to the effect that granting a political party a licence to establish and set up a broadcasting service in Seychelles is bound to create ill-will between the different groups of people, outrage public feeling and lead to presentation of programmes which are not accurate or impartial and does not serve the best interest(page 91, record).

We also read in the affidavit of the deponent problems that had arisen in Rwanda and in Germany during the time of Hitler and several other countries where political parties had broadcasting stations and the position in other countries referred to in paragraph 11 above(para 14, C14 record).

He considers that granting a radio station to the appellant would spark confrontation, hatred and killings. They may be dismissed as personal value judgments especially when we know that Seychelles is not a society divided in two camps as in Rwanda and that the anti-culture of Nazi Germany was never the culture of Seychelles.

Further, it appears that the deponent considers that a radio station under the control of the appellant will become an instrument to instigate hatred and massacres similar to the role played by "*Radio des Mille Colines*" in Rwanda! We presume that such remarks have been made in haste and are the product of imagination. The objective fact is that the history of this country has shown no trace of genocide, no use of machetes and no admiration for Hitler and his policies. What is also a fact is that towards the end of World War II, our people burnt effigies of the Kaiser in public and sang "anti-Kaiser" songs which then became very popular, in private and public places. Hence, when our Constitution speaks of an example of a "harmonious multi-racial society," of "national stability and political maturity despite the pressures of a sadly divided world," the words are warranted by our colonial and past history as well as the way we have chosen to "build a just, fraternal and humane society."

Indeed, the Railey Report (page 164, record), of which we take judicial notice, acknowledged that the Seychelles showed remarkable political maturity in respect of the events investigated by Judge Railey. In the face of excessive use of force by the police -which was admitted - the demonstrators' reply was to have recourse to legal proceedings, putting their trust in the courts of the country.

Some of us may take the view that the scary remarks made are unjustified. And others that nothing may be taken for granted in this day and age. Whatever it be, the construction of democracy today requires perpetual vigilance. But democracy

moves in the right direction when it affords the people a platform that is impartial and independent for the administration and management of media law to meet the complex challenges of modern times.

On this matter, we cite Lord Bingham in the *ADI* case on the State's duty to create a level playing field:

The fundamental rationale of the democratic process is that if competing views, opinions and policies are publicly debated and exposed to public scrutiny the good will over time drive out the bad and the true will prevail over the false. It must be assumed that, given time the public will make a sound choice when, in the course of the democratic process, it has the right to choose. But it is highly desirable that the playing field of debate should be so far as practicable level. This is achieved where, in public discussion, differing views are expressed, contradicted, answered and debated. It is the duty of broadcasters to achieve this object in an impartial way by presenting balanced programmes in which all lawful views may be ventilated. It is not achieved if political parties can, in proportion to their resources, buy unlimited opportunities to advertise in the most effective media, so that elections become little more than an auction. Nor is it achieved if well-endowed interests which are not political parties are able to use the power of the purse to give enhanced prominence to views which may be true or false, attractive to progressive minds or unattractive, beneficial or injurious. The risk is that objects which are essentially political may come to be accepted by the public not because they are shown in public debate to be right but because, by dint of constant repetition, the public has been conditioned to accept them. The rights of others which a restriction on the exercise of the right to free expression may properly be designed to protect must, in my judgment, include a right to be protected against the potential mischief of partial political advertising.

The right is the right of the people of Seychelles and the requirement is the requirement of the State to give that explicit guarantee of accuracy, integrity, independence and impartiality of information. As has been stated in the paper by Article 19 ([article19.org](http://article19.org)):

Freedom of information is the free flow of information and ideas which is diverse, accurate and impartial.

It is clear from the above that there is State responsibility involved. It is in the establishment of a regulatory body, a watch-dog organization which will ensure the accountability of all bodies involved in the broadcasting media, not only the private providers but also those that operate from public funds. Political neutrality in broadcasting cannot be attained where the government is itself judge and party to whether it is fulfilling the expectations of the public in discharging its right to information subject to the rights of others and the public interest.

If institutional autonomy and independence in broadcasting is required of private

providers the same rule should apply to public providers. The paper by Article 19 (article19.org) states:

All too frequently, the public broadcaster operates largely as a mouthpiece of government rather than serving the public interest. In many countries, broadcasting was until recently a State monopoly, a situation which pertains in some States.

For that reason, article 19 sets down a number of principles designed:

- (a) to promote and protect independent broadcasting and yet ensure that broadcasting serves the interests of the public;
- (b) to regulate in the public interest and yet prevent that regulation from becoming a means of government control;
- (c) to prevent commercial interests from becoming excessively dominant; and
- (d) to ensure that broadcasting serves the interest of the public as a whole.

It is our view that because of the complexity of these issues, they may only have been addressed by a body specialized and knowledgeable in the area. By avoiding to do so and inserting a blanket provision of ban against political and religious parties, the State in this instance may have been rightly inspired but needed to implement within the framework of article 168. The right way should have been by placing first things first by setting up the independent broadcasting watch-dog first as the Constitution had set down some 16 years ago under which the ban would have applied.

In the light of the above, we allow the appeal in part.

We allow the appeal on the ground that the spectrum argument is not one that holds valid and to the extent that the Constitutional Court relied on it, it does not represent the law as stated in Part I.

However, we confirm the order reached by the Constitutional Court that the ban provided for in the 2006 Amendment does not amount to an impermissible interference with the freedom of the applicant guaranteed under the Constitution, on other grounds than those invoked in Part I.

We, further, hold that the application of the 2006 Amendment without giving effect to the constitutional obligation contained in article 168 would not amount to a judicious exercise of the legal power existing in the 2006 Amendment.

In addition, pursuant to our powers under article 46(5)(c) and (e) of the Constitution, we direct respondent no 3, on a day to be fixed by this Court to report what progress has been made by the relevant authorities to discharge their obligation under article 168 of the Constitution.



In the light of the fact that the appellant has partly succeeded in this case of constitutional importance, we make no order as to costs.

**Record: Court of Appeal (Civil No 4 of 2009)**