

IN THE CONSTITUTIONAL COURT OF SEYCHELLES

**[Corum: D. KARUNAKARAN –ACTING CHIEF JUSTICE (Presiding),
B. RENAUD – JUDGE, G. DODIN – JUDGE , C. McKEE - JUDGE]**

CP No. 02/2014 & CP No. 03/2014

[2015] SCCC 2

THE SEYCHELLES NATIONAL PARTY

1st Petitioner

(herein rep. by its President, Mr. Wavel Ramkalawan,
Of Arpent Vert, Mont Fleuri, Mahe)

and

THE SESELWA UNITED PARTY

2nd Petitioner

(herein rep. by its President Mr Ralph Volcere,
Of Premier Building, Victoria, Mahe)

and

CITIZENS DEMOCRACY WATCH

3rd Petitioner

(herein rep. by its Vice-Chairman, Mr. Gelage Hoareau
Of St. Anne and Spa, St Anne Island)

versus

THE GOVERNMENT OF SEYCHELLES

1st Respondent

(herein rep. by the Attorney General, Mr. Ronny Govinden)

Of National House, Victoria, Mahe)

and

THE ATTORNEY GENERAL

2nd Respondent

Mr. Ronny Govinden

Of National House, Victoria, Mahe)

CC No. 02/2014

And in the matter of:

VIRAL DHANJEE

Petitioner

versus

MR JAMES ALIX MICHEL

1st Respondent

President of the Republic of Seychelles

State House, Victoria, Mahe

and

THE ATTORNEY GENERAL

2nd Respondent

(Rep. the Government of Seychelles)

National House, Mt Fleuri, Mahe

CC No. 03.2014

Heard

Counsel:

CC No. 02/2014 Mr. A Derjacques for Petitioners

Mr. R. Govinden assisted by Mr. Anand for Respondents

CC No. 03/2014 Mrs. A. Amesbury for Petitioner

Mr. R. Govinden assisted by Mr. Anand for Respondents

Delivered: 7th July 2015

JUDGMENT

Judgment of the Court

Introduction and background

- [1] This judgment concerns the constitutionality of certain provisions of the Public Order Act (Act 22 of 2013) [hereinafter referred to as ‘the Act’]. Two cases of the same nature joining certain similar issues were brought before the Court and, by agreement of Counsel for all the parties involved, were heard together and the Court has drawn up only one judgment addressing the issues raised in both applications.
- [2] This is the unanimous decision of the Court.

SNP and others v Government and another CC02/2014

- [3] The first case **CC 02/2014** was entered on 14th March, 2014 by the 1st Petitioner, the Seychelles National Party represented by its President, Mr. Wavel Ramkalawan; the 2nd Petitioner, the Seselwa United Party represented by its President Mr. Ralph Volcere, and by the 3rd Petitioner, Citizens Democracy Watch represented by Mr. Gelage Hoareau. The Petitioners in this case are hereinafter collectively referred to as the “First Petitioners”. The First Petitioners brought the petition against the 1st Respondent, the Government of Seychelles represented by the Attorney-General; the 2nd Respondent the Attorney-General; the 3rd Respondent the Electoral Commission represented by its Chairman Mr. Hendricks Gappy and the 4th Respondent the Commissioner of Police represented by Mr. Ernest Quatre. The 3rd and 4th Respondents were eventually excluded following amendment made on 24th November, 2014 and the case proceeded against the 1st and 2nd Respondents only.
- [4] The 1st and 2nd Petitioners in this matter are both registered political parties which fielded candidates in the last Presidential Elections. The 3rd Petitioner is a non-governmental organisation registered as an Association, and is concerned and mandated by its members to promote democracy, constitutionality and good governance in the Republic of Seychelles.

[5] In arguments the First Petitioners were represented by Learned Counsel Mr. Anthony Derjacques. The two remaining Respondents were represented by the Honourable Attorney General, Mr. Ronny Govinden assisted by Mr. Anand.

Dhanjee v Michel and others CC03/2014

[6] The second case **CC 03/2014** was entered on 27th March, 2014 by the Petitioner Mr. Viral Dhanjee against the 1st Respondent Mr. James Alix Michel in his capacity as President of the Republic of Seychelles; the 2nd Respondent Mr. Patrick Herminie in his capacity as the Speaker of The National Assembly (representing the Legislature, the National Assembly); the 3rd Respondent the Attorney- General (representing the Government of Seychelles); the 4th Respondent the Attorney-General, and, the 5th Respondent the Attorney-General (as required by Court Rules). That Application was subsequently amended, resulting in the Amended Petition involving only two Respondents, namely the President of the Republic of Seychelles, and the Attorney General.

[7] The Petitioner in this second matter (hereafter referred to as “the Second Petitioner”) is a private individual, who relies on his citizenship of Seychelles to grant him *locus standi* to challenge the provisions of this Act. Moreover, he avers that he has a duty under Article 40(a) to uphold and defend the Constitution of the Republic of Seychelles (hereinafter referred to as “the Constitution”) and the law, and under Article 40(f) therein has to strive towards the fulfilment of the aspirations contained in the Preamble of this Constitution.

[8] The Second Petitioner further averred that he had, and continues to have political aspirations in terms of Article 24 of the Constitution which gives him the right to participate in government, and that the Act contravenes and is likely to contravene his rights under the Articles enumerated in paragraph 9 of his Petition, but more specifically Articles 22 and 23 of the Constitution.

[9] In Arguments, the Second Petitioner was represented by Learned Counsel Mrs. Alexia Amesbury, and the Respondents were represented by the Honourable Attorney General, Mr Ronnie Govinden assisted by Mr. Anand .

Locus standi

[10] One of the principles the Constitutional Court applied in the past on *locus standi*, is that only a person whose interest or right is directly affected by a law can challenge its constitutionality. A person cannot impeach a law because someone else is hurt. It is the fact of injury to the complainant himself, and not to others which justifies judicial interference. This has been the approach of the Constitutional Court of Seychelles in the last decade of the 20th century. This conventional approach – however suited to the social-economic-political conditions of that time – is not suited to the changing and challenging socio-economic-political necessities of the twenty-first century Seychelles. But this rule of *locus standi*, is now subject to the growth of the concept of Public Interest Litigation, which has indeed, greatly contributed to the ever-growing “constitutionalism” in the rest of the advanced democratic societies of the West and the East. “The Provisions of our Constitution are not mathematical formulas having their essence in their form; they are organic living institutions” transplanted from the best Constitutions of the world. (*Gompers v USA* 233 US 604 1914)

[11] The principle was enunciated by the Supreme Court of India as early as 1982 in *S.P. Gupta v Union of India* AIR 1982 SC 149 when Bhagwati, J. stated:

Any member of the public having sufficient interest can maintain an action for judicial redress for public injury arising from breach of public duty or from violation of some provisions of the Constitution or the law and seek enforcement of such public duty and observance of such Constitutional or legal provision.

[12] We are of the opinion that our approach in allowing the petitioners *locus standi* in this case is in keeping with modern constitutionalism in that it takes a broad approach to *locus standi*. A strict approach to the Rules of Court should not serve to stop a citizen from accessing the Constitutional Court where he has a case.

Introduction to the Public Order Act

[13] A draft of the Act in question was sent to the National Assembly for consideration on 28 November 2013, approved by the National Assembly on 6 December 2013 and assented to by the President of Seychelles on 31 December 2013. The Act consists of 39 sections of law. The main operative sections of the Act seek to grant the Commissioner

of Police and the Police Force with certain powers to control public gatherings, public meetings and public processions in order to maintain law and order across the Republic of Seychelles during non-emergency and non-war times.

[14] Almost all countries have similar laws on their statute book. However, the way that these laws look varies greatly across the jurisdictions, and the key players to whom these laws grants powers under these Acts reflect the local flavour of democracy.

[15] The notion of ‘public order’ is a relatively nebulous idea, which includes the maintenance and preservation of the normal functioning of society. In modern constitutional democracies, this also involves control of the exercise of competing rights and freedoms in order to ensure that all citizens are able to exercise the fullest range of rights and freedoms within that society without disruption from state and without disrupting others. The phrase ‘public order’ appears throughout the constitution as part of the justifiable limitations on certain rights, and there is a clear understanding in the Constitution that notion of public order is important to be protected.

[16] In many countries, draconian laws have sought to control the behaviour of the population under the guise of protecting the ‘public order’. These laws have granted very wide, unchecked powers to state authorities and historically, these authorities have been able to suppress fundamental rights and freedoms of the population or portions of the population under the guise of protecting the public order. This is particularly concerning when it is used to control free association and freedom of expression which are fundamental tenets of a democratic society. We were required, in this case, to determine the extent to which the present Public Order Act is justifiable under the Constitution. The Seychellois Constitution specifies that such laws are only permissible to the extent that they are necessary in a democratic society and this is the standard against which the provisions of the Public Order Act must stand.

Impugned Provisions

[17] The First Petitioners in the matter of 02/2014 challenged the constitutionality of sections 3(1), 3(2), 6, 8, 11(1), 12, 24 and 29 of the Act. In addition, the Second Petitioner in the matter of 03/2014 argued that the entire Act was unconstitutional due to the extent to which it contravenes the Constitution of Seychelles. In his pleadings, the

Second Petitioner specifically challenged the following provisions: Sections 3(2), 5(1) (a,b), 5(2), 6(1), 7, 8(3), 8(4), 8(5), 9, 10, 12, 13(1)(b), 15(1), 15(2), 16(1-5), 17, 18(1) and (3), 19(1)(b), 19(4-6), 20(1), 21, 22, 24, 26, 27, 29 and 33 of the Act.

Offences under the Act

[18] Many of the provisions impugned by the Second Petitioner in the matter of 03/2014 were criminal offences created as sanctions for unlawful behaviour under the Act. Having considered these offences in detail, we can see that these provisions are providing a sanction for behaviour which is made unlawful by contravening the Act. The unlawful behaviour is sometimes mentioned in other provisions of the Act, and sometimes is described in the same provisions where the sanctions appear.

[19] The Legislature has the prerogative to create sanctions to enforce its provisions. Therefore, in the present Act, we are satisfied that as long as the prohibition of the unlawful behaviour withstands the constitutional test, then what follows (the sanctions) will be constitutional. For example, where it is found to be constitutional to impose a restriction on blocking or prohibiting access to emergency vehicles and ambulances, then the sanctions imposed for failure to adhere to this standard of behaviour, will also be constitutional.

[20] We will consider the impugned offences at a later point in the judgment.

[21] There are two matters *in limine*, and it is expedient to deal with them at this juncture.

Joinder

[22] We wish to briefly discuss the matter of joinder of parties in Constitutional cases, specifically the joinder of the Attorney General who is required to be joined to proceedings under Rule 10(3) of the Constitutional Court (Application, Contravention, Enforcement or Interpretation of the Constitution) Rules SI 33 of 1994 [hereinafter referred to as “the Rules”].

[23] It occasionally happens that the same party may be joined to the proceedings in different capacities. We are of the opinion, that in such circumstances it is sufficient for the party to be named once in the heading of the proceedings. It is important that the

content of the pleadings must clearly indicate each of the capacities in which that party is cited, and in which capacity relief is sought against that party. Furthermore, where it is necessary for the Attorney General to be joined to the proceedings under the rules of court the Attorney General is to be joined as a respondent.

[24] Rule 10(3) of the Rules provides as follows:

“The Constitutional Court shall give notice of the reference to the parties to the proceedings of the court of law or tribunal in which the question arose and, where the Attorney-General is not a party, to the Attorney-General”

[25] Therefore, we are of the opinion that the Attorney General is best joined as a respondent to the proceedings, and that there is no need to join the Attorney General where the Attorney General is already a party to the proceedings.

Pleadings against the President and the Attorney General for failure of their Constitutional duties

[26] The Petitioner averred that by assenting to, and enacting this unconstitutional and undemocratic law, the Act the 1st, 2nd and 4th Respondents violated their oaths of office and oath of Allegiance which form part of the Constitution and consequently also violated the Constitution. In oral argument, Learned Counsel for the Second Petitioner abandoned this averment.

Constitutional Court approach to assessing the constitutionality of the impugned provisions

[27] The approach that this Court takes to assessing the constitutionality of the impugned provisions has its basis in the wording of the Constitution. First and foremost, Article 5 states that “the Constitution is the supreme law of Seychelles and any other law found to be inconsistent with this Constitution is, to the extent of the inconsistency, void.” There are two ways in which a challenge to the constitutionality of a provision will reach the Constitutional court, the first is under Article 46 of the Constitution which specifically addresses violations of Charter Rights, and the second is under Article 130 which addresses all violations of the Constitution which do not involve Charter rights.

[28] Under Article 46(5), upon the finding of a contravention of a provision of the Charter by any law, act or omission the Constitutional Court may –

- (a) Declare any act or omission which is the subject of the application to be a contravention of the Charter;*
- (b) Declare any law or the provision of any law which contravenes the Charter void;*
- (c) 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*
- (d) Award any damages for the purpose of compensating the person concerned for any damages suffered;*
- (e) Make such additional order under this Constitution or as may be prescribed by law.*

[29] When considering Charter rights, any limitations or restrictions which are imposed on the right need to be considered in the light of the wording of the internal limiting paragraph of the right in question which is usually found as the second clause of the right and lays out the acceptable grounds on which a right may be limited by a law. Secondly, the Court must be minded of the wording of Article 47 which states that “[w]here a right or freedom contained in this Charter is subject to any limitation or qualification, that limitation, restriction or qualification – (a) Shall have no wider effect than is strictly necessary in the circumstances; and (b) Shall not be applied for any purpose other than that for which it has been prescribed.”

[30] With regard to an allegation of a violation of a provision of the Constitution which is not a Charter right, the Court will consider the violation in the light of Article 130(4) which provides as follows:

- (4) Upon hearing an application under clause (1), the Constitutional Court may –*
 - (a) declare any act or omission which is the subject of the application to be a contravention of this Constitution;*
 - (b) declare any law or the provision of any law which contravenes this Constitution to be void;*
 - (c) grant any remedy available to the Supreme Court against any person or authority which is subject of the application or which is a party to any*

proceedings before the Constitutional Court, as the Court considers appropriate

[31] Needless to say, a law or statute which is not within the scope of legislative authority or which infringes a fundamental right enshrined in the Charter or which contravenes any other provisions of the Constitution or which exceeds the limits of reasonable restrictions permitted by the Constitution and necessary in a democratic society or which destroys the basic structure or underlying principles of the Constitution is unconstitutional and invalid. Such inconsistent or restrictive law is void to the extent of its contravention, infringement or excess.

[32] The Constitutional Court is clearly empowered to declare an entire law to be unconstitutional. In order for an entire Act to be declared unconstitutional we would need to carefully consider whether the underlying purpose of the Act was unconstitutional to such an extent that it rendered the whole Act unconstitutional, or alternatively whether each an every operative provision of the Act was failed the test for constitutionality. To declare a statute unconstitutional places an onerous burden on the courts. For a statute is enacted by an elected legislature. The courts therefore, impose on themselves a good deal of self-restraint in performing their task of judicial review of legislation. Indeed, the courts will hold a statute unconstitutional only as a last resort.

[33] In considering the Act as brought before the Court by the Petitioners, we are minded of our precious Constitutional role, to safeguard the Constitution and ensure that the laws passed by the Legislature are in conformity with its provisions and underlying tenets. We are cautious to not overstep this responsibility and need to take great care in declarations of unconstitutionality of provisions of the Constitution. We need to adopt this cautious approach particularly when asked to declare an entire Act to be unconstitutional. As will be seen in the remainder of this judgment, we are not of the opinion that the entire Act is unconstitutional and therefore are unwilling to declare the whole Act to be unconstitutional, however, in certain circumstances we are of the opinion that provisions fail the test for constitutionality, and therefore fall to be declared unconstitutional. In making such declarations, we have borne in mind the doctrine of severability when declaring provisions of this Act unconstitutional.

Consideration of the impugned provisions

[34] For the next part of this judgment we will consider each challenge to the substantive clauses of the Act. For logical ease, we have consolidated the list of challenges into one list of issues which deals with the each impugned section of the Act in ascending order.

1. The First Petitioners pleaded that **section 3 (1)** and **section 3 (2)** of the Act contravene **Article 160 (1)** and **Article 160 (2)**, of the Constitution. The Second Petitioner pleaded further that **section 3(2)** of Act gives a Minister who is a member of the Cabinet and hence the government and a politician (the Executive) together with the Commissioner of Police the power to control the exercise of the right under **Article 23**.
2. The Second Petitioner pleaded that **section 5(1)** of the Act gives the Commissioner of Police absolute discretion over the control of public gatherings, which violates **Article 23**. Furthermore, **section 5(1)(a)** violates the right to freedom of expression under **Article 22** and that **section 5(1)(b)** violates the right to assemble freely and associate with other persons guaranteed under **Article 23**.
3. Both Petitioners pleaded that **section 6 and section 8** of the Act contravene **Article 23(1) and 23(2)** of the Constitution. Furthermore, the Second Petitioner averred that **section 8(3)** also violates **Article 45**.
4. The Second Petitioner pleaded that **section 7** requires a notice of intention in order to hold a public meeting or gathering with 6 days notice, even if the meeting or gathering only consists of one person and this is in contravention of **Article 25**.
5. The Second Petitioner pleaded that **section 9(2)** of the Act allows the Commissioner of Police to suppress a fundamental right in violation of **Article 23** and **Article 45**. Second Petitioner avers further that **section 9(3)** places restrictions on the **Article 23** right which is not necessary in a democratic society.
6. Second Petitioner avers that **sections 9 and 10** place so many conditions and requirements on the **Article 23** right as to render it a nullity.
7. The First Petitioners pleaded that **section 11(1)** of the Act contravenes **Article 23(1) and 23(2)** of the Constitution.
8. With regard to **section 12**:
 - a. The Second Petitioner avers that **section 12** is a violation of **Article 66(2)** and amounts to abuse of executive authority invested in the 1st Respondent.

- b. The First Petitioners pleaded that **section 12** of the Act contravenes the constitutional principle of proper and appropriate checks and balances as against Executive power, and denies access or grossly minimises appropriate and timely access to the judiciary. Furthermore that it establishes an executive monopoly on the management and enforcement of constitutional rights in relation to the Act.
9. The Second Petitioner pleaded that the Minister’s powers under **section 13(2)(b)** of the Act violate **Article 23**, as it allows the Minister to deny the exercise of the right by an order
10. The Second Petitioner pleaded that **Section 18(1)** gives the Commissioner the power to ban freedom of expression under **Article 22** and **Article 23**.
11. The Second Petitioner pleaded that **Section 18(3)** allows the police the power to use force to curtail the exercise of a fundamental right and criminalises non-compliance
12. With regard to **section 19**:
- a. The Second Petitioner pleaded that **section 19(1)(b)** violates a person’s right under **Article 23** to assemble freely and associate with other persons, and in particular to form or belong to political parties, the organisation and promotion of political objectives, and the participation in the control or management or training of an associations members or supporters.
- b. The Second Petitioner averred that **section 19(4)** allows the 4th Respondent to wind up an association in violation of **Article 23**.
- c. The Second Petitioner pleaded that **section 19(5)** violates **Article 19(7)** of the Constitution and violates the right to a fair hearing because **section 19(5)** “allows evidence that breaks all the rules of law and practice in regards to the admissibility of hearsay evidence.”
- d. The Second Petitioner pleaded that **section 19(6)** violates the **Article 20** right to privacy as the police are allowed to enter the premises and are allowed to seize anything found in the premises in violation of the right to property under **Article 26**.
13. The Second Petitioner avers that **section 20** unnecessarily criminalises the carrying of weapons and the use of obscene language which already exists under the Penal Code.

14. The Second Petitioner avers that **section 22** violates **Articles 15, 26** and “even violates all international norms that exists in democratic countries and makes the Act an undemocratic law”
15. The First Petitioners pleaded that **section 24** of the Act contravenes **Articles 41, 42 and 43** of the Constitution, and in addition it violates **Articles 18, 23 and 25** of the Constitution. Second petitioner also challenges this as a violation of the equality provisions, as it allows discrimination against a class of persons.
16. The Second Petitioner avers that **section 26 and 27** “control a persons behaviour,” and violates **Article 16**, the right to be treated with dignity
17. With regard to **section 29**
 - a. The First Petitioners pleaded that **section 29** of the Act contravenes **Articles 18(2)(b), 26(1) and 28** of the Constitution.
 - b. The Second Petitioner further averred that the offence created pursuant to **Section 29(1)(a), 29(1)(b) and 29(1)(c)** of the Act is arbitrary unreasonable, onerous, ambiguous thereby rendering such offences, unconstitutional.
 - c. Second Petitioner also averred that **section 29(1)** violates the **Article 22** right to freedom of expression, and the **Article 26** right to property. Moreover, Second Petitioner averred that **section 29(2)** violates the due process clause contained in **Article 19(7)** and **Article 18(2)**. Furthermore, the Second Petitioner averred that **section 29(2)(b) and (d)** violate the right to privacy under **Article 20** and **Article 18** without due process.
18. The Second Petitioner challenged the constitutionality of a number of **offences** created under the Act.

Determination of Issues

[35] There are an unprecedented number of issues to be discussed and we will address each impugned provision in turn.

Does section 3 (1) and section 3 (2) of the Act contravene Article 160 (1) and Article 160 (2) of the Constitution?

[36] **Section 3** of the Act is worded as follows:

Section 3(1) *The Commissioner shall, subject to any general or special directions of the Minister, be responsible for the administration of this Act and may perform such duties as are imposed and exercise such powers as are conferred upon the Commissioner by this Act.*

Section 3(2) *The Minister may, from time to time, give the Commissioner directions of a general character, consistent with the provisions of this Act, as to the exercise of the powers conferred on, and the duties required to be discharged by, the Commissioner under this Act and the Commissioner shall give effect to such directions.*

[37] The Petitioners pleaded that this provision is in contravention of **Article 160** of the Constitution which provides as follows:

Article 160(1) *The Police Force shall be commanded by the Commissioner of Police who shall be appointed by the President subject to approval by the National Assembly.*

160(2) *Nothing in this article shall be constructed as precluding the assignment to a Ministry or Department of Government of responsibility for the organization, maintenance and administration of the Police Force, but the Commissioner of Police shall be responsible for determining the use, and controlling the operations, of the Force in accordance with law.*

[38] It is clearly envisaged by the framers of the Constitution that the Commissioner of Police (hereinafter referred to as the “Commissioner”), be independent in his or her role as the commander of the Police Force. By enshrining this position in the Constitution, the framers ensured that the Commissioner’s role is autonomous and independent, deriving its authority and responsibility directly from the Constitution itself. By intentional design, the role is not easily amended or influenced by political actors and subject to the enhanced protection of being part of the constitutional document. The Constitution is explicit that the Commissioner is solely responsible for the use and operations of the Police Force (**Article 160(2)**).

[39] The only authorised political interference in the running of the police force is the assignment of the responsibility for the organisation, maintenance and administration of the Police Force under **Article 160(2)**. However, the extent of this interference is limited to that of a logistical nature, which is signified by the words “organisation, maintenance and administration”.

[40] **Section 3** enables the Minister responsible for Home Affairs to give ‘general or specific directions’ to the Commissioner (**Section 3(1)**) and further **subsection (2)** requires the Commissioner to follow any instructions as to the exercise of the powers conferred on, and the duties required to be discharged by the Commissioner under the Act. Issuing instructions of such a nature clearly permits the Minister to play a role which goes further than the organisation, maintenance and administration of the Police Force.

[41] The Court recognises the honourable Attorney General’s submissions that the Court should assume that a Minister will exercise his powers in a constitutional manner. However, where an impugned provision is, on its face, enabling the Minister to influence the duties of a constitutionally appointed official outside of the ambit of the constitutional empowering Article, then that impugned provision would be unconstitutional even in the absence of the Minister taking any actions under that provision. Section 3 grants such extra constitutional powers to the Minister by giving him the power to give directions to the Commissioner with regard to the powers and duties of the Commissioner under this Act. These directions enable the Minister to interfere with the use and control of the operations of the police force, which is the power exclusively given to the Commissioner under the Constitution.

Remedy

[42] Under **Article 130(4)(b)** of the Constitution, this Court may “declare any law or the provision of any law which contravenes the Constitution to be void”. This is a responsibility that the Court takes very seriously, and we pay due respect to the legislative process which is undertaken by democratically elected representatives of the people. However, the Court is under a duty to strike out any offending provision and declare it void. This Court is not in the business of redrafting provisions on behalf of the Legislature in order to save the provisions from a declaration of unconstitutionality, particularly in this instance. That would be a step further than this Court’s given

responsibilities and would infringe on the realm of the legislature. We also remind ourselves that the Constitutional Court may adopt a liberal attitude toward socio-economic legislation, but not toward legislation which restricts the civil and political rights of the population.

[43] We find that section 3(1) and (2) of the Act contravenes Article 160(1) and (2) of the Constitution to the extent that they enable the Minister to interfere unconstitutionally with the role of the Commissioner.

[44] Therefore, we hereby declare that section 3 is void.

[45] Given the finding above it is unnecessary to consider the further averments by the second Petitioner that **Section 3(2)** of the Act gives a Minister who is a member of the Cabinet and together with the Commissioner of Police, the power to control the exercise of the right under **Article 23**.

Does section 5(1) of the Act give the Commissioner of Police absolute discretion over the control of public gatherings in violation of Article 23. Furthermore does section 5(1)(a) violate the right to freedom of expression under Article 22 and section 5(1)(b) violate the right to assemble freely and associate with other persons under Article 23?

[46] This pleading is the first of several to assess a section of the Act against a right created by an Article in the Seychellois Charter of Fundamental Human Rights and Freedoms (hereinafter referred to as “the Charter”) which is Part 1 of Chapter III of our Constitution. Such challenges are brought under **Article 46** of the Constitution, which provides in relevant part that the Constitutional Court “may declare any law or the provision of any law which contravenes the Charter void” [**Article 46(5)**].

Approach to Charter Rights analysis

[47] The approach of this Court and the Court of Appeal when considering the rights in the Charter is to consider the right as well as any permissible restrictions to the right as set out in the Article in an analysis which was laid out in the case of *Bernard Sullivan v Attorney General and another* SCA 25 of 2012. In this case, the Court of Appeal laid

down the appropriate test to apply when considering whether a restriction of a fundamental Charter right is constitutionally acceptable.

[48] In *Sullivan*, the Court of Appeal considered the constitutionality of an offence which was averred to restrict the exercise of the right to free speech under Article 22.

[49] What has become known as the *Sullivan* test was set out from paragraph 22 onwards of the judgment, the Court of Appeal held that there are three tests which are applied to determine the constitutionality of legal provisions. Firstly, we have to determine whether the offence as framed is formulated with sufficient precision to satisfy a ‘prescribed’ law. Secondly, whether the exception is necessary in a democratic society. Thirdly, whether there is proportionality between the restrictions on the fundamental Charter right imposed by the law and the objective of the legislation identified.

[50] The Court went on to elaborate each of the tests:

[50.1] *Test for a prescribed law*: the law should be certain, clear and precise and framed so that its legal implications are foreseeable. (*Sullivan* at paragraph 23).

[50.2] *Test of ‘necessary in a democratic society’* (*Sullivan* at paragraph 24) The Court should bear in mind that the concept of democracy is “dynamic”, and the Court should be guided by “national and international norms” since **Article 48** of the Constitutions requires the Court to take judicial note of:

- a) *The international instruments containing these obligations; (international instruments)*
- b) *The reports and expression of views of bodies administering or enforcing these instruments; (advisory opinions of international bodies administering the instruments)*
- c) *The reports, decisions or opinions of international and regional institutions administering or enforcing Conventions on human rights and freedoms; (decisions or international and regional human rights tribunals)*
- d) *The Constitutions of other Democratic States or nations and decisions of the courts of the State or nations in respect of their Constitutions. (foreign law)*

[50.3] The Court should also consider **Article 45** which provides that the Charter “shall not be interpreted so as to confer on any person or group the right to engage in any activity aimed at the suppression of a right or freedom in the Charter”.

[50.4] Finally the Court should also consider the definition of a democratic society in **Article 49** of the Constitution, which is “a pluralistic society in which there is tolerance, proper regard for the fundamental human rights and freedoms and the rule of law and where there is a balance of power among the Executive, Legislature and Judiciary”.

[50.5] The Court in *Sullivan* cautioned that there is a need to remain conscious of adhering to the policy decision of the Seychelles legislature, and a court should take notice of the realities of local considerations when assessing whether the international recommendations are appropriate for the local situation.

[50.6] The final test is that of proportionality (*Sullivan* at paragraph 29): In formulating the test for proportionality. The Court relied on the test from Zimbabwe’s Gubbay, CJ who established the test for determining whether a limitation is ‘arbitrary, excessive or not permissible’ as follows—

whether (i) the legislative objective is sufficiently important to justify limiting a fundamental right; (ii) the measures designed to meet the legislative objective are rationally connected to it; and (iii) the means used to impair the right or freedom are no more than is necessary to accomplish the objective. [Nyambirai v National Social Security Authority [1996] 1 LRC 64, 75].

[51] Many countries require a proportionality analysis as part of their jurisprudence on the limitation of human rights, these include the German Federal Constitutional Court, the European Court of Human Rights, the South African Constitutional Court, the Ugandan Supreme Court and the Zimbabwean Supreme Court. Although the approach of these Courts to proportionality is not identical, all recognise that proportionality is an essential requirement of any legitimate limitation of an entrenched right. The formulation of the proportionality inquiry as adopted into our jurisprudence in the *Sullivan* case has its roots

in the proportionality inquiry developed by the Canadian Supreme Court. In the seminal matter of *R v Oakes* (1986) 19 CRR 308, the Canadian Supreme Court described the appropriate proportionality test as follows:

There are, in my view, three important components of a proportionality test. First, the measures adopted must be carefully designed to achieve the objective in question. They must not be arbitrary, unfair or based on irrational considerations. In short, they must be rationally connected to the objective. Second, the means, even if rationally connected to the objective in this first sense, should impair "as little as possible" the right or freedom in question: R v Big M Drug Mart Ltd. at p. 352. Third, there must be a proportionality between the effects of the measures which are responsible for limiting the Charter right or freedom, and the objective which has been identified as of "sufficient importance".

[52] It is easy to see the similarities between the Canadian test and the approach adopted in *Sullivan*. *R v Oakes* required an assessment of the rational connection between the measures and their objective, as little impairment as possible and a proportionality between the effects of the measures and the objective. The *Sullivan* test requires a sufficiently important objective, with rationally created measures designed to achieve that objective and no more impairment than is necessary to achieve the objective. The requirement of proportionality between the degree of the effects of the measures and the importance of the objective itself is the only inquiry which is not explicit in the *Sullivan* test. However, what this is addressing is that there is no disproportionality between the nature of the legislative outcome and the effect on the rights involved. We are of the opinion that this leg of the inquiry would be addressed as part of the analysis of the rationality of the measures.

[53] One interesting element which can be adopted from Canada with respect to this approach has to do with their approach to the second requirement of the *Oakes* test, which provides that the limitation should impair the right "as little as possible". This is also adopted by the *Sullivan* test, and it is reinforced in Article 47 of the Constitution which states in relevant part: "[w]here a right of freedom contained in this Charter is subject to any limitation or qualification, that limitation, restriction or qualification (a) shall have no wider effect than is strictly necessary in the circumstances." This question

of necessity raises a fundamental problem of judicial review. This was discussed by the South African Constitutional Court in *S v Makwanyane and another* (CCT3/94) [1995] ZACC 3 where the court adopted the Canadian approach as follows:

Can, and should, an unelected court substitute its own opinion of what is reasonable or necessary for that of an elected legislature? Since the judgment in R v Oakes, the Canadian Supreme Court has shown that it is sensitive to this tension, which is particularly acute where choices have to be made in respect of matters of policy. In Irwin Toy Ltd v Quebec (Attorney General),¹³⁴ Dickson CJ cautioned that courts, "must be mindful of the legislature's representative function." In Reference re ss. 193 and 195 (1)(c) of the Criminal Code (Manitoba),¹³⁵ it was said that "the role of the Court is not to second-guess the wisdom of policy choices made by ...legislators"; and in R v Chaulk, that the means must impair the right "as little as is reasonably possible".¹³⁶ Where choices have to be made between "differing reasonable policy options", the courts will allow the government the deference due to legislators, but "[will] not give them an unrestricted licence to disregard an individual's Charter Rights.

[54] This then is our approach to the question of the constitutionality of impugned provisions against the Articles of the Charter: to ensure that the limitation on the right is only as wide as is strictly necessary in a democratic society, whilst remaining conscious of the fact that there may be differing reasonable policy options for addressing a particular legislative objective and the Court is ill-placed to advise the Legislative on its policy choices.

[55] We turn now to consider the section at hand. **Section 5(1)** of the Act provides as follows:

5. (1) The Commissioner may, if it appears to him or her to be necessary or expedient in the interests of public order so to do, in such manner as he may think fit -

- (a) control and direct the extent to which music may be played, human speech or any other sound may be amplified, broadcast, relayed or otherwise reproduced by artificial means, in a public place;*
- (b) control and direct the conduct of all public gatherings; and*
- (c) for any of the purposes in paragraph (a) and (b) give or issue such orders as the Commissioner may consider necessary or expedient,*

(2) Any person who fails to comply with any order given or issued under paragraph (c) shall commit an offence and shall be liable on conviction to imprisonment for a term not exceeding 2 years or to a fine not exceeding SCR2000 or to both such imprisonment and fine.

[56] Second Petitioners alleged that **section 5(1)** of the Act violates **Article 23** of the Constitution by giving the Commissioner of Police absolute discretion over the control of public gatherings. Furthermore, the Petitioner alleges that **section 5(1)(a)** violates the right to freedom of expression under **Article 22** and **section 5(1)(b)** violates the right to assemble freely and associate with other persons under **Article 23**.

[57] The right to freedom of expression is laid out in **Article 22** of the Constitution as follows in relevant part:

- 22. (1) 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.*
- (2) 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;*

....

[58] **Article 23** is titled, “The right of assembly and association” and provides as follows:

- 23. (1) Every person has a right to freedom of peaceful assembly and association and for the purpose of this article this right includes the right to assemble freely and associate with other persons and in particular to form or to belong to political parties, trade unions or other associations for the*

protection of the interests of that person and not to be compelled to belong to any association.

(2) 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 interests of defence, public safety, public order, public morality or public health;

...

(c) for the protection of the rights and freedoms of other persons,

...

[59] The right to freedom of expression and the right to peaceful assembly and association are fundamental to a functioning democracy. They allow citizens to gather and express their ideas, verbally or through unspoken forms of speech, individually and together. The rights to peaceful assembly and association protect each person's right to choose to associate with likeminded people, and through their togetherness express their perspectives and aspirations. The Commonwealth Secretariat '*Guidelines of Best Practice to Promote Freedom of Expression, Assembly and Association*' (issued by the Commonwealth Secretariat in 2003 and available on www.thecommonwealth.org) discusses these rights as follows:

There is a rich and noble history of the positive need to protect these rights as a means for bringing the views of citizens to the attention of governments. From the mass protests in connection with the right to self-determination by colonized peoples, to civil rights protests, to protests against apartheid, it is clear that the right to demonstrate and protest has been historically vindicated as being part of the democratic landscape of countries.

[60] We can see that the wording of both Articles are very broadly couched and both allow for the passing of laws which are necessary in a democratic society to restrict the right in question for the purposes of promoting the interests of public order. However, simply because such a restriction is permissible, does not mean that all public order related laws will be acceptable if they restrict the right to freedom of expression, they are still

required to pass the requirements of necessity in a democratic country and proportionality. In the present circumstances,

[61] In applying the *Sullivan* test, clearly **section 5** is a clear and precisely framed legislative provision, and therefore meets the first test for a prescribed law.

[62] This law couches the Commissioner's powers to affect the rights of individuals who are taking part in activities under **subsections (1)(a) and (b)** in very broad terms. The Commissioner's power is to "control and direct" the extent to which speech may be amplified and disseminated in a public place (which includes the playing of music, broadcasting of ideas and amplification of the human voice); moreover, he or she may also 'control and direct' the conduct of all public gatherings, which are defined as the "gathering or concourse of ten or more persons in any public place." The Petitioners have correctly identified that these powers grant the Commissioner the power to limit the exercise of **Article 22** and **Article 23** rights where these are occurring in a public place, and the question is whether this is necessary in a democratic society?

[63] The **Article 22** and **Article 23** rights are not unlimited. It is easy to recognise that large public gatherings may need to be controlled through police intervention, and the amplification of sounds in public places can cause a nuisance and offence to others in close proximity. Where the free use of these rights is affecting the happy enjoyment by others of their other rights and freedoms, the Commissioner of Police is a well placed public authority to monitor and control the effect of the exercise of these rights where they are occurring in public. The Commissioner, as the commander of the Police Force, may need to deploy the police forces to monitor the situation and to ensure that such situations do not get out of control. We acknowledge the necessity of granting such powers to a public official to exercise oversight of the peaceful exercise of these rights where they are being used in public and have a greater effect on the rights of others, and we accept that the Commissioner is best placed to exercise this power in this instance.

[64] It is not necessary to look in detail at other countries and norms in this regard, as we will find that this power is reasonable in a pluralistic, democratic society and is a natural

corollary of the Commissioner's role as the commander of the Police Force, the primary agents for ensuring the maintenance of law and order throughout the country. Therefore the provision passes the second leg of the *Sullivan* test for necessity.

[65] Our concern with the provision becomes apparent when we start to consider the proportionality of the provision. The fundamental objective, to protect the health and safety of the local population from assembling crowds is important and we acknowledge this, yet, the degree of discretion given to the Commissioner is very broad. The chapeaux of **section 5** provides that the Commissioner's discretion may be exercised where it 'appears' to the Commissioner to be 'necessary or expedient'. Therefore this discretion may be exercised based on subjective criteria which requires a very low threshold in order to be invoked.

[66] The extent to which the Commissioner can act under this provision can have a great effect on the rights involved as the Commissioner may 'direct and control' gatherings and the amplification of speech and broadcasts. We are of the opinion that the discretion here is broader than is strictly necessary to achieve the purpose of maintaining law and order. We do accept that the goal of this provision is sufficiently important, and the granting of the Commissioner the power to control such situations is rationally connected to the goal of maintaining public order. However, the provision in **section 5** is not narrowly enough drafted, it does not restrict the discretion of the Commissioner sufficiently, and it would be difficult for an individual to challenge the exercise of this power because the threshold is 'appears'. Therefore we are of the opinion that the potential effect of this power is not proportional to the legislative objective as grants a wider power to the Commissioner than is necessary in the circumstances.

[67] Therefore, by the *Sullivan* analysis, this provisions fails to be constitutional as it fails the proportionality leg of the inquiry.

Remedy

[68] We find that section 5(1) contravenes Article 22 and 23 of the Constitution. As a result of the unconstitutionality of section 5(1), the criminal offence created to enforce this provision will also be unconstitutional.

[69] **Therefore, we declare section 5 of the Act is void in its entirety.**

Do section 6 and section 8 of the Act contravene Article 23(1) and 23(2) of the Constitution. Furthermore, does section 8(3) violate Article 45?

[70] This pleading concerns two provisions which lie at the very heart of this Act, and the ruling on this pleading will impact many other provisions of the Act.

[71] **Section 6** of the Act provides as follows:

- 6. (1) Subject to the provisions of this Act, a public meeting or a public procession shall not be held unless the Commissioner is notified of the intention to hold the public meeting or public procession and -*
- (a) the Commissioner allows the public meeting or public procession with or without conditions under section 8(2) or 9(2); and*
 - (b) the holding of that public meeting or public procession is not prohibited under section 13 or any other provisions of this Act.*

[72] And **section 8** provides as follows:

8. (1) The Commissioner shall, upon receipt of any notice under section 6 in respect of a proposed public meeting or public procession consider the information furnished in the notice and any other information available to the Commissioner in relation to the proposed public meeting or public procession and give a decision.

(2) Subject to subsection (3) the proposed public meeting or public procession shall take place in accordance with the particulars contained in the notice filed under section 7; unless the Commissioner within 3 working days from the receipt of the notice inform the applicant in writing of the imposition of conditions for the holding of the proposed public meeting or procession, in which case the proposed public meeting or procession shall be carried out in accordance with conditions imposed.

(3) The proposed public meeting or public procession shall not take place if the Commissioner refuses to allow it to take place in accordance with section 8(4), .in which case the Commissioner shall within 3 working days from the receipt of the notice under section 7 inform the applicant in writing of his decision and the reasons for his decision in writing.

(4) The Commissioner may decide not to allow a public meeting or public procession to take place if the notice is not in compliance with the provisions of section 7(3) or if the Commissioner has reasonable grounds to believe that the proposed meeting or procession may,

(a) occasion public disorder or cause damage to public or private property;

(b) create a public nuisance;

(c) give rise to an obstruction on any public road;

(d) put the safety of any person in jeopardy;

(e) cause feelings of enmity, hatred, ill-will or hostility between different groups in Seychelles;

(f) glorify the commission or preparation (whether in the past, in the future or generally) of acts of terrorism or any other offence or otherwise have the effect of directly or indirectly encouraging or inducing members of the public to instigate, prepare or. commit any act of terrorism or other offences;

(g) be held within or enter a prohibited area or an area to which an order or a notification under section 13 applies;

(h) interfere with or hinder the holding of a public meeting or a public procession which has been allowed under section 8; or

(i) otherwise not be in the interest of public order.

(5) A person who advertises or caused to be advertised a public meeting or public procession of which that person knows or ought reasonably to know that -

(a) a notice of intention to organise a public meeting or public procession has not been given under section 7; or

(b) the 3 working days period allowed under subsections (2) and (3) has not elapsed,

shall commit an offence and shall be liable on conviction to imprisonment for a term not exceeding 5 years or to a fine not exceeding SCR5,000 or to both such imprisonment and fine.

[73] **Section 6** read with **section 8** creates a framework for the regulation and control of public meetings and public processions. Anyone looking to organise such a public meeting or procession is obliged to inform the Commissioner of the intention under **Section 6**. Permission for the meeting or procession to proceed is implicitly granted unless the Commissioner informs the organiser of a refusal for the event to take place or of such restrictions or conditions for the holding of the event [**section 8(2)**]. The Commissioner may prohibit the holding of the event [**section 8(3)**] where the notice was not in compliance with the provisions of **section 7(3)** or if the Commissioner has reasonable grounds to believe that the proposed meeting or procession may occasion some form of disruption to the public order along the grounds enumerated in **section 8(4)**. There are certain public places where no such procession or meeting may be held, which is specified in **Section 13** and includes official buildings such as National House and court buildings.

[74] A “public meeting” is defined in **section 2** of the Act as “a meeting held for the purpose of the discussion of matters of public interest or for the purpose of the expression of views on such matters, but does not include meetings of any local authority or statutory body incorporated by law.”

[75] A “public procession” is any demonstration, march or procession by one or more persons in a public place, but does not include any parade, march or manoeuvre of any of the armed forces of the Republic, or the police or any recognised Corps or any marriage or funeral procession”.

[76] A “public place” is defined as “any highway, public park or garden, any foreshore and any public bridge, road, lane, footway, square, court, alley, or passage, whether a thoroughfare or not and includes any open space to which, for the time being, the public have or are permitted to have access, whether on payment or otherwise.”

[77] We find it perplexing that the definitions of a public meeting and a public procession have no restriction on the number of persons who may make up the meeting or procession. Therefore, a demonstration or protest by a single person would require giving notice to the Commissioner. Furthermore, a “public meeting” under the Act also covers meetings in any non-public place, such as at a private home or office block.

[78] There is no doubt that requiring an individual to inform the Commissioner prior to exercising their right to peacefully assemble and even to meet, affects the unrestricted exercise of the right to peaceful assembly and association. Therefore we need to consider whether the restriction is necessary in a democratic society. As previously discussed, the *Sullivan* test was laid out with reference to **Article 22**, whereas we have been requested to consider **Article 23** in this instance, however the wording of the **subarticle (2)** of **Article 23** is the same as that in **Article 22**, therefore, the court is satisfied that this is appropriately analogous.

Application of Sullivan test:

[79] There is no doubt that these provisions are sufficiently clear and explicit as to be a law of general application. Therefore, we can start the analysis with the question of whether requiring that individuals notify the Commissioner of Police of the intention to hold a public meeting or procession would be necessary in a democratic society.

[80] The holding of public meetings and public processions are by their very nature designed to attract the attention of the public at large, and have the potential to disrupt the normal peace, traffic and general business of the area in which they are held. The authorities ought to be informed about the holding of functions which have the potential to disrupt the normal running of the society, in order to be able to monitor and to respond to any issues which may arise out of the amassing of the population. Yet, at the same time, the importance of the ability of the populace to exercise their right of peaceful assembly in a democratic society cannot be overstated. The Commonwealth Secretariat’s *Guidelines of Best Practice to Promote Freedom of Expression, Assembly and Association*, 2003 (www.thecommonwealth.org) makes the following recommendations for balancing these interests:

The right to freedom of assembly includes the rights to demonstrate, protest or meet, and authorities are not to interfere with this right. In exercising the right to demonstrate and protest, the following procedure ought to be followed:

- *Authorities must be notified of a proposed demonstration or protest unless the circumstances are such that prior notification was not possible;*
- *Authorities have no authority to stop a demonstration or protest but may stipulate reasonable conditions to safeguard against potential violence;*
- *Prohibition is a last resort where there is a genuine threat of violence if the event were to take place;*
- *Judicial review is to be made available against decisions of the authorities;*
- *Organisers are to be made aware by the authorities of the conditions of a demonstration or protest and their ability for any damages caused.*

[81] In line with this recommendation, the Court accepts that requiring permits for public events is commonly utilised in other democratic societies and allows for the appropriate overview of public events, which could cause disruptions. Requiring notice under **section 6** allows the Commissioner to adequately plan and deploy his forces, and to take preventative measures where there may be a risk of danger to the safety of society.

[82] However, our concern lies not with the nuisance being sought to be avoided, but rather with the breadth of the stroke used in designing this measure. Requiring permits for public meetings as defined, which includes those held in private places, with no consideration of the size of the meeting, or the degree of threat of that meeting to public order is not necessary in a democratic society. Furthermore, requiring permits for public processions as defined, with no consideration of the size of the procession, or the degree of threat of that meeting to public order is not necessary in a democratic society. We are not convinced that it would be necessary for the Commissioner to have knowledge of meetings occurring on private property, where there is no risk to the public order. Moreover, we are unable to see how a procession of one person could create a nuisance that would require such a limitation of the unfettered exercise of the rights involved. It is interesting to note that according to the Oxford English Dictionary, a “procession” is defined as “the action of a body of people going or marching along in orderly succession in a formal or ceremonial way, esp. as part of a ceremony, festive occasion, or

demonstration.” The Webster Dictionary, defines a “procession” as “a group of individuals moving along in an orderly, often ceremonial way”. Obviously, a single individual can never constitute a procession in any sense of the term.

[83] The Court is of the view that **section 6(1)**, would have been constitutionally passable as necessary in a democratic society if these two definitions were more carefully tailored to address the underlying reason for the restriction. However, as presently defined, **section 6** restricts the right to peaceful assembly and association under **Article 23** more than is necessary in our democratic society and therefore contravenes the Constitution.

[84] As **section 6** fails with regard to the second leg of the *Sullivan* test, it is unnecessary to look further into **section 8**, including its criminal offence provision [**section 8(5)**] as these are dependant on **section 6** for their application.

[85] However, there was much discussion during the hearings about whether it is constitutional for the Commissioner to ever prohibit the holding of an event and we are of the opinion that this warrants a short mention by way of *obiter dictum*. The Petitioners argued that the Commissioner of Police should not be able to ‘prohibit’ but only to ‘regulate’ public meetings and processions. In support of these contentions, the Petitioners cited the Zimbabwean case of *Christine Moulundica and 7 others v the People* (1995) SJ where it was held that “freedoms are not absolute but may only be regulated but not abridged or denied”. The Petitioner also cited *The State Bihar v K.K and others* AIR 1971 (India) where it was held that in order to be reasonable, a restriction must not be arbitrary or excessive and the procedure and manner of imposition of restrictions must also be fair and just. Finally the Learned Counsel relied on *Thapper v State of Madras* S.C.R (1950) 594 where the Indian court held that with regard to a prohibition “so long as the possibility of it being applied for purposes not sanctioned by the Constitution, it cannot be ruled out, and must be held to be wholly unconstitutional and void”.

[86] Given our finding that **section 6** contravenes the constitution, it is not necessary to decide this question. However, some of our reasoning follows, **section 8(4)** permits the commissioner to decide not to allow a public meeting or public procession to take place if the Commissioner has reasonable grounds to believe that it may result in any of the

possibilities listed in **section 8(4)(a)-(i)**. These provisions do not allow the Commissioner to make a blanket denial on meetings, but requires him or her to consider each notice of a public meeting or public procession on a case by case basis. He or she is required to form a considered opinion based on a “reasonable ground” that the meeting may cause disorder. The Commissioner is the best placed authority to make such an assessment as these concerns fall within his or her constitutional responsibility. Moreover, the Commissioner is required to provide written notice of the refusal to permit a public meeting or procession to be held. The exercise of this discretion is subject to judicial review and appeal to the Appeal Board.

[87] The Court is hesitant to say that there will be not be any circumstances when the Commissioner will need to prohibit an event. It may be appropriate, in a particular case for the Commissioner to refuse to permit a public meeting or procession to take place in order to avoid some or other risk to public order or safety. The power has been delegated to the Commissioner with sufficient safeguards, which causes this Court to reject the argument that it is unconstitutional to permit the Commissioner to have the power to refuse a permit in a specific case, as is envisaged by this provision. However, this power is given to the Commissioner on an implied condition that he will exercise this power in accordance with the constitution, failure by the Commissioner to exercise this power constitutionally and in good faith would be unconstitutional and subject to challenge.

Remedy:

[88] We find that section 6(1) is unconstitutional to the extent of the definitions of “public meeting” and “public procession” as the resultant restriction is broader than is necessary in a democratic society. Section 6(1) violates Article 23 as the law places a restriction on the free exercise of the right to peaceful assembly which is not necessary in a democracy. Concurrently this also contravenes Article 47 by placing a restriction on the exercise of a right which restriction has a wider effect than is strictly necessary in the circumstances.

[89] **Therefore, we declare that section 6 of the Act is void.**

[90] **Therefore, we declare section 6 of the Act is unconstitutional in its entirety and void.**

[91] We find Section 8 of the Act unconstitutional to the extent that it is reliant on section 6.

[92] Therefore, we declare section 8 of the Act is void to the extent of its unconstitutionality.

Does Section 7 contravene Article 25?

[93] Section 7 of the Act states as follows:

7. (1) *A notice of intention to hold a public meeting or public procession shall be given to the Commissioner in accordance with subsections (2) and (3).*

(2) *A notice under this section shall be given not less than 6 clear working days before the date on which the public meeting or public procession is to be held.*

(3) *A notice under this section shall, be in a form prescribed by regulations, -*

(a) given in writing, -

(i) if it is a demonstration carried on by a person by himself or herself or a public march by a single person, by the person; and

(ii) in any other case, by any of the organisers of the public meeting or public procession; and

(b) contain the following particulars -

(i) the location, date and time the meeting or public procession is to be held and the estimated duration of the meeting or public procession;

(ii) in the case of a public procession, the location, time of commencement and duration of any meeting to be held in conjunction with the public procession and the route, the places at which the procession will halt and the time it will remain stationary in each such place;

(iii) the number of persons likely to take part in it;

- (iv) *the purpose of the public meeting or public procession;*
- (v) *the name, address and telephone number of the organiser of the public meeting or public procession, and of a person able to act, if necessary in place of the organiser for the purposes of section 9(1)(b);*
- (vi) *the arrangements for its control being made by the person proposing to organise it;*
- (vii) *such other particulars and information relating to the public meeting or public procession as may be prescribed;*
- (viii) *such other particulars and information relating to that public meeting or public procession, as the case may be, as the Commissioner may require.*

(4) Notwithstanding subsection (2), the Commissioner may, in any case where the Commissioner is reasonably satisfied that earlier notice could not have been given, accept shorter notice than is specified in that subsection.

(5) In cases where the Commissioner has decided not to accept shorter notice than is specified in subsection (2), the Commissioner shall as soon as practicable inform in writing the decision to the person who has given such notice.

[94] The Second Petitioner argued that this requirement to provide notice in order to hold a public meeting or procession violates **Article 25** of the Constitution, the right to freedom of movement, which provides in relevant part as follows:

25. (1) Every person lawfully present in Seychelles has a right of freedom of movement and for the purpose of this article this right includes the right to move freely within Seychelles, the right to reside in any part of Seychelles, the right to leave Seychelles and the right not to be expelled from Seychelles.

(2) Every person who is a citizen of Seychelles has a right to enter Seychelles and, subject to clause (3)(d), not to be expelled from Seychelles.

(3) *The right under clause (1) may be subject to such restrictions as are prescribed by a law necessary in a democratic society-*

(a) in the interests of defence, public safety, public order, public morality or public health;

(b) for protecting the rights and freedoms of other persons;

....

[95] The reasoning goes that the definitions of ‘public meeting’ and ‘public procession’ are so broad that all manner of activities would be regulated by this section of the Act. This would include any discussion about matters of public interest, even if these fell within the premises of a private residence, and any group of persons walking one after the other, even if they had no common intention or purpose. If all of these additional activities are required to provide notice to the Commissioner prior to being able to attend such meetings, or walk in public places, then this restricts the right to move freely in Seychelles.

[96] The intention that this provision cover demonstrations of only one person is explicit in **subsection 3(a)(i) of section 7**.

[97] We are willing to accept that this provision has an effect on the ability of individuals to move freely in Seychelles, however, it sits more clearly as a restriction on **Article 22** (freedom of expression) and **Article 23** (freedom of peaceful association and assembly).

[98] It seems apparent that the notice anticipated under **section 7** is the same notification required under **section 6**. However, having struck down **section 6** as unconstitutional, we are required to consider whether **section 7** is unconstitutional as it stands.

[99] Again, we are convinced that the definitions of ‘public meeting’ and ‘public procession’ are so broad, that the section has the effect of imposing an unnecessary restriction on the freedom of expression and the right to peaceful assembly. It is unnecessary to repeat the full *Sullivan* analysis in this regard.

[100] Were these definitions to be remedied such that the provision did not place such a broad restriction on the rights involved, we are convinced that this provision itself would

not be unconstitutional so long as the definitions were no wider than is strictly necessary to achieve the legislative purpose of these sections.

Remedy

[101] We find that section 7 is unconstitutional as it places unnecessary restrictions on the right to freedom of expression and the right to peaceful assembly.

[102] Therefore, we declare section 7 is void in its entirety.

Does Section 9(2) of the Act allow the Commissioner to suppress a fundamental right in violation of Article 23 and 45?

[103] Section 9(2) provides as follows:

9. (1) At every public meeting or public procession -

- (a) good order and public safety shall be maintained throughout the public meeting or public procession; and*
- (b) present throughout the public meeting or public procession shall be the organiser who organised the meeting or procession or, a person nominated in writing by the organiser.*

(2) The Commissioner may impose on the organiser of, and the persons taking part in, the public meeting or public procession such conditions as in the Commissioner's opinion are necessary to prevent the public meeting or public procession, as the case may be, being convened so as to result in happening of anything referred to in section 8(4)(a) to (i).

(3) Without prejudice to the generality of subsection (2), the conditions may, in particular, impose requirements as to -

- (a) the number of persons who may take part in the public meeting or public procession;*
- (b) the number and size of banners, placards, displays or other objects used;*
- (c) the engagement of such number of security officers as may be necessary to ensure good order and public safety throughout the public meeting or public procession, as the case be;*

(d) the place or places where the public meeting or public procession may, or may not, be held or carried on.

(4) The Commissioner may, if the Commissioner reasonably believes that it is necessary in order to prevent the happening of anything referred to in section 8

(4)(a) to (i) -

(a) impose additional conditions other than those provided in subsection (2) on persons organising or taking part in an authorised public meeting or public procession; or

(b) amend any condition previously imposed under subsection (2) or paragraph (a).

(5) Where the Commissioner has decided to impose additional conditions or amend any conditions previously imposed in accordance with subsection (4), he shall inform the person organising the public meeting or public procession thereof in writing.

(6) In the event that the Commissioner imposes additional conditions or amends any conditions imposed in accordance with subsection (4) whilst the public meeting or public procession is underway a senior police officer shall give such directions to those organising or taking part in the meeting or public procession as may be necessary to comply with the additional or amended conditions.

(7) Any reference in this Act to a condition imposed under section 8(2) shall, except where the context otherwise requires, include a reference to an additional condition imposed or a condition as amended under subsection (4).

[104] The Second Petitioner argued that **subsection (2) of section 9** allows the Commissioner to impose unconstitutional conditions on a public meeting or public procession which restrict the free exercise of the right to freely associate and assemble under **Article 23**.

[105] As we see it, the provision does allow the Commissioner to place restrictions on a particular event as are necessary to prevent the public meeting or procession from resulting in the public order disturbances listed in **section 8(4)**. The question which requires determination is whether this is an unconstitutional violation of **Article 23**.

[106] For the sake of completeness, we will briefly analyse this section under the *Sullivan* headings. However, again most of our concerns could be addressed by adequately addressing the definitions of ‘public meeting’ and ‘public procession’. **Section 9** is a law for the purpose of the first leg of the analysis. The objective of the section is to grant powers to Commissioner in order to allow him, as the commander of the police, to adequately address any concerns which he may have about an event, and which may cause the sorts of disruptions to public order, including the imposition of restrictions which will prevent the event from being convened.

[107] We accept the necessity of enabling the Commissioner to deal with threats to public safety and order where he or she has reasonable ground to believe that such threats are likely to occur and where the response is appropriate in the circumstances. The Commissioner is best placed to decide what the appropriate measures would be necessary in the circumstances. As a result of the breadth of the definitions of “public meeting” and “public procession”, we are of the opinion that with regard to **section 9(2)**, the legislative provision is too broadly worded to be necessary in a democratic society.

Remedy

[108] We find section 9(2) is an unconstitutional violation of Article 23.

[109] Therefore, we hereby declare section 9 (2) void.

Does section 9(3) place restrictions on the Article 23 right that are not necessary in a democratic society?

[110] **Section 9(3)** allows the Commissioner to impose specific conditions on a public meeting or public procession, whereas **section 9(2)** dealt with general conditions. These

section 9(3) conditions are dependant on **section 9(2)**, in that they need to be “necessary (in the Commissioner’s opinion) to prevent the public meeting or public procession, as the case may be, being convened so as to result in happening of anything referred to in **section 8(4)**.” The nature of the conditions specified, include limitations on —

(a) the number of persons who may take part in the public meeting or public procession;

(b) the number and size of banners, placards, displays or other objects used;

(c) the engagement of such number of security officers as may be necessary to ensure good order and public safety throughout the public meeting or public procession, as the case be;

(d) the place or places where the public meeting or public procession may, or may not, be held or carried on.

[111] We are satisfied that this **section 9(3)** permits the Commissioner to place restrictions on the **Article 23** right. We believe that the power to impose such limitations is a necessary power to grant to the Commissioner in order to ensure that he has the power to adequately carry out his constitutional duty. In our view, **section 9(3)** as drafted, which includes these existing definitions of public meeting and public procession, is not necessary in a democratic society, and as such that section fails on the second leg of the *Sullivan* test.

[112] Therefore, we find that **section 9(3)** places an unconstitutional restriction on the **Article 23** right as a result of the breadth of the definition classes of ‘public meeting’ and ‘public procession.’

Remedy

[113] , **We find section 9(3) in an unconstitutional violation of Article 23.**

[114] **Therefore, we hereby declare section 9(3) void.**

Do sections 9 and 10 place conditions and requirements on the Article 23 right rendering it a nullity?

[115] **Section 10** provides definitions for that part as follows:

10. In this part-

"meeting" and "procession" include the period between the commencement and the dispersal of the meeting or procession, as the case may be;

"senior police officer" means the most senior in rank of the police officers at the scene of the public meeting or public procession, or anyone of them if there are more than one of the same rank;

"large public meeting" means a meeting of more than one thousand persons.

[116] As can be seen from the foregoing, **section 10** does not contain any operative terms, and is merely a definitions section.

[117] The Second Petitioner argued under this pleading that the cumulative effect of the restrictions on the right to peaceful assembly and association as contained in **section 9 and section 10** are such that the **Article 23** right is rendered null. With respect to the Petitioner, this pleading as it has been worded cannot be upheld. The **Article 23** right exists in many different contexts, and this Act, on its own cannot render the right a 'nullity' in totality. Moreover, our findings with regard to the unconstitutionality of **section 9(2) and 9(3)** relate specifically to the overbroad definitions of 'public meeting' and 'public procession' and not to the underlying concept of providing the Commissioner with the power to take actions to ensure safety at adequately defined public meetings or processions where there is a legitimate potential of a threat to public order and public safety.

[118] For the sake of completeness, we now briefly consider the remaining provisions of **section 9**:

- a. We find that **section 9(1)**, on its own, does not restrict any constitutional rights;
- b. **Section 9(4)** is unconstitutional for the same reasons related to the definitions of 'public meeting' and 'public procession';
- c. **Section 9(5)** is dependant on **subsection (4)** in order to be operative. Therefore when **section 9(4)** is declared void, this subsection **section 9(5)** will become inoperative and need not be found to be unconstitutional on its own.

- d. **Section 9(6)** is unconstitutional for the same reasons related to the definitions of ‘public meeting’ and ‘public procession’;
- e. **Section 9(7)** is dependant on **subsections (2) and (4)** in order to be operative, and therefore when **sections 9(2) and 9(4)** have been declared void, **section 9(7)** will also become inoperative, and need not be found to be unconstitutional on its own.

Remedy

[119] **At the end of the analysis, we find section 9(4), and section 9(6) are unconstitutional limitations on the right to Article 23.**

[120] **Therefore, we hereby declare section 9(4) and 9(6) void.**

Does Section 11(1) of the Act contravene Article 23(1) and 23(2) of the Constitution?

[121] This pleading deals specifically with the power to prohibit the holding of a public meeting or public procession. **Section 11** provides as follows:

11.(1) Notwithstanding section 8(2), the Commissioner may, by notice in writing to the applicant, cancel a public meeting or a public procession that has been allowed by the Commissioner where -

(a) there is reason to believe that the notice to hold a public meeting or a public procession contained any statement that is false in a material particular; or

(b) the Commissioner becomes aware of a circumstance that would have required or permitted the Commissioner to refuse to allow the public meeting or public procession from taking place had the Commissioner been aware of the circumstance when he first considered the information furnished in the notice.

[122] This power to cancel a public meeting or procession under **section 11** is the corollary of the power granted to the Commissioner under **section 6** to grant the permission for the holding of events. As was discussed previously, we are of the opinion that there may be instances where the Commissioner may need to prevent a specific event from occurring

on a certain day or in a certain place, and this power is not on its face unconstitutional. However, were the Commissioner to use this power to prohibit certain persons from exercising their rights, or certain groups from ever holding a public meeting or a procession, then those actions would be subject to judicial review, or grounds for a constitutional remedy.

[123] We have held above that **section 6** is unconstitutional for the reasons given above. **Section 11** is implicitly dependant on **section 6**. Therefore, **section 11** will also fall to be unconstitutional as it implies and relies on the power in **section 6** which we have found to be unconstitutional. To the extent that **Section 11** allows the Commissioner to exercise a power over public meetings and public processions as presently defined, it will also fall to be unnecessary in a democratic society and is therefore unconstitutional.

Remedy

[124] **We find that section 11 of the Act is an unconstitutional infringement of the Article 23 right.**

[125] **Therefore, we hereby declare that section 11 is void.**

Is section 12 of the Act a violation of Article 66(2) or of the constitutional principles of checks and balances against executive power, and timely access to the judiciary?

[126] **Section 12** deals with the establishment of an Appeals Board to hear appeals from decisions of the Commissioner under **section 8** of the Act. The wording of **section 12** provides as follows:

12. (1) There shall be an Appeals Board to hear and determine appeals against the decisions of the Commissioner under section 8.

(2) The Appeals Board shall consist of five members appointed by the President.

(3) A person appointed as a member of the Appeals Board shall have experience in legal, judicial and law enforcement matters.

(4) A member of the Appeals Board shall be appointed on such terms and conditions as the President may determine.

(5) The Chairperson and other members of the Appeals Board shall hold office for three years and shall be eligible for reappointment.

(6) The President shall at any time terminate the appointment of a member who has been found guilty of -

(a) any misconduct, default or breach of trust in the discharge of that member's duties; or

(b) an offence of such nature as renders it desirable that the member's appointment be terminated.

(7) The Appeals Board may regulate its own proceedings.

(8) Any person aggrieved by the decision of the Commissioner may appeal to the Appeals Board in such manner as may be prescribed.

(9) After receiving an appeal, the Appeals Board shall, within 6 working days , after considering the appeal,

(a) reject the appeal and confirm the Commissioner's decision;

(b) allow the appeal in whole or in part and vary the Commissioner's decision;

(c) set aside the Commissioner's decision and make a decision in substitution for it; or

(d) direct the Commissioner to reconsider the Commissioner's decision,

and the appellant shall be notified in writing of the Appeals Board's decision on the appeal.

[127] The First Petitioners pleaded that **section 12** of the Act contravenes the constitutional principle of proper and appropriate checks and balances as against executive power, and denies access or grossly minimises appropriate and timely access to the judiciary. Furthermore that it establishes an executive monopoly on the management and enforcement of constitutional rights in relation to the Act.

[128] The First Petitioners relied on *Michel v Dhanjee* SCA NO: 05 & 06 of 2012 where the court held that tribunals and courts must allow a fair hearing by an impartial and independent court or authority. The wording of this test is taken directly from **Article 19(7)** of the Constitution which provides as follows: “Any court or other authority required or empowered by law to determine the existence or extent of any civil right or obligation shall be established by law and shall be independent and impartial, and where proceedings for such a determination are instituted by any person before such a court or other authority the case shall be given a fair hearing within a reasonable time.”

[129] The Second Petitioner averred that **Section 12** is a violation of **Article 66(2)** and amounts to abuse of executive authority invested in the 1st Respondent. **Article 66(2)** provides as follows:

66.(1) The executive authority of the Republic shall vest in the President and shall be exercised in accordance with this Constitution and the laws of Seychelles.

(2) The executive authority vested in the President under this article shall extend to the execution and maintenance of this Constitution and the laws of Seychelles and to all matters with respect to which the National Assembly has power to make laws.

[130] The Petitioners argued that the Appeal Board set up by **section 12** is too closely controlled by the executive (appointed by President and liable for removal in same way) and therefore would not be able to be impartial. The Respondents correctly pointed out that there are several appeal boards set up by statute, which are administrative in nature in the same way that this Board would be, including the. Licences Appeal Board and Investment Appeal Board. Moreover, the Respondents reiterated that whilst there is not right of appeal the decision of the Appeal Board in the Act, there is judicial review and the Constitutional Court would have jurisdiction where allegations of violations of the constitution are made.

[131] If we consider the test under Article 19(7) and *Michel v Dhanjee* with relation to the Appeal Board:

Independent –

[132] The Appeal Board would need to be able to regulate its own proceedings, and not be subjected to the real or possible control or direction of another body.

[133] Merely having the President appoint and remove the panel members does not give the President power to interfere with the substantive working of the Board. The President would not have any power to direct or control the decisions taken by the board and the President's powers in section 12(2); 12(4) and 12(6) all relate to the appointment of the members and do not give the President any further powers. If there were any perceived or actual interference with the working of the Board would be grounds for a Constitutional Case. [See in this regard, *Seychelles National Party v. The Government of Seychelles & The Attorney General* CC 6/1999].

[134] Furthermore, the Board is empowered to regulate its own proceedings, under **section 12(7)**. Therefore, we are satisfied that the Board is sufficiently independent to pass this leg of the test.

Impartial -

[135] Whereas independence referred to institutional independence, impartiality refers to the first principles of natural justice when it comes to the adjudication of matters. This is looking at the decision maker individually and considering their ability to judge fairly. [see also *Seychelles National Party v the Government of Seychelles supra*]

[136] **Section 12(3)** provides that “the member of the Appeals Board shall have experience in legal, judicial and law enforcement matters.” This requires that a member must have experience in all three areas. Therefore, the adjudicators who are appointed under these conditions are likely to be impartial notwithstanding having been appointed by the President.

A fair hearing in a reasonable time

[137] We must remember that a fair hearing does not necessarily entail an oral hearing. The Board is bound by the provisions to take a decision within 6 days, Thus, the systems are designed to be very fast and efficient to cater to the urgency of such matters, and to ensure that the rights are adjudicated with due care and urgency.

[138] An individual has a right to review the decision in a court of law, and could still request that the Constitutional Court exercise its oversight if a fundamental right is being denied or infringed.

[139] With regard to the appointment of the members of the Board, in our considered view the establishment of an Appeal Board by the Legislature and the nomination of the President to appoint suitable members to this board is not a violation of **Article 66(2)**, the vesting of the executive power in the President.

[140] Therefore, we cannot accept that the Appeal Board is unconstitutional, *per se*.

Remedy

[141] Therefore, the issue with regard to section 12 fails.

Does section 13(2)(b) of the Act violate Article 23?

[142] **Section 13** of the Act provides as follows:

13 (1) Notwithstanding anything otherwise provided in this Act, the following areas shall be prohibited areas where no public meeting or public procession shall take place -

(a) the premises of the Court of Appeal; the Supreme Court, and other subordinate courts and tribunals;

(b) the precincts of the National Assembly;

(c) the premises of the State House; and

(d) the premises of any Defence Forces of the Republic of Seychelles.

(2) If, in relation to any public place, the Minister is of the opinion that it is necessary in the public interest to do so, the Minister may -

(a) by order published in the Official Gazette, prohibit the holding of public meetings or public processions or both in any public place (referred to in this Act as a "prohibited area");

(b) by order published in the Official Gazette, designate a specific area or areas (as the case may be) whereat large public meeting shall take place.

(3) *An order made under sub-section (2) –*

(a) *may exclude any meeting or procession, or any meeting or procession of any class or description, specified in the order from the prohibited area; and*

(b) *shall have the effect of cancelling any previous public meeting or public procession which had been allowed to proceed under section 8 in respect of a prohibited area.*

[143] The Second Petitioner is challenging **section 13(2)** on the ground that it violates **Article 23** because of the discretion that it gives to the Minister. Under this provision, the Minister may prohibit the holding of public meetings or processions in any public place if the Minister is of the opinion that it is necessary in the public interest. The Minister must publish this order in the Official Gazette. There is no time limit on this prohibition, or anything to guide the exercise of this discretion other than that it may cover “any public place” and that it must be “necessary in the public interest”.

[144] The Minister’s ability to declare an area a prohibited space will certainly affect the ability of individuals from exercising their rights of assembly and association in that place. Therefore, we need to consider the constitutionality of this restriction by applying the *Sullivan* test.

[145] The restriction is imposed by law and the orders envisaged by the Minister are required to be published in the Official Gazette which will adequately grant notice to the population about the prohibition of that place. This satisfies the first leg of the inquiry.

[146] We recognise that there are instances where it would become necessary to prohibit the gathering and assembling of the public, such as on a beach where endangered turtles are laying their eggs, a heritage site that is being preserved, or a place where the Minister has reason to believe could pose a threat to public safety. It was a legislative choice to grant this power to the responsible Minister. And we find that this is necessary in a democratic society.

[147] As to the proportionality analysis, with regard to **section 13(2)(a)** we are of the opinion that the discretion granted to the Minister is too broad by limiting its exercise

merely to the Minister's 'opinion'. Therefore, we consider that the restriction goes further than is strictly necessary in that:

- a. the Minister's power is to grant a total prohibition with regard to that place, which could be an entire district;
- b. the governmental objective has not been clearly explained to the Minister, his discretion is only guided by the phrase "in the public interest";
- c. there is no requirement that the prohibition be for a restricted period or subject to any review by another organ of state; and
- d. the 'public procession' of one person may be prohibited which is wider than is necessary.

[148] Therefore we are of the opinion that Section 13(2)(a) fails the *Sullivan* test and find it is an unjustified infringement of Article 23 of the Constitution.

[149] When we consider **section 13(3)(a)** we find that the Minister may exclude any specific meeting or procession or any class or description from the prohibited area. This provision allows the Minister to discriminate between groups of people with no limitation on how this discretion must be exercised and no defined reasonable classification. This provision violates Article 27, the right to equal protection of the law by permitting discrimination with no checks on the Minister's discretion. **It is our considered view that Section 13(3)(a) is not necessary in a democratic society, and hereby find it to be an unconstitutional violation of Article 27.**

Remedy

[150] We find section 13(2)(a) is an unconstitutional violation of Article 23 of the Constitution and that section 13(3)(a) is an unconstitutional violation of Article 27.

[151] Therefore we hereby declare section 13(2)(a) and section 13(3)(a) of the Act to be void.

Question raised by court with regard to section 14

[152] As a result of our analysis of section 13, the Court has had the opportunity to also consider Section 14 which we are of the opinion, requires judicial comment due to its apparent link to section 13 despite the fact that it has not been specifically addressed in the pleadings.

[153] Section 14 which provides as follows:

14(1) If, in relation to any public place and any period of time not exceeding 28 days, the Commissioner is of the opinion that, having regard to –

- (a) any serious public disorder or serious damage from public meetings or public processions of a particular class or description in that public place during that period;*
- (b) any serious public nuisance or obstruction in any public road, or threat to the safety of persons in that public place that may result from such public meetings or public processions;*
- (c) any serious impact which such public meetings or public processions may have on relations between different groups in Seychelles;*
- (d) any undue demand which such public meetings or public processions may cause to be made on the police or defence forces; and*
- (e) the extent of powers exercisable under this subsection,*

it is necessary in the public interest to do so, the Commissioner may, with the concurrence of the Minister, by Notice published in the Official Gazette prohibit the holding of public meetings or public processions or both, or those of a specified class or description, in that public place during that period.

[154] This section allows the Commissioner to prohibit the holding of public meetings and processions in a specific place for a period of up to 28 days. The exercise of this discretion requires the concurrence of the Minister, and the publication of a notice in the Official Gazette.

[155] The discretion under **section 14** is narrower and more defined than the Minister's discretion under section 13. However, we are still concerned by the definition of 'public procession' being broader than is necessary in a democratic society. We are minded of

the fact that the definition of public procession includes a procession of one person, therefore we are of the view that this would fail the *Sullivan* test of proportionality, as the power under **section 14** may impose limitations on public processions as defined and such is not necessary in a democratic society.

[156] Furthermore, **Section 14** allows the Commissioner to distinguish between “specified classes” or “descriptions” of meetings or processions, with no intelligible criteria on how any such differentiation would be acceptable. Therefore, we find that **section 14(1)** would also violate **Article 27**, the right to equal protection before the law.

[157] Although we recognise the necessity of this provision in a democratic society we, however, have difficulty with references to ‘public procession’ as defined, and the specified classes and descriptions. We are compelled, therefore, to find that section 14, as drafted, is an unconstitutional violation of **Articles 23 and 27**.

Remedy

[158] **Therefore, to that extent, we find section 14(1) is an unconstitutional violation of Article 23 and Article 27.**

[159] **Therefore we hereby declare section 14(1) void.**

Does section 18 violate Article 22 and Article 23?

[160] For the avoidance of doubt, no particular objections have been raised against **sections 15, 16 and 17** save what we have stated *infra*.

[161] **Section 18** grants the Commissioner the power to prohibit entertainment and sporting events in certain circumstances. **Section 18** provides as follows:

18. (1) If at any time it appears to the Commissioner that serious public disorder is likely to arise at or on the occasion of any sporting event or other entertainment of any description, the Commissioner may, by notice addressed to the promoter or manager thereof, prohibit the holding or continuance thereof in any area or place or on any particular day.

(2) A notice under subsection (1) shall be served on the person, or one of the persons promoting, organising or managing the sporting event or entertainment.

(3) Any police officer may give or issue such order and use such force as may be necessary to prevent the holding or continuance of a sporting event or other entertainment the holding or continuance of which has been prohibited by a notice issued under subsection (1), and to disperse any gathering of persons thereat.

(4) Any person who fails to comply with any order given by a police officer under subsection (3) shall commit an offence and shall be liable on conviction to imprisonment for a term not exceeding 2 years or to a fine not exceeding Rs2000 or to both such imprisonment and fine.

(5) A certificate under the hand of the Commissioner specifying the terms, and the date and manner of service, of a notice under this section shall be prima facie evidence thereof in all legal proceedings.

[162] Second Petitioners averred that this provision granted the police unconstitutional powers to prevent the holding of sporting events and entertainment. Specifically, Second Petitioners pleaded that **section 18(1)** grants the Commissioner the power to ban freedom of expression under **Article 22** and the right and freedom to assemble and associate under **Article 23**. Furthermore, the Second Petitioner pleaded that **section 18(3)** of the Act allows the Police to use force to curtail the exercise of a fundamental right to participate or organise a sporting or entertainment event.

[163] The enjoyment and participation in social events such as sporting events is an important part of the human experience, it is part of how people relax, express their skills and talents and enjoy their community and culture., There is no enshrined right to participation in social events, however, an individual's ability to attend and enjoy such occasions may be protected through other rights such as the right to cultural life and values (**Article 39**) and the right to dignity (**Article 16**). For the purpose of this analysis,

the Petitioners have argued that **section 18** allows the Commissioner to violate **Article 22** and **Article 23**.

[164] At the same time, the Commissioner,, as the commander of the Police Force is constitutionally mandated to ensure that public order is upheld, so that conditions persist in society which allow each individual to go about their lives peaceably and safely. It flows from this responsibility that the Commissioner is granted the power to intervene to protect public order in circumstances where serious public disorder may arise. The power under section 18 to prohibit the holding of a specific sporting event in a particular place or on a particular day, is not a power to prohibit sporting events in all circumstances or in all places, but has to be grounded on reasons, and narrowly exercised, on a case by case basis.

[165] We are not convinced that this section places any infringement on the rights to freedom of expression or freedom of association. Even if it did, we believe given that the narrow effect of this section and the importance of preventing serious public disorder at large public gathering, this would be necessary in a democratic society, and justifiable under the internal limitations of the second paragraphs of both rights involved.

[166] This section is taken directly from the Public Order (Amendment) Ordinance, 1967 where it appeared at **section 4**. We find it questionable whether this section belongs in this Act which predominantly deals with public order related to public meetings and processions. Furthermore, other such powers are granted to the Commissioner in other places on the Statute book, including powers to quell disorder at public gatherings, including the power to arrest.

[167] Therefore we find that **section 18** does not infringe a fundamental right.

Does section 19 violate Article 23, 19(5), 19(7) or 20?

[168] The Second Petitioner brought several challenges to the provisions of **section 19**, which prohibits the organising, training and equipping of quasi-military organisations. We will deal with each pleading in turn.

[169] **Section 19** provides as follows:

19. (1) *If the members or adherents of any association of persons are -*

(a) organised or trained or equipped to enable them to be employed in such a manner that such employment usurps or tends or appears to usurp the functions of the police or of the Defence Forces; or

(b) organised and trained or equipped either for the purpose of enabling them to be employed for the use or display of physical force in promoting any political objective, or in such manner as to arouse reasonable apprehension that they are organised and trained or equipped for that purpose,

then any person who knowingly takes part in the control or management of the association, or in so organising or training any members or adherents thereof, shall commit an offence and shall be liable on conviction to imprisonment for a term not exceeding 5 years or to a fine not exceeding SCR5,000 or to both such imprisonment and fine.

(2) In any proceedings against a person charged with the offence of taking part in the control or management of an association under subsection (1), it shall be a defence to that charge for the person to prove that the person neither consented to nor connived at the organisation, training or equipment of members or adherents of the association in contravention of the provisions of this section.

(3) No prosecution shall be instituted under this section without the consent of the Attorney-General.

(4) If upon application being made by the Attorney-General, it appears to the Supreme Court that any association is an association of which members or adherents are organised, trained or equipped in contravention of the provisions of this section, the Court may make such order as appears necessary to prevent any disposition of property held by or for the association, and in accordance with the rules of Court, which the Chief Justice is hereby empowered to make, may direct that an inquiry be held and report be made as to any such property and as to the affairs of the association, and may make

such further orders as appear to the Court to be just and equitable for the application of such property in or towards -

(a) the discharge of the liabilities of the association lawfully incurred before the date of the application or since that date with the approval of the Court;

(b) the repayment of moneys to persons who became subscribers or contributors to the association in good faith and without knowledge of any such contravention as aforesaid;

(c) any cost incurred in connection with any such inquiry and report as aforesaid or in winding up or dissolving of the association,

and may order that any property which is not directed by the court to be so applied as aforesaid shall be forfeited to the Republic.

(5) In any proceedings under this section, proof of things done or of words written, spoken or published, whether or not in the presence of any party to the proceedings, by any person taking part in the control or management of an association, or in organising, training or equipping members or adherents of an association shall be admissible as evidence of the purposes for which, or the manner in which, members or adherents of the association were organised or trained or equipped.

(6) If a Judge is satisfied by information on oath that there is reasonable ground for suspecting that an offence under this section has been committed, and that evidence of the commission thereof is to be found at any premises or place specified in the information, the Judge may, on an application made by a police officer, of or above the rank of sub-inspector, grant a search warrant authorising any such officer named in the warrant together with any other persons named in the warrant and any other police officers to enter the premises or place at any time within one month from the date of the warrant, if necessary by force, and to search the premises or place and every person found therein, and to seize anything found on the premises or place or on any such person which the officer has reasonable ground for suspecting to be evidence of the commission of such an offence as aforesaid:

(7) No woman shall, in pursuance of a warrant issued under the provisions of subsection (6), be searched except by a woman.

[170] The Second Petitioner pleaded that **section 19(1)(b)** violates a person's right under **Article 23** to assemble freely and associate with other persons, and in particular to form or belong to political parties, the organisation and promotion of political objectives, and the participation in the control or management or training of an associations members or supporters.

[171] The right under **Article 23** is the right to freedom of *peaceful* assembly and association. We cannot accept that this right incorporates any right to form, organise train or participate in quasi- military groups or armed forces. Moreover, the right does not extend to unarmed situations where troops are trained to display physical force. Training and arming forces is the responsibility of the national government and is subject to Constitutional checks and balances. Quasi-military forces and displays of physical force should not fall within the political objectives of any political party within a democratic country. Therefore, the first challenge with regard to section 19 fails.

[172] Secondly, the Second Petitioner averred that **Section 19(4)** allows the 4th Respondent to wind up an association in violation of **Article 23**. Again, it is important to note that the Article 23 only covers peaceful assembly and association. This section places the Supreme Court in charge of ensuring that the affairs of the association are just and equitably dealt with. The effect of this provision is that the Attorney General can apply to wind up or dissolve the association as a consequence of their contravention of **section 19** of the Act.

[173] We are of the opinion that where the members of an association have formed a quasi-military group, that they are no longer protected by the right to peaceful assembly. The objective of this section is to ensure that the association's property is adequately dealt with, its debtors and creditors satisfied, and that it is wound up fairly. This is narrowly tailored, and falls within the jurisdiction of the Supreme Court who will exercise oversight to ensure the fairness and equitability of the procedure. We cannot see any infringement of **Article 23**.

[174] Thirdly, the Second Petitioner pleaded that **Section 19(5)** violates **Article 19(7)** of the Constitution and violates the right to a fair hearing because section 19(5) “allows evidence that breaks all the rules of law and practice in regards to the admissibility of hearsay evidence.” [page 11, Petition in 03/2014]

[175] **Article 19(7)** of the Constitution provides as follows

Any court or other authority required or empowered by law to determine the existence or extent of any civil right or obligation shall be established by law and shall be independent and impartial, and where proceedings for such a determination are instituted by any person before such a court or other authority the case shall be given a fair hearing within a reasonable time.

[176] The Second Petitioner did not develop this argument further during the pleadings, however, suffice it to say, we have considered the wording of **Section 19(5)** and that of **Article 19(7)**. We are confident that although **section 19(5)** creates an exception to the common law hearsay rule, it is not in violation of **Article 19(7)** as such an exception does not undermine the independence, impartiality and fairness of the hearing. A judge of the Supreme Court will still manage the proceedings and is therefore able to consider the rules of evidence in that particular case and ensure the fairness of the hearing.

[177] Finally, The Second Petitioner pleaded that **Section 19(6)** violates **Article 20**, the right to privacy, as the police are authorised to enter the premises and are authorised to seize anything found in the premises in violation of the right to property under article 26. Neither **Article 20** nor **Article 26** are absolute rights. Our democracy, like many others, permits the searching of premises and seizing of property which it is reasonably thought to have been used in the commission of a crime. In this instance, a Judge of the Supreme Court is overseeing the issue of the warrant which adds protection for the person whose property is in question. In the circumstances, we accept that this may cause a restriction to the rights of the person whose premises are entered and whose property is seized. However, we are convinced that this is a necessary restriction in a democratic society as it is narrowly worded with due regard to protecting the rights involved by having a judge oversee the procedure.

[178] As a final note on this section, we wish to draw attention to **section 19(3)** which states that a prosecution under this section may only be instigated with the consent of the Attorney General. The rest of **section 19** is clearly drafted to apply equally to any parties or associations. Our concern is that this section may give the impression that the Attorney General, who acts on behalf of the government, may exercise bias under this section. We wish to draw attention to recent developments in other democratic jurisdictions with regard to the Attorney General's power to not prosecute an individual, which require that the Court be satisfied of the reasons for the refusal or failure to prosecute. Therefore, we are of the opinion that this section will become but a formality in the process of prosecution and not a means of creating injustice.

Does Section 20 unnecessarily criminalise the carrying of weapons and the use of obscene language which already exists under the Penal Code.

[179] **Section 20** places a prohibition on the carrying of weapons at public meeting and public procession. It provides as follows:

20. (1) Any person who is present at any public meeting or on the occasion of any public procession who has on his person any weapon calculated or likely to cause harm to any other person, otherwise than in pursuance of lawful authority, shall commit an offence and shall be liable on conviction to imprisonment for a term not exceeding 5 years or to a fine not exceeding SCR5,000 or to both such imprisonment and fine.

(2) Any person who, in any public place or at any public meeting or on the occasion of any public procession, uses threatening, abusive or insulting words with intent to provoke a breach of the peace or whereby a breach of the peace is likely to occur, shall commit an offence and shall be liable on conviction to imprisonment for a term not exceeding 2 years or to a fine not exceeding SCR2000 or to both such imprisonment and fine.

[180] The Second Petitioner's argument is that this provision already exists as a crime on the statute book, under the Penal Code. Having repeated provisions on the statute book is not a violation of any constitutional principle or right. It is a legislative choice as to where and how crimes are created on the statute book. As long as the provisions meet

constitutional scrutiny, we are of the view that it is not the role of the Court to advise the National Assembly where or how to draft offences. Therefore this issue with regard to **section 20** fails.

Does Section 22 violate Articles 15, 26 and all international norms that exist in democratic countries?

[181] **Section 22** provides as follows:

22. (1) Notwithstanding the provisions of any other law in force in Seychelles, any police officer of or above the rank of sub-inspector may if such police officer considers it necessary so to do for the maintenance and preservation of law and order erect or place or give orders for the erection or the placing of barriers on or across any road or street or in any public place within Seychelles, in such manner as such police officer may think fit.

(2) Any police officer may take all reasonable steps to prevent any vehicle being driven past any such barrier and any driver of any vehicle who drives or attempts to drive past any such barrier, or who fails to comply with any reasonable signal of a police officer requiring such person to stop such vehicle before reaching any such barrier, shall commit an offence and shall be liable on conviction to imprisonment for a term not exceeding 2 years or to a fine not exceeding SCR2000 or to both such imprisonment and fine.

(3) No police officer shall be liable for any loss or damage resulting to any vehicle or for any injury to the driver of such vehicle failing to obey any police officer acting under subsection (2).

[182] **Section 22(1)** permits a police officer above the rank of sub-inspector to erect or place barriers on or across any road or street if it is necessary to do so for the maintenance and preservation of law and order. Moreover, **section 22(2)** permits any police officer to take all reasonable steps to prevent any vehicle being driven past the barrier, including charging that person with a crime created under this section. **Section 22(3)** provides that “no police officer shall be liable for any loss or damage resulting to any vehicle or for

any injury to the driver of such vehicle failing to obey any police officer acting under **subsection (2)**".

[183] Having considered **subsections (1) and (2)** we cannot see any constitutional issues raised by the Second Petitioner with regard to those sections. When the Second Petitioner challenged this provision, he was concerned about the restriction of liability that is created under **subsection (3)**. This subsection is open to many interpretations, and appears to grant full immunity from liability, both civil and criminal, to the police officer. This would mean that an individual who is injured or whose property is damaged as a result of their failure to stop at a road block, may not seek compensation or damages against the police officer whose actions caused the loss. Moreover, it was argued, the ban of liability would also protect the deeper pockets of the Police Force and Commissioner. This will bar an individual from seeking damages for losses suffered. Furthermore, it may be construed in such a way as to prevent an individual from being held criminally liable for unlawful actions taken under this section.

[184] The Second Petitioner claims that this section violates the right to life and the right to property. There can be no claim that this limitation of liability violates the right to life as this does not permit the taking of any life, but merely 'reasonable steps'. The right to property provides that "every person has a right to property and for the purpose of this article this right includes the right to acquire, own, peacefully enjoy and dispose of property either individually or in association with others." We find that **section 22** does not limit this right as it is not, *per se*, placing any restriction on any identifiable property in question.

[185] Nonetheless, we are uneasy by this legislative provision. All persons should benefit from equal protection of the law, as is mandated under **Article 27(1)**. **Article 27** provides that "[e]very person has a right to equal protection of the law including the enjoyment of the rights and freedoms set out in this Charter without discrimination on any ground, except as necessary in a democratic society" Under the Civil Code of Seychelles, an individual may seek redress for any fault against him, under **Article 1382**. However, as a result of **section 22**, victims of police actions under that section may not seek any redress, therefore, they are discriminated against. This law makes policemen,

acting under the auspices of this provision, immune to claims for losses or damages based on their actions, thereby depriving the affected individual of their ability to seek remedy for harm suffered. **Article 27(1)** provides that any differential treatment must be “necessary in a democratic society” in order to stand.

[186] The only reasonable objective for this provision is that it is designed to enable policemen and women to be able to fulfil their duties without concern about being held responsible for damages caused in the course of fulfilling these duties. However, we cannot see how this is a necessary limitation of liability in a democratic country. The police are able to use their usual police powers, including the use of force, where reasonable and necessary, and the power to arrest. If they exceed these powers, and cause damage to private persons or their property, this should be able to be brought to a courtroom for a judge to decide on whether the individual is entitled to claim compensation. We therefore, find that this blanket immunity is not necessary in a democratic society.

Remedy

[187] **We find that section 22(3) contravenes Article 27 of the Constitution.**

[188] **Therefore we hereby declare section 22(3) to be void.**

Does Section 24 of the Act contravene Articles 18, 23, 25, 27 or Articles 41, 42 and 43 of the Constitution,?

[189] **Section 24** of the Act provides as follows:

24. (1) Whenever the President is of opinion that it is expedient for the maintenance and preservation of law and order so to do, the President may, by Order, published in the Gazette, direct that no person in the area or areas specified in the Order shall, otherwise than in compliance with such conditions as may be contained in the Order, be out of doors between such hours as may be prescribed by the Order except under the authority of a written permit granted by the Commissioner or such other person as the Commissioner may authorise to issue such written permit.

(2) *The President may exempt from the provisions of the Order made under subsection (1) such person or class of persons as may be specified in the Order.*

(3) *The President may authorise the Commissioner and such other person as may be specified in the Order made under subsection (1) to suspend in that person's absolute discretion, the operation of the Order in any specified area or in any part thereof and similarly to terminate such suspension and to declare the Order to be in operation.*

(4) *Any person who contravenes any of the provisions of an Order made under subsection (1) shall commit an offence and shall be liable upon conviction to imprisonment for a term not exceeding 2 years or to a fine not exceeding SCR2,000 or to both such imprisonment and fine.*

[190] The Petitioners have challenged this provision on three different grounds. First, the Petitioners averred that **section 24** is a violation of **Articles 41, 42 and 43**. Second, the Petitioners averred that **section 24** violates **Articles 18, 23 and 25**. Finally, the Petitioners averred that **section 24** violates **Article 27**, the equality clause.

Violation of Articles 41, 42 and 43

[191] The Petitioners pleaded that **Section 24** of the Act contravenes **Articles 41, 42 and 43** of the Constitution. These provisions, set out a mechanism for instances of public emergency, and the restrictions that may be placed on the rights of individuals during such emergencies. **Article 41** permits the President to make a declaration which places the country in a State of Emergency in certain circumstances. The President may only declare a State of Emergency in circumstances where he or she has reason to believe that:

- a. “A grave threat to national security or public order has arisen or is imminent;
- or
- b. A grave civil emergency has arisen or is imminent.”

[192] Once the State of Emergency is declared, certain constitutional protections are triggered:

- a. in order to provide for adequate notice to the population, the declaration must be published in the Gazette [**Art 41(1)**];
- b. the facts and circumstances leading to the declaration must be forwarded to the Speaker of the National Assembly who must cause these to be considered by the National assembly within 7 days from the proclamation [**Art 41(3)**];
- c. the proclamation is only valid for 7 days unless it is approved by the National Assembly with a resolution passed with not less than a 2/3rds majority [**Art 41(2)**];
- d. once approved by the National Assembly, it may not last for more than three months [**Art 41(4)**]; and
- e. it may be revoked by the National Assembly [**Art 41(5)**].

[193] This declaration of a State of Emergency does not have any effect on the rights of the populace of itself, but it places the population on notice that extraordinary steps may be taken by the government in order to combat an extraordinary threat to the country.

[194] **Article 43** provides for the placing of restrictions on rights and freedoms during a state of public emergency. A state of public emergency is any period during which Seychelles is at war, or a declaration of a State of Emergency is in force (**Article 49**). Under **Article 43**, during a period of public emergency, laws may be passed (either before or under the state of emergency) which provide for “the taking of such measures as are strictly required to meet the exigencies of the situation” [**Article 43(2)**]; however any such laws shall not provide for the taking of measures that are inconsistent with **Article 15** (right to life), **Article 16** (right to dignity), **Article 17** (freedom from slavery, forced or compulsory labour), **Article 18(3)** (right to be informed of reason for arrest, right to remain silent, right to be defended, and in the case of a minor the right to communicate with the parent or guardian), **Article 19(2-6)** (fair trial rights), **Article 19(11)** (the right to appeal a conviction), **Article 21** (the right to freedom of conscience) and **Article 27** (the right to equal protection of the law).

[195] It was argued by the Petitioners that this power to declare a curfew as provided under **section 24**, was in some way related to the powers to restrict rights in **Article 43**. Historically, the power to impose a curfew was part of the extraordinary powers which

were exercised only at such times as there existed a public emergency. In recent years, however, the constitutions of modern countries have specifically delegated this power to declare a curfew, as it does not automatically rest with any organ of State unless specifically designated under the Constitution or under an Act of Parliament.

[196] However, having carefully considered **Article 43**, we are of the opinion that it cannot be interpreted that **section 24** is intended to be a law applicable during times of public emergency envisaged under **Article 43** for the following reasons.

- a. Firstly, the wording of the Act would need to clearly indicate that this was intended to implement **Article 43(2)**. If the intention is to legislate for emergency situations as contemplated under **Article 43(2)**, the legislature would have expressly stated so and complied with the requirements under **Article 43(3)** of the Constitution.
- b. Secondly, the threshold for its application is too low because a public emergency only exists when the country is at war, or where a grave threat to national security or public order has arisen or is imminent; or a grave civil emergency has arisen or is imminent. However, **section 24** may be invoked by the President whenever “the President is of the opinion that it is expedient for the maintenance and preservation of law and order”.
- c. Thirdly, the powers allow for unequal treatment of portions of society as the President may “exempt from the provisions of the Order... such person or class of persons as may be specified in the Order”, whereas the right to equal protection before the law is a non-derogable right under **Article 43** even in times of public emergency.

[197] Therefore, we find that **section 24** is unrelated to **Article 43**, and as it is not related to **Article 43** it will also not infringe **Article 43** as it is not purporting to limit rights under **Article 43**.

Violation of Articles 18, 23 and 25

[198] The Petitioners argued that **section 24** permits the unconstitutional infringement of the rights to **Article 18** (right to liberty), **Article 23** (freedom of association) and **Article**

25 (freedom of movement). **Section 24** clearly allows the President to affect the rights to free movement and the right to assembly. That this may amount to detention was not fully argued before us, however, the constitutional notion of detention is very broad, and includes confinement along with criminal detention, and so we have to treat the imposition of a curfew very seriously as it may impact several rights, most specifically the right to free movement (**Article 25**), but also other civil and political rights may be impacted by being required to be indoors during certain times which may prevent individuals from assembling and associating (**Article 23**) and may in certain cases amount to detention.

[199] The primary right affected, however, is **Article 25** which provides, in relevant part, as follows:

“(1) Every person lawfully present in Seychelles has a right of freedom of movement and for the purpose of this article this right includes the right to move freely within Seychelles, the right to reside in any part of Seychelles, the right to leave Seychelles and the right not to be expelled from Seychelles.”

....

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

- (a) In the interests of defence, public safety, public order, public morality or public health,*
- (b) For protecting the rights and freedoms of other persons;*
- (c) For the prevention of a crime or compliance with an order of a court;*
- (d) For the extradition of persons from Seychelles; or*
- (e) For lawful removal of persons who are not citizens of Seychelles from Seychelles”*

[200] **Article 25** involves the same wording (“law necessary in a democratic society”) as the *Sullivan* test, and therefore the *Sullivan* test may be applied in order to assess the constitutionality of the limitation of the right.

[201] Law: **Section 24** is a law creating a power which is sufficiently clearly delineated to be classified as a law.

[202] *Necessary*: It was not clear in the arguments what nuisance this curfew power was necessary to prevent in times when there is no serious threat to public order or **Article 41** situation. The power to issue a curfew is an extreme power, it is a total restriction on **Article 25** and is typically only used in extreme circumstances, such as during war or riots. This section is effectively enabling a typically emergency power to be used in non-emergency circumstances, without the many protections found in the **Article 41 and 43** provisions.

[203] The Hon. Attorney General submitted that there may be situations where there is a riot in a localised area, in which circumstances it would be inappropriate to declare an **Article 41** state of emergency, he argued that in such times the only effective measure would be for the President to declare that people should stay indoors.

[204] **Clause (3) of Article 25** allows the limitation of the right in the interests of defence, public safety, public order, public morality or public health; and we accept that other countries also have curfew powers. It is important, however, that we consider whether this curfew power is necessary in our country, which only has a small population.

[205] We can appreciate that curfews may be useful in ensuring the safety of individuals after hours, or preventing an unruly situation from escalating. However, in non-emergency situations, the police should be able to control an uprising without requiring a curfew, particularly when considering the size of the Seychellois population and its generally peaceable populace. In any event, the Police Force is empowered to take measures to ensure that law and order are maintained, including the power to arrest and use reasonable force.

[206] Therefore, we cannot conclude that granting this power to the President in non-emergency situations is a necessary restriction on the right to free movement in a democratic society.

[207] *Proportionality*: Given this finding, it is not necessary to apply the proportionality test to the measures at hand. However, we would likely find that the restriction is not proportionate to the objective that the section is seeking to achieve.

[208] Therefore, we find that **section 24** fails the *Sullivan* test in that it is unnecessary for such a broad and restrictive power to be granted to the President in a time of peace or where no public emergency exists.

Remedy

[209] **We find that section 24 is an unconstitutional restriction of Article 25.**

[210] **We hereby declare section 24 void.**

[211] Given our finding, it is unnecessary to consider the other grounds argued by the Petitioners with regard to Section 24.

Do Sections 26 and 27 “control a persons behaviour,” and violate Article 16, the right to be treated with dignity?

[212] Under **section 26**:

26. *A police officer may exercise a power under this section in relation to any person at or near a regulated place if the police officer reasonably suspects that the person's behaviour -*

(a) is or has been interfering with trade or business at the place by obstructing, hindering or impeding someone entering or leaving the place;

(b) is or has been disorderly, indecent, offensive, or threatening to someone entering or leaving the place;

(c) is or has been disrupting the peaceable and orderly conduct of any event, entertainment or gathering at the place; or

(d) shows that the person is about to commit an offence or has just committed or is committing an offence.

[213] Furthermore, **section 27** provides as follows:

27.(1) Subject to this section, a police officer of or above the rank of inspector may give a person or group of persons whose behaviour is of a kind mentioned in section 26 any direction that is reasonable in the circumstances.

(2) A police officer shall not give a direction under subsection (1) that interferes with a person's right of peaceful meeting unless it is reasonably necessary in the interests of –

(a) public safety;

(b) public order; or

(c) the protection of the rights and freedoms of other persons.

(3) The "rights and freedoms" referred to in subsection (2)(c) includes the right and freedom of the public to enjoy the place and the right of persons to carry on lawful business in or in association with the place.

(4) Without prejudice to the generality of subsection (1), any direction may require a person to -

(a) leave the regulated place and not return or not be within the regulated place within a specified period of not more than 24 hours;

(b) leave a stated part of the regulated place and not return or be within the stated part of the regulated place within a specified period of not more than 24 hours;

(c) move from a particular location at or near the regulated place to a stated reasonable distance, in a stated direction, and not return or be within the stated distance from the place within a specified period of not more than 24 hours.

[214] The Second Petitioner argued that **Sections 26 and 27** of the Act allow the police to control a person's behaviour, which violates their **Article 16** right to be treated with

dignity, particularly as the standard of acceptable or legally permissible behaviour under the Act is that which will be dictated by a Police Officer.

[215] The right to dignity under **Article 16** is that “[e]very person has a right to be treated with dignity worthy of a human being and not to be subjected to torture, cruel, inhuman or degrading treatment or punishment.”

[216] The behaviour which is illustrated in **section 26** is not subjectively set by an individual police officer, but is behaviour which is not acceptable in Seychellois society as decided by the National Assembly when they enacted this law. We cannot see that there is any violation of the right to dignity in a police officer requesting that an individual leave a public place where that person’s behaviour is falling below the threshold described in **section 26**. This is a reasonable police power which is provided for in all democratic societies.

[217] Moreover, the request to move away, under **section 27** is also a usual police power, and is reasonable and necessary in order to ensure the peaceful goings on. This section is merely empowering the police to take reasonable steps of a police officer.

[218] We therefore conclude that neither **section 26** nor **section 27** is unconstitutional and therefore the pleading in this respect fail.

Is section 29 a violation of Article 18(2), Article 26 and Article 28 or otherwise arbitrary, unreasonable, onerous and ambiguous and therefore unconstitutional?

[219] **Section 29** of the Act provides as follows:

29. (1) *Any police officer or an NDEA officer or a customs officer or an immigration officer, if satisfied upon information and after such further inquiry as that officer thinks necessary, that any person -*

(a) is making, has made or is about to make;

(b) is exhibiting or communicating or is about to exhibit or communicate; or

(c) has in that person's possession,

any film or picture or document containing a record of any law enforcement operation or investigation, or of a prohibited place and that the film or

picture, or document if exhibited or communicated (whether to the public or any section thereof) will -

- (i) prejudice the effective conduct of an ongoing law enforcement operation or investigation; or*
- (ii) endanger the safety of any law enforcement officer in an ongoing law enforcement operation or investigation; or*
- (iii) endanger the security of the State*

then, the officer may exercise any of the powers specified in subsection (2).

(2) The police officer or NDEA officer or customs officer or immigration officer may -

- (a) direct the person reasonably believed to be making, exhibiting or communicating or possessing a film or picture or document or is about to do so respectively, to immediately cease making, exhibiting or communicating the film, or picture or document, and either to immediately delete, erase or otherwise destroy the film or picture or document or to surrender the film or picture or document or any copy thereof to the police officer, or NDEA officer or custom officer or immigration officer, as the case may be;*
- (b) without warrant, search any person who the officer has reason to believe is in possession of a film or picture or document referred to in subsection (1);*
- (c) without warrant, and with such assistance and by such force as is necessary, seize any film or picture or document referred to in subsection (1) and any copy thereof, and any equipment (including a mobile phone) used or about to be used in the making, storage, exhibition or communication of the film or picture; and*
- (d) take into custody any person reasonably believed to be in possession of such film or picture or document.*

(3) Where a person to whom a direction under subsection (2)(a) is given fails to comply with the direction, the person shall commit an offence and shall be liable on conviction to imprisonment for a term not exceeding 2 years and to a fine not exceeding SCR2000 or to both such imprisonment and fine and

any film, picture, document and any equipment, (including a mobile phone) seized may be forfeited or dealt with as ordered by the Court.

[220] Challenges have been brought to **section 29** of the Act under the following Articles of the Constitution: **Articles 18(2)(b), 19(7), 22, 26(1) and 28**. Furthermore, **Section 29(2)(b) and (d)** are challenged for violating **Article 20**, the right to privacy and **Article 18**, the right to liberty. The wording of the Articles relied upon are as follows:

Article 18

(1) Every person has a right to liberty and security of the person.

(2) The restriction in accordance with fair procedures established by law, of the right under clause (1) in the following cases shall not be treated as an infringement of clause (1):

(a) the arrest or detention in execution of a sentence or other lawful order of a court;

(b) the arrest or detention on reasonable suspicion of having committed or of being about to commit an offence for the purposes of investigation or preventing the commission of the offences and of producing, if necessary the offender before a competent court;....

Article 19(7)

Any court or other authority required or empowered by law to determining the existence or extent of any civil right or obligation shall be established by law and shall be independent and impartial , and where proceedings for such a determination are instituted by any person before such a court or other authority the case shall be given a fair hearing within a reasonable time

Article 22

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 seek, receive and impart ideas and information without interference.

Article 26

Every person has a right to property and for the purpose of this article this right includes the right to acquire, own, peacefully enjoy and dispose of property either individually or in association with others.

Article 28

(1) The State recognises the right of access of every person to 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.

[221] When we consider **section 29**, the one aspect of the wording of **section 29** which immediately produce the most cause for concern, has to do with the power under **section 29(2)** for the police officer to order a person to cease filming, and to immediately delete, erase, or otherwise destroy the film or picture or document

[222] The prescribed purpose of this provision is to ensure the safety of the officers, and to ensure that the investigations or operations are not hampered by the recording of the operations of the police or other officers.

[223] Does this affect the right to access information? The answer is no. The right under **Article 28** is restricted to information held by a public authority. It serves a purpose which is not infringed here where this is the converse: the civilian is holding information about a public organ's operations.

[224] Does this affect **Article 18(2)**? The answer is again, no. Under this law, the arrest or apprehension of an individual would still be under the suspicion of committing a crime. The individual involved would have the protection of of **Article 18(2)**.

[225] Does this affect Freedom of Expression? The answer, in our view is yes. An individual who is forced to stop making, exhibiting or communicating a film or picture is prevented from capturing information which may be relevant to in the public interest, or in their own defence or in the defence of others. We are aware of the need to hold public officers to account and the increasingly important role of video footage in shedding light on situations as they arise. This footage may equally be used to vindicate the police in

instances where individuals allege police brutality. This right is important for the purposes of public accountability. In this modern era anyone can become a journalist, in the moment, and they should not be silenced in order to protect the police in their investigations and operations. If it turns out that they were responsible for transmitting information which caused frustration to the investigation, there are other offences under which the individual involved will be able to be prosecuted.

[226] Moreover, this section affects the **Article 26** right to property (which includes the right to intellectual property). At the same time that it is important to ensure that the police and other law enforcement officers are able to do their jobs without the risk that videographic evidence may place them in some form of risk, or without their efforts being frustrated by the easy dissemination of information to suspects and persons being investigated. However, we must also recognise the importance of the public being able to hold police and other officers accountable. In the modern age, the use of technology is helpful in solving crimes, and can serve a valuable purpose. We have to balance these competing interests. The risk to the operation will usually be contemporaneous, and once the moment has passed, the risk will be less significant. Whereas causing an individual to cease making a video, or requiring that it is immediately deleted will result in the total destruction of their property or ideas contained therein. This can seriously impact on the individual's ability to create intellectual property in the form of the video / document they are making, and their ability to seek, receive and impart ideas without interference. Such a violation must be justified and necessary.

[227] When we apply a *Sullivan* test, we find that **section 29** is a law for the purposes of the first test. We accept, that this section may have a legitimate purpose. Therefore, we accept that it is necessary in a democratic society to protect police officers in their duties. However, the test fails on the proportionality leg because the information and documents are required to be deleted and destroyed without proper legal procedures.. The documents or films which are required to be deleted or destroyed, could be seized in order to allow the police to better determine the risk and later released when they no longer pose the risk, or alternatively the person may be arrested. These are less restrictive measures which could have been taken in order to make the law more fair. A police officer requiring a person to delete a film, document or information is unconstitutional is not proportional to the goal intended. Furthermore, to prevent someone from making the

video is also not proportional as the making on its own will not be able to affect the investigation or operation. However if the video is being communicated, and this creates real-time danger or jeopardise the ongoing operation, then such exhibiting or communicating may be required to be stopped.

Remedy

[228] Therefore we find that section 29(2)(a) of the Act is an unconstitutional violation of Article 22 and Article 26.

[229] We hereby declare section 29(2)(a) is void.

[230] **Article 20(1)** provides that

Every person has a right not to be subjected –

(a) without the consent of that person, to the search of the person or property or premises of that person or to the unlawful entry by others on the premises of that person;

(b) without the consent of the person or an order of the Supreme Court, to the interception of the correspondence or other means of communication of that person either written, oral or through any medium.

(2) Anything contained in or done under the authority of any law shall not be held to be inconsistent with or in contravention of clause 1(a) to the extent that the law in question makes provision –

(a) that it is reasonably required in the interest of defence, public safety, public order, public morality, public health, the administration of Government, town and country planning, nature conservation and the economic development and well-being of the country;

(b) that is reasonably required for the purpose of protecting the rights or freedoms of other persons;

...

Except so far as that provision or, as the case may be, the thing done under the authority thereof is shown not to be necessary in a democratic society.

[231] As it stands now, **section 29(2)(b) and (c)** of the Act provide for the warrantless search of an individual, and the warrantless seizure of any film, picture or document or any equipment on which such pictures, documents or films may be made and stored which includes documents on mobile phones, computers or tablets.

[232] It may be that such measures are necessary in order to protect the safety of any law enforcement officer as contemplated under **section 29(1)(c)(ii)**, however these measures may also be invoked in the other situations laid out in **section 29(1)(c)(i) and (iii)**. These reasons provided for by **section 29** are not contemplated under the permissible restrictions to the right to privacy under **Article 20(2)**. Therefore, **section 29** is drafted in such a way as to allow warrantless searches and seizures in ways not contemplated by the exceptions under **Article 20**. In our view, the breadth of such provisions, goes further than is strictly necessary and therefore to that extent **section 29** is unconstitutional under **Article 47**.

[233] We are of the opinion that NDEA officers, customs officers or immigration officers should not be included in the list of empowered officials under **section 29** of the Act. They have their prescribed statutory duties under their respective Acts. However, this point is not relevant given our finding that **section 29(2)(a), (b) and (c)** are unconstitutional.

[234] The offence created under **section 29(3)** is unconstitutional because it is based on **section 29(2)(a)** which has been declared to be unconstitutional.

Remedy

[235] **We find section 29(2)(a), (b) and (c) and section 29(3) are unconstitutional.**

[236] **Therefore, we hereby declare section 29(2)(a), (b) and (c) and section 29(3) are void.**

The constitutionality of offence provisions

[237] The Second Petitioner pointed out certain criminal offences have been created to sanction the failure to abide by the provisions of the Act. It is our considered view that the Legislature has the prerogative to create charging sections to enforce its provisions.

In the present Act, we hold that as long as the prohibition of the unlawful behaviour withstands the constitutional test, then the relevant charging sections shall remain and be constitutional. Where any provision has been declared unconstitutional, that would render the related charging section unconstitutional.

[238] The Second Petitioner also challenged offences which criminalised behaviour already criminalised elsewhere on the statute book. It is not unconstitutional for the same offence to appear more than once on the statute book, provided that the offence is brought against an individual only once. This merely gives the police a choice of under which law to charge an individual.

[239] We are cautious of striking down offence provisions, because the legislature has considered the creation of the offence and it has carefully considered the appropriate sanction to put in place.

[240] Therefore, it follows that any offence created for the contravention of any provisions of this Act which has not been declared unconstitutional by this judgment, will still remain intact as an offence.

Conclusion

[241] In summing up, for the reasons hereinbefore stated, we unanimously make the following declarations and orders:

A. In respect of the Public Order Act, 2013:

1. Section 3 is unconstitutional as it violates Article 160(1) and (2) of the Constitution. Hence, we hereby declare section 3 void.
2. Section 5 is unconstitutional as it violates Article 22 and Article 23 of the Constitution. Hence, we hereby declare section 5 void.
3. Section 6 is unconstitutional as it violates Article 23 of the Constitution. Hence, we hereby declare section 6 void.
4. Section 7 is unconstitutional as it violates Article 22 and Article 23 of the Constitution. Hence, we hereby declare section 7 void.

5. Section 8 is unconstitutional to the extent that it is reliant on section 6. Hence, we hereby declare section 8 void.
6. Section 9(2), 9(3), 9(4) and 9(6) are unconstitutional these sections violate Article 23 of the Constitution. Hence, we hereby declare section 9(2), 9(3), 9(4) and 9(6) void.
7. Section 11 of the Act is unconstitutional as it violates Article 23 of the Constitution. Hence, we hereby declare section 11 void.
8. Section 13(2)(a) is unconstitutional as it violates Article 23 of the Constitution. Hence, we hereby declare section 13(2)(a) void.
9. Section 13(3)(a) is unconstitutional as it violates Article 27 of the Constitution. Hence, we hereby declare section 13(3)(a) void.
10. Section 14(1) is unconstitutional as it violates Article 23 of the Constitution. Hence, we hereby declare section 14(1) void.
11. Section 22(3) is unconstitutional as it violates Article 27 of the Constitution. Hence, we hereby declare section 22(3) void.
12. Section 24 is unconstitutional as it violates Article 25 of the Constitution. Hence, we hereby declare section 24 void.
13. Section 29(2)(a) is unconstitutional as it violates Article 22 and Article 26 of the Constitution. Hence, we hereby declare section 29(2)(a) void.
14. Section 29(2)(b) and section 29(2)(c) are unconstitutional as these sections violate Article 20. Hence, we hereby declare section 29(2)(b) and section 29(2)(c) void.
15. Section 29(3) is unconstitutional to the extent that it is reliant on section 29(2). Hence, we hereby declare section 29(3) void.

B. Accordingly, we direct the Registrar of the Supreme Court to transmit certified copies of this judgment to the President of the Republic and to the Speaker of the National Assembly in accordance with Article 46(6) of the Constitution; and

C. We make no order as to costs.

Signed, dated and delivered at Ile du Port on 7th July 2015.

D KARUNAKARAN
Acting Chief Justice (Presiding)

B. RENAUD
Judge of the Supreme Court

G. DODIN
Judge of the Supreme Court

C. McKEE
Judge of the Supreme Court