

## THE COOK ISLANDS CONSTITUTION: THE APPOINTMENT OF A PRIME MINISTER AFTER A GENERAL ELECTION

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The granting of independence or self government to former British colonies in the Pacific region has generally been effected by the adoption of a written constitution, modelled on the unwritten conventions of the Westminster system of government, following the approach taken in Australia and Canada, as well as in other nations, now members of the Commonwealth of Nations.

One such written constitution is that of the Cook Islands, enacted in the Cook Islands Constitution Act of 1964 which was passed by the Parliament of New Zealand on 17 November 1964 and which came into force on 4 August 1965, conferring by s.3 self government on the Cook Islands but reserving by s.5 responsibility for external affairs and defence in Her Majesty the Queen in right of New Zealand. The Constitution of the Cook Islands, found in the Schedule to the Act, establishes a Westminster style of government.

However, certain problems arose with respect to the position of the Prime Minister after the general election for the Parliament of the Cook Islands held on 30 March 1983 at which the Cook Islands Party gained 13 of the 24 seats, ousting the previous Democratic Party Government led by Sir Thomas Davis. In accordance with Article 14(3)(c) of the Constitution, Sir Thomas Davis tendered his resignation to the Queen's Representative who then appointed the leader of the Cook Islands Party, Mr. G.A. Henry, as Prime Minister pursuant to Article 13(2)(b).

The issue then arose as to whether Mr. G.A. Henry was obliged to resign or else be dismissed by the Queen's Representative pursuant to Article 14(2).

Before the commencement of the first session of the new Parliament, the Queen's Representative acting under s.3 of the Judicature Act 1980-81 and on the advice of the Prime Minister, referred this issue and other questions to the High Court of the Cook Islands.<sup>1</sup> These questions were removed by the Chief Justice to the Court of Appeal. The relevant parts of Articles 13 and 14 are as follows:

### 13. Cabinet

(2) The Prime Minister shall be appointed as follows:

- (a) If the appointment is to be made while Parliament is in session, the Queen's Representative shall appoint as Prime Minister a member of the Parliament who commands the confidence of a majority of the members of the Parliament:

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1. The case is unreported and is cited as:  
*In the matter of Articles 13 and 14 of the Constitution*  
*and*  
*in the matter of the Judicature Act 1980-81 Section 3*  
*and*  
*in the matter of a reference by the Queen's Representative.*

- (b) If the appointment is to be made while the Parliament is not in session the Queen's Representative shall appoint as Prime Minister a member of the Parliament who in the opinion of the Queen's Representative, acting in his discretion, is likely to command the confidence of a majority of the members of the Parliament:
- (c) If the appointment is to be made after a dissolution of the Parliament and before the holding of the general election of the Parliament following that dissolution, the Queen's Representative shall appoint as Prime Minister a person who was a member of the Parliament immediately before that dissolution and who in the opinion of the Queen's Representative, acting in his discretion, is likely to command the confidence of a majority of the persons who were members of the Parliament immediately before that dissolution:  
 Provided that where the Parliament has been dissolved pursuant to sub-clause (2) of Article 37 hereof, the Queen's Representative shall appoint as Prime Minister a person who was a member of the Parliament immediately before that dissolution and who in the opinion of the Queen's Representative, acting in his discretion, is capable of performing the functions of the Prime Minister.

#### 14. Duration of office of members of Cabinet

- (1) The appointment of the Prime Minister who is in office immediately before the date of the holding of a general election of the Parliament may be terminated by the Queen's Representative, acting in his discretion, after the date of the holding of that election and before the date of commencement of the first session of the Parliament following that election.
- (2) The appointment of the Prime Minister who is in office at the commencement of the first session of the Parliament following a general election thereof shall be terminated by the Queen's Representative on the seventh day of that session if the Prime Minister has not sooner resigned.
- (3) The appointment of the Prime Minister shall also be terminated by the Queen's Representative —
- (a) If the Prime Minister ceases to be a member of the Parliament for any reason other than the dissolution of the Parliament; or
- (b) If the Parliament passes a motion in express words of no confidence in cabinet or if cabinet is defeated on any question or issue which the Prime Minister has declared to be a question or issue of confidence:  
 Provided that if after the passing of such a motion or after that defeat the Prime Minister so requests, the Queen's Representative, acting in his discretion, may dissolve the Parliament instead of terminating the appointment of the Prime Minister; or
- (c) If the Prime Minister resigns his office by writing under his hand delivered to the Queen's Representative; or
- (d) If the Prime Minister is absent from the Cook Islands, otherwise than on official business, for a period of more than 3 months without written authority given by the Queen's Representative, acting in his discretion.

The four questions before the Court of Appeal and the answers given in its unreported opinion, delivered by the Chief Justice<sup>2</sup> were:

- (1) Is the Queen's Representative required by Article 14 (2) to terminate the appointment of the Prime Minister, the Hon. G.A. Henry, within 7 days as therein prescribed, if the Prime Minister has not earlier resigned?

Answer: Yes.

2. At Rarotonga on 29 July 1983. The Court of Appeal comprised Speight C.J., Dillon & Keith JJ.

(2) If the answer to Question (1) is “Yes”, then for the purposes of the appointment contemplated by Article 13(2)(a), is a vote required to be taken in Parliament expressing confidence in the Prime Minister?

Answer: Yes.

(3) If the answer to Question (2) is “Yes”, is the majority to be fixed by —

- (a) the majority of the members present (Article 34(2));
- (b) the majority of members elected;
- (c) or the majority of the total membership including vacancies?

Answer: (a) the majority of the members present.

(4) In the event of a tied vote of confidence does the “person presiding” (Article 34(3)), have a casting vote?

Answer: Yes, if the member presiding is a member and No, if he is not a member.

(1) With respect to the first question, the Court was of the opinion that Mr. Henry must resign within 7 days of the first session of the new Parliament or else be dismissed by the Queen’s Representative. That was the clear and unambiguous requirement of Article 14(2) which required every Prime Minister, however or whenever appointed, to resign to enable the Queen’s Representative to appoint a Prime Minister under Article 13(2)(a) who is, ‘a member of the Parliament who commands the confidence of a majority of the members of the Parliament’.

Under Article 13(2)(a), the Queen’s Representative has no discretion in appointing the Prime Minister, rather, the Parliament by a vote of confidence or other act must indicate who commands its support and that is the person who must be appointed by the Queen’s Representative.

This lack of discretion is in contrast with the appointment of a Prime Minister under Article 13(b) and (c) when the Parliament is not in session. In this situation, the Queen’s Representative is empowered to appoint a member ‘who in the opinion of the Queen’s Representative, acting in his discretion, is likely to command the confidence of a majority of the members of the Parliament.’

It was on this basis that the Hon. Mr. G.A. Henry had been appointed after the general election, but Article 14(2) required him to resign within 7 days of the first session of the new Parliament to enable that Parliament to indicate who in fact has its majority support and consequently, be appointed Prime Minister under Article 13(2)(a).

So, whenever a Prime Minister is appointed in the discretion of the Queen’s Representative under Article 13(b) and (c), that is, when the Parliament is not in session, as soon as it is convened, that Prime Minister must resign and the Parliament has the opportunity to affirm the choice of the Queen’s Representative or indicate that another member commands the confidence of the Parliament.

The rationale behind these provisions<sup>3</sup> was the absence at the time of their drafting of any political party system in the Cook Islands. Despite the subsequent establishment of political parties, the Court of Appeal refused to read down Article 14(2) to refer to hold-over Prime Ministers only, in view of its clear and specific terms.

The Court recognized that if the unwritten conventions of the Westminster system are converted into statutory form, changes both intended and unintended are likely to occur and went on to say:

It should not be assumed that the traditional models have been carried over without change. As the Privy Council<sup>4</sup> warned we should guard against forcing the new constitutional language into a traditional pattern if it does not fit.

3. Similar provisions are found in the Western Samoan Constitution, Articles 32(2)(a) & 33(1).

Accordingly, by comparison with the unwritten conventions of the Westminster system, the powers of the Queen's Representative were narrower and the powers of the Parliament were wider as:

... it is the Parliament that in reality chooses (sic) the Prime Minister. The power of the Queen's Representative is a temporary and limited one. If he makes an appointment after the election and before the Parliament meets or if he leaves the holdover Prime Minister in office, Parliament must confirm that decision or in effect choose a new Prime Minister.

Reinforcing their view, the Court of Appeal referred to and relied upon the historical background to the drafting of the Constitution, in particular, *A Report to the Members of the Legislative Assembly of the Cook Islands on Constitutional Development*, presented in September 1963 by Professor C.C. Aikman, Professor J.W. Davidson and Mr. J.B. Wright, which recommended that the Prime Minister should be elected by the Parliament. The Court also relied upon similar provisions in the constitutions of other Pacific Islands, namely Nauru,<sup>5</sup> Papua New Guinea,<sup>6</sup> Tuvalu,<sup>7</sup> the Solomon Islands,<sup>8</sup> Kiribati,<sup>9</sup> Vanuatu<sup>10</sup> and in particular, that of the first modern constitution of the Pacific region, Western Samoa.<sup>11</sup>

(2) The second question before the Court of Appeal concerned the role of the Parliament under Article 13(2)(a), in particular, whether the Parliament was required to pass a vote of confidence in a member as the proposed Prime Minister. In contrast with the other provisions of Articles 13 and 14, Article 13(2)(a) required the Queen's Representative to appoint as Prime Minister that member of Parliament 'who commands the confidence of a majority of the members of the Parliament'. Such a person, according to the court, '... would be evidenced by a vote of confidence in the candidate or some other unequivocal act of the legislature endorsing the candidate'.

Again, the court reasserted the predominance of the words of the Constitution over the unwritten conventions of the Westminster system which knew only of a vote of confidence in a cabinet or government and not in a Prime Minister.

(3) With respect to the third question, the court held that any vote endorsing a member of Parliament as Prime Minister needed to be passed by a majority of the members *present* (Article 34(2)).

(4) Finally, the Court answered the fourth question as to the role of the Speaker, by holding, that if the speaker is not a member of the Parliament then he has no right to vote at all, whereas, if he is a member of Parliament, he has only a casting vote where there is an equality of votes (Article 34(3)).

The constitutional requirement endorsed by this decision, namely, that a Prime Minister appointed by the Queen's Representative in his discretion must resign to enable the Parliament to select the Prime Minister, is a requirement not found in the United Kingdom, Canada, Australia and New Zealand where political parties developed at a fairly early stage in their constitutional development. Now, with the establishment of political parties in the South Pacific region, this constitutional requirement seems unnecessary in view of the fact that the leader of the majority party in the Parliament who will be appointed Prime Minister by the Queen's Representative after a general election and then must resign, will be reappointed after the Parliament passes a vote of confidence in him along party lines. Clearly, when the unwritten conventions of the Westminster System are converted into statutory form, problems arise as political conditions change and the statutory formulation of these conventions is not sufficiently flexible to adapt to those changes.

4. See *Adegbenro v. Akintola* [1963] A.C. 614 at 631-2.

5. Nauru Constitution 1968, Articles 16 and 24.

6. Papua New Guinea Constitution 1975, ss.142 and 145.

7. Tuvalu Constitution U.K.S.I. 1975, ss.32 and 33 and Annex I.

8. Solomon Islands Constitution U.K.S.I. 1978, ss.33 and 34 and Schedule I.

9. Kiribati Constitution U.K.S.I. 1979, No. 719, ss.30-38.

10. Vanuatu Constitution 1980, Article 39 and Schedule 2.

11. *supra* n.3.

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