THE SPECTRE OF OUSTER CLAUSES: THE DEPORTATION OF THE UNIVERSITY OF THE SOUTH PACIFIC VICE CHANCELLOR FROM FIJI

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ABSTRACT

Ouster clauses supposedly shield administrative decisions from judicial review. It is unforeseeable however that an ouster clause can make an unlawful decision lawful. The principle of the corporate veil that separates directors from the company as a legal entity, which can be lifted for breach of fiduciary duty illustrates this. Similarly, an unlawful administrative decision cannot be shielded by ouster clauses from judicial review.

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INTRODUCTION

The power of ouster clauses to prevail over the constitutional jurisdiction of the High Court to consider an application from a plaintiff for relief has confounded the judiciary in common law jurisdictions for centuries. Recent cases in Fiji have diverged from the generally accepted position that the High Court retains an inherent right to supervise an inferior tribunal and any aggrieved person regarding a decision can request the court to exercise that power. This article examines whether it is beyond the power of decrees, statues, or parliament to confer to an administrative tribunal the power to make binding and conclusive decisions regarding the limits of its jurisdiction. In particular, the recent decision of the Minister of Immigration in Fiji to deport the Vice Chancellor of the University of the South Pacific (USP) under a provision that is protected by an ouster clause.

Arguably, acceptance of a permanent ouster implies that an administrator can decide with impunity aware that irrespective of its unlawful status he or she is shielded by the ouster clause. In other words, an ouster clause stands to make an unlawful decision lawful despite assurance otherwise in the constitution. It undermines the supremacy of the constitution which exemplifies the principles of justice, the rule of law and separation of powers.

BACKGROUND

Professor Pal Ahluwalia was appointed as Vice Chancellor and President of the University of the South Pacific on or about November 2018. Soon after assuming his position Professor Ahluwalia presented a white paper highlighting corrupt practices and abuse of office. The abuse involved senior academics and staff who manipulated the payment of allowance running into hundreds of thousands of dollars they were not entitled to during the time of his predecessor Professor Rajesh Chandra of Fiji. This was followed by the engagement of BDO Charted Accounts of New Zealand to carry out an investigation, thus the BDO Report which has remained confidential. However, excerpts disclosed from New Zealand reveal the names of senior academics and staff concerned who are closely linked to people in high authority within the Fiji government.[i]

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A counter-report emerged alleging abuse of authority by Professor Ahluwalia from the chairperson of the Risk and Audit Committee, Mahood Khan. Pro Vice Chancellor Winston Thompson decided to investigate the allegation through the Executive Committee which he chairs. The Executive Committee subsequently suspended Professor Ahluwalia pending investigation, but the University Council reinstated the Vice Chancellor and ordered that both Thompson and Mahood be investigated.[ii]

As the saga continued the University Council became aware of a clause in Professor Ahluwalia's contract which stipulated that "should your work permit be declined or cancelled for any reason, your appointment will be terminated immediately without notice or payment in lieu." While the University Council was working amending the clause the Fiji government beat them to it and rescinded Professor Ahluwalia's work permit on Wednesday 3 February 2021 before deporting him and his wife at 10 am the next day.[iii]

According to Professor Ahluwalia the deportation letter was served to them at 11 pm by police and immigration officers who broke into his compound, bundled them into a vehicle and drove them to Nadi airport. The 'prohibited immigrant' notice served to them cited s 13(2)(g) of the Immigration Act 2003 which states:

> (2) The following persons if they are not citizens, are members of the prohibited class-
>
> (g) a person who prior to or after entry into the Fiji Islands, as a result of information received from any country through official or diplomatic channels, or from any other source the Minister considers reliable, is deemed by the Minister to be a person who is or has been conducting himself in a manner prejudicial to the peace, defence, public safety, public order, public morality, public health, security or good government of the Fiji Islands.

OUSTER CLAUSES

Generally, an ouster clause is a provision in a statute that seeks to remove the courts' jurisdiction from reviewing a decision taken under the authority of that provision. It is however well settled in most common law jurisdictions that an ouster clause cannot supersede the

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inherent authority of the High Court to supervise inferior courts and its jurisdiction to determine a plaintiff's application for relief by judicial review of an administrative decision based on an error in law.

For example, it is generally accepted in English administrative law that ouster clauses are unlikely to be effective. The logic by the majority of the House of Lords in the landmark case of *Anisminic v Foreign Compensation Commission* [iv]is that an ouster clause cannot be used as a shield for an unlawful decision from judicial oversight. In support of this interpretation Lord Diplock stated in *O'Reilly v Mackman* (emphasis added):[v]

> . . .if a tribunal whose jurisdiction was limited by statute or subordinate legislation mistook the law applicable to the facts as it had found them, it must have asked itself the wrong question, i.e., one into which it was not empowered to inquire and so had no jurisdiction to determine. **Its purported 'determination', not being a 'determination' within the meaning of the empowering legislation, was accordingly a nullity.**

The Supreme Court affirmed the principle by a majority in *R (on the application of the Privacy International) (Appellant) v Investigatory Powers Tribunal and others (Respondents)*[vi] that the words in an ouster clause in s 67(8) of the Regulation of Investigatory Powers Act 2000 (RIPA) are not effective to prevent review by the courts. Aptly summarized by Lord Carnwath thus:[vii]

> I see no strong case for holding that, consistently with the rule of law, binding effect cannot be given to a clause which purports wholly to exclude the supervisory jurisdiction of the High Court to review a decision of an inferior court or tribunal, whether for excess or abuse of jurisdiction, or error of law. In all cases, regardless of the words used, it should remain ultimately a matter for the court to determine the extent to which such a clause should be upheld, having regard to its purpose and statutory context, and the nature and importance of the legal issue in question; and to determine the level of scrutiny required by the rule of law.

The United Kingdom may have no written constitution like Fiji but the principle remains the same – ouster clauses do not prevent a judicial review challenge based on an error in law. A review of the High Court decision in *Plaintiff S157/2002 v Commonwealth of Australia* illustrates this point:[viii]

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A citizen of Bangladesh arrived in Australia with an Indian passport but was subsequently refused a protection visa by the Refugee Review Tribunal. After the decision was upheld by the Federal Court the plaintiff applied to invoke the jurisdiction of the High Court under s 75(v) of the constitution that he had been denied natural justice. At issue is the effectiveness of the privative clause in s 474 of the Migration Act 1958, which provides:

(1) A 'privative' clause decision'
- (a) Is final and conclusive
- (b) Must not be challenged, appealed against, reviewed, quashed or called in question in any court; and
- (c) Is not subject to prohibition, mandamus, injunction, declaration or certiorari in any court.

The section further clarifies that such a decision includes administrative decisions made or proposed to be made, or required to be made, as the case may be, under this Act, including the granting, giving, suspending, cancelling, revoking or refusing to give a certificate, direction, approval, consent or permission (including a visa).

One of the main issues that were to be a consideration is the authority of s 474 of the Act to oust the application by the plaintiff to the High Court for relief under s 75 of the Constitution. The Court ruled that "s 474 would be invalid if, on its proper construction, it attempted to oust the jurisdiction of the High Court as conferred by s 75(v) of the Constitution. As summarised in the joint judgement of Gaudron, McHugh, Gummow, Kirby and Hayne JJ:[ix]

> A decision flawed for reasons of a failure to comply with the principles of natural justice is not a 'privative clause decision within s 474(2 of the Act.

In other words, a decision has to be lawful to be protected by any privative or ouster clause.

THE SPECTRE OF OUSTER CLAUSES IN FIJI

The deportation of Professor Pal Ahluwalia, the Vice Chancellor of the University of the South Pacific from Fiji revealed the spectre of ouster clauses to the public for the first time. As

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discussed above immigration and police officers (about fifteen of them according to reports) broke down the perimeter fence and forced their way into the house at 11 pm to serve the 'prohibited immigrant' notice to the professor and his wife. Apart from the odd hour, the number of officers required to serve the notice and effect deportation is extraordinary.

The 'prohibited immigrant' notice which facilitated their deportation referred to s 13(2)(g) of the Immigration Act 2003:

> 13(2)The following persons, if they are not citizens are members of the prohibited class –(g) a person who prior to or after entry into the Fiji Islands, as a result of information received from any country through official or diplomatic channels, or from any other source the Minister considers reliable, is deemed by the Minister to be a person who or has been conducting himself in a manner prejudicial to the peace, defence, public safety, public order, public morality, public health, security or good of the Fiji Islands.

The public condemnation that followed based on the above was in ignorance of the amendment (which did not appear in the notice) of the section by Promulgation No 3 of 2008 that introduced an express ouster clause:

> Provided that and notwithstanding anything contained in this Act, the decision of the Minister made under this paragraph shall be final and conclusive and shall not be questioned or reviewed in any court.

The dubious character of actions taken to enforce deportation creates uncertainty over the scope of the ouster clause – given that the 'prohibited immigrant' notice is, *prima facie,* devoid of justice and due process. More so, when the Prime Minister himself is the Minister responsible for Immigration under whose authority the notice was issued. To be deported immediately upon being served with the 'prohibited immigrant' notice and in the middle of the night is simply unacceptable (if not unheard of) in a constitutional democracy, thus the dicta; can the ouster clause shield an unlawful administrative decision from judicial review? Being declared a 'prohibited immigrant' is not a 'deportation order' *pur se*, but the person(s) being declared as such should take the necessary steps to leave the country as soon as possible.

A review of *State v Attorney-General & Minister for Justice, ex parte One Hundred Sands Ltd*[x] and the subsequent appeal will provide background information that illuminates the callous

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enforcement of a decision protected by an ouster clause and the treatment of Professor Ahluwalia and his wife. In the case, the plaintiff (One Hundred Sands Ltd) applied to the High Court for judicial review of the decision by the respondent (Attorney General) to revoke a Casino Gaming License granted to the applicant on 15 March 2012. The case turned on the objection from the Solicitor General grounded in s 173(4)(d) of the Constitution:[xi]

> (4) Notwithstanding anything contained in this Constitution, no court or tribunal (including any court or tribunal established or continued in existence by the Constitution) shall have the jurisdiction to accept, hear, determine, or in any other way entertain, or to grant any order, relief or remedy, in any proceeding of any nature whatsoever which seeks or purports to challenge or question—
>
> (d) any decision made or authorised, or any action taken, or any decision which may be made or authorised, or any action which may be taken, under any Promulgation, Decree or Declaration, and any subordinate laws made under any such Promulgation, Decree or Declaration (including any provision of any such laws), made or as may be made between 5 December 2006 until the first sitting of the first Parliament under this Constitution, except as may be provided in or authorised by any such Promulgation, Decree or Declaration (including any provision of any such laws), made or as may be made between 5 December 2006 until the first sitting of the first Parliament under this Constitution.

The High Court considering its jurisdiction against the ouster provision referred to the well-known clause in *Minister of Home Affairs v Fisher* that: [xii]

> The way to interpret a Constitution on the Westminster model is to treat it not as if it were an Act of Parliament but as *sui generis* calling for principles of interpretation of its own, suitable to its character . . . without necessary acceptance of all the presumptions that are relevant to legislation of private law.
>
> Their Lordship fully accepts that a constitution should be dealt with that way and should receive a generous interpretation. But that does not require the courts, when construing a constitution, to reject the plain ordinary meaning of the words.

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In analysing the ouster clause, the Court applied the 'literal rule' of interpretation and decided that the clear and unambiguous wording of s 173(4)(d) does not preclude the court from reviewing the decision on 9 February 2015. The decision at issue was made outside the protected period between 5 December 2006 and 6 October 2014 (being the first sitting of parliament).[xiii] In any event, the Court ruled that the decision to revoke the gaming license was not illegal because the Respondent was entitled to revoke it for non-performance. In that context the decision was rational and justified supported with procedural propriety.[xiv]

On appeal, however, *One Hundred Sands Ltd v Attorney General of Fiji,*[xv] the Court of Appeal re-examine the High Court's decision regarding its jurisdiction given the ouster clause i.e., s 173(4)(d) of the Constitution. Interestingly, the Court of Appeal was of the view that the adoption of the 'literal rule' would not assist in this situation and a different interpretation should be utilised; i.e. the 'mischief rule' – what was intended to be avoided by s 173(4)(d). Arguably the 'mischief rule' as held in *Re Sussex Peerage* should only be applied where the statute is ambiguous and its application in this instance appears erroneous. Nonetheless, the Court of Appeal decided that:

> In view of this position the decision of the learned High Court Judge in holding that the High Court Judge had jurisdiction to hear and determine the application of the appellant is erroneous and has to be set aside. Section 173 provides for the exclusion of jurisdiction in the widest possible terms when it states that "Notwithstanding anything contained in this Constitution no court or tribunal (including any court or tribunal established or continued in existence by the Constitution) shall have the jurisdiction to accept, hear, determine, or in any way entertain or to grant any order, relief or remedy in any proceeding of any nature whatsoever." This section therefore clearly excludes the jurisdiction of the High Court in accepting, hearing and determining the application of the Appellant seeking leave for judicial review.

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THE PRECEDENT

As things stand, the Court of Appeal decision [xvi] is binding, demonstrated in *Swamy v Permanent Secretary for Immigration* [xvii] that the ouster provision in s 13(2)(g) of the Immigration Act effectively excludes the High Court jurisdiction from judicial review.

The Applicant was the Vice Chancellor of the University of Fiji. She was not a citizen of Fiji and was a permit holder according to her employment contract to work and reside in Fiji. The Applicant left Fiji on or around 22/3/2020 during a period of partial lockdown which was in operation where she worked. She had remained overseas since then and was declared a 'prohibited immigrant' by the Minister of Immigration in terms of section 13(2)(g) of the Act which the Court noted to be "final and conclusive and shall not be questioned or reviewed in any court."

The High Court in its introduction to the judgement outlined that:

> Such an ouster clause in any Act of parliament does not oust jurisdiction for judicial review, but the Court of Appeal in *One Hundred Sands Ltd v Attorney General of Fiji* [2017] FJCA 19 in which the Full Court held that jurisdiction for leave to appeal for Judicial Review is excluded in terms of Section 173 of Constitution of the Republic of Fiji of all decisions irrespective of any time restrictions, covered under a Decree or Promulgation etc. made during the period stated therein (i.e. 5.12.2006 to 6.10.2014). The decision taken under section 13(2)(g) of the Immigration Act 2003, was a decision taken in terms of Promulgation No 3 of 2008, and it introduced the ouster clause of section 13(2)(g) of the Immigration Act 2003. The Court of Appeal held that all decisions are taken in terms of Decrees, Promulgations etc. are excluded from the jurisdiction of the court, even without an ouster clause, irrespective of the time of such decision.

ALTERNATIVE INTERPRETATION

In the face of the decision by the Court of Appeal, this article proposes an alternative interpretation of s 173(4)(d) of the Constitution with a more plausible explanation. Whether it

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is ambiguous is a moot point but the fact remains that the section does not exist in a vacuum. As such, clarity of meaning can be gleaned from examining the overall scheme of the statute or constitution.

As Lord Blackburn stated in *River Wear Commissioners v. Adamson*:[xviii]

> I believe that it is not disputed that what Lord Wensleydale used to call the golden rule is right, viz., that we are to take the whole statute together, and construe it all together, giving the words their ordinary signification, unless when so applied they produce an inconsistency, or an absurdity or inconvenience so great as to convince the Court that the intention could not have been to use them in their ordinary signification, and to justify the Court in putting on them some other signification, which, though less proper, is one which the Court thinks the words will bear
>
> In all cases, the object is to see what is the intention expressed by the words used. But, from the imperfection of language, it is impossible to know what that intention is without inquiring farther, and seeing what the circumstances were with reference to which the words were used, and what was the object, appearing from those circumstances, which the person using them had in view; for the meaning of words varies according to the circumstances with respect to which they were used.

Furthermore, it is well established, under what may be called the "internal harmony" rule, that individual clauses within a statute must be read so that they do not mutually conflict. In other words, the literal canon avails only when the meaning of the words is plain, having regard to their context.[xix]

It follows therefore that s 173 of the Constitution should be examined in its context, located in '**Chapter 12, Part D – Transitional**', while the section itself (s 173) is under the sub-title of **'Preservation of Laws'**. The government has been ruling by Decrees since 2006 but after the promulgation of the 2013 Constitution, there was a transitional period until thew parliament sits. Thus, Decrees in place since 2006 must continue unimpeded from judicial review during the transitional period. This supports the High Court interpretation that s 173(4)(d) applied only to decisions taken within the period between 5 December 2006 to 6 October 2014 (being the

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first sitting of Parliament). The decision at issue was made on 9th February 2015 outside the protected period thus the court's jurisdiction to determine the application for judicial review.

THE AFTERMATH

However, the case of Professor Ahluwalia (the USP Vice Chancellor) and his wife is distinguished from the above case. While the Vice Chancellor of the University of Fiji (Swamy) left Fiji contrary to the lockdown directive; Professor Ahluwalia (USP) was in Fiji and working as per conditions of his work permit.

He was not notified of any breaches on his part and was denied the opportunity to respond to the allegation against him. It is also evident that the 'prohibited immigrant' notice was issued to counter the University Council's effort to amend his contract stating that "should your work permit be declined or cancelled for any reason, your appointment will be terminated immediately without notice or payment in lieu." Given the recent application of the 'prohibited notice' under s 13(2)(g) in the University of Fiji case and the decision of the Court of Appeal in *One Hundred Sands Ltd v Attorney General of Fiji* [xx] it is highly probable that the decision to invoke the powers of the Minister for Immigration was done with malice and impunity in the knowledge that the decision was protected from judicial review.

Therein lies the spectre of ouster clauses by which action is taken without due process under the authority of a provision supposedly protected from judicial review. It can be inferred that the 'prohibited immigrant' notice and subsequent deportation of Professor Ahluwalia is unjustified, unlawful, and irrational with procedural impropriety. The question then is whether an ouster clause can make an unlawful decision lawful, a sad indictment to the rule of law.

INHERENT JURISDICTION

Confronted with the above argument regarding the more compelling interpretation of s 173(4)(d) of the Constitution, the ouster clause in s 13(2)(g) of the Immigration Act has to be considered against the inherent jurisdiction of the High Court. Section 100(3)(4) of the Constitution states that:

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> (3) The High Court has unlimited original jurisdiction to hear and determine any civil or criminal proceeding under any law and such other original jurisdiction as is conferred on it under this Constitution or any or any written law.
>
> (4) The High Court also has original jurisdiction in any matter under this Constitution or involving its interpretation.

Furthermore, the High Court has inherent jurisdiction to oversee and review any decision by any inferior court or tribunal, therefore, no ouster clause can effectively limit the High Court's jurisdiction for judicial review as per s 100(3) of the Constitution.

In any event even if the ouster clause in s 173(4)(d) of the Constitution stands it cannot override the inherent jurisdiction of the High Court in s 100(3) which appears in **Chapter 5-Judiciary, Part A-Courts and Judicial Officers**, s 97(1):

> The judicial power and authority of the State is vested in the Supreme Court, the Court of Appeal, the High Court, the Magistrates Court, and in such other courts or tribunals as are created by law.

In contrast the ouster clause in s 173(4)(d) appears in **Chapter 12-Commencement, Interpretation, Repeals and Transitional; Part D-Transitional - Preservation of Laws.**

It is apparent therefore that the ouster clause in s 173(4)(d) and similar clauses therein are in place to provide continuity by protecting Decrees and decisions during the transitional period before the first sitting of parliament.

CONCLUSION

The jurisdiction of the High Court is unlimited and inherent in overseeing and reviewing decisions of inferior courts or tribunals. The proposition is such that any person afflicted by a decision of a tribunal has an inherent right to seek redress from the court. An ouster clause, therefore, is not effective in limiting the jurisdiction of the High Court, an unlawful decision cannot be protected by an ouster clause nor indeed make it lawful. Similar to lifting the veil in

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company law, the shield of the ouster clause should be set aside in administrative law for judicial review of unlawful decisions.

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