IN THE CARIBBEAN COURT OF JUSTICE
APPELLATE JURISDICTION

ON APPEAL FROM THE COURT OF APPEAL OF GUYANA

CCJ Appeal No GYCV2022/001
GY Civil Appeal No 21 of 2021

BETWEEN

THE ATTORNEY GENERAL OF GUYANA **APPELLANT**

AND

MONICA THOMAS
BRENNAN JOETTE NATASHA NURSE
THE CHIEF ELECTIONS OFFICER
DAVID GRANGER, REPRESENTATIVE OF A PARTNERSHIP FOR NATIONAL UNITY + ALLIANCE FOR CHANGE
HORATIO EDMONSON, REPRESENTATIVE OF FEDERAL UNITED PARTY
BHARRAT JAGDEO, REPRESENTATIVE OF PEOPLE'S PROGRESSIVE PARTY/CIVIC
JOHN FLORES, REPRESENTATIVE OF THE LIBERTY AND JUSTICE PARTY
ASHA KISSOON, REPRESENTATIVE OF THE NEW MOVEMENT
VISHNU BANDHU, REPRESENTATIVE OF UNITED REPUBLICAN PARTY
ABEDIN KINDI ALI, REPRESENTATIVE OF THE CHANGE GUYANA
PATRICK BOURNE, REPRESENTATIVE OF THE PEOPLE'S REPUBLIC PARTY
JONATHAN YEARWOOD, REPRESENTATIVE OF A NEW UNITED GUYANA
SHAZAM ALLY, REPRESENTATIVE OF THE CITIZEN INITIATIVE
GERALD PERREIRA, REPRESENTATIVE OF THE ORGANIZATION FOR THE VICTORY OF THE PEOPLE **RESPONDENTS**

And

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BHARRAT JAGDEO **APPELLANT**

AND

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GERALD PERREIRA, REPRESENTATIVE OF THE ORGANIZATION FOR THE VICTORY OF THE PEOPLE
THE ATTORNEY GENERAL OF GUYANA **RESPONDENTS**

Consolidated by orders of the Court dated 13 May 2022

Before The Honourable: **Mr Justice Wit, JCCJ**
Mr Justice Anderson, JCCJ
Mme Justice Rajnauth-Lee, JCCJ
Mr Justice Barrow, JCCJ
Mr Justice Jamadar, JCCJ

Appearances

Mr Mohabir Anil Nandlall SC, Mr Nigel O Hawke, Ms Prithima Kissoon, Ms Shoshanna Lall, Ms Raeanna Clarke, Mr Chevy A Devonish and Ms Asasha Ramzan for The Attorney General of Guyana

Mr Douglas Mendes SC, Mr Rishi Dass, Mr Devindra Kissoon, Ms Natasha M Vieira and Mr Clay Hackett for Bharrat Jagdeo

Mr John S Jeremie SC, Mr Roysdale Alton Forde SC, Mr Khemraj Ramjattan, Mr Bonar M E Robertson, Mr Selwyn Pieters and Mr Keith Scotland for Monica Thomas and Brennan Nurse

Mr Kurt Da Silva for The Chief Elections Officer

Mr Basil Williams SC for David Granger

Mr Timothy M Jonas SC for Asha Kissoon

Mr Ganesh A Hira for Vishnu Bandhu

Mr Kamal Ramkarran for Jonathan Yearwood

Mr Kashir A Khan, Mr Mohamed S G F Khan, Mr Ivan A Alert, Mr Joshua Abdool and Mr Kalesh Loakman for Shazam Ally

Constitutional law – Jurisdiction – Court of Appeal – Election petition struck out by High Court for improper/late service – Petitioners appealed – Court of Appeal decided it had jurisdiction to hear appeal – Circumstances in which Court of Appeal may have jurisdiction – Whether majority of Court of Appeal rightly determined it had jurisdiction – Whether decision of Chief Justice final or interlocutory in context of right of appeal under s 6(2) of Constitution – Constitution of the Co-operative Republic of Guyana 1980, art 163 – Court of Appeal Act, Cap 3:01, s 6(2) – National Assembly (Validity of Elections) Act, Cap 1:04 - National Assembly (Validity of Elections) Rules.

SUMMARY

General and Regional Elections were held in Guyana on 2 March 2020. After the declaration of the results in August 2020, Election Petition 99P/2020 was filed on 15 September 2020, challenging the validity of the results and seeking an order that the elections be deemed unconstitutional, null, void and of no legal effect.

Election Petition 99P/2020 (along with Election Petition 88P/2020) was heard by Chief Justice Roxane George (Ag). The Chief Justice, at a Case Management Conference, raised the issue of whether Mr David Granger, Representative of A Partnership for National Unity and Alliance for Change, was a proper and necessary party to the petition and whether Mr Granger had been properly served. If Mr Granger should have been served with Election Petition 99P/2020 and the supporting documents, this should have been done within five days of filing of the petition, as required by s 8 of the National Assembly (Validity of Elections) Act ('Elections Validity Act') and r 9(1) National Assembly (Validity of Elections) Rules ('Elections Validity Rules'), that is, by 21 September 2020. In fact, Mr Granger had been served on 25 September 2020. After hearing the parties, the Chief Justice held that Mr Granger was a proper and necessary party and that he should have been properly served. As this was not done, she dismissed the petition, ruling it was a nullity.

The petitioners (now First and Second Respondents) appealed against the Chief Justice's decision. The Attorney General and Mr Jagdeo (the Appellants) objected and applied to strike out the appeal on the ground that the Court of Appeal lacked jurisdiction to hear and determine the appeal. The court's election petition jurisdiction is found in art 163 of the Constitution. According to art 163(3) of the Constitution, an appeal to the Court of Appeal shall lie from the decision of a Judge of the High Court granting or refusing leave to institute proceedings for the determination of any question referred to in art 163(1); or from the determination by the High Court of any such question, or against any order of the High Court made in consequence of such determination. The Court of Appeal, by majority, found that an appeal lies to the Court of Appeal through art 123 of the Constitution and s 6(2) of the Court of Appeal Act and that the exercise of the ordinary jurisdiction of the Court was not excluded by the special jurisdiction created by art 163 of the Constitution. The Court of Appeal accordingly held that it did have the jurisdiction to entertain the appeal.

The Attorney General and Mr Jagdeo then appealed to the Caribbean Court of Justice (CCJ). The judgment of the Court was delivered by Anderson JCCJ, with whose reasoning Wit JCCJ and Rajnauth-Lee JCCJ, agreed. The overarching issue was whether the Court

of Appeal was correct to hold that it has the jurisdiction to hear an appeal from the decision of the High Court dismissing the petition on the ground of non-compliance with the Elections Validity Act and the Elections Validity Rules. The Court noted that there are three possible grounds on which such jurisdiction may be based. The first ground is art 163 of the Constitution and the Elections Validity Act and Rules. Anderson JCCJ explained that the fundamental proposition to be derived from art 163 and from the Elections Validity Act and Rules, is that they establish a comprehensive regime for challenges to an election. Election Petition 99P/2020 had to be determined in accordance with this framework. As r 9 was breached, it fell to the High Court, the court before which the petition had been presented (and in which exclusive jurisdiction was vested by art 163 of the Constitution and s 3(1) of the Elections Validity Act), to determine the issue of non-compliance. It could not be accepted that proceedings which began in the High Court under this exclusive, exclusionary and special jurisdiction for dealing with election petitions, suddenly transmogrified into ordinary civil law proceedings on appeal. Neither is it permissible to depart from or import, by implication, a jurisdiction not created in the article. The Court emphasised that art 163(3) circumscribes the right to appeal decisions of the High Court in election petitions to only two circumstances. The Chief Justice struck out the petition on the basis that there was improper/late service on Mr. Granger. Her decision did not fall into either of those circumstances, and thus no appeal was possible.

As to whether jurisdiction could be based on art 123 of the Constitution coupled with s 6 of the Court of Appeal Act, the majority disagreed for three reasons. The special elections jurisdiction in art 163 of the Constitution and the Elections Validity Act and Elections Validity Rules must prevail over the general “civil law proceedings” jurisdiction contemplated by art 123 of the Constitution and s 6(2) of the Court of Appeal Act. Secondly, there exists the broad and fundamental principle that general provisions in a statute must yield to specific provisions. And thirdly, any tension between art 163 of the Constitution and s 6(2) of the Court of Appeal Act concerning the election jurisdiction must, naturally, be resolved in favour of the Constitution.

As to the third and final ground, Anderson JCCJ noted that there may be an exception to the rule as to the Court of Appeal's jurisdiction in order to maintain integrity of the Constitution, a possibility considered by this Court in *Cuffy v Skerritt.* He opined that procedural as well as substantive errors may be a basis for arguing that there should be a right of appeal to the Court of Appeal but that the threshold for making such an argument is necessarily very high. In this case, however, there was no real suggestion from the Respondents that the Chief Justice's decision in dismissing the petition for want of proper service could support an argument that would justify invocation of the exception.

In an opinion that concurred in the result but differed as to reasons, Barrow JCCJ observed that it must be considered that while exclusive jurisdiction is given to determine primarily the validity questions listed in art 163(1), the general jurisdiction is not excluded from operating when the issue being determined is not a validity question under art 163(1). The Chief Justice's decision to dismiss the petition as a nullity in this case demonstrates that what was appealed in this case was not a validity question under art 163(1), with its restricted right to appeal, but an ordinary question of law regarding service of process as required under the Elections Validity Act and Rules. The invocation of jurisdiction was not solely in relation to validity questions under art 163. He continued that art 163(1) was not in play in this case, but rather art 163(4), which gives power to Parliament to legislate with respect to the practice and procedure of the High Court in relation to the jurisdiction and powers conferred upon it by or under art 163(4)(c). In crafting these legislative provisions, Parliament included s 42 of the Elections Validity Act and r 21 of the Elections Validity Rules, which gave the court the same powers, jurisdiction and authority in election petitions 'as if the proceedings were an ordinary action.' These provisions were thought apposite to answering the question of whether the decision to dismiss the petition is subject to the Supreme Court's general jurisdiction in the same way as an ordinary action. In an ordinary action, a dismissal of a claim for improper service would be subject to consideration under the general appellate jurisdiction of the Supreme Court. Of course, that did not mean that an appeal lies against the decision but, rather, that the decision may be reviewed to decide whether the right of appeal given by the High Court Act, or the Court of Appeal Act includes that decision. In this case, several indications make it clear that the Chief Justice's

order dismissing the petition was an order made in chambers. Section 6(2(a)(i) of the Court of Appeal Act places an order made in chambers in the same statutory boat as an order made in a summary proceeding, where no right is given to appeal to the Court of Appeal. The result must be that the purported appeal by the then petitioners against the dismissal by the Chief Justice of the petition in this case as a nullity is, itself, a nullity because there was no right of appeal to the Court of Appeal.

In concurring, Jamadar JCCJ agreed with Barrow JCCJ that the decision to dismiss the petition for failure to comply with statutory requirements as to service was an exercise of judicial discretion pursuant to the powers, jurisdiction, and authority provided for by s 42 of the Elections Validity Act (and r 21 of the Elections Validity Rules). Thus, any right of appeal as to service of an originating process, is to be sought within the ordinary powers, jurisdiction, and authority of the court (incorporated by s 42 of the Elections Validity Act). An appeal of such a decision does not lie to the Court of Appeal, but to the Full Court.

He observed that in Guyana, the deep basic structure and core constitutional values and principles to be found in Guyanese constitutionalism should guide a court when faced with choices as to multiple interpretations of statutory provisions. This is especially true in relation to provisions that implicate core constitutional values such as free and fair parliamentary elections. He suggested that the narrow jurisdictional issue in this appeal needs to be placed, contextualised, and understood through the lenses of democratic governance in Guyana, the role of the Courts, and the learning to be found from authorities such as *Hinds v R* and *Williams v Mayor of Tenby* and *R (Woolas) v Parliamentary Election Court*. As to the interpretation of s 42 of the Elections Validity Act, Jamadar JCCJ explained how s 42 could be constitutionally reimagined and reinterpreted by liberating the meaning of 'subject' from its colonial mindset. By doing so, s 42 becomes accommodating of a more permissive, purposive, and inclusive interpretation and application, that permits an appeal to the Full Court. This approach to s 42 is reasonably justified in the particular circumstances of this case, where the issue is whether a right of appeal lies from a decision striking out an election petition for late service.

The Appeal was accordingly allowed and the decision of the Court of Appeal set aside. The Court ordered that each party bear their own costs.

Cases referred to:

A-G v Joseph [2006] CCJ 3 (AJ), (2006) 69 WIR 104 (BB)*; A-G v Maharaj* (Trinidad and Tobago HC, 2 August 2017)*; A-G of Grenada v David* (Grenada CA, 2 June 2008)*; Aikman v Belize Bank Ltd* (Belize CA, 18 May 1992); *Ali v David* [2020] CCJ 10 (AJ) GY, (2020) 99 WIR 363*; American Life Insurance and North American Life Insurance Co Ltd, Re* [2001-2002] GLR 157; *Associated Provincial Picture Houses Ltd v Wednesbury Corp* [1948] 1 KB 223; *Bata Shoe Co (Guyana) Ltd v Commissioner of Inland Revenue* (1976) 24 WIR 172; *Belize International Services Ltd v A-G of Belize* [2020] CCJ 9 (AJ) BZ, [2021] 1 LRC 36; *Bell v DPP of Jamaica* [1985] 2 All ER 585 (JM PC); *Bico Ltd v Mcdonald Farms Ltd* (Barbados CA, 1 November 1996); *Bisram v DPP* [2022] CCJ 7 AJ (GY); *Boodram v A-G of Trinidad and Tobago* [1996] AC 842 (TT PC); *Bozson v Altrincham Urban District Council* [1903] 1 KB 547; *Browne v Francis-Gibson* (1995) 50 WIR 143; *Chung v AIC Battery and Automotive Services Co Ltd* (Guyana CA, 23 May 2011); *Chung v AIC Battery and Automotive Services Co Ltd* [2013] CCJ 2 (AJ) (GY), (2013) 82 WIR 357; *Commissioner of Police v Alleyne* [2022] CCJ 2 (AJ) BB, [2022] 2 LRC 590; *Cuffy v Skerrit* (Dominica CA, 28 April 2021), *Cuffy v Skerrit* [2022] CCJ 12 (AJ) DM; *Day v Governor of the Cayman Islands* [2022] 3 LRC 557; *Delorie v Government* [2017] 3 LRC 429; *Delph v Chief Election Officer* [2003-2004] GLR 29; *Exeter v Gaymes* (Saint Vincent and the Grenadines CA, 13 June 2017); *Frampton v Pinard* (Dominica CA, 3 April 2006); *Ghana Independent Broadcasters Association v A-G* [2018] 4 LRC 1; *Gibson v A-G of Barbados* [2010] CCJ 3 (AJ) (BB), (2010) 76 WIR 137; *Govind v The State* 2003 IIIAD (Delhi) 525; *Grant v Phillip* (Saint Kitts and Nevis HC, 4 November 2010); *Green v Saint Jean* (Dominica HC, 7 June 2011); *Guyana Consumers' Advisory Bureau v Public Utilities Commission* (Guyana CA, 17 February 1999); *Habet v Penner* (Belize SC, 4 May 2012); *Hamilton v Liburd* (Saint Christopher and Nevis CA, 3 April 2006); *Haron Bin Mohamed Zaid v Central Securities (Holdings) Bhd* [1983] 1 AC 16; *Hill v Sagicor Life Inc* [2018] CCJ 22 (AJ) (BB); *Hinds v R* (1975) 24 WIR 326; *Jacpot Ltd v Gambling Regulatory Authority* [2018] UKPC 16, [2018] LLR 754; *Jonas v Quinn-Leandro* (Antigua and Barbuda HC, 31 March 2010); *Jones v Barnes* 103 S Ct 3308 (1983); *Joseph v Reynolds* (Saint Lucia CA, 31 July 2012); *LeGroulx v Pitre* [2008] OJ No 443; *Locabail (UK) Ltd v Bayfield Properties Ltd* [2000] QB 451; *Marin v R* [2021] CCJ 6 (AJ) BZ; *Matthew v The State* [2004] UKPC 33, (2004) 64 WIR 412 (TT); *Maya Leaders Alliance v A-G of Belize* [2015] CCJ 15 (AJ) (BZ), (2015) 87 WIR 178; *McDonna v Richardson* (Anguilla CA, 29 June 2007); *McEwan v A-G of Guyana* [2018] CCJ 30 (AJ) GY, (2019) 94 WIR 332; *McKane v Durston* 153 US 684 (1894); *Meerabux v A-G of Belize* (2005) 66 WIR 113 (PC); *Melville v Chief Elections Officer* (Guyana HC, 16 February 2010); *Minister of Home Affairs v Fisher* [1980] AC 319; *Mist v R* [2006] 3 NZLR 145; *Mithani v Assistant Collector of Customs* 1967 AIR 1639; *Moran v Lloyd's* [1983] 2 All ER 200; *Narula Trading Agency v Commissioner of Sales Tax Delhi* 1981 AIR Delhi 1; *Nervais v R* [2018] CCJ 19 (AJ) (BB), (2018) 92 WIR 178; *Nova Scotia Manufacturing v Narine* (2015) 85 WIR 423; *Olasemo v Barnett Ltd* (1995) 51 WIR 191; *Payne v Hammond* (Guyana HC, 5 June 1986); *Persaud v Lowenfield* (Guyana HC, 19 February 2016);

Persaud v Nizamudin [2020] CCJ 4 (AJ) (GY); *Peters v A-G* (2001) 63 WIR 244; *Petrie v A-G* (1968) 14 WIR 292; *Pla v Andorra* (2004) 18 BHRC 120; *Prashad v Persaud* [2022] CCJ 5 (AJ) GY; *Prevost v Blackmore* (Dominica HC, 14 September 2005); *Quinn-Leandro v Jonas* (2010) 78 WIR 216; *R v Flowers* [2020] CCJ 16 (AJ) BZ, [2020] 5 LRC 628; *R (Woolas) v Parliamentary Election Court* [2012] QB 1; *Ram v A-G* [2019] CCJ 10 (AJ) (GY), (2019) 97 WIR 266; *Ramcharran v DPP* [2022] CCJ 4 (AJ) GY; *Rees v Crane* (1994) 43 WIR 444 (TT PC); *Rehman v Khan* [2015] EWHC 4168 (Admin); *Russell v A-G of St Vincent and the Grenadines* (1995) 50 WIR 127; *Salaman v Warner* [1891] 1 QB 734; *Salter Rex & Co v Ghosh* [1971] 2 QB 597; *Sampanthan v A-G* [2019] 5 LRC 29; *Singh v Perreira* (Guyana CA, 11 November 1998); *Skerrit v Defoe* [2021] CCJ 4 (AJ) DM; *Smith v A-G of Trinidad and Tobago* [2022] UKPC 28; *Smith v Christopher* (British Virgin Islands HC, 23 July 2003); *Strachan v Gleaner Co Ltd* (Jamaica CA, 18 December 1998); *Summerlin Ltd v Reneau* (Belize CA, 27 October 2017); *Sylvester v Singh* (Saint Vincent and the Grenadines CA, 18 September 1995); *Thomas v A-G of Trinidad and Tobago* [1982] AC 113; *Thomas v Lowenfield* (Guyana CA, 21 December 2021); *Trinidad and Tobago Police Service Association v Chief Personnel Officer* (Trinidad and Tobago CA, 12 December 1983); *Tyson v R* (2017) 92 WIR 328; *Walker v James* (Antigua and Barbuda HC, 15 March 2018); *Wallace-Whitfield v Hanna* (Bahamas CA, 28 October 1982); *White v Brunton* [1984] 2 All ER 606; *Williams v Giraudy* (1975) 22 WIR 532; *Williams v Mayor of Tenby* (1879) 5 CPD 135; *Williams and Salisbury, Re* [1978] 26 WIR 133.

Legislation referred to:

Antigua and Barbuda – Constitution of Antigua and Barbuda 1981, Representation of the People Act, Cap 379; **The Bahamas** – Constitution of the Commonwealth of The Bahamas 1973, Parliamentary Elections Act, CH 7; **Barbados** – Constitution of Barbados 1966; **Belize** – Belize Constitution Act, Cap 4, Representation of the People Act, Cap 9; **Dominica** – Constitution of the Commonwealth of Dominica 1978, House of Assembly (Elections) Act, Chap 2:01; **Grenada** – Grenada Constitution Act, CAP 128A, Representation of the People Act, CAP 286A; **Guyana** – Civil Procedure Rules 2016; Constitution of Guyana and the Election Laws (Amendment) Act 2000, Order 60/2020, Constitution of the Co-operative Republic of Guyana Act, Cap 1:01, Court of Appeal Act, Cap 3:01, High Court Act, Cap 3:02, National Assembly (Validity of Elections) Act, Cap 1:04, National Assembly (Validity of Elections) Rules, Cap 1:04; **Jamaica** – Constitution of Jamaica 1962, Election Petitions Act, Representation of the People Act; **Saint Christopher and Nevis** – Constitution of Saint Christopher and Nevis 1983, National Assembly Elections Act, Cap 2.01; **Saint Lucia** – Constitution of Saint Lucia 1978, Elections Act, Cap 1.02; **Trinidad and Tobago** – Constitution of the Republic of Trinidad and Tobago 1976, Representation of the People Act, Cap 2:01; **United Kingdom** – Corrupt Practices (Municipal Elections) Act 1872 (35 & 36 Vict c 60), Parliamentary Elections Act 1868 (31 & 32 Vict c 125), Parliamentary Election Petition Rules 1868.

Other Sources referred to:

Bailey D and Norbury L, *Bennion, Bailey and Norbury on Statutory Interpretation* (8th edn, LexisNexis 2020); Barreto J-M, 'Decolonial Thinking and the Quest for Decolonising Human Rights' (2018) 46 Asian Journal of Social Science 484; Bisram V, 'Impact of Ethnic Conflict on Development: A Case Study of Guyana' (CUNY Academic Works 2015) <https://academicworks.cuny.edu/cgi/viewcontent.cgi?article=1523&context=gc_etds> accessed 4 October 2022; France A, *Le Lys Rouge* (*The Red Lily)* (1894); Lincoln A, *Abraham Lincoln papers: Series 3. General Correspondence. 1837-1897* (Abraham Lincoln, Gettysburg Address: Nicolay Copy, 19 November 1863) < www.loc.gov/item/mal4356500/ > accessed 4 October 2022; Mignolo W D, Walsh C E, *On Decoloniality: Concepts, Analytics, Praxis* (Duke University Press 2018); Samaroo B, *Adrian Cola Rienzi: The Life and Times of an Indo-Caribbean Progressive* (Royards 2022); Spackman A, 'Official Attitudes and Official Violence: The Ruimveldt Massacre, Guyana 1924' (1973) 22(3) Social and Economic Studies 315.

JUDGMENT
of
The Honourable Justices Wit, Anderson, Rajnauth-Lee, Barrow and Jamadar

Delivered by
The Honourable Mr Justice Anderson

and

CONCURRING JUDGMENTS
of
The Honourable Justices Barrow and Jamadar
on 19 October 2022

JUDGMENT OF THE HONOURABLE MR JUSTICE ANDERSON, JCCJ:

Introduction

[1] By Notice of Appeal filed in this Court on 1 March 2022,[1] and served on 14 named Respondents, including Mr Bharrat Jagdeo, ('Mr Jagdeo'), the Honourable Attorney General of Guyana ('the Attorney General') appealed against a judgment

[1] GYCV2022/001.

of the Court of Appeal of Guyana delivered on 21 December 2021. By Notice of Appeal filed on 7 April 2022,[2] and served on 14 named Respondents, including the Attorney General, Mr Jagdeo appealed against the said decision of the Court of Appeal. In this judgment, the Attorney General and Mr Jagdeo are together referred to as 'the Appellants.' The appeals of the Appellants were consolidated by Order of this Court dated 13 May 2022.

[2] In their essence, the consolidated appeals are against the decision of the Court of Appeal, taken by majority, that the Court of Appeal has jurisdiction to hear and determine an appeal from the decision of the High Court dismissing an Election Petition on the ground of procedural noncompliance with the National Assembly (Validity of Elections) Act[3] ('Elections Validity Act') and the National Assembly (Validity of Elections) Rules[4] ('Elections Validity Rules') made under that Act. This is not the first time that the jurisdiction of the Court of Appeal to hear and determine appeals from election petitions instituted before the High Court has been litigated before this Court. In a series of recent cases from Guyana[5] and from Dominica[6] this Court has been called upon to decide similar though not identical issues and our pronouncements in those cases will naturally be relevant to the determination of this appeal.

Background

High Court Proceedings

[3] The High Court proceedings arose in consequence of the General and Regional Elections held in the Cooperative Republic of Guyana on 2 March 2020. The results of the elections were declared on 20 August 2020. The validity of the declared results was challenged by way of Election Petition 88P/2020, and

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[2] GYCV2022/002.
[3] Cap 1:04.
[4] Cap 1:04.
[5] *Ram v A-G* [2019] CCJ 10 (AJ) (GY), (2019) 97 WIR 266; *Ali v David* [2020] CCJ 10 (AJ) GY, (2020) 99 WIR 363.
[6] *Skerrit v Defoe* [2021] CCJ 4 (AJ) DM; *Cuffy v Skerrit* [2022] CCJ 12 (AJ) DM.

Election Petition 99P/2020 filed on 15 September 2020 in the High Court presided over by the Honourable Madame Justice Roxane George (Chief Justice Ag). The petitioners asked the High Court to grant an order that the election of 2 March 2020 was unconstitutional, null, void and of no legal effect.

[4] The Chief Justice held that the procedures in filing and serving petition 88P/2020 were fully complied with and that that petition would proceed. As regards petition 99P/2020 (hereinafter referred to as 'the Petition'), the Chief Justice, at a Case Management Conference, raised the issue of whether the second named respondent, Mr David Granger, Representative of A Partnership for National Unity and Alliance for Change, was a proper and necessary party to the Petition and whether Mr Granger had been properly served. Counsel for the parties were invited to respond and were heard. In a carefully reasoned judgment, which engaged a detailed survey and analysis of relevant cases, the Chief Justice held that Mr Granger was a proper and necessary party and that he should have been served within five days of filing of the Petition as required by s 8 of the Elections Validity Act[7] and r 9(1) of the Elections Validity Rules;[8] that is, by 21 September 2020. Mr Granger was in fact served on 25 September 2020. Repeatedly stressing the need for strict adherence with stipulated timelines in election petitions, and drawing upon precedents to this effect,[9] the Chief Justice on 18 January 2021, dismissed the Petition ruling that it was a nullity. She awarded the respondents who appeared, costs to be taxed if not agreed.

Court of Appeal Proceedings

[5] By Notice of Appeal filed on 24 February 2021,[10] the First and Second Respondents (then First and Second Appellants) appealed to the Court of Appeal

[7] Within the prescribed time, not exceeding five days after the presentation of an election petition, the petitioner shall in the prescribed manner serve on the respondent a notice of the presentation of the petition, and of the nature of the security or proposed security, and a copy of the petition, unless the Court otherwise directs on the application of the petitioner.
[8] The time and manner of service of an election petition are, for the purposes of s 8, prescribed by virtue of the following provisions of this paragraph and paragraphs (2), (3) and (4). The time for service of a copy of an election petition and notice of the presentation of the petition and of the nature of the proposed security shall be five days, exclusive of the day of presentation.
[9] *Payne v Hammond* (Guyana HC, 5 June 1986); *Melville v Chief Elections Officer* (Guyana HC, 16 February 2010).
[10] An Amended Notice of Appeal was filed on 31 May 2021.

contending, by reference to diverse grounds, that the Chief Justice erred in dismissing the Petition. On 11 March 2021, Mr Jagdeo filed a Notice of Preliminary Objection[11] objecting to the Notice of Appeal. On 19 March 2021, the Attorney General filed a Notice of Motion (supported by affidavit of Mr Nigel Hawke)[12] seeking an Order striking out the Notice of Appeal. The principal ground advanced by the Appellants was that the Court of Appeal had and has no jurisdiction to hear and determine the appeal. They contended that no appeal lay to the Court of Appeal given the provisions of art 163(2) and (3) of the Constitution. The Respondents relied on both the Constitution and the Court of Appeal Act[13] to argue that jurisdiction was vested in the Court of Appeal to hear the appeal.

Decision of Cummings-Edwards (Chancellor Ag)

[6] The Chancellor firstly considered the nature of election laws and the provisions of art 163 of the Constitution to aid in determination of the issue of whether there was a right of appeal. She ultimately held that art 163(1) of the Constitution specifically related to the issues which may be appealed and none of those issues fell for consideration before the Chief Justice. The dismissal of the Petition was made based on the issue of service on a proper and essential party and this was redolent of an interlocutory process. She therefore agreed that no appeal laid under art 163(3).

[7] The Chancellor then considered art 123(1) of the Constitution and s 6(2) of the Court of Appeal Act holding, apparently, that the conjoint effect of these provisions was to give jurisdiction to the Court of Appeal to hear and determine appeals in civil proceedings from a judge of the High Court. Whilst admitting that the election petition jurisdiction under art 163 was special, the Chancellor held that in entertaining appeals under art 123(1) of the Constitution and s 6(2) of

[11] Joint Record of Appeal, '4th Respondent's Notice of Preliminary Objection' 2398-2403.
[12] Joint Record of Appeal, '13th Respondent's Notice of Motion to Strike Out Appeal and Affidavit of Nigel Hawke' 2404-2475.
[13] Cap 3:01.

the Court of Appeal Act, the Court of Appeal was not restrained by art 163 and could hear such appeals from final orders made by the High Court. This holding necessitated interpretation of whether the Order of the Chief Justice dismissing the Petition was a final order determining the rights of the parties or not, and the appropriate test to be applied for that interpretation. After a review of the authorities, the Chancellor was of the view that no one specific test was to be applied in a hard and fast manner, and that in applying either the 'order test' or the 'application test', the Order of the Chief Justice finally disposed of the matter in the Court and was therefore a final order. Consequently, under s 6(2) of the Court of Appeal Act, the appeal could lie to the Court.

Decision of Gregory JA

[8] Gregory JA reviewed relevant authorities and concluded that in art 163(1), the jurisdiction of the High Court, as an election court, is not expressed to be a final jurisdiction nor is the jurisdiction of the Court of Appeal under art 163(3) expressed in terms which exclude appeals of decisions other than those which determine the questions in art 163(1). The Justice of Appeal concluded that no provision in art 163(1) and (3) or in the regime set out in the Elections Validity Act and the Elections Validity Rules indicates that the jurisdiction of the High Court, as an election court, is intended to be final in the sense of being unappealable, where a petition is disposed of on a procedural question or one falling outside the circumstances enumerated in art 163(1). Likewise, the Court of Appeal's jurisdiction is not described by such limiting words or a finality clause, as is the case in many jurisdictions.

[9] Gregory JA also concluded that the High Court was exercising its inherent jurisdiction to clear from its list a matter which may have run afoul of the election rules. And, since the Elections Validity Act and Elections Validity Rules do not specify any consequence for non-compliance with the regime, the High Court was exercising its ordinary powers when it dismissed the Petition. On her reading of

art 163(1), the related regime, and the authorities, she concluded that the High Court's jurisdiction under art 163(1) is an additional jurisdiction to hear election disputes and does not exclude the exercise of its ordinary jurisdiction in giving effect to and operationalising the additional jurisdiction conferred by art 163. Where the High Court has exercised its ordinary powers and terminated a petition on a ground outside of art 163(1), the Court of Appeal would have jurisdiction to entertain an appeal under s 6 of the Court of Appeal Act if the order sought to be appealed complies with the requirements of the section. As to whether the Chief Justice's order was a final order for the purposes of s 6(2) of the Court of Appeal Act, Gregory JA concluded that it was appropriate to apply the 'order test' in this case and determined it was a final order.

Persaud JA – Dissenting Opinion

[10] Persaud JA held that the Court of Appeal had no jurisdiction to entertain the appeal. It was trite law that an appeal does not lie "as of right" and must be conferred by statute. Article 163(1) and (3) provide for the circumstances in which a right of appeal lies from an election petition and there is no other specific constitutional or statutory provision in that regard, nor is there any other legislative basis governing the High Court's jurisdiction as it relates to election petitions. The general provisions of the Court of Appeal Act and the Civil Procedure Rules 2016 could not be interpreted to supplement the clear provisions of art 163(1) or create a parallel right of appeal to the Court of Appeal. Finally, the Justice of Appeal reasoned that even if art 123 of the Constitution and s 6 of the Court of Appeal Act could support an appeal, s 6(2) of the Court of Appeal Act clearly prohibited the Court of Appeal from entertaining such an appeal from an order of the High Court which was not final. Applying the 'application test', it was clear that the Order made by the Chief Justice was interlocutory and therefore could not be the subject of an appeal to the Court of Appeal.

The Caribbean Court of Justice

Submissions of the Attorney General

[11] Before this Court, the Attorney General contends that the majority in the Court of Appeal erred in law in determining that that court had jurisdiction to hear and determine the appeal from the dismissal of the Petition. The Attorney General cites the historical and special nature of the court's jurisdiction to hear and determine election petitions, the concomitant strictness and rigidity which its processes and procedure attract, and the fatal consequences which flow from non-compliance. Further, he submits that because of the historical evolution and *sui generis* nature of this jurisdiction, only the statutory and constitutional framework which creates it applies, inclusive of its rules and regulations. The election court is not possessed of an inherent jurisdiction but only possessed of those powers and jurisdiction with which it is conferred by the statutory and constitutional framework which create and regulate it. Lastly, as a right of appeal is not a common law right, an appeal will only lie if the constitutional and statutory framework creating and governing jurisdiction specifically creates such a right, and if it does, that right will be subject to such conditionalities, and limitations imposed by the provision creating or regulating it.

[12] The Attorney General opined that on the correct interpretation to be given to arts 123, 133, and 163 of the Constitution and their interplay with the Elections Validity Act and Elections Validity Rules as well as s 6(2) of the Court of Appeal Act, the Court of Appeal had no jurisdiction to hear appeals from the High Court on election petitions outside of the provisions of art 163(3) of the Constitution. He referred to and relied on the maxim *generalia specialibus non derogant* as well as recent decisions of this Court in *Ram v Attorney General of Guyana;*[14] *Ali v David*[15] and *Cuffy v Skerrit*[16] as supporting these propositions.

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[14] [2019] CCJ 10 (AJ) (GY), (2019) 97 WIR 266 at [33]-[35], [39]-[40].
[15] [2020] CCJ 10 (AJ) GY, (2020) 99 WIR 363 at [43], [52].
[16] [2022] CCJ 12 (AJ) DM.

Submissions of Mr Jagdeo

[13] Mr Jagdeo contends that the Court of Appeal's jurisdiction in election petition challenges to the validity of an election is limited by art 163(3) to the hearing and determination of appeals against decisions made in the circumstances outlined in the Article. Since the determination by the Chief Justice was neither a decision granting or refusing leave nor a determination of a question referred to in art 163(1), the Court of Appeal lacked jurisdiction to hear the appeal. In support of this argument Mr Jagdeo argues first, that there is no right of appeal against any decision of the High Court unless expressly granted, and second, that the principle *expressio unius est exclusion alterius* applied. An interpretation of art 163(3) which limits the right of appeal to the matters listed therein furthers the general purposes of election law to ensure the speedy determination of election petitions.

[14] Mr Jagdeo submitted that the majority in the Court of Appeal was wrong to proceed on the basis that the Chief Justice's decision to strike out the Petition was an exercise of its ordinary civil jurisdiction not covered by art 163(3) but governed by s 6(2) of the Court of Appeal Act. Applying the canon of construction *generalia specialibus non derogant*, the Chief Justice's decision was an exercise of the High Court's jurisdiction as an election court and not under its ordinary civil jurisdiction. In any event, the Order of the Chief Justice that was appealed against was not a final order and is therefore not appealable under s 6(2) of the Court of Appeal Act. Mr Jagdeo submits that the majority erred in law in failing to recognise the 'application test' as the proper and prevailing test for the determination of the nature of judicial orders in the Commonwealth and in the Guyanese courts. In this case, the Order of the Chief Justice was interlocutory.

Submissions of the First and Second Respondents[17]

[15] The First and Second Respondents submit that the High Court is conferred with the jurisdiction to determine the matters set out in art 163(1) and this jurisdiction is further provided for in the Elections Validity Act together with the jurisdiction under s 42 of the Elections Validity Act. Section 42 of the Elections Validity Act is a conferral of jurisdiction on the High Court pursuant to art 123(1) of the Constitution and as such is "other law" within the terms of art 123(1). They submit that s 42 of the Elections Validity Act expressly incorporates the jurisdiction, powers, and authority of the High Court.

[16] The First and Second Respondents further submit that the jurisdiction of the Court includes the inherent jurisdiction and inherent powers of the High Court. Gregory JA's conclusion that the High Court 'was exercising its inherent jurisdiction to clear from its list a matter which may have run afoul of the rules' is sound. Thus, the source of the power to strike out an election petition for procedural non-compliance lies in the High Court's inherent jurisdiction or its ordinary powers.

[17] The First and Second Respondents say that it was correct for the Chancellor to conclude that the Court of Appeal had the jurisdiction to entertain appeals given the provisions of art 123(1) and s 6(2) of the Court of Appeal Act. It is not inconsistent with the supremacy of the Constitution for there to exist a separate basis for appealing to the Court of Appeal. Neither does the existence of this separate basis for appealing to the Court of Appeal render the regime established by art 163(3) otiose.

[18] Further, the Constitution does not state that there can be no right of appeal other than what is provided for in art 163(3). Gregory JA was correct to observe that art 163(3) was not expressed in terms which exclude appeals of decisions other than

[17] Record of Appeal, 'Written Submissions of the First and Second Named Respondents in Reply to Written Submissions by the Appellants, Attorney General and Bharrat Jagdeo' 5472-5489.

those which determine the questions in art 163(1). There is no express provision which supports the contention that art 163(3) creates an exclusive right, excluding another avenue of appeal and the contention that the jurisdiction of the High Court as an election court is intended to be final in the sense of being unappealable.

[19] Finally, the First and Second Respondents submit that the Court of Appeal is entitled to apply and maintain its own practice and procedure in determining whether an order is final. They contend that the Order of the Chief Justice was a final order.

Matters for Determination

[20] The overarching issue in these appeals is whether the Court of Appeal of Guyana was correct to hold that it has the jurisdiction to hear an appeal from a decision of the High Court dismissing the Petition on the ground of non-compliance with the Elections Validity Act and the Elections Validity Rules. As argued by the parties, there are three possible grounds on which such jurisdiction may be based:

a. Article 163 of the Constitution and the Elections Validity Act and Rules

b. Article 123 of the Constitution coupled with s 6 of the Court of Appeal Act

c. Exception to maintain integrity of the Constitution

[21] These possible bases are examined in turn below, however, it should be said at the outset that the different grounds were not pursued with equal vigour but rather with differing degrees of intensity and conviction by the various parties. For example, the Appellants were especially keen to demonstrate that art 163 vests no jurisdiction in the Court of Appeal to hear the appeal in contention. Whilst not entirely conceding this point, the First and Second Respondents focused on

locating the Court of Appeal's jurisdiction to hear the appeal in art 123 of the Constitution linked with s 6 of the Court of Appeal Act.

Article 163 of the Constitution and Elections Validity Act and Rules

[22] Article 163 of the Constitution of Guyana is the centrepiece of the jurisdiction of the courts in election petitions. It is therefore necessary to lay out that Article in full. It states as follows:

> 163. (1) Subject to the provisions of this article, the High Court shall have exclusive jurisdiction to determine any question –
>
> (a) regarding the qualification of any person to be elected as a member of the National Assembly;
>
> (b) whether –
>
> (i) either generally or in any particular place, an election has been lawfully conducted or the result thereof has been, or may have been, affected by any unlawful act or omission;
> (ii) the seats in the Assembly have been lawfully allocated;
> (iii) a seat in the Assembly has become vacant; or
> (iv) any member of the Assembly is required under the provisions of article 156(2) and (3) to cease to exercise any of his or her functions as a member thereof;
>
> (c) regarding the filling of a vacant seat in the Assembly; or
>
> (d) whether any person has been validly elected as Speaker of the Assembly from among persons who are not members thereof or having been so elected, has vacated the office of Speaker.
>
> (2) Proceedings for the determination of any question referred to in the preceding paragraph may be instituted by any person (including the Attorney General) and, where such proceedings are instituted by a person other than the Attorney General, the Attorney General if he or she is not a party thereto may intervene and (if he or she intervenes) may appear or be represented therein.

(3) An appeal shall lie to the Court of Appeal –

(a) from the decision of a Judge of the High Court granting or refusing leave to institute proceedings for the determination of any question referred to in paragraph (1);

(b) from the determination by the High Court of any such question, or against any order of the High Court made in consequence of such determination.

(4) Parliament may make provision with respect to –

(a) the circumstances and manner in which and the conditions upon which proceedings for the determination of any question under this article may be instituted in the High Court and an appeal may be brought to the Court of Appeal in respect thereof;

(b) the consequences of the determination of any question under this article and the powers of the High Court in relation to the determination of any such question, including (without prejudice to the generality of the foregoing power) provision empowering the High Court to order the holding of a fresh election throughout Guyana or a fresh ballot in any part thereof or the re-allocation of seats in whole or in part; and

(c) the practice and procedure of the High Court in relation to the jurisdiction and powers conferred upon it by or under this article and of that Court and the Court of Appeal in relation to appeals to the Court of Appeal under this article

and subject to any provision so made, provision may be made with respect to the matters aforesaid by rules of court (emphasis added).

[23] The power conferred by art 163(4)(a) upon Parliament to make provisions for *'the circumstances and manner in which and the conditions upon which* proceedings for the determination of any question under this article may be instituted in the High Court *and an appeal may be brought to the Court of Appeal in respect thereof'* (emphasis added) has been exercised by Parliament. The Elections Validity Act[18] was enacted to provide for the determination of questions relating

[18]See (n 3).

to the validity of elections of Members of the National Assembly under a system of proportional representation, other matters affecting such elections, allocation of seats of such members of the Assembly and to vacancies in such seats. Section 3(1) provides for the method of questioning the validity of an election in the following terms:

> 3. (1) Any question referred to in article 163(1) (a), (b), and (c) of the Constitution may, in respect of an election referred to in article 60(2) of the Constitution and with a view to securing appropriate remedial orders, be referred to the Court and shall thereupon be determined by it, in accordance with this Act.

[24] The Act then elaborates the procedure for presentation and service of the election petition, the time for the presentation of the petition, amendment of the petition, and several other procedural matters, such as security for costs, trial of the petition, production of election documents, withdrawal of petition, costs, and report of the Court to the Speaker of the National Assembly. Section 38 provides that:

> 38. Subject to this Act and rules of court, the principles, practices, and rules on which committees of the House of Commons of the Parliament of the United Kingdom used to act in dealing with election petitions shall be observed, so far as may be, by the Court in the case of election petitions.

[25] Subsidiary legislation was passed pursuant to the Act and expressly 'made under art 163 of the Constitution' in the form of the Elections Validity Rules.[19] These Rules elaborate upon several of the procedural matters covered in the Elections Validity Act and provide the Forms to be used in relation to the presentation of the petition. As regards service of the petition, the Elections Validity Rules specify that the time for service of the election petition and notice of the presentation of the election petition, 'shall be five days, exclusive of the day of presentation.'[20] There does not appear to be any provision in the Constitution, Elections Validity

[19] See (n 4).
[20] Rule 9(1). See also s 8 of the Elections Validity Act.

Act or Elections Validity Rules that specifies the consequences of failure to abide by the provision specifying the time for service.

[26] The Elections Validity Act and Elections Validity Rules are pellucidly clear that they are dealing exclusively with the jurisdiction of the High Court over election petitions. They both define the "Court" to mean the High Court. Nowhere in the Act or Rules is there any mention of the Court of Appeal. The word "appeal" appears only in s 37(1) of the Act, and there in the context of appealing the imposition of incapacity to be a Member of the National Assembly in consequence of a conviction for an offence. It follows that there is nothing in the Elections Validity Act or Elections Validity Rules that elaborates on appeals to the Court of Appeal beyond what is stated in art 163(3) and (4). In *Delph v Chief Election Officer*[21] it was said unequivocally that the hearing of an election petition is governed by the provisions of the Elections Validity Act 'as opposed to an appeal which is governed by Court of Appeal Act, Cap. 3:01'.[22] Further, whatever may be the precise application of the practices of the UK House of Commons committees on election petitions, that application is subject to the Act and Rules, and to the Constitution.[23]

[27] The fundamental proposition to be derived from art 163 of the Constitution and from the Elections Validity Act, and the Elections Validity Rules made pursuant to that Act, is that they establish a comprehensive regime for challenges to an election. In *Ram v Attorney General of Guyana*[24] this Court explained that art 163 references a specific scheme for addressing questions regarding the qualification of any person to be elected as a member of the National Assembly. Article 163(1) vests in the High Court 'exclusive jurisdiction to determine any question regarding the qualification of any person to be elected as a member of the National Assembly.' The courts must exercise that jurisdiction within a particular

[21] [2003-2004] GLR 29.
[22] ibid at 33.
[23] See also *Peters v A-G* (2001) 63 WIR 244.
[24] *Ram* (n 14) at [33].

framework established by the Constitution. Article 163(4) empowers Parliament to lay down that framework, and that framework includes the manner and circumstances in which proceedings may be instituted, and an appeal brought to the Court of Appeal. This Court confirmed that it was Parliament, not the courts, which lays down the practice and procedure in relation to the jurisdiction and powers conferred upon the High Court by the Constitution.[25] So, while the Constitution has given the courts the exclusive jurisdiction to determine the questions of the qualification of members of the National Assembly in art 163, the courts exercise this exclusive jurisdiction to determine questions of the qualification of members of the National Assembly strictly in keeping with the provisions laid down by the Parliament.[26]

[28] And, as explained above, Parliament has laid down the practice and procedure in relation to the jurisdiction and powers conferred upon the High Court by the enactment of the Elections Validity Act and the Elections Validity Rules. A court has no jurisdiction to determine the validity of an election by any other means. As explained by this Court in *Ali v David,* there exists a constitutionally mandated and evidence based open justice process based under the exclusive jurisdiction of the High Court with a right to appeal, if specified, to the Court of Appeal. This process and the utilization of it are fundamental to the electoral system, the legitimacy of elections, and democratic governance in Guyana.[27]

[29] A similar judgment has been made by this Court in relation to the regime of election petitions in other jurisdictions. Speaking for the Court in *Skerrit v Defoe,*[28] Anderson JCCJ reiterated that the exclusive and exclusionary jurisdiction of the High Court of Dominica to determine the validity of elections by way of election petitions was essentially a parliamentary jurisdiction which

[25] ibid at [34]. See also art 163(4)(c) of the Constitution.
[26] *Ram* (n 14) at [34].
[27] *Ali* (n 15) at [40].
[28] [2021] CCJ 4 (AJ) DM cited in *Cuffy* (n 16) at [45]. See also *Petrie v A-G* (1968) 14 WIR 292; *Williams v Giraudy* (1975) 22 WIR 532; Russell *v A-G of St Vincent and the Grenadines* (1995) 50 WIR 127; *Hamilton v Liburd* (Saint Christopher and Nevis CA, 3 April 2006).

had been assigned to the judiciary by the Constitution and by legislation. That jurisdiction was distinct and different from the ordinary civil or even constitutional jurisdictions enjoyed by the courts. Referring to numerous cases,[29] Anderson JCCJ drew attention to the rules governing the conduct of election petitions which were specifically designed to ensure, *inter alia*, that disputed election proceedings were brought to completion expeditiously so that the legitimacy of a government should not long remain in question.

[30] Those remarks formed part of the basis for the observation by Saunders PCCJ in *Cuffy v Skerrit*[30] that:

> What is evident from the abundance of jurisprudence is that the idea is: to discourage, if not eliminate altogether, appeals on points of practice and procedure; and to render un-appealable the trial judge's interlocutory decisions relating to failure to disclose a cause of action, substantial non-compliance with election laws, vagueness, abuse of process and the like. Such decisions are not regarded as final (in the sense of being susceptible to an appeal) within the context of s 40 of the Constitution. Decisions by a trial judge on those issues are as un-appealable to a higher court as the Speaker's decisions were when this unique jurisdiction used to lie not with the courts but with the parliament. The constitutional provisions reflect a particular policy to have elections petitions fully determined as quickly as possible.

[31] In similar vein, the judgment of Dame Pereira CJ, in Court of Appeal in *Cuffy v Skerrit,*[31] was accepted as accurately representing the election jurisdiction in Dominica. On that occasion the Chief Justice said:

> The High Court's jurisdiction in this regard was originally exercised by Parliament and was transferred to the courts by way of the Constitution. The jurisdiction has been variously described as special, exclusionary and exclusive. According to section 103 of the Constitution, this jurisdiction is a separate jurisdiction from the court's original jurisdiction to hear and remedy matters concerning infringements of the Constitution. It is also separate to the court's original jurisdiction given under section 16 of the

[29] *Browne v Francis-Gibson* (1995) 50 WIR 143; *Singh v Perreira* (Guyana CA, 11 November 1998); *Prevost v Blackmore* (Dominica HC, 14 September 2005); *Quinn-Leandro v Jonas* (2010) 78 WIR 216; *Green v Saint Jean* (Dominica HC, 7 June 2011); *Habet v Penner* (Belize SC, 4 May 2012); *Joseph v Reynolds* (Saint Lucia CA, 31 July 2012).
[30] *Cuffy* (n 16) at [46].
[31] (Dominica CA, 21 May 2021).

> Constitution for the enforcement of the protective or fundamental rights contained in Chapter 1. It is common ground that this special jurisdiction incorporates the court's inherent jurisdiction to protect it from abuse in its exercise of the jurisdiction so that the case law is replete with decisions striking out election petitions on a number of bases ranging from failure to disclose a cause of action, substantial non-compliance with election laws, and vagueness to abuse of process.[32]

[32] When the Petition in the present case was filed pursuant to the Elections Validity Act, art 163 was triggered.[33] Section 3(1) of the Act confirms this where it states that any question referred to in art 163(1)(a), (b) and (c) of the Constitution may be referred to the High Court and determined by it in accordance with the Act. The Petition therefore was to be determined in accordance with the Elections Validity Act and the Rules made under that Act. As r 9 was breached, it fell to the High Court, the court before which the Petition had been presented (and in which exclusive jurisdiction was vested by art 163 of the Constitution and s 3(1) of the Elections Validity Act), to determine the issue of non-compliance. We therefore cannot accept that proceedings which began in the High Court under its special jurisdiction for dealing with election petitions, suddenly became transmogrified into ordinary civil law proceedings on appeal.

[33] It is important to emphasise that art 163(3) circumscribes the right to appeal decisions of the High Court in election petitions to only two circumstances: (a) from the decision of the High Court granting or refusing leave to institute proceedings for the determination of any question referred to in para (1), and (b) from the determination by the High Court of any such question, or against any order of the High Court made in consequence of such determination. It follows that, because of the exclusive, exclusionary, and special jurisdiction, it is not permissible to depart from or import, by implication, a jurisdiction not created in the article.

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[32] ibid at [10].
[33] *Ali* (n 15) at [46].

[34] Further, the exclusivity of the stated grounds of appeal is anchored in the well settled principle *expressio unius est exclusio alterius* which has been repeatedly applied by Commonwealth courts to construction of the Constitution: (eg, by the Sri Lanka Supreme Court in *Sampanthan v Attorney General;*[34] the Constitutional Court of the Seychelles in *Delorie v Government*;[35] the Supreme Court of Ghana in *Ghana Independent Broadcasters Association v Attorney General;*[36] and the Ontario Superior Court of Justice in *LeGroulx v Pitre*[37]). Article 163(3) addressed the specific question of appeals from decisions made by the High Court in the exercise of the exclusive jurisdiction granted to it by art 163(1). It must be taken as given that the draftsperson(s) were familiar with the variety of decisions which the High Court on an election petition would be called upon to give and that some of those decisions might be interlocutory in nature and may have nothing to do with the ultimate questions which the Court would be called upon to determine as to the lawfulness of the election. Nevertheless, the draftsperson(s) did not provide for a general right of appeal from all interlocutory decisions but instead chose to provide for an appeal in relation to only one type of interlocutory decision, namely the decision to grant or refuse leave to institute proceedings. They then crafted the only other category of case in which a right of appeal was to be given and limited it to a determination of the questions referred to in art 163(1) and orders made in consequence of any such determination. *Expressio unius est exclusio alterius*, by choosing to narrowly delineate the matters which might form the subject of a right of appeal, art 163(3) is to be taken to have implicitly excluded any other appeal.[38]

[35] Article 163(3) is unambiguous in its terms stipulating the circumstances in which a right of appeal is available. In the present case, the Chief Justice struck out the Petition on the basis that there was improper/late service on Mr Granger, a

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[34] [2019] 5 LRC 29 at 61.
[35] [2017] 3 LRC 429.
[36] [2018] 4 LRC 1 at 28.
[37] [2008] OJ No 443 at [102].
[38] See also Diggory Bailey and Luke Norbury, *Bennion, Bailey and Norbury on Statutory Interpretation* (8th edn, LexisNexis 2020) at 705.

necessary party to the Petition. She did not decide to grant or refuse leave to institute proceedings to consider or determine any of the questions specified in art 163(1) nor did she determine any of those questions or make an order in consequence of the determination of any of those questions.

[36] In this Court the argument was raised that the dismissal of the Petition for want of service was "analogous" to refusing leave to institute proceedings. This argument gained traction because of (a) the observation of Gregory JA that an order disposing of a petition on procedural grounds, and one made after taking evidence had the same effect; and (b) the difficulty in identifying any procedure under the Constitution or in legislation to grant or refuse leave to institute proceedings. In the end, however, the argument was doomed to fail. The strict construction of election petition laws hardly seems conducive to their interpretation "by analogy". In our view, the First and Second Respondents' appeal to the Court of Appeal did not fall under either of the circumstances set out in art 163(3).

[37] Notwithstanding its failure, the argument of the First and Second Respondents opens the door to an important and necessary discussion regarding the constitutional provision allowing an appeal from the granting or refusal of leave to bring an election petition. It is widely accepted that the application for leave is a distinct and independent stage of proceedings *prior* to presentation and service of the petition and the actual determination of the questions set out in art 163(1). A requirement to obtain leave is not explicitly spelt out in Guyana, and this is like the situation in several other Caribbean states. In broadly similar terms the Constitution and legislation in Antigua and Barbuda,[39] Barbados,[40] Dominica,[41] Grenada,[42] Jamaica,[43] St Kitts and Nevis,[44] and St Lucia[45] provide for election petitions to be heard exclusively in the High Court, or Supreme Court, as the case

[39] See Constitution of Antigua and Barbuda 1981, s 44; Representation of the People Act, Cap 379, Part III; See further, *Walker v James* (Antigua and Barbuda HC, 15 March 2018) at [29].
[40] Constitution of Barbados 1966.
[41] Constitution of the Commonwealth of Dominica 1978, s 40; House of Assembly (Elections) Act, Cap 2:01.
[42] Grenada Constitution Act 1973, s 37; Representation of the People Act, Cap 286A s 98.
[43] Constitution of Jamaica 1962, s 44; Election Petitions Act, s 4; Representation of the People Act.
[44] Constitution of Saint Christopher and Nevis 1983, s 36; National Assembly Elections Act, Cap 2.01, ss 12 and 94.
[45] Constitution of Saint Lucia 1978, s 39; Elections Act, Cap 1.02.

may be, but nowhere requires that leave be first obtained. In isolated cases, there is a requirement for leave to amend and to withdraw an election petition.[46]

[38] However, leave is explicitly required either by Constitution or legislation or both, in at least three independent Caribbean States: The Bahamas;[47] Belize;[48] and Trinidad and Tobago.[49] The provisions in Trinidad and Tobago are representative of this explicit requirement. Under s 52(1) of the Constitution, the High Court has the power to determine questions as to membership. This section reads in part as follows:

> 52. (1) Any question whether—
> any person has been validly appointed as a Senator or validly elected as a member of the House of Representatives;
> …
> shall be determined by the High Court.
>
> *(2) Proceedings for the determination of any question referred to in subsection (1) shall not be instituted except with the leave of a Judge of the High Court* (emphasis added).

Section 106 of the Representation of the People Act (RPA) of Trinidad and Tobago[50] reads in part as follows:

> 106. (1) The following questions shall be referred to and determined by the High Court in accordance with sections 106 to 129:
>
> *(a) where leave has been granted under section 52(2) of the Constitution*, any question whether any person has been validly appointed as a Senator or validly elected as a member of the House of Representatives; and

[46] See eg, Antigua and Barbuda, Representation of the People Act, Cap 379, ss 45(3) and 53; Saint Lucia, Elections Act, Cap 1.02, ss 12 and 13.
[47] Constitution of the Commonwealth of the Bahamas 1973, art 45; Parliamentary Elections Act, CH 7, s 83(1).
[48] Belize Constitution Act 1981, s 86; Representation of the People Act, Cap 9 does not express a requirement for leave.
[49] Constitution of the Republic of Trinidad and Tobago 1976, s 52(1); Representation of the People Act, Cap 2:01, s106.
[50] Cap 2:01

(b) any question whether any person has been validly elected as a member or to an office of a Municipal Council or of the Tobago House of Assembly.[51] (Emphasis added)

[39] Section 52 and provisions in the RPA were the subject of three erudite judgments of the Trinidad and Tobago Court of Appeal in the case of *Peters v Attorney General*.[52] There were differences among the judges as to whether the application for leave under s 52 of the Trinidad and Tobago Constitution could be ex parte or had to be inter partes (an important point to which we return shortly) but there was unanimity that the leave stage was separate and independent from the presentation and hearing of the election petition (there called the representation petition) on the merits. As de la Bastide, CJ (later, President of this Court) stated, 'The obtaining of leave is a step taken prior to and independently of the actual institution and prosecution of a representation petition.'[53]

[40] Although not expressly prescribed by law, it appears that the practice in Guyana is to obtain leave prior to the presentation of an election petition, as indeed occurred in the present proceedings.[54] This practice is to be considered alongside the decision by the Court of Appeal of Guyana in *Singh v Perreira*[55] that the obtaining of leave was not an essential requirement. The Court came to this conclusion because of the absence of a legislative provision in the laws of Guyana like s 52(2) of the Constitution of Trinidad and Tobago and s 78(1) of the Representation of the People Act of Bahamas which both mandate the obtaining of leave of the High Court before an election petition can be presented. The Court was of the view that if art 163(a) was obscure and had a doubtful meaning it was not for them to say by inference or otherwise that leave is required to file an election petition. Rather, Parliament was required to either amend the Constitution

[51] Sections 106 to 129 of the Representation of the People Act sets out in detail the relevant procedures to be complied with when leave is granted to file an election petition.
[52] *Peters* (n 23).
[53] ibid at 267.
[54] Re Thomas and Nurse (Order dated 10 September 2020, entered 10 December 2020 by Rishi Persaud CJ (Ag)).
[55] (Guyana CA, 11 November 1998).

to state that leave was necessary before the filing of an election petition or to amend the Act dealing with election petitions to include such a requirement.

[41] Although the matter is not strictly before us on this appeal, it was the subject of oral argument and, later, the proffer of relevant authorities, and we consider it convenient to make the following observations. Enactment of legislation is clearly preferable to give clarity to the process of applying for leave to present an election petition and the learned Attorney General was forthright in undertaking to consider the drafting of this legislation. Pending such legislation, we note that in deciding whether it is permissible to imply a requirement for application for leave, consideration must be given to whether such a requirement: (1) is necessary to give meaning and effect to the Constitution; (2) involves choices between or among different policy positions; and (3) would impose onerous burdens on the parties.

[42] Article 163(3) provides for an appeal from the grant or refusal of leave to bring an election petition and it therefore appears to us by necessary implication that there must be an application for leave, not merely by practice, but by law. For the court to stipulate that an application for leave is not required would be to render art 163(3) (a) entirely otiose and devoid of any legal meaning and effect. This is particularly unacceptable as art 163(3) (a) is the only ground granting a right of appeal from an interlocutory decision in election petitions, (namely the decision to grant or refuse leave to institute proceedings). Decisions on this matter do not merely involve the parties but also can and often partake of great constitutional, political and public importance. A legal requirement for leave simply flows from and is necessary to give effect and meaning to the Constitution; it does not involve economic, social, political, or other policy choices; and it imposes no undue burden on the parties. For these reasons we agree entirely with the following sentiments expressed by Kennard C in *Singh v Perreira*[56] where he stated the following:

[56]ibid.

7. If one construes article 163(3)(a) by itself does it not suggest that leave is necessary before an election petition is presented? That sub article gives the right to a citizen who had applied to a judge of the High Court for leave to present an election petition to appeal to this court from a refusal to grant such leave. In addition, it gives to a citizen a right to appeal the order of a High Court judge who had granted to another citizen leave to institute proceedings by way of election petition.

8. I ask the question how can a person appeal the grant of leave to present an election petition if that person is not aware that leave has been granted.

9. Can it not be reasonably argued that leave of the court is necessary before an election petition is presented. And is this not the point I must at this stage address my mind to and not whether the proposed appeal will in fact succeed. As I had stated earlier, it is not my concern at this stage to determine whether or not the proposed appeals will in the end succeed. My concern is whether prima facie the appeals sought be brought have merit. In my view article 163(2) should be read in conjunction with article 163(3)(a).

[43] A related issue is whether the application for leave can be ex parte or must be inter partes. This is a very important issue but was not substantively argued before us. We therefore offer the following comments no more than as a possible "jumping off point" or a possible *aide mémoire* for a fuller more authoritative consideration, possibly by the Full Bench of this Court.

[44] Whether an application for leave must be inter partes was a central issue in *Peters v Attorney General*[57] where the second respondents made an ex parte application to Smith J for leave under s 52 of the Constitution to present petitions challenging the election of *Peters and Chaitan* (P and C) on the ground that they held dual citizenships on nomination day (though it was conceded that they had renounced their foreign citizenships by election day). The second respondents had also been nominated as candidates for the same two electoral districts as P and C. The latter were aware of the applications but declined the opportunity for the hearing to be adjourned for one hour to enable them to make representations as they contended

[57] *Peters* (n 23).

that one hour was not sufficient time to prepare arguments. Smith J treated the applications as "opposed ex parte applications" and granted leave. Thereupon the appellants filed constitutional motions (in identical terms) complaining that the representation petitions infringed their constitutional rights because, *inter alia*, the ex parte granting of leave to file the petitions breached the rules of natural justice and denied them the protection of the law in that the failure of the Rules Committee to make rules under s 144 of the Representation of the People Act, meant that there was no procedure laid down governing an application for leave. Upholding the judgment of Archie J, the Court of Appeal, by majority, held that application for leave to file representation petitions under s 52(2) of the Constitution may be made ex parte and, in the absence of rules made under the Representation of the People Act, such applications should be made in accordance with the Rules of the Supreme Court 1975.

[45] de la Bastide CJ rejected the notion that the representation petitions contravened or threatened to contravene the appellants' constitutional rights and held that the petitions were not an undue process. He stated:

> In my view, the rules of natural justice do not require that the proposed respondent be heard on the application for leave to bring proceedings under s 52. Section 52 is silent as to whether the application for leave is to be made ex parte or inter partes, but it should be interpreted as permitting the application to be made 'ex parte'. The appellants were entitled to challenge the grant of leave by appealing against the order of Smith J but they chose not to do so… It was also argued for the appellants that, in the absence of rules made by the Rules Committee under s 144 of the RPA, there was no procedure laid down governing an application for leave, and accordingly, the jurisdiction to grant leave was 'inchoate' and inaccessible. It does not appear that the obtaining of leave is treated as part of the legal proceedings for which Part VI of the RPA lays down a regime. The obtaining of leave is a step taken prior to and independently of the actual institution and prosecution of a representation petition. This is suggested by the language of s 106(1)(a) which: 'Where leave has been granted under section 52(2) of the Constitution.' Accordingly, I see no reason why the ordinary Rules of the Supreme Court should not be applicable to applications for leave, and why such applications should not be made on affidavit in the same way as other types of ex-parte applications are made to a judge of the High Court.

> Accordingly, I hold that leave to file these representation petitions was validly given and the appellants' objection to the representation petitions proceeding on that ground, is not well founded.

[46] The (then) Chief Justice held that the grant of leave on an ex parte application was valid since although sui generis, representation petitions were more akin to civil rather than criminal proceedings and there is generally no requirement under the rules of natural justice that a person or body instituting criminal or disciplinary proceedings against a person should hear him first before doing so. There was generally no question of giving a defendant an opportunity to be heard before he or she is sued in civil proceedings, as illustrated in the institution of judicial review proceedings, where the requirement for leave served the same purpose as was intended to be served under s 52 of the Constitution, namely, to prevent the launching of actions that are frivolous and vexatious or plainly have no chance of success. de la Bastide CJ accepted that s 52 was silent as to whether the application for leave was to be made ex parte or inter partes but held that the section should be interpreted as permitting the application to be made 'ex parte' on the basis that expedition was required in election petitions and that there was a right of appeal from the grant of leave.

[47] Nelson JA concurred. He cited the Bahamian case of *Wallace-Whitfield v Hanna*[58] to reject the argument that the grant of leave on an ex parte application was invalid. *Wallace-Whitfield* held that the provisions of s 78(1) of the Representation of the People Act 1969 permitting an application for leave to present an election petition ex parte were intra vires art 51 of the Constitution. In a joint judgment Luckhoo P, Smith and da Costa JJA stated that the purpose of the statutory provision was to avoid the bringing of frivolous or vexatious petitions and for that purpose the Supreme Court must be satisfied that the applicant has locus standi to bring the petition. The judge was not required to make any finding that would affect any right of or determine anything to the detriment of any person who might eventually be made a party to a petition, or to conduct a mini trial. No counter-

[58] (The Bahamas CA, 28 October 1982) cited in *Peters* (n 23).

affidavits or cross-examination was envisaged in such an application as they would be an inter partes application. The judge was, in effect, 'a judicial censor to screen, as it were, applications before applicants are permitted to bring proceedings against persons against whom allegations are to be made in those proceedings.' Nelson JA adopted these dicta of the Court of Appeal of the Bahamas and concluded:

> … the policy and intention of the architects of the Constitution were to exclude the rules of natural justice at the leave stage, but to grant the proposed respondent a full opportunity to be heard by a panel of appeal judges without any right of further appeal. There is nothing contrary to fundamental justice in allowing the application for leave to be made ex parte but permitting a party a full opportunity to be heard by a panel of three judges.[59]

[48] Sharma JA dissented, holding that the election petition had been obtained in breach of the rules of natural justice and ought to be set aside. Starting from the premise that the courts have always frowned upon ex parte applications because they were made in the absence of the other party, he noted that there were no rules stating that applications under s 52 could be made ex parte, and continued:

> In my respectful view there is some force in Dr Ramsahoye's argument, that the right of appeal against the grant or refusal of leave is an important and crucial factor in determining whether the appellant had a right to be heard. When the application is being heard ex parte the respondent is not present. If then he wants to appeal against the grant of leave, the first opportunity he has of presenting his side of the case, which ex hypothesi would not have been put forward at the leave stage, would be at the hearing of the appeal. This in my opinion would result in an untenable position, as the Court of Appeal would not strictly be reviewing the judge's order, as the other side had not been heard. In point of fact it would be reviewing what the judge did on an ex-parte application.
>
> …
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> There is the notion that, whenever leave is sought in circumstances similar to these proceedings, it is always a sifting process with discretion by the trial judge to invite the respondent to be present, and this is true to some

[59] *Peters* (n 23) at 371.

> extent. I do not accept, however, that the law on this aspect of our jurisprudence is so developed that it is incapable of expansion. I mean for example, there can still be a sifting process, but concomitant with that is that the other side must be heard. There is nothing jurisprudentially objectionable to a right to be heard before the judge can exercise his discretion, whether to grant or refuse the application, especially since s 52 of the Republican Constitution provides for an appeal against the decision either way as of right.[60]

[49] The majority view in *Peters* was expressly endorsed by Chang CJ (Ag) in the Guyanese case of *Melville v Chief Elections Officer*[61] where the second respondent admitted that the petitioner had obtained leave to file the election petition but contended that it was applied for and obtained ex parte and therefore obtained in breach of and contrary to the rules of natural justice and art 163(3) of the Constitution. The Chief Justice accepted that art 163(3) clearly contemplated that leave must first be obtained before election petition proceedings are instituted but held that the leave obtained on the ex parte application was valid.

[50] However, Chang CJ identified an even deeper problem with accepting ex parte applications for leave under art 163(3). He stated the problem as follows:

> If the obtaining of leave from a High Court judge to present an election petition is a condition precedent to the presentation of such petition, this necessarily means the exclusive jurisdiction of the High Court under Article 163 (1) can be exercised only if such leave has been obtained. Since it is the petitioner who must satisfy the High Court that it has the jurisdiction to hear the petition, the affidavit in support of a petition must state that such leave has been obtained. If not, how would a High Court judge, who did not himself grant such leave, determine that he has the jurisdiction to proceed to hearing? If Article 163 (3) (a) confers a constitutional right of appeal against the grant of such leave and if the case of Peters v. A.G. (supra) is correctly decided, time within which the respondent must file his Notice of Appeal may begin to run and may even run out before the respondent even becomes aware of the grant of such leave (as indeed did occur in the case of Stanley Singh v. Ester Perreira (Court of Appeal of Guyana – unreported).

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[60] ibid at 295, 296.
[61] (Guyana HC, 16 February 2010).

[51] These are, indeed, serious, and important issues that remain to the decided at the highest level and we say no more about them here.

Section 123 of Constitution and Section 6 of the Court of Appeal

[52] Chapter XI (arts 123-133) of the Constitution of Guyana makes provision for the Judicature. Article 123 provides that there shall be for Guyana a Supreme Court of Judicature consisting of a Court of Appeal and a High Court, with such jurisdiction and powers as are conferred on those Courts respectively by this Constitution or any other law. Each of these courts is a superior court of record 'and, save as otherwise provided by Parliament, shall have all the powers of such a court.'[62] Article 123(3) provides that 'Parliament may confer on any court any part of the jurisdiction of and any powers conferred on the High Court by this Constitution or any other law.' Article 133 is concerned with appeals and provides as follows:

> 133. (1) An appeal to the Court of Appeal shall lie as of right from decisions of the High Court in the following cases, that is to say –
>
> (a) final decisions in any civil or criminal proceedings on questions as to the interpretation of this Constitution; and
>
> (b) final decisions given in exercise of the jurisdiction conferred on the High Court by article 153 (which relates to the enforcement of fundamental rights and freedoms).
>
> (2) Nothing in paragraph (1) shall apply to the matters for which provision is made by article 163.

[53] The Court of Appeal Act confers on the Court of Appeal jurisdiction to hear and determine appeals from the High Court. Section 6(2) has been cited as providing a basis for the jurisdiction to hear and determine the appeal from the decision of the Chief Justice to dismiss the Petition in this case. The subsection reads as follows:

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[62] Article 123(2).

(2) Subject as otherwise provided in this section, an appeal shall lie to the Court of Appeal in any cause or matter from any order of the Full Court or of a judge of the High Court (whether made before or after the date on which this Act comes into force) where such order is

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(a) final and is not –

(i) an order of a judge of the High Court made in chambers or in a summary proceeding;
(ii) an order made with the consent of the parties;
(iii) an order as to costs;
(iv) an order referred to in paragraph (d);

(b) a decree nisi in a matrimonial cause or an order in an admiralty action determining liability;

(c) declared by rules of court to be of the nature of a final order;

(d) an order upon appeal from any other court, tribunal, body or person.

[54] In the present proceedings, Cummings-Edwards C expressly decided that no appeal lay under art 163(3) of the Constitution but then referenced art 123(1) and s 6(2) of the Court of Appeal Act as providing an avenue of appeal in relation to final orders from election petitions. The Chancellor did not provide a reason for finding, apparently, that art 163(3) did not provide for an exclusive appellate regime in election petition proceedings. Gregory JA reviewed art 163 of the Constitution and s 42 of the Elections Validity Act, in concluding that 'jurisdiction of the High Court under Article 163(1) is an additional jurisdiction to hear election disputes and does not exclude the exercise of the ordinary jurisdiction of the High Court...' She was of the view that where the High Court exercised its ordinary powers and terminated a petition on a ground outside of art 163(1), the Court of Appeal has the jurisdiction to entertain an appeal under s 6 of the Court of Appeal Act.[63]

[63] *Thomas v Lowenfield* (Guyana CA, 21 December 2021) at [42]-[46].

[55] Respectfully, we cannot agree. There is no natural or inherent or common law right to appeal from a decision of a superior court of record. Neither is such a right required as part of constitutional due process. From at least 1894, in *McKane v Durston*,[64] the Supreme Court of the United States has held that there is no constitutional right to appeal.[65] And in *Trinidad and Tobago Police Service Association v Chief Personnel Officer*[66] Kelsick CJ stated that there is no right of appeal at common law and that the right can only be bestowed by statute.

[56] This was confirmed by Luckhoo JA in the Guyana Court of Appeal in *Bata Shoe Co (Guyana) Ltd v* Commissioner *of Inland Revenue* [67] where he held:

> A right of appeal is a matter of jurisdiction. The Constitution has in certain matters given to the courts jurisdiction, including an appellate jurisdiction, as, for example, in matters coming within the scope of arts 8, 19, 71 and 92. But, save where the Constitution has itself given jurisdiction, it is Parliament which normally makes provision for jurisdictional rights. With respect to a right of appeal, the position at common law was that such a right did not exist. The courts had no inherent powers to hear appeals. There could be no implication of such a right. It was a matter for the legislature. Time and again the courts have declared that an appeal was a creature of statute.

[57] It is therefore well established that for a right to appeal to exist, that right to appeal must be specifically given in the Constitution or by statute.

[58] In granular terms, there are four insuperable difficulties in locating the right to appeal in art 123 of the Constitution and s 6(2) of the Court of Appeal Act or in a combination of the two sets of provisions. Firstly, the special elections jurisdiction in art 163 of the Constitution and the Elections Validity Act and Elections Validity Rules must prevail over the general "civil law proceedings" jurisdiction contemplated by art 123 of the Constitution and s 6(2) of the Court of Appeal Act. This reflects, secondly, the broad and fundamental principle that general

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[64] 153 US 684 at 687 (1894); *Jones v Barnes* 103 S Ct 3308, 3312 (1983).
[65] ibid.
[66] (Trinidad and Tobago CA, 12 December 1983) at 5.
[67] (1976) 24 WIR 172 at 201. See also *Chung v AIC Battery and Automotive Services Co Ltd* (Guyana CA, 23 May 2011).

provisions in a statute must yield to the specific provisions. Thirdly, any tension between art 163 of the Constitution and s 6(2) of the Court of Appeal Act concerning the election jurisdiction must, naturally, be resolved in favour of the Constitution. These difficulties cannot be displaced by simply referring to the undoubted power which art 123 confers on Parliament to add to the jurisdiction of the Court of Appeal. Fourthly, the question as to whether the Order of the Chief Justice was a final order and thereby came within s 6(2) remains unsettled. These issues are discussed in further detail below.

a. Special Nature of the Election Petition Jurisdiction

[59] A right to appeal sourced in art 123 and s 6(2) would be contrary to the special nature of the election petition jurisdiction. On this point we agree with the reasoning and decision of Persaud JA. Gregory JA was impressed by the absence in art 163(3) of any words which excluded appeals from decisions other than those determining the questions set out in art 163(1). The Justice of Appeal doubted that the framers of the Constitution would have left the question of the finality of interlocutory decisions of the High Court to implication. She considered that 'the jurisdiction of the High Court under art 163(1) is an additional jurisdiction to hear election disputes and does not exclude the exercise of the ordinary jurisdiction of the High Court in giving effect to and operationalising the additional jurisdiction conferred by art 163. Where the High Court has exercised its ordinary powers and terminates a petition on a ground outside of art 163(1), the Court of Appeal would have jurisdiction to entertain an appeal under s 6 of the Court of Appeal Act if the order sought to be appealed complies with the requirements of the section.'[68]

[60] We do not agree. For the reasons traversed earlier, the Court of Appeal has no jurisdiction except that which is provided by law. The framers of the Constitution and Parliament in the exercise of its powers under art 163(4) expressly addressed the question of the decisions against which an appeal may be brought and settled

[68] *Thomas v Lowenfield* (Guyana CA, 21 December 2021) at [46].

for those listed in art 163(3). The suggestion that only a formula of words which expressly excludes all interlocutory decisions from appeals would suffice proceeds from the premise that an appeal already lies against interlocutory decisions and an express provision is needed to exclude the right of appeal which, as indicated earlier, is not the case. Article 133(2) makes clear that it does not enlarge the jurisdiction of the Court of Appeal with respect to the matters covered in art 163.

[61] Further, there is no inherent jurisdiction in the Court of Appeal to hear appeals from election petitions. This Court has recognised that the courts' jurisdiction is a restricted one and is not inherent. The courts' jurisdiction is derived from the Constitution which specifies that this jurisdiction is ordained by Parliament. In *Ram v Attorney General of Guyana*,[69] Saunders PCCJ confirmed this Court's view that the assumption by the courts of an "inherent power" to interrogate qualifying and disqualifying criteria in relation to election to the National Assembly will constitute overreach on the part of the judiciary. It will evince a trespass by the courts on the affairs of Parliament by disregarding the method and manner by which the Constitution specially requires the courts to determine such questions. Rule 3(1) of the Elections Validity Rules indicates that the courts have no jurisdiction to determine matters which must be raised by way of an election petition filed otherwise than as prescribed by Parliament. The courts cannot take it upon themselves, in violation of those Rules, to enlarge its jurisdiction to disqualify a member of the Assembly. If Parliament wishes to enlarge the courts' jurisdiction, then it must specifically so provide.[70]

[62] Saunders PCCJ noted two important policy decisions for the Constitution denying the courts an inherent jurisdiction and allowing the jurisdiction to be specifically conditioned by rules laid down by Parliament. The first was that this is a jurisdiction that concerns the membership of Parliament and under the principle

[69] See *Ram* (n 14).
[70] ibid at [37]-[38].

of separation of powers, the Constitution recognises that Parliament, and not the courts acting under an inherent jurisdiction, should be at liberty to define the contours of a jurisdiction that concerns the membership of Parliament. Secondly, it is in the public interest that the validity of the election and hence membership of Parliament should be quickly determined according to the strict rules and procedures that are pre-determined by Parliament.[71]

[63] The authorities upon which the First and Second Respondents rely to found inherent powers of the High Court's jurisdiction in election proceedings do not assist them. None of the cases concern the existence of inherent jurisdiction with respect to an election regime framework within a constitution. For example, *Mithani v Assistant Collector of Customs*[72] concerns the High Court's inherent powers to cancel bail granted to a person accused of a bailable offence; *Narula Trading Agency v Commissioner of Sales Tax Delhi*[73] concerns the High Court's jurisdiction to grant a stay of recovery of tax where an application had been filed under the Income Tax Act or the Delhi Sales Tax Act and in *Govind v The State,*[74] the Court examined the extent and ambit of inherent powers of the High Court under the Code of Criminal Procedure. Indeed, the Eastern Caribbean Supreme Court's decision in *Grant v Phillip*[75] relied on by the First and Second Respondents, assists the position of the Appellants as that court ultimately confirmed and applied the principle that the election jurisdiction is a special and peculiar jurisdiction which is separate to the courts' civil jurisdiction.

b. General Provisions must give way to Specific Provisions

[64] It is well accepted that the provisions in a general statute must yield to those in a special one. This is reflected in the canon of construction *generalia specialiabus non derogant* which has been repeatedly applied to the construction of the

[71] ibid at [40].
[72] 1967 AIR 1639.
[73] 1981 AIR Delhi 1.
[74] 2003 IIIAD Delhi 525.
[75] (Saint Kitts and Nevis HC, 4 November 2010).

Constitution (see eg, this Court in *Hill v Sagicor Life Inc*;[76] the Privy Council in *Day v Governor of the Cayman Islands*[77] and in *Thomas v Attorney General of Trinidad and Tobago*[78], the Constitutional Court of Seychelles in *Delorie v Government of Seychelles*[79] and the Court of Appeal of Trinidad and Tobago in *Attorney General v Maharaj*[80]*).*

[65] The broad powers granted by art 123(1) of the Constitution to the Court of Appeal, granting it jurisdiction as conferred by the Constitution and any other law, and s 6 of the Court of Appeal Act providing for appeals in civil matters must give way to the specific (and later) provisions in the Constitution providing for the special election jurisdiction in the High Court. Put another way, art 163(3) specifically delineates the types of determinations of the election court which can be the subject of an appeal. Being a special provision governing appeals in election disputes, it cannot be overridden by the general appellate (and earlier) provisions contained in art 123 and in s 6(2) of the Court of Appeal Act. Any provision in an Act providing a general right of appeal to the Court of Appeal must yield to the provisions of art 163(3) which deals specifically with appeals to the Court of Appeal in election petition matters.

[66] The Court of Appeal Act does not expressly create a right of appeal against decisions made in an election petition. It applies generally to "civil proceedings." To recognise a right to appeal an election petition under this general rubric would be to create two parallel rights of appeal to the Court of Appeal. Moreover, if there was the right of appeal under the Court of Appeal Act, there would be a wide and otherwise unfettered right of appeal against all final orders, whereas under art 163(3) the right of appeal would be limited to the specific questions identified therein. But this leads to what Counsel for Mr Jagdeo accurately describes as 'the manifest absurdity that the constitutional appellate regime established by art

[76] [2018] CCJ 22 (AJ) (BB).
[77] [2022] UKPC 6, [2022] 3 LRC 557 at [38].
[78] [1982] AC 113.
[79] *Delorie* (n 35).
[80] (Trinidad and Tobago HC, 2 August 2017).

163(3) would be swallowed up and therefore rendered otiose by the general statutory provisions for appeals under the Court of Appeal Act.'[81] This entirely untenable conclusion is avoided by application of the *generalia specialibus non derogant* principle.

c. Tension between Constitution and Legislation

[67] A right grounded in s 6 of the Court of Appeal Act to appeal decisions in election petitions would give rise to tension with the specific statutory code in art 163 of the Constitution. It is a matter of elementary constitutional law that if ordinary legislation is in tension with the Constitution, then the courts must give precedence to the words of the Constitution and not the other way around. According to this Court in *Ali v David*, the idea that an Order could create a new election regime at variance with the plain words of the Constitution was constitutionally unacceptable.[82]

[68] The point of tension between the Constitution and ordinary legislation was addressed by Chang CJ (Ag) in a related context in *Persaud v Lowenfield.*[83] The Chief Justice interpreted the intersection of art 163 of the Constitution and s 42 of the Elections Validity Act in a manner that resonates with the present dispute. Section 42 provided for the powers of the High Court in the following terms:

> 42. The Court shall, subject to this Act and rules of court, have the same powers, jurisdiction and authority with respect to any proceedings brought under or by virtue of this Act as if the proceedings were an ordinary action within the jurisdiction of the Court, and without prejudice to the generality of the foregoing provisions of this section, may exercise the power of the Court to consolidate hearings in relation to the hearing of any such proceedings and any proceedings in respect of any election of members of a regional democratic council where the elections in respect of which all the proceedings have been brought were held on the same day.

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[81] Bharrat Jagdeo, 'Bharrat Jagdeo's Written Submissions', Submissions in *A-G of Guyana v Thomas; Jagdeo v Thomas* GYCV2022/002; GYCV2022/001, 14 June 2022, [25].
[82] *Ali* (n 15) at [52].
[83](Guyana HC, 19 February 2016).

[69] Rejecting the argument that subject to the provisions of the Elections Validity Act, and the rules of court (which the Chief Justice presumed meant rules made by the Constitution itself) the High Court has the same powers, jurisdiction and authority with respect to election petition proceedings as it has in ordinary proceedings, Chang CJ (Ag) stated:

> But, no Act of Parliament can enlarge the jurisdiction and powers conferred on the High Court by the Constitution (unless the Constitution itself contains what has been called a disentrenching provision). Article 163(4)(d) empowers Parliament to make provisions respecting the practice and procedure of the High Court but only in respect of the exercise of the exclusive jurisdiction and powers conferred upon it by or under Article 163(1). Thus, it does appear to the court that section 42 of the National Assembly (Validity of Elections) Act must be construed strictly as conferring on the High Court the same powers, jurisdiction and authority with respect to procedural matters and matters of practice as are possessed by the High Court in an ordinary civil action – but only in respect of the exercise of its exclusive jurisdiction conferred by Article 163(1). Section 42 of the National Assembly (Validity of Elections) Act must be construed in the context of Article 163(1) since Article 163(4)(d) enables Parliament to make provisions with respect to the practice and procedure of the High Court but only in relation to: "the jurisdiction and powers conferred upon it by this article……"
>
> The practice and procedure in respect of which Parliament is enabled must therefore relate only to the exclusive jurisdiction of the High Court to determine the questions mentioned in Article 163(1). Section 42 of the National Assembly (Validity of Elections) Act therefore does not support the 1st respondent's contention since it does not open itself to the wide construction which appears on its face. It is contextually limited in its application.

[70] We respectfully agree with these observations. The proper interpretation of s 42 of the Elections Validity Act, as well as s 6 of the Court of Appeal Act, must entail construing the powers vested in the High Court in a manner consistent with the constitutional provisions on jurisdiction.

d. Was the Order Dismissing the Election Petition "Final"?

[71] Having found that there was no jurisdiction in the Court of Appeal to entertain the appeal from the order of the Chief Justice dismissing the election petition, it is not strictly necessary to consider whether the order was final or interlocutory. Nevertheless, out of deference to the considerable argument by the parties, we think that it is appropriate to make the following brief remarks.

[72] This Court recently construed the meaning of "final" in the context of s 40 of the Dominican Constitution which granted a right of appeal in respect of a "final" decision of the High Court determining certain election questions. In *Cuffy v Skerrit*[84] Saunders PCCJ recognised the two competing tests usually employed to assess whether a decision is final or interlocutory, namely the 'order test'[85] and the 'application test.'[86] The former focuses on the order that is made by the judge and looks at the consequences and effect of the order. If the order disposes completely of the proceedings, subject only to the possibility of an appeal, then the order made is considered "final", even if the application prompting the order was interlocutory in nature. The 'application test' focuses on the application that resulted in the order that was made. If the application could result in an order that will not finally dispose of the case, then the order made on that application will be considered interlocutory, even if it actually turns out to be dispositive of the case. Another explanation is that the 'application test' is based on the nature of the decision, and it treats it as final if (subject to appeal) it will determine the outcome of the litigation either way. For example, a judgment in default of defence or a striking out order finally disposes of the litigation but is treated as interlocutory because it would have been interlocutory if it had gone the other way.[87]

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[84] *Cuffy* (n 16) at [37].
[85] See also *Bozson v Altrincham Urban District Council* [1903] 1 KB 547; *Haron Bin Mohammed Zaid v Central Securities (Holdings) Bhd* [1983] 1 AC 16; *Moran v Lloyd's* [1983] 2 All ER 200.
[86] See also *Salaman v Warner* [1891] 1 QB 734; *Salter Rex & Co v Ghosh* [1971] 2 QB 597; *White v Brunton* [1984] 2 All ER 606.
[87] *Jacpot Ltd v Gambling Regulatory Authority* [2018] UKPC 16, [2018] LLR 754 at [8].

[73] The First and Second Respondents submit that the Court of Appeal and this Court are entitled to decide the question of whether an order is final or interlocutory in accordance with its own practice and procedure and in this regard should consider the Guyanese Court of Appeal case of *Re: Williams and Salisbury.*[88] In that case, the Court of Appeal was non-committal as to which test was to be applied. The First and Second Respondents have cited *Haron Bin Mohammed Zaid v Central Societies (Holding) BHD* to support its contention that the Court of Appeal is entitled to apply and maintain the practice and procedure outlined in *Re: Williams and Salisbury*. In *Haron Bin Mohammed Zaid*, the Privy Council observed that the authorities and the Federal Court in Malaysia had established that over the years, the 'order test' was used to determine whether an order is final or interlocutory. As it was a matter of practice and procedure, the Privy Council, in accordance with the Federal Court's practice upheld the decision of the Federal Court.

[74] Mr Jagdeo relies on several Guyanese Court of Appeal decisions which demonstrate that while there has been some uncertainty, the established practice in Guyana is that the 'application test' is employed.[89] In the Commonwealth Caribbean, the 'application test' is widely employed;[90] attention was called specifically to the decision of the Eastern Caribbean Court of Appeal in *Attorney General of Grenada v David.*[91] There, the Court held that an order made striking out a claim seeking to challenge the validity of an election on procedural grounds was an interlocutory order after applying the 'application test'.

[75] It is normally the case that the tests lead to different results. In the present proceedings, use of the 'order test' would necessarily have meant that as the dismissal of the Petition by the Chief Justice brought the matter to an end the

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[88] (1978) 26 WIR 133.
[89] See *Guyana Consumers Advisory Bureau v Public Utilities Commission* (Guyana CA, 17 February 1999); *Re: American Life Insurance and North American Life Insurance Co Ltd* [2001-2002] GLR 157; *Nova Scotia Manufacturing v Narine* (2015) 85 WIR 423.
[90] For example, in Barbados: *Bico Ltd v Mcdonald Farms Ltd* (Barbados CA, 1 November 1996); In Belize: *Aikman v Belize Bank Ltd* (Belize CA, 18 May 1992); *Summerlin Ltd v Reneau* (Belize CA, 27 October 2017); In Jamaica: *Olasemo v Barnett Ltd* (1995) 51 WIR 191; *Strachan v Gleaner Co Ltd* (Jamaica CA, 18 December 1998); Eastern Caribbean: *Sylvester v Singh* (Saint Vincent and the Grenadines CA, 18 September 1995); *McDonna v Richardson* (Anguilla CA, 29 June 2007).
[91] (Grenada CA, 2 June 2008).

ineluctable conclusion would follow that the Order was final. However, use of the 'application test' would not necessarily have resulted in the termination of the matter. If the Chief Justice had ruled that Mr Granger was not a necessary party or that he was a necessary party but that he had been served on time, then the Petition would not have been found to be a nullity and would have proceeded to trial. It was only if, as happened to have been the case on the facts, the Court found that service was deficient and that the Petition was in consequence a nullity, that the proceedings would be brought to an end. As such, on the 'application test', the orders made by the Chief Justice were not final orders and are not appealable to the Court of Appeal pursuant to s 6(2) of the Court of Appeal Act.

[76] I do not consider that there is necessarily a binary choice to be made between acceptance of the 'order test' or the 'application test'. It is to be noted that this Court in *Cuffy v Skerrit* expressly refused to elect between the two tests. Instead, having considered both tests, the Court stated:

> [43]. In any event, we agree with the approach taken by Alleyne CJ in *Hamilton v Liburd*… In order to determine the meaning of 'final' in the context of the right of appeal granted by s 40 of the Constitution, it is best to construe the actual constitutional provisions,… To do so one must utilise the normal tools of construction. What do those provisions mean? What do they aim at accomplishing? What is the history of those provisions? What is the rationale for and the context in which the Constitution deprives a litigant of the right to appeal all but a *final* determination of the question as to whether any person has been validly elected as a Representative? In light of the answers to those questions how should one approach the meaning of 'final'?[92]

[77] No doubt, the guidance provided by the 'order' and 'application' tests will be considered, but the wisdom of ultimate recourse to text, history and tradition of the Constitution means that the question of when an order is final remains a matter of constitutional construction, which it should, rather than of mechanical application of tests not necessarily fashioned with the Constitution in mind, which

[92] *Cuffy* (n 16) at [43].

it should not. This gives the flexibility necessary to ensure that the decision on the question of the interlocutory nature of decisions of the High Court is in keeping with the rationale and objectives of the Constitution. If some degree of certainty is sacrificed in consequence that is a price worth paying. This is especially so in relation to the Guyanese Constitution which does not use the language of "interlocutory" and "final" to prescribe the election petition orders which may be appealed to the Court of Appeal; that language is found in s 6(2) of the Court of Appeal Act.

[78] It may have been for this reason that the Court of Appeal of Guyana, in *Re Williams and Salisbury,*[93] refused to adopt one test in favour of the other. The Court of Appeal had to decide whether the trial judge's order refusing to direct a magistrate to state a case for the opinion of the High Court was interlocutory or final. Article 92 of the Constitution gave a right of appeal from final decisions. Haynes C, in answering the question of what the test of a final decision was, noted that the authorities showed more than one test had been applied by judges. After applying both tests to the issues and considering similar, near-similar and analogous cases, he ultimately held that he was not in any doubt whatever about the matter, that the decision appealed from (an order of the trial judge refusing to direct a magistrate to state a case) was not a 'final' judgment.[94] Massiah JA held that no matter which test was applied, the order appeared to be interlocutory.[95] This attitude has leaked over into the statutory context with the Court of Appeal in *Chung v AIC Battery and Automotive Company Ltd,*[96] being non-committal in choosing between the tests. The Court of Appeal held that an order striking out an affidavit of defence was a final order because the order effectively deprived the appellants of possession of property as well as made them liable to mesne profits. The result was that the respondents were entitled to judgment, and this effectively put an end to the action. If it was accepted that the order "finally disposed of the

[93] *Williams* (n 88).
[94] ibid at 141-142.
[95] ibid at 172.
[96] (Guyana CA, 23 May 2011).

rights of the parties", or determined the matters in litigation, then that brought an end to the matter, except for any possible appeal. This Court upheld that decision because the order was one "which finally determined the rights of the parties"[97] but made no determination as to which test ('application' or 'order' test) was to be applied.

[79] As we have held that there was no right of appeal from the order of the Chief Justice in the present proceedings, a decision on whether her Order was a 'final' order does not arise.

Exception to Maintain Integrity of the Constitution

[80] A hard problem of constitutional construction arises where an election court appears to have made an error in respect of areas of its decision-making that are not appealable. To forego testing the possibility that there was an error and thereby permit the possibly erroneous decision to stand would be to immunise potential wrongful decision-making against challenge notwithstanding the public importance of the decision or the degree of grievance felt by the wronged party. But to permit an appeal would seem to disregard the constitutional provisions and potentially violate the critical objective of expeditious identification of the government soon after elections are held.

[81] The problem was considered by this Court in *Cuffy v Skerrit*[98] and it is well-worth quoting extensively from what was said on that occasion. This Court stated:

> [49] Although it is the case that the provisions conferring jurisdiction on the Court of Appeal to hear appeals in election petitions are to be found in the Constitution, and those provisions appear to admit of no exceptions to the requirement that only final decisions may be appealed, it is also the case that the Constitution prescribes that every person in Dominica is entitled to a fair hearing within a reasonable time by an independent and impartial tribunal. A rather high value is

[97] *Chung v AIC Battery and Automotive Services Co Ltd* [2013] CCJ 2 (AJ) (GY), (2013) 82 WIR 357 at [10].
[98] *Cuffy* (n 16).

to be placed on this fundamental right to a fair hearing by an independent and impartial tribunal. That right is not only fundamental, it is a condition for enjoying and securing the enjoyment of other rights. It follows then that if appellants complain that, in the hearing of an interlocutory aspect of their election petitions, their enjoyment of this fundamental right was compromised, then the Court of Appeal should assume jurisdiction to consider *that* complaint. If the complaint can conveniently be brought as an appeal from the trial judge's decision, and is made out, the Court of Appeal must afford the complainants such relief as is appropriate in the circumstances. The Court of Appeal would not then be wrongfully assuming some inherent jurisdiction at variance with s 40, it would be complying with another provision of the supreme law that is to be accorded a value that is higher than that which is provided for in ss 40(6) and (7).

[50] The Court of Appeal's decision in *Exeter v Gaymes* fits squarely into this exception to the rule establishing the Court of Appeal's jurisdiction to review only final decisions as set out in ss 40(6) and (7) of the Constitution...

[51] Although the Chief Justice's statements in the instant case were not explicitly so framed, Dame Pereira gave other examples of instances where, in the course of hearing an election petition, and notwithstanding the interlocutory nature of the order appealed, a Court of Appeal may wish to assume jurisdiction to investigate a breach of the constitutional right to a fair hearing before an independent and impartial tribunal: Other examples of similar nature include a decision arrived at on an election petition in denial of the right of a party to be heard, or the right to be represented by counsel, or where there is some actual or apparent bias on the part of the judge ....We respectfully endorse that reasoning as providing a non-exhaustive set of examples that could possibly allow a party (whether Petitioner or Respondent) to appeal an interlocutory order made in election proceedings. At [46] above, we noted that the policy choice reflected in s 40(6) rests on the presumed competence of professional judges. In this regard, it is arguable that if a judge acts in a manner that obviously and manifestly contradicts that premise, it might then be said that in such circumstances the petitioner has not received a hearing that is fair and that the Court of Appeal is entitled to intervene. Clearly, the threshold for making such an argument must be quite high. In all of these instances, a review by the Court of Appeal is really not *an exception* to the right of appeal granted by s 40. In truth, it is more accurately to be regarded as an independent means of access to the courts to complain about a breach of the constitutional right to a fair hearing by an independent and impartial tribunal.[99]

[99] ibid at [49]-[51].

[82] Two important points are worthy of expansion. Firstly, the precise issue in *Cuffy v Skerrit* related to the question of whether the Order of the election court was "final" thus allowing an appeal to the Court of Appeal under s 40 of the Constitution of Dominica. But clearly the *dicta* are to be taken much more broadly as providing guidance for diverse errors that may be committed by an election court. The examples given in the quotation above include apparent bias (as in the *Exeter* case itself); other infringements of the right to a fair hearing; and standards of decision-making which contradict the premise of presumed competence of professional judges. In short, procedural as well as substantive errors may be basis for arguing that there should be a right of appeal to the Court of Appeal.

[83] Secondly, the threshold for making such an argument is necessarily very high. In relation to allegations that the right to a fair hearing was infringed, there is a rich history of litigation on the breach of the constitutional right to a fair hearing on which to draw: *Rees v Crane*[100]; *Boodram v Attorney General of Trinidad and Tobago*[101]; *Meerabux v Attorney General of Belize*[102]*; Smith v Attorney General of Trinidad and Tobago*[103]*; Bell v DPP of Jamaica*[104]*; Locabail (UK) Ltd v Bayfield Properties Ltd*[105]; *Tyson v R*[106]; *Exeter v Gaymes*[107]*; Gibson v Attorney General of Barbados.*[108] The constitutional right to a fair hearing naturally and necessarily permeates and is applicable to the provisions on decision-making in election petitions. In relation to other procedural errors, or as regards substantive errors, the threshold is demonstrably not, and is higher than, that for judicial review. The seminal *Wednesbury* standard of unreasonableness (or irrationality)[109] would constitute the absolute floor of such a standard; outside the constitutionally prescribed grounds of appeal, an error by the election court will only possibly be appealable if it was so unreasonable that no reasonable tribunal

[100] (1994) 43 WIR 444 (TT PC).
[101] [1996] AC 842 (TTPC).
[102] (2005) 66 WIR 113 (BZPC).
[103] [2022] UKPC 28.
[104] [1985] 2 All ER 585 (JMPC).
[105] [2000] QB 451.
[106] (2017) 92 WIR 328.
[107](Saint Vincent and the Grenadines CA, 13 June 2017).
[108] [2010] CCJ 3 (AJ) (BB), (2010) 76 WIR 137.
[109] *Associated Provincial Picture Houses Ltd v Wednesbury Corp* [1948] 1 KB 223.

acting reasonably could have made it. Or, to put the matter another way, it is only if such an error would demonstrably shake the confidence of a significant segment of right-thinking members of the society in the competence or integrity of the justice system (not necessarily in the result of the elections) that an appeal may lie. It follows that applicability of the exception, especially in relation to non-fair-hearing allegations, will be exceedingly rare, and will be only properly invoked to maintain the integrity of the Constitution in the eyes of reasonable members of the society.

[84] In the present case, there is no real suggestion from the Respondents that the decision of the Chief Justice in dismissing the Petition for want of proper service could in any way support an argument that would justify invocation of the exception.

Conclusion

[85] For the foregoing reasons, we consider that the appeal ought to be allowed. The Court of Appeal had no jurisdiction to hear the appeal from the decision of the High Court delivered on 18 January 2021 dismissing Election Petition 99/2020 for want of proper service. We would also observe that this appeal has again highlighted the need for legislative intervention to clarify the procedure for challenging the results of elections. The constitutional trigger for an appeal of a decision granting or refusing leave to institute proceedings for determination of election disputes could benefit from clarification in circumstances where there is no readily ascertainable mechanism for granting or refusing such leave in Guyana. Similarly, it may be better for the Legislature to prescribe the circumstances, if any, in which there may be an appeal from an election court, where such appeal is not presently contemplated by the Constitution. Such prescription could well necessitate amendment of art 163(3).

JUDGMENT OF THE HONOURABLE MR JUSTICE BARROW, JCCJ:

[86] The short question on this appeal is whether an appeal lies to the Court of Appeal against the decision of the High Court dismissing an election petition as a nullity for failure of the petitioners to serve the petition within the time specified by statute[110] for the service of such a petition.

[87] Against that decision of the High Court, the petitioners appealed, and the respondents to the appeal applied to strike out the purported appeal on the ground that there was no right of appeal. The Court of Appeal decided, by majority, that the petitioners had the right to appeal to that court and so declared. The respondents to the petitions, now the Appellants, have appealed to this Court arguing that the decision of the Court of Appeal was erroneous.

Jurisdiction over Election Petitions

[88] The crux of the dispute stems from the special nature of the court's jurisdiction in relation to election petitions. Article 163 of the Constitution, which is reproduced in its entirety in the opinion of Justice Anderson at [22] above, confers exclusive jurisdiction on the High Court to determine election petitions.

[89] The exclusive jurisdiction which art 163 confers is, in relevant part, to determine any question as to qualification to be elected; whether an election has been lawfully conducted or the seats have been lawfully allocated, or a seat has become vacant, or a member must vacate their seat; regarding the filling of a vacant seat; or whether a person has been validly elected as speaker. For convenience, these are hereafter referred to as 'the validity questions.'

[110] National Assembly (Validity of Elections) Act, Cap 1:04, s 8 and National Assembly (Validity of Elections) Rules, r 9.

[90] As accepted by all parties, jurisdiction to determine the validity questions and to hear election petitions raising them is entirely a creation of statute; it is not a part of the historical, or common law, or ordinary or general jurisdiction of the Supreme Court, either in Britain or Guyana.[111] For this reason, as the parties also accepted, the general law that operates for the determination of an ordinary claim in the High Court and an appeal against it does not govern the determination of a validity question in an election petition. To facilitate the exercise of this special jurisdiction to determine the validity questions, art 163 conferred power on the legislature to enact, as it did, a separate litigation regime to govern the determination of validity questions. The regime enacted comprised the *National Assembly (Validity of Elections) Act*[112] (hereafter 'the Elections Validity Act') and the *National Assembly (Validity of Elections) Rules* (hereafter 'the Elections Validity Rules').

[91] From this construct flows the submission of the Appellants that there is no right of appeal in this case because, while art 163(3) gives a right to appeal, it is a limited right of appeal that this article gives. The right so given, they say, is restricted to specified matters being the validity questions. They submit that a decision dismissing a petition is not a specified matter; it is not the determination of a validity question which may be appealed. In essence, the Appellants contend that there may not be an appeal against any decision except a decision of the validity questions.

[92] Much of the discussion in this appeal focused on elaborating on the exclusivity of the High Court jurisdiction over election petitions and the attendant exclusion, as the Appellants saw it, of the right of appeal. The Respondents (originally the petitioners) argued in favour of the limitation of that exclusivity; that it did not exclude their appeal.

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[111] A valuable exposition of the history of the jurisdiction is presented in the judgment of the English Court of Appeal in *R (Woolas) v Parliamentary Election Court* [2012] QB 1 [22]–[30].
[112] Cap 1:04.

The Special versus the Ordinary Jurisdiction

[93] In my respectful view, the implication of the undoubted distinction that has been drawn between the court's specially conferred, exclusive jurisdiction over the validity questions, and the court's general jurisdiction, goes further than has been fully discussed. The further reach of the implication of there being two different jurisdictions, which calls for consideration, as it seems to me, is the proposition that while exclusive jurisdiction is given to determine the validity questions, the general jurisdiction is not excluded from operating when the issue being determined is not a validity question.

[94] It was recognised in *R (Woolas) v Parliamentary Election Court*[113] that the special jurisdiction of an election court over validity questions and the finality of its decision was a separate matter from the court's general jurisdiction to decide questions of law but that the former did not exclude the operation of the latter.[114] In that case a defeated candidate successfully challenged the result of an election as having been procured by illegal practices under the *Representation of the People Act 1983*. It was decided by a Divisional Court in that case that judicial review was available against the decision of an election court which had wrongly applied the law concerning the validity of an election.

[95] It is not to the point that the remedy of judicial review was available because an 'election court' (as it later became known) in England is an inferior tribunal presided over by High Court judges but is not an arm or division of the High Court and this makes it amenable to judicial review,[115] whereas in Guyana the 'election court' is the High Court itself. It is also recognised that the legislation that was construed in *Woolas* is significantly different and that a decision on different statutes may produce different decisions on the same issue. Those factors do not detract from the broader point established, which is that even in election petition

[113] *Woolas* (n 111).
[114] ibid at [47].
[115] ibid at [58].

cases in which the statute provides for finality of decisions, a reviewing court possessed jurisdiction to decide if the election court had correctly interpreted and applied the law upon which it was adjudicating.

[96] As the court in *Woolas* stated:

> 47. However, the fact that the decision of an election court as a judgment declaring the status of the election is a judgment *in rem* and in that sense is final and binding on the whole world does not mean that it cannot be challenged, if the judgment has been reached on the basis of a wrong interpretation of the law. Although it is plain that Parliament intended that a lawful decision of the election court must be final in all respects, we do not consider that Parliament intended to provide that a decision that had been made on a wrong interpretation of the law could not be challenged. An express provision to that effect would have been required.

[97] In *Cuffy v Skerrit*[116] this Court decided, in the context of the legislative scheme in the Commonwealth of Dominica, that even where there was express provision that excluded a right of appeal against an interlocutory decision, that a challenge could be made to the High Court's decision in election petition proceedings, whether by appeal or by a separate claim, on the ground of a breach of the constitutional right to a fair hearing.[117] In that case, the provision that excluded any appeal other than the given, limited right of appeal was s 40 of the Constitution, which was summarised by the Court as follows:

> [30] Subsections (6) and (7) respectively state:
>
> (6) An appeal shall lie as of right to the Court of Appeal from any *final* decision of the High Court determining such a question as is referred to in subsection (1) of this section;
>
> (7) No appeal shall lie from any decision of the Court of Appeal in exercise of the jurisdiction conferred by subsection (6) of this section and ***no appeal shall lie*** from any decision of the High

[116] *Cuffy* (n 16).
[117] ibid at [49].

> Court in proceedings under this section other than a *final* decision determining such a question as is referred to in subsection (1) of this section (emphasis added). (emphasis added)

[98] While applying the no-appeal rule in that case, as mentioned, the Court affirmed its broader jurisdiction to determine a disputed question of law in a fitting case. More to the point, because it speaks to the co-existence of the two jurisdictions within the same election petition proceedings, is the observation by Pereira CJ in the Court of Appeal decision of the same case.[118] The Chief Justice observed, after summarising the special jurisdiction conferred in election challenges that:

> [10] … It is common ground that this special jurisdiction *incorporates the court's inherent jurisdiction* to protect it from abuse in its exercise of the jurisdiction so that the case law is replete with decisions striking out election petitions on a number of bases ranging from failure to disclose a cause of action, substantial non-compliance with election laws, and vagueness to abuse of process.[119] (Emphasis added)

[99] At the risk of over-simplifying the complexity of the issue that was litigated in *Ali v David*,[120] the Court's decision in that case may be referenced to show the clear distinction between a determination of a validity question and a determination of a question as to the validity of a different legal provision. The Court found that the validity of the appointment of the President under art 177(4) of the Constitution, and therefore the validity of the elections under art 163, would be finally determined by a prospective decision of the High Court and then the Court of Appeal and there could be no appeal to the CCJ from these. However, what was actually determined in that case was the validity of a legal provision, *Order 60 of*

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[118] *Cuffy* (n 31).
[119] ibid at [10]. As authority for that statement the Chief Justice referred to the examples of Rawlins J in *Frampton v Pinard* (Dominica CA, 3 April 2006), *Smith v Christopher* (British Virgin Islands HC, 23 July 2003), *Jonas v Quinn-Leandro* (Antigua and Barbuda HC, 31 March 2010).
[120] See *Ali* (n 15).

2020[121], made by the Elections Commission, which purported to direct the manner of counting the votes and thereby the outcome of the elections.

[100] The Court decided that there would have been no finality to the intended determination by the Court of Appeal of the validity of Order 60 because a challenge to that provision would not produce a decision as to the validity of the elections. In sum, neither art 163 nor art 177 was the subject of the litigation and, therefore, the exclusive jurisdiction to decide validity questions did not extend to a determination of the validity of Order 60; the general jurisdiction of the Supreme Court and this Court, therefore, could be exercised.

[101] The cogency of these decisions demonstrating the operation of the court's general jurisdiction over the interpretation of the law, even in election cases, is strengthened by a closer study of the questions of law that the High Court determined in dismissing the Petition in the present case. That scrutiny, which follows immediately below, reveals that what the High Court decided were questions as to compliance with provisions in the enabling, procedural legislation, viz the Elections Validity Act and the Elections Validity Rules, as distinct from validity questions under art 163 of the Constitution.

The Questions Decided

[102] At the outset, at [86] above, it was observed that the High Court dismissed the Petition on the ground of failure to comply with s 8 of the Elections Validity Act and r 9 of the Elections Validity Rules. Section 8 of the Elections Validity Act reads:

> 8. Within the prescribed time, not exceeding five days after the presentation of an election petition, the petitioner shall in the prescribed manner serve on the respondent a notice of the presentation

[121] 'Order No 60 of 2020 – The Constitution of Guyana and the Election Laws (Amendment) Act' (Guyana, The Official Gazette (Extraordinary): Legal Supplement - B, No 60/2020, 4 May 2020).

> of the petition, and of the nature of the security or proposed security, and a copy of the petition…

[103] Rule 9 of the Elections Validity Rules prescribes that the time for service of a copy of an election petition and notice of the presentation of the petition and of the nature of the proposed security shall be five days, exclusive of the day of presentation.

[104] It is settled law that a statute which establishes an obligation to serve legal process on a designated party and a time within which such process must be served thereby also establishes a pre-condition to proceeding as well as a limitation period for proceeding.[122] The High Court's decision to dismiss the Petition as a nullity in this case shows the principle in operation. And that determination demonstrates that what was appealed in this case was not a validity question, with its restricted right to appeal, but an ordinary question of law regarding service of process as required under the Elections Validity Act and Rules. No question under art 163(1) was decided.

[105] The proposition that the determination sought to be appealed in this case was not of a validity question under art 163 is supported considerably by having regard to the invocation of jurisdiction that was made in the title of the election petitions that commenced the proceedings.[123] The heading or rubric of the Petition, identifies the legislation that gave rise to the bringing of the proceedings and in relation to which the High Court was asked to exercise jurisdiction and make determinations. Manifestly, the invocation of jurisdiction was not solely in relation to validity questions under art 163. The rubric of the Petition reads:

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[122] *Williams v Mayor of Tenby* (1879) 5 CPD 135.

[123] Record of Appeal, 'Petition, Affidavit of Monica Thomas in support of Petition, Authority to Attorneys-at- law, Notice of Presentation of Election Petition, Notice of Security for Costs and Schedule' 2879.

In the Matter of Articles 60, 161(A), 162 and 163 of the Constitution of the Republic of Guyana.
And

In the Matter of the Representation of the People Act, Chapter 1:03.

And

In the Matter of the National Assembly (Validity of Elections) Act, Chapter 1:04.

And

In the Matter of the Election Laws (Amendment) Act No 15 of 2020

[106] In the United Kingdom, in their earliest enactment, the relevant provisions as to time for presentation of a petition, service of notice of it on the respondent and the like were contained in the primary legislation that permitted the bringing of election petitions.[124] As prescribed in the accompanying rules that governed the trial of election petitions in England, the General Form of Petition[125], made reference in the rubric only to the *Parliamentary Elections Act 1868*. The contrast with the regime in Guyana, as seen from the rubric reproduced above, places beyond doubt that on the presentation of the instant election petitions in these proceedings what is being litigated are matters arising from the various, different legislation.

'As if an Ordinary Action'

[107] To return to the point, it was not art 163(1) that was in play in the present scenario but rather art 163(4), which gives power to Parliament to legislate with respect to the practice and procedure of the High Court in relation to the jurisdiction and powers conferred upon it by or under Article 163; sub-para 4 (c). As has been noted, the Elections Validity Act and Rules were made under the authority of art 163[126] and in crafting these legislative provisions, Parliament saw fit to include s

[124] Parliamentary Elections Act 1868 (31 & 32 Vict c 125), ss 6 and 8.
[125] Parliamentary Election Petition Rules 1868, r 5.
[126] See [90] above.

42 of the Elections Validity Act and r 21 of the Elections Validity Rules. Section 42 states:

> The Court shall, subject to this Act and rules of court, have the same powers, jurisdiction and authority with respect to any proceedings brought under or by virtue of this Act *as if the proceedings were an ordinary action* within the jurisdiction of the court ... (emphasis added)

[108] Rule 21 states that on the trial of election petitions … '(b) All interlocutory matters may be heard and disposed of by a judge in chambers …'.

[109] Those provisions are apposite to answer the question that is in dispute on this appeal, viz whether the decision to dismiss the Petition is subject to the Supreme Court's general jurisdiction in the same way as an ordinary action.

[110] In an ordinary action, a dismissal of a claim for the same failures as were found to have occurred in this case would be eminently subject to consideration under the general appellate jurisdiction of the Supreme Court. It must be clarified that reference to a decision being subject to consideration under the general appellate jurisdiction does not mean that an appeal lies against the decision but, rather, that the decision may be reviewed to decide whether the right of appeal given by the High Court Act, or the Court of Appeal Act, includes that decision.

[111] This examination also gives rise to the point that it is wholly immaterial that no right of appeal is given in the Elections Validity Act: this is because it is fundamental that the right to appeal (or to apply for leave to appeal) a High Court decision, in an ordinary action, is <u>not</u> conferred in the statute upon which the High Court has adjudicated. The right to appeal, in an ordinary action, is conferred by the High Court Act and the Court of Appeal Act[127] which give the Supreme Court its general appellate jurisdiction. There seems no reason in principle why the

[127] See Court of Appeal Act Cap 3:01, s 6 reproduced at [120] below.

decision of the High Court that an election petition was a nullity should be treated differently.

Appeal in Principle

[112] The proposition that a decision to dismiss an election petition was appealable in principle, as if it were an ordinary action, emerged at an early stage in the history of the court's election jurisprudence, just after Parliament in England passed the law that gave jurisdiction to judges of the common law courts to decide election petitions.[128] In *Williams v Mayor of Tenby*[129] a judge at chambers had ordered that a municipal election petition be taken off the file on the ground, among others, that notice of the presentation of the petition had not been served on the respondent within five days.[130] Shades of the present litigation!

[113] The appeal against that decision was heard as a matter of course, with no suggestion that there was not a right to appeal because it was an election matter that fell within the special jurisdiction of an election court and not the regular court. The Court of Common Pleas dismissed the appeal on the basis that the provisions as to service 'are peremptory, and that the terms not complied with are conditions precedent, which ought to be complied with before the petition could be presented.'[131]

[114] It is underscored that what was decided at chambers and on appeal was the validity of the petition as distinct from the validity of the election. As in the present case, there was no trespass upon the exclusivity of the jurisdiction of the election court to decide the validity of the election and the finality of such a decision.

[128] Parliamentary Elections Act 1868 (n 124).
[129] *Williams* (n 122).
[130] As required by s 13(4) of the Corrupt Practices (Municipal Elections) Act 1872 (35 & 36 Vict c 60).
[131] *Williams* (n 122) at 138.

Distinguishing *Cuffy v Skerrit*

[115] It may be helpful to distinguish the decision in *Cuffy v Skerrit*[132] from the present case. In *Cuffy,* the High Court judge struck out the petitions on the grounds that they were insufficiently particularised, did not disclose a cause of action and were abuses of the process of the court. It is noted that the objection was taken in the course of the hearing of the petition, as a preliminary objection to a petition that was extant. That was a decision that fell within the prohibition of appeals other than against a final 'decision of the High Court in proceedings under this section' [s 40 (7)].

[116] The distinction with the present case is that (A) there is no equivalent to s 40 of the Dominica Constitution which expressly excludes appeals from decisions other than a *final* decision and (B) the decision in this case was not in proceedings under art 163 but was a decision that such proceedings did not exist. The intended proceedings did not exist because the pre-condition for their existence, viz service within the specified time upon the necessary party, had not occurred. The Petition in this case was not struck out, as in *Cuffy*; it was declared a nullity and dismissed.[133]

The Application made in this Case

[117] In *Cuffy,* the Court decided that no appeal was permitted because the determination sought to be appealed was not a final but an interlocutory decision, and s 40 of the Constitution provided that only final decisions could be appealed. In reaching that decision the Court considered the two tests by which to decide whether a decision was final or interlocutory, being the 'order test' and the 'application test'.

[118] As Saunders PCCJ explained in *Cuffy* at [37]-[38]:

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[132] *Cuffy* (n 16).
[133] Record of Appeal, 'Decision on Validity of Election Petition 99P/2020 and Directions on Petition 88P/2020 at 102' 4371-4401.

> … The former focuses on *the order* that is made by the judge. It looks at the effect of the order. If the order disposes completely of the proceedings, subject only to the possibility of an appeal, then the order made is considered to be final, even if the application prompting the order was interlocutory in nature. …

[119] The President continued,

> The application test yields different results. This test focuses on *the application* that resulted in the order that was made. If the application could possibly result in an order that will not finally dispose of the case, then the order made on that application will be considered interlocutory, even if it actually turns out to be dispositive of the case…

[120] In the present case, the same discussion has been conducted in the various submissions and judgments to decide whether or not the decision sought to be appealed is a final order, from which an appeal lies as of right pursuant to s 6(2) of the *Court of Appeal Act.*[134] In relevant parts, the provision reads as follows:

> … (2) Subject as otherwise provided in this section, an appeal shall lie to the Court of Appeal in any cause or matter from any order of the Full Court or of a judge of the High Court (whether made before or after the date on which this Act comes into force) where such order is—
>
> (a) final and is not—
>
> (i) an order of a judge of the High Court made in chambers or in a summary proceeding;
>
> …
>
> (b) …
>
> (c) …

[134] Cap 3:01.

(d) …

[121] The discussion as to final or interlocutory, with the continuing uncertainty as to which test to apply, is overtaken by the certainty provided by the express requirement in the Act: for an appeal to lie from any order of a judge of the High Court it must be that the order 'is not an order of a judge *made in chambers* …'; sub-s (2)(a)(i) (emphasis added). This provision very helpfully clarifies that whether or not the order of the judge is final, to be appealable it must be an order that was not made in chambers.[135]

[122] It seems clear that the order made by the Chief Justice in this case was an order made in chambers. A start to this conclusion is with the observation of Cummings-Edwards C at the beginning of her Decision (at [2]), where she stated that at the case management conference for the hearing of the Petition the Honourable Chief Justice raised issues on service and invited submissions from counsel thereon.[136] It is the common understanding that a case management conference is a proceeding in chambers.

[123] The indication that the Order was made in proceedings in chambers is confirmed by a perusal of the *Notice Of Application For Dismissal Of An Election Petition dated 29 October 2020*[137] that was filed following the Chief Justice's observations in chambers. While applications can undoubtedly be made during the hearing of the substantive trial and, therefore, not in chambers but in open court (such as in the case of the trial as a preliminary issue of the application to strike out in *Cuffy v Skerrit*)[138], in this case the application was made as a preliminary to the trial and

[135] *Cuffy* (n 16) at [37]-[38].
[136] This is stated by the Chief Justice at [7] of her Decision in *Thorne v Lowenfield* (Guyana HC, 18 January 2021).
[137] Record of Appeal, 'Notice to dismiss an Election Petition in the High Court of the Supreme Court of Judicature National Assembly (Validity of Elections) Act, Cap 1:04' 3907-3924.
[138] Uncertainty can attend the categorisation of proceedings as being in chambers. This is because all or any part of the jurisdiction vested in the High Court may be exercised by a single judge both in open court and in chambers, as provided in s 18(3) of the High Court Act, and because a judge sitting in chambers may conduct or adjourn proceedings in chambers into open court, both for considerations of physical space as well as to make them no longer private, which is a major feature of chamber proceeding, but accessible to the public. The essence of the characterisation of an order as made in chambers comes from the nature of the proceedings in which the order was made including, in particular, the suitability of the subject matter for determination with less formality (a

to determine whether there could be a trial. Consistent with the character of the application in this case as a chamber application, it was supported by the affidavit of Mr Jagdeo, and the Decision of the Honourable Chief Justice[139] shows that the application was decided purely on affidavit evidence: more pointedly, no oral evidence was taken, as would be the norm for an application in open court. The indications are clear that the order of the Chief Justice dismissing the Petition was an order made in chambers.

The Result

[124] The result must be that the purported appeal of the then Petitioners against the dismissal by the Chief Justice of the Petition in this case as a nullity is, itself, a nullity because there was no right of appeal to the Court of Appeal.

[125] The decision of Jamadar JCCJ in *Persaud v Nizamudin*[140] directly decides the point that (even) a final order of a judge in a summary proceeding may not be appealed under s 6(2)(a)(i) of the Court of Appeal Act; instead, it may be appealed to the Full Court under s 79 of the *High Court Act.*[141] The Court in that case, therefore, upheld the decision of the Court of Appeal that it lacked jurisdiction to hear the purported appeal. It may be readily appreciated, as seen in the text of s 6(2)(a)(i) reproduced at [120] above and the discussion of the provision, that it places an order made in chambers in the same statutory boat as an order made in a summary proceeding. They are both orders for which no right is given to appeal to the Court of Appeal.

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reflection of this in England was that other 'legal practitioners' and not only barristers could appear, with greater dispatch and without adjudicating upon the substantive issues in dispute. The coupling in s 6(2)(a)(i) of an order of a judge made in proceedings in chambers and one made in a summary proceeding shows the overarching feature of the summary nature of the proceedings in which the order was made as the rationale for excluding such an order from benefit of the unrestricted right to appeal.

[139] Thorne v Lowenfield (Guyana HC, 18 January 2021).

[140] [2020] CCJ 4 (AJ) (GY).

[141] Cap 3:02.

[126] Therefore, because the purported appeal was a nullity, it is not possible for this Court to now send the purported appeal to the right court, or for the Court of Appeal to have done so. In clear legal terms, a proceeding which is a nullity does not exist: it is a nothing. There is nothing to send.

[127] For the reasons given, I would adjudge that the Court of Appeal lacked jurisdiction to hear an appeal against the order of the Chief Justice dismissing the Petition and would order accordingly.

JUDGMENT OF THE HONOURABLE MR JUSTICE JAMADAR, JCCJ:

Introduction

'... that this nation ... shall have a new birth of freedom ... and that government of the people, by the people, for the people, shall not perish from the earth.' [142]

[128] There is a pressing need to interrogate the language of the law through the lenses of Guyanese constitutionalism if the constitutional aspirations of the Guyanese People are to be truly and fully realized. This appeal affords an opportunity to better understand the implications of that exercise.

[129] I have read the opinions of Anderson and Barrow JJCCJ and support the latter, which I have found to best explain the legally appropriate and constitutionally apt approaches to take on the central issue raised in this appeal. That issue is: whether the Court of Appeal has jurisdiction to hear and determine an appeal from the decision of the High Court dismissing an election petition on the ground of procedural non-compliance in relation to service of a petition, as prescribed by the National Assembly (Validity of Elections) Act ('Elections Validity Act') and the

[142] Abraham Lincoln, 'Abraham Lincoln papers: Series 3. General Correspondence. 1837-1897' (Abraham Lincoln, Gettysburg Address: Nicolay Copy, 19 November 1863) <www.loc.gov/item/mal4356500/> accessed 4 October 2022.

National Assembly (Validity of Elections) Rules ('Elections Validity Rules') made under the Elections Validity Act.[143]

[130] The background facts and contexts have been well documented in these two opinions and I do not propose to rehearse ground that has already been covered. In this affirming opinion, I only intend to share thoughts on why there are broader policy reasons, as I see them, for the correctness of Barrow JCCJs clear, coherent, and compelling opinion. Though our approach reaches the same outcome as that of the others' reasoning, the ideological underpinnings are quite distinct and the jurisprudential implications consequentially different.

[131] It is acknowledged that, as with the Court of Appeal, our views resist the normative consequentiality of the dominant narrative, grounded as it is in prevailing ideologies of limitation, and seeming reliance on 'the austerity of tabulated legalisms'[144] in so far as legal method is hamstrung by constitutionally insufficient approaches. The blind spots in that narrative being the much wider constitutional and political roles that free and fair parliamentary elections play in liberal social democratic governance, and the constitutional imperative to a post-colonial method of legal interpretation.

[132] This appeal raises several matters of pure statutory interpretation that have generated anxious argument, and that are amenable to multiple rational lines of reasoning. For example, in the context of art 163 of the Constitution, questions of interpretation arise as to: (i) what is the effect and import of s 42 of the Elections Validity Act – 'the court shall have the same powers … as if the proceedings were an ordinary action within the jurisdiction of the court …'; and (ii) what is the intent and purpose of s 38 of the Elections Validity Act – principles, practices, and

[143] Pursuant to s 8 of the Elections Validity Act and r 9(1) of the Elections Validity Rules, the notice of presentation of petition, a copy of the petition with affidavit in support, and the notice of the nature of the security or proposed security, had to be served 'on the respondent' within five days of filing of the documents, excluding the day of presentation of the petition. Query whether, in light of arts 8, 9, 13, 39, 149D, and 154A of the Constitution, the exercise of judicial remedial discretions such as the discretionary striking out of an election petition, should not be done in contravention of protected fundamental rights and human rights, and should be exercised so as to advance and uphold those rights?

[144] *Matthew v The State* [2004] UKPC 33, (2004) 64 WIR 412 (TT); *Minister of Home Affairs v Fisher* [1980] AC 319, 328. See also *Mist v R* [2006] 3 NZLR 145 at [45].

rules of the House of Commons of the UK Parliament in dealing with election petitions shall be observed ... by the court.

[133] Section 38 of the Elections Validity Act, though stated as subject to the Act and rules of court, suggests that in Guyana there is a Parliamentary intent to anchor the conduct of election challenges in the principles, practices, and rules of the UK Parliament. Accepted that its practical relevance may lie in procedural and best practices 'gap filling', the salience of underpinning 'principles' is not to be overlooked. Section 42 of the Elections Validity Act purports to vest in the election court 'the same powers, jurisdiction and authority … *as if* the proceedings were an ordinary action within the jurisdiction of the Court …' (emphasis added). An acknowledgment that election challenges are not ordinary actions and at the same time to incorporate the jurisdiction, powers, and practices related to ordinary actions. Which begs the questions: What is the true status of an election court in relation to the High Court? And, consequently: What aspects of the election court's decision making are reviewable, whether in its special or its ordinary jurisdiction, whether on appeal or otherwise, and how so?

[134] Several different answers have been generated to these questions in this appeal and to similar issues in other election matters from this and other Caribbean jurisdictions.

[135] It seems that a court faced with choices as to multiple interpretations of statutory provisions needs to have an orienting filter that guides the options that are best suited for the circumstances. One such filter which demands priority, in Caribbean states such as Guyana, is the deep basic structure and core constitutional values and principles to be found in Guyanese constitutionalism.[145] Policy considerations can play an integral role in this exercise.[146]

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[145] *Belize International Services Ltd v A-G of Belize* [2020] CCJ 9 (AJ) BZ, [2021] 1 LRC 36 at [14], [299], [301]; *Ali* (n 15) at [1], [2]; *Commissioner of Police v Alleyne* [2022] CCJ 2 (AJ) BB, [2022] 2 LRC 590 at [23]-[25].
[146] *Marin v R* [2021] CCJ 6 (AJ) BZ at [38], [88].

[136] To be clear. Guyana in October 1980 promulgated its current Constitution as 'the new Constitution of the Co-operative Republic of Guyana.' Article 1 states that Guyana is 'an indivisible, secular, democratic sovereign state in the course of transition from capitalism to socialism …' This aspiration, articulated in this form and as the very first statement in the new Constitution, is unlike any other independent former British Caribbean colony. It is intentional, purposeful, and instrumental. It telegraphs an intention to establish a new identity and *a fortiori* to break with what may have been normative in the past that may hinder this intent. Guyana intends to be and become a social democratic republic.

[137] The purposiveness of Article 1 is clear if one considers the preambular clause that explains the intent of the Guyanese people, as constitutive of the State, to:

> Forge a system of governance that promotes concerted effort and broad-based participation in national decision making … based on democratic values, social justice, fundamental human rights, and the rule of law.

[138] Given the supremacy of constitutional values and principles (Article 8), that sovereignty is explicitly vested in 'the people' (Article 9), that free and fair elections are 'an integral part of the democratic organization of the State' (Article 12), that 'the principal objective of the political system … is to establish an inclusionary democracy' (Article 13), and the overt Parliamentary *imprimatur* to create a democratic socialist state (against a backdrop of imperial colonial law, law making, and legal methodologies), the challenge for legal methods of analysis, interpretation, and application, is how does one re-imagine, deconstruct, reconstruct, and deploy legal argumentation in an overtly post-colonial socialist context. The explanations below seek to demonstrate why and how this may be done.

[139] Fundamental to this endeavour, is to critically interrogate assumed and inherited legal methodologies taken as givens, and to seek to discover new ways of seeing, interpreting, applying law in the project of interpretative 'law-making', consistent with the will and aspirations of the Constitution and peoples of Guyana. This is in fact the role of a judge in the legislative project, to interpret legislation. And in doing so to bridge the gap between the law as written and current, new, and emerging social realities. It is not judicial overreach, but rather judicial duty, constitutionally warranted. Indeed, this Court has been consistently taking this approach.

Comment

[140] In light of the above, I agree with Barrow JCCJ on the following:

a. The election petition jurisdiction conferred by art 163 of the Constitution creates a special, limited, and exclusive jurisdiction to deal with election petitions and the specific issues that are prescribed in that article (Article 163(1) – 'the validity questions').

b. This election petition jurisdiction is statutorily based and carefully circumscribed.

c. To facilitate the hearing and determination of election petitions, a statutory scheme has been enacted for that purpose as provided for by art 163, contained in the Elections Validity Act and the Elections Validity Rules.

d. Article 163 does provide for appeals to the Court of Appeal which are limited by the provisions of art 163 to: (i) the grant or refusal of leave to institute proceedings to determine a validity question, and (ii) the determination of any validity question raised in an election petition or consequential orders made upon any such determination.

e. While this exclusive election petition jurisdiction and these rights of appeal are intended, among other things, to facilitate the expeditious determination of the validity questions, the general jurisdiction of the court is not excluded in relation to matters and issues that are not directly related to the substantive determination of the validity

questions. Indeed, this general jurisdiction is both necessary and supported in law and practice.

f. The subject matter of this appeal (and the appeal to the Court of Appeal) was not a validity question, but a question of ordinary procedural law concerning service of an originating process (in this case an election petition).

g. Pursuant to art 163(4), Parliament passed laws and made rules (the Elections Validity Act and Elections Validity Rules), which deemed the powers, jurisdiction and authority of an election court to be such 'as if the proceedings were an ordinary action within the jurisdiction of the court …' (s 42 of the Elections Validity Act).

h. The decision to dismiss the Petition for failure to comply with statutory requirements as to service,[147] was clearly an exercise of judicial discretion pursuant to the powers, jurisdiction, and authority provided for by s 42 of the Elections Validity Act (and r 21 of the Elections Validity Rules).

i. As a matter of straightforward statutory interpretation and application, in the context of the statutory regime outlined above, any right of appeal on what would be the subject matter of an ordinary action, such as service of an originating process, is to be sought within the ordinary powers, jurisdiction, and authority of the court (incorporated by s 42 of the Elections Validity Act), 'as if the proceedings were an ordinary action within the jurisdiction of the court.'

j. This latter proposition is made pellucid by art 163(4)(c) of the Constitution, which provides that Parliament may make provisions with respect to 'the practice and procedure of the High Court in relation to the jurisdiction and powers conferred upon it by or under this article and of that Court and the Court of Appeal in relation to appeals to the Court of Appeal under this article', which it has done, among other things, via s 42.

k. In this regard, the binary simplicity of uncritically applying the principle of statutory interpretation, that suggests that the specific excludes the general, is seemingly rendered irrelevant, otiose, and constitutionally inapt, in so far as reliance is sought in art 163 for the exclusion of appeals in relation to service of an originating process (an election petition). Though it may appear to function as a persuasive rhetorical device.

[147] Service was allegedly effected four (4) days outside of the statutory period. After hearing the parties and considering the affidavit evidence, on 18 January 2021, it was ordered that the petition '… be and is hereby dismissed.'

l. Pursuant to s 79 of the High Court Act, an appeal of this nature lies to the Full Court.[148]

m. Pursuant to s 6(2) of the Court of Appeal Act, an appeal of this nature does not lie to the Court of Appeal.[149]

[141] It is suggested that considering all of the above, the narrow jurisdictional issue in this appeal needs to be placed, contextualised, and understood through the following lenses:

(i) Democratic Governance in Guyana[150]

[142] Election petitions do not arise or exist in a vacuum. Each democratic state, in the exercise of its sovereignty and within certain constitutional boundaries, is entitled to prescribe the forms that elections shall take, how parliamentary elections are to be conducted, and how they are to be reviewed. In Guyana, for example, the form of elections is by secret ballot in accordance with the system of proportional representation.[151] This is not the same system used for parliamentary elections in other Caribbean states, say as in Trinidad and Tobago which uses the first-past-the-post system.

[143] The ways in which election results are to be reviewed in the Caribbean also demonstrates nuances, though there are also several aspects that are held in common. For example, in Guyana it is the practice, without any explicit statutory underpinning (but indirectly acknowledged in art 163(3)(a) of the Constitution), that leave of the court is required to commence an action by way of election petition. This is also so in Trinidad and Tobago,[152] Belize,[153] and in The

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[148] Section 79 states: 'An appeal shall lie to the Full Court from any judgment given or order made by a single judge of the Court in exercise of its civil jurisdiction in respect of which there is no appeal to the Court of Appeal'. See also Part 62.01, CPR 2016.
[149] Section 6(2) states: 'Subject as otherwise provided in this section, an appeal shall lie to the Court of Appeal in any cause or matter from any order of the Full Court or of a judge of the High Court … where such order is (a) final and is not (i) an order of a judge of the High Court made in chambers or in a summary proceeding …'
[150] See arts 1, 9 to 13 of the Constitution.
[151] Article 60 of the Constitution.
[152] Constitution of the Republic of Trinidad and Tobago, s 52(2) and Representation of the People Act, Cap 2:01, s 106(1)(a).
[153] Belize Constitution Act, Cap 4, s 86(2).

Bahamas,[154] and these jurisdictions have enacted express statutory provisions for the leave requirement. But there are no such leave requirements in say Barbados, Dominica, St Lucia, or Jamaica. And incidentally, there is also no such leave requirement in the UK.[155]

[144] And, as Barrow JCCJ has explained in distinguishing the legislative regime and criteria for appeals in Guyana from that in Dominica (in distinguishing this Court's decision in *Cuffy v Skerrit*[156]), these differences must be considered as intentional and purposive. Attempts to conflate them into a single Caribbean regime and jurisprudence would be a disregard for territorial sovereignty and an overt override of legislative policy making – in effect, substantive judicial law making. In Guyana, its judicial system with the existence of a High Court, Full Court, and Court of Appeal, and the layers and categories of appeals that the legal system values and prescribes, is distinct and to be treated as purposive.

[145] It is not unreasonable to see that the Parliament of Guyana would have intended that in furtherance of social democratic governance in Guyana, a right of appeal in election petitions on matters such as the service of the originating process, could lie to the Full Court. And in so doing strike a balance between the policy demands of expediency in matters such as this one, and limited and controlled opportunities for appealing decisions which left unappealable could undermine the values of transparency, accountability, and reviewability in and of parliamentary elections and electoral results. Results that can go to the very heart of democracy in Guyana – the legitimacy and lawfulness of parliamentary elections and electoral results.

[146] Indeed, during oral arguments before this Court, the Attorney General informed the Court that he could only recall one election petition (prior to the 2020 general elections) that was determined on the merits. It would appear that all others were

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[154] Constitution of the Commonwealth of The Bahamas, Art 45(3) and Parliamentary Elections Act, CH 7, s 83(1).
[155] *Rehman v Khan* [2015] EWHC 4168 (Admin) at [3]. Consider the application of s 38 of the Elections Validity Act in the absence of an express statutory underpinning in Guyana.
[156] *Cuffy* (n 16).

struck out or failed on preliminary grounds. The others' opinion is permissive of this phenomenon, which on the face of it could seem to be inimical to the core democratic socialist values to which Guyana ascribes. The approach taken by Barrow JCCJ pays due regard to the entire legislative scheme in Guyana and in so doing facilitates the opportunities for judicial intervention that this affords. In so far as both approaches are considered arguable and based in law, from a policy perspective of good democratic governance, the approach we advise is preferable. Certainly, it is what Guyana seems to have intended.

(ii) The Role of the Courts[157]

[147] It is by now uncontroversial that this Court, whenever faced with multiple legitimate choices as to the interpretation and application of law, that it will choose the approaches that most align with relevant and applicable constitutional deep structure values, human rights principles, and international obligations and standards.[158] Wit JCCJ has opined, rather poetically, in *Attorney General v Joseph*, that in relation to the constitution as text, deep basic structure and constitutional values '… breathe, as it were, life into the clay of the more formal provisions in that document …'[159]

[148] As this Court opined in *Cuffy's* case, free and fair elections are the bedrock of legitimate liberal democracies.[160] But, as important as this is (to be understood maybe as the formal aspects of democracy), liberal democracy is only legitimate with the inclusion of certain core values and principles, which constitute what may be called the substantive aspects of democracy. These include the deep structure values and human rights principles that inform and underpin liberal democratic Caribbean constitutionalism. In Guyana, these include the principles of

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[157] Article 39(1) of the Constitution.
[158] *A-G v Joseph* [2006] CCJ 3 (AJ), (2006) 69 WIR 104 (BB); *Maya Leaders Alliance v A-G of Belize* [2015] CCJ 15 (AJ) (BZ), (2015) 87 WIR 178; *Nervais v R* [2018] CCJ 19 (AJ) (BB), (2018) 92 WIR 178; *McEwan v A-G of Guyana* [2018] CCJ 30 (AJ) GY, (2019) 94 WIR 332; *R v Flowers* [2020] CCJ 16 (AJ) BZ, [2020] 5 LRC 628; *Marin* (n 146); *Ramcharran v DPP* [2022] CCJ 4 (AJ) GY; *Bisram v DPP* [2022] CCJ 7 AJ (GY).
[159] *A-G v Joseph* [2006] CCJ 3 (AJ), (2006) 69 WIR 104 (BB) at [18]-[19].
[160] *Cuffy* (n 16) at [55] (Saunders PCCJ) and at [75]-[77] (Jamadar JCCJ).

transparency, accountability, and reviewability which are inherent in the Constitution, and which inform its existence.[161]

[149] Take as an example, the separation of powers as both a formal and substantive constitutional concept in liberal democratic Guyanese constitutionalism. The principle negotiates and pragmatically distributes the arrangements, tensions, and balances of power relations and democratic governance between and among the core institutions of state. Central to this distribution and arrangement are the good governance principles of transparency, accountability, and reviewability.[162] The courts are the guardians of these values through its scrutiny of both process and decision making by public authorities and entities. At stake are, at minimum, the relationships between the exercise of power and freedom, between the state constituted *qua* State and the People who are constitutive of the State, and how these inform participatory democratic governance.

[150] Parliamentary elections are therefore necessarily subject to this constitutional supervision and scrutiny, as through elections two of the three core institutions of state – the Parliament and Executive - are constituted, and through them and their agencies the governance of the state administered. It would be passing strange, in a constitutional democracy such as Guyana, if the very process that appointed these decision makers could be exempt from judicial scrutiny (by independent and impartial courts, the third arm of state), whereas their decisions, once appointed, are subject to such review. That would be anathema to the rule of law in a liberal social democratic state. This much is self-evident. However, the core question that is at stake in this case, is the extent of limitation of those rights of review.

[151] What are the implications for this case? There is no question that the Constitution and the laws of Guyana provide the Courts with the power to review both the conduct and results of parliamentary elections. Whether these statutorily

[161] See for example, arts 39, 62, 64, 78B 133, 153, 154A.
[162] *Belize International Services Ltd v A-G of Belize* [2020] CCJ 9 (AJ) BZ, [2021] 1 LRC 36 at [16]-[18] (Wit JCCJ) and at [305]-[306], [334]-[356] (Jamadar JCCJ).

prescribed mechanisms, discussed at length above by Anderson and Barrow JJCCJ, exhaust the range of options for review was considered in *Cuffy's* case, and in that regard the opinions proffered in that matter are apposite.[163] Simply put, they may not be exhaustive. But that is not a matter for exploration in this appeal. What is, are the implications for the choices of approach to the issue that falls to be decided by this Panel.

[152] There is every good reason, given the legislative opportunity that Barrow JCCJ has explained, to embrace an approach that facilitates increased transparency, accountability, and reviewability in relation to the conduct and outcomes of parliamentary elections in Guyana. Especially in the legislative framework that exists and as countenanced by art 163 of the Constitution, and which includes s 42 of the Elections Validity Act.

(iii) Hinds v R[164]

[153] As long ago as 1975, Lord Diplock in *Hinds v R*, speaking about the separation of powers, explained that core constitutional values including human rights and fundamental freedoms 'impose a fetter on the exercise by the legislature, the executive and the judiciary of the plenitude of their respective powers.'[165]

[154] This 'fetter' on the exercise of judicial power, understood in current times, operates both as restraint and as well as a concomitant duty on the courts as guardians of democratic and constitutional values, to positively conduct their affairs,[166] including their core work of deciding cases (and to that extent engaging in the legitimate constitutional business of interpretative 'judicial law making'), so as to give effect to deep basic structure and human rights principles and values.

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[163] *Cuffy* (n 16) at [49]-[53] (Saunders PCCJ) and at [69]-[73] (Jamadar JCCJ).
[164] (1975) 24 WIR 326.
[165] ibid at 332.
[166] *Maya Leaders Alliance v A-G of Belize* [2015] CCJ 15 (AJ) (BZ), (2015) 87 WIR 178 at [47] where this Court stated inter alia, that the right to protection of the law may, in appropriate cases, require the relevant organs of the State to take positive action in order to secure and ensure the enjoyment of basic constitutional rights.

The Judiciary is no less an organ of the State than the Parliament or Legislature and is no less obligated to meet the State's constitutional operating standards.[167]

[155] This places a positive duty on courts in their interpretation and application of the law, as in this matter, to do so through constitutional lenses.[168] Indeed, the Constitution of Guyana declares as a positive obligation on state agencies, including the Judiciary, a duty to ensure the 'full and equal enjoyment of all rights and freedoms guaranteed under this Constitution or any other law.'[169] This approach also applies to laws relating to electoral challenges.

[156] Which invites the question: Given two or more legitimate possible interpretations of a statute or cluster of provisions across statutes (including constitutional provisions), which interpretation and application is most constitutionally vires? In this case, this invitation, in my respectful opinion, compels the answer that Barrow JCCJ has offered.

[157] This is also because in Guyana, art 144 of the Constitution, in the context of the protection of the law, provides for a guarantee of a fair hearing[170] and as well for 'the duty of a court to ascertain the truth in every case.'[171] These constitutional imperatives, given a generous and purposive interpretation and application, extend to all types of proceedings, including election petitions. An interpretation of the legislative scheme that legitimately facilitates an appeal on a dismissal of an election petition for non-service or late-service, advances the imperative to truth and the rule of law. As well, an interpretation of the legislative scheme that deprives a petitioner of an opportunity to appeal where one exists, is arguably a

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[167] *Ali* (n 15) at [2].
[168] See art 149D of the Constitution. See also *Pla v Andorra* (2004) 18 BHRC 120, a court exercising a constitutional supervisory role over other courts 'could not remain passive where a national court's interpretation of a legal act … appeared unreasonable, arbitrary or, … blatantly inconsistent … with the principles underlying the …' Constitution.
[169] Article 149D (2) of the Constitution.
[170] Article 144(1) of the Constitution.
[171] Article 144(2) of the Constitution.

denial of the fundamental right to the protection of the law. A denial that could afford a right of appeal on a constitutional review in election proceedings.[172]

(iv) UK Support – 1879 to 2010, from Williams[173] to Woolas[174]

[158] Barrow JCCJ has very ably demonstrated that appeals on questions concerning service of election petitions and on procedural decisions have not been considered anathema in the UK. Reticence about such appeals seems to be virtually non-existent. Indeed, even as those courts stress the necessity for expediency, they quite easily accommodate expediency through the exercise of judicial will and purpose, no doubt also facilitated by a sufficiency of resources. However, it begs the question, whether enabling the requirement of expediency by supressing legitimate avenues for the court's intervention in the election petition process is rule of law compliant? Or is it an instance of throwing out the proverbial (and valued) baby with the (dispensable and replaceable) bath water, in furtherance of a policy (expediency) which actually does not require such an intervention?

[159] In the UK, the jurisprudence in *Woolas*' case clarifies, that in the context of parliamentary election challenges: 'under our constitution it is for the judiciary to determine the meaning of the law enacted by Parliament.'[175] In this regard the courts, while accepting that the lawful decision of an election court (as a specialised court with limited purpose and function) was final, reserved onto itself the supervisory jurisdiction and power to review wrong interpretations of the law.[176] Though the legal arrangements in the UK are somewhat different from what pertains in Guyana, what is striking is the insistence, that 'consistent with the constitutional principles derived from the separation of powers and the rule of law that it is for the courts to determine the meaning of the law … as the rule of

[172] Article 149D of the Constitution; *Cuffy* (n 16) at [49]-[51], [69]-[73]. See also *Peters* (n 23) at 291 (de la Bastide CJ); *Marin* (n 146) at [24].
[173] *Williams* (n 122).
[174] *Woolas* (n 111).
[175] ibid at [10].
[176] ibid at [47], [52].

law requires interpretation of the law by the ordinary courts.'[177] And consistent with this approach, for the ordinary courts to reserve onto themselves, separate and apart from and in contradistinction to an election court comprised of High Court judges, the interpretation and application of the law in the context of election petitions.

[160] Indeed, this is exactly the approach that this Court has advocated in *Ali v David*,[178] as Barrow JCCJ has pointed out. That is to say, separate and apart from the determination of the validity questions under art 163 of the Constitution, there is a constitutional duty vested in the courts to review and uphold the ordinary law, which incorporates the rights of appeal pertaining to that review.

Section 42 interpreted through Post-Colonial Lenses

[161] Section 42 of the Elections Validity Act states that:

> The Court shall, *subject to* this Act and rules of court, have the same powers, jurisdiction and authority … as if the proceedings were an ordinary action within the jurisdiction of the Court … (emphasis added)

[162] What do the words 'subject to' mean? At first glance this would seem to permit a straightforward answer. But is it so? It depends on what informs one's interpretation of the meaning of language. To be certain, language is not neutral. Its meaning, interpretation, and usages are shaped by culture and history.[179]

[163] The colonial project was all about the exercise of dominion, power, over and against others. 'Divide and rule' its operating mantra. Division, separation, and

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[177] ibid at [52].
[178] *Ali* (n 15).
[179] Post-colonial thought critiques, reveals and exposes the false yet assumed (claimed and imposed) ahistorical and universalist character of English language, that veils its own locus of enunciation, which includes British colonialism and the project of empire. See Jose-Manuel Barreto, 'Decolonial Thinking and the Quest for Decolonising Human Rights' (2018) 46 Asian Journal of Social Science 484, 490. See also Walter D Mignolo, Catherine E Walsh, *On Decoloniality: Concepts, Analytics, Praxis* (Duke University Press 2018) 194. See also *McEwan v A-G of Guyana* [2018] CCJ 30 (AJ) GY, (2019) 94 WIR 332, [2019] 1 LRC 608.

either/or, othering dialectics at the heart of its operating systems – to create, sustain, into perpetuity the project of empire. Law was instrumental in this regard, and the meanings ascribed to language an agency for this agenda. Colonial courts were complicit in this respect. Inherited and uncritically accepted colonial legal methods and precedents must be seen in this light. In fact, in this context Legislatures and Executives also need to be mindful of the meanings imported through the language they use in law making.

[164] Guyana seeks to overturn this divisive colonial capitalist imperial mindset, that has pitted ethnic, religious, and other groups, including minorities, against one another and made the project of independent nation building beyond empire calamitous.[180] Law and the language of law need to be interrogated through the new lenses of Guyanese constitutionalism, and reimagined, to be free of the prisons of the colonial project and come into alignment with the imperatives of this new constitutional order. A new order which seeks to construct an inclusive society based on core social democratic values such as equality and participation, in which the exercise of power is conceptualised as power-with (the equitable distribution and sharing of power) and not power-over or against.[181]

[165] How could the language in s 42 be reimagined and interpreted to align with this new reality, and escape from the shackles of the old? One way is to liberate the meaning of 'subject' from its colonial mindset. To free it from its assumptions of subjugation and submission, of power over and against, of division and othering, of either-or relations, and of exclusive hierarchical and conditional dependencies. And rather to make its meaning more inclusive, informed by connotations of both-and, together-with. Section 42, reimagined and reinterpreted this way and thus in alignment with the new constitutionalism that Guyana avows, becomes

[180] Dr Brinsley Samaroo, *Adrian Cola Rienzi: The Life and Times of an Indo-Caribbean Progressive* (Royards 2022). See also Ann Spackman, 'Official Attitudes and Official Violence: The Ruimveldt Massacre, Guyana 1924' (1973) 22(3) Social and Economic Studies 315;Visnoonand Bisram, 'Impact of Ethnic Conflict on Development: A Case Study of Guyana' (CUNY Academic Works 2015) <https://academicworks.cuny.edu/cgi/viewcontent.cgi?article=1523&context=gc_etds> accessed 4 October 2022.
[181] See for example, arts 13, 28, 29, 34, 35 and 39(1) of the Constitution.

accommodating of a more permissive, purposive, and inclusive interpretation and application.[182]

[166] This approach to s 42 is reasonably justified in the particular circumstances of this case, where the issue is whether a right of appeal lies from a decision striking out an election petition for late service. As explained, what is ultimately at stake involves core constitutional values that impact the court's powers to supervise and review the parliamentary electoral process. Which is not to say that the methodology described may not also be of more general application in suitable instances.

Postscript

[167] These concurring opinions, which develop different threads of argumentation and insight, invite deeper reflection on the issues raised, issues which may arise for future consideration by this Court. I therefore reserve my view on whether the Court of Appeal or for that matter this Court, having concluded that an appeal would lie to the Full Court, could send this appeal to the Full Court for its consideration. In this regard I note that the ordinary law, as provided for in the Civil Procedure Rules 2016, and where a matter is struck out for non-service on an essential party, may be informed by Part 27.01, (3) and (4).[183]

[168] In sum, the approach that we advocate avoids having to draw rigid categorical lines in an attempt to resolve an either-or conundrum, and in its hermeneutic of constitutionally grounded open inclusivity, sees, interprets, and applies the both-and Parliamentary intent that aligns more readily with Guyanese constitutionalism. Law exists in concrete socio-political contexts, and not in

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[182] A similar comparative analysis can be applied to art 153(1) of the Constitution in relation to the enforcement of the fundamental rights and freedoms in Part 2 of the Constitution.

[183] CPR 2016, Part 27.01: *(3) A failure to comply with these Rules or a Practice Direction is an irregularity and does not render a proceeding or a step in a proceeding, a document or an order in a proceeding a nullity.*
(4) Where there has been non-compliance with these Rules or a Practice Direction, the Court may, (a) dispense with compliance with any Rule or Practice Direction; (b) grant all necessary amendments or other relief, on such terms as are just, to secure the just determination of the real matters in dispute; or (c) set aside the proceeding or a step in the proceeding in whole or in part.

abstract concepts. Justice must be effective in time and place, for all manner of persons, and for the society at large.[184] In the end, it may be that the roots of our differences are not just ideological, but also that the others' perspective lies more in the conceptual, than does ours, which is more firmly anchored in the *sitz im leben* of the contextual.[185]

Disposition

[169] The following are the Orders of this Court:

(i) The Appeal is allowed.

(ii) The decision of the Court of Appeal is set aside.

(iii) Each party shall bear their own costs.

/s/ J Wit

The Hon Mr Justice Wit

/s/ W Anderson

The Hon Mr Justice Anderson

/s/ M Rajnauth-Lee

The Hon Mme Justice Rajnauth-Lee

/s/ D Barrow

The Hon Mr Justice Barrow

/s/ P Jamadar

The Hon Mr Justice Jamadar

[184] Anatole France, *Le Lys Rouge* (*The Red Lily)* (1894) ch 7: 'The law, in its majestic equality, forbids the rich as well as the poor to sleep under bridges, to beg in the streets, and to steal bread.'

[185] *Verba docent, exempla trahunt* – words teach, examples compel.