IN THE HIGH COURT OF THE SUPREME COURT OF JUDICATURE

CONSTITUTIONAL AND ADMINISTRATION DIVISION

PROCEEDINGS FOR JUDICIAL REVIEW

2020-HC-DEM-CIV-FDA-627

BETWEEN:

TIMOTHY JONAS

Applicant

-and-

1. **THE ATTORNEY GENERAL OF GUYANA**

Respondent

2. **ROYSDALE FORDE**
3. **MURSELINE BACCHUS**
4. **STANLEY MOORE**

(Added Respondents)

5. **HARI RAMKARRAN, S.C.**
6. **KAMAL RAMKARRAN** and **KEOMA D. GRIFFITH** in the capacity as representatives of **THE BAR ASSOCIATION OF GUYANA**

(*Amicus Curiae*)

BEFORE THE HON. MR. JUSTICE NARESHWAR HARNANAN

APPEARANCES:

- Mr Teni Housty for the Applicant
- Mr Mohabir Anil Nandlal, Ms Beverly Bishop-Cheddie and Mr Chevy Devonish for the Attorney General
- Mr Arud Gossai for Mr Murselene Bacchus
- Mr John Jeremie SC, Mr Keith Scotland, Mr Rondel Keller and Ms Olayne Joseph for Mr Roysdale Forde
- Mr Devindra Kissoon for Mr Stanley Moore, Mr Edward Luckhoo SC, Mr Stephen Fraser SC and Mr Andrew Pollard SC
- Mr Hari N Ramkarran SC in person
- Mr Robin Stoby SC, Ms Pauline Chase and Mr Horatio Edmondson for The Guyana Bar Association
- Mr Kashir Khan and Mr Mohammed Khan for Mr Robin Stoby SC

DECISION:

INTRODUCTION:

1. In the world of legal practitioners, the title of '*Senior Counsel*'[1] if bestowed, is significant. It is a title which recognises the value of an appointee's contribution to the positive development of jurisprudence in the country, and further afield.
2. The title is a beacon for all to identify the appointee as having the legal acumen, ability and capacity to handle complex or particularly difficult matters. Likewise, legal fees, and even court costs are traditionally computed at higher rates for Senior Counsel, if their advice or advocacy leads to a successful resolution of the matter.
3. To the ordinary observer, an appointment recognising an Attorney-at-Law as Senior Counsel, engenders respect and confidence in the appointee that he/she has proven themselves to have outstanding skill and competence as advocates and advisors in law, and who are capable and trustworthy with high personal integrity.
4. In Guyana, the title of Senior Counsel is conveyed upon the appointee by His Excellency, the President. Shortly thereafter, at a sitting of the Full Court of the High Court, the appointee is ceremonially moved from the utter to the inner bar and is adorned with a Senior Counsel robe which is traditionally tailored in silk, hence the colloquial phrase on appointment as 'taking silk'.
5. Prior to this appointment process, little is known by the public, or the legal profession for that matter, of the method or procedure adopted to bestow the esteemed title of Senior Counsel on identified practitioners.
6. Whether deliberate or not, it is a process shrouded in some mystery. With the steady movement towards increased transparency in good administration and governance, especially in this technological age, and with the relative ease

[1] Previously known as 'Queens Counsel' before independence. Also known colloquially as taking 'Silk' in recognition of the material a Senior Counsel's gown is made.

information could be accessed by the public on matters which affect their lives, it is not surprising that this challenge has reached the Court.

7. It is a matter of fact that after a hiatus of some 20 years, between 1996 and 2016, 22 Attorneys-at-Law have been conferred with the honour of Senior Counsel, between 2016 and 2019.

BRIEF FACTS:

8. Mr Timothy Jonas, an Attorney-at-Law of some vintage, has brought these proceedings to quash the decision of His Excellency, the President of Guyana, through the Attorney General, to appoint the latest batch of 4 Attorneys-at-Law to the dignity of Senior Counsel in December 2019. He complains that there is no statutory or other power conferred on the President of Guyana to make such appointments.

9. He contends that it is the Full Bench of the High Court which exercises an inherent jurisdiction to sit and confer this dignity on Attorneys-at-Law who have practiced with distinction before the Court. He complains that the President, a member of the Executive, has intruded into the realm of the Judiciary, violating ***Article 122*** of the Constitution of Guyana and is illegal and void.

10. The Attorney General disagrees with the Applicant's contentions. He advocates that His Excellency, The President, as the Supreme Executive Authority of Guyana, is vested with the exclusive prerogative to confer the honour of 'silk' upon Attorneys-at-Law. Further, that prerogative or power to confer silk was never vested in the judiciary of Guyana and therefore, the Presidents' prerogative to confer silk does not infringe on judicial independence, nor is unconstitutional in any other way.

11. Given the nature of the challenge filed by the Applicant, service of the proceedings was ordered on the 4 Attorneys-at-Law who were identified to be appointed Senior Counsel in December 2019. Three of them were granted audience as added Respondents, on their application, and they caused evidence and legal submissions to be filed to assist the Court in its

consideration of the matters raised by the Applicant. The Guyana Bar Association [GBA] also sought audience and was granted permission to file evidence and submissions, *amicus curiae*.

12. The added Respondents essentially support the contentions by the Attorney General, and whilst the GBA is effectively supportive of the conclusion that it is the Executive which makes the appointments, they contend that the formal admission to the inner bar by the Judiciary is more than just ceremonial. They submit that it is this act of admission which confers the rights and privileges of Senior Counsel in and before the Court.

13. Mr Hari Ramkarran, a long-standing Senior Counsel [appointed in 1996], also sought audience and was granted permission to file submissions, *amicus curiae*. In his application to join these proceedings, Mr Ramkarran SC mentioned that he was asked by a client to prepare an opinion on the merits of these proceedings and while preparing this opinion he formed the view that ALL appointments of Senior Counsel after 1980 are unconstitutional, null, void and of no effect.

14. He contends that appointments to this honour, which were made through the prerogative powers of Her Majesty Queen Elizabeth II and exercised by the Governor General in the Independence Constitution, were transferred to the President by the ***Republic Act*** in 1970. However, these powers ceased to exist on the promulgation of the 1980 Constitution on the 6th October 1980.

15. Mr Ramkarran however does not seek any orders, but only supports the position of the Applicant in his contention that the President has no statutory or other power to make the Senior Counsel appointments in December 2019.

16. A point to note at this juncture is an indication by the applicant that there was no challenge to Senior Counsel appointments by the President, prior to the December 2019 announcements, as the Full Court of the High Court would have been constituted and sat to admit those appointees to the inner bar. In this case, the Court has not admitted the 4 appointees to the inner bar as yet.

17. As a result of the contentions by Mr Ramkarran, this Court ordered that the proceedings be served on all Senior Counsel as the arguments raised tangentially and/or directly touches and concern their interests. Three Senior Counsel, Mr Edward Luckhoo, Mr Stephen Fraser and Mr Andrew Pollard supported the contentions of the 2nd named added Respondent, Mr Stanley Moore, in disagreeing with the Applicant and Mr Hari Ramkarran's positions.

18. A fourth Senior Counsel, Mr Robin Stoby, also sought to render assistance to the Court by filing legal submissions. His position is summarized that from the very origins, the system for the appointment of Senior Counsel has always been and effectively remains a conjoint operation between the Sovereign, now the Head of State, and the Judiciary.

19. He describes that in the context of Guyana's constitutional construct, the exercise of executive and/or prerogative power to appoint Senior Counsel is subject to the guidance of the Judiciary, which reflects an example of conclusory (authoritarian) sovereignty operating within a framework of contingent (rooted in democratic traditions) sovereignty. Mr Stoby SC does also recognise that there is an absence of a clear and definitive process for the identification and conferment of Silk on persons entitled to the appointment.

ISSUES:

20. The questions here are not complicated. This Court simply has to consider two main issues:

    (a) Whether His Excellency, The President has the authority to appoint Attorneys-at-Law, Senior Counsel;

    (b) Whether His Excellency, The President has acted unconstitutionally in appointing Attorneys-at-Law, Senior Counsel in December 2019

21. This Court expresses its profound gratitude to all Counsel who filed submissions in this matter. The high calibre of representations made before

this Court were of significant assistance towards resolving the identified issues.

(a) <u>Whether His Excellency, The President has the authority to appoint Attorneys-at-Law, Senior Counsel.</u>

The History, Law, Practice and Convention – Appointment to the Honour of Senior Counsel

21. The historical background on the appointment of Attorneys-at-Law to the respected status of Senior Counsel is not disputed. However, for the sake of completion, a brief history will be recounted.

22. ***Justice Ruth McColl***, Judge of Appeal, New South Wales Court of Appeal, Australia gave a classic historical perspective into the appointment of Queen's Counsel. She wrote an article[2] intituled, ***Learned in the Law – The Transition from Queen's Counsel to Senior Counsel***, that:

> This is an appropriate occasion to consider ***how the Executive Government came to have a role in the appointment of Queen's Counsel***. The answer lies in an understanding of constitutional and legal history, of the governmental role of the courts, and of the relationship between the courts and the barristers and solicitors who are officers of those courts. ***This Court was established by royal prerogative, not by an Act of Parliament***. The term "court" itself, which originally meant the Sovereign's palace, and has as an extended meaning the place where justice is administered, is eloquent on the subject of the association between the Sovereign and the administration of justice.[3]

[2] New South Wales Bar Association News, 1993 Edition at page 9. She was at the time a practicing lawyer and was appointed Senior Counsel in 1994 and to the Court of Appeal in 2003.
[3] *Jacob, Law Dictionary,* quoted in *Halsbury's Laws of England,*4th ed., vol. 10, para 701.

The emergence of an organised legal profession in England was a process that was intimately connected with the courts and the persons to whom the courts granted rights of audience.

In medieval times literacy was largely confined to the clergy, and clerics acted in the administration of civil justice. The first organised body of lay practitioners was the order of serjeants-at-law established at about the time of King Edward I. The Church forbade clerics to appear as advocates in the secular courts and there then emerged a class of lay advocates.[4] The Court of Common Pleas was for a substantial period the dominant court in England, and the serjeants-at-law had an exclusive right of audience in that court. As the practice of appointing ecclesiastics and public officials to the bench was abandoned, the judges themselves were recruited from the ranks of serjeants.[5]

Another class of professional lay advocates, with a right of audience in the Court of Kings Bench and the Exchequer, later grew up. These advocates, called barristers, were organised in Inns of Court. They came to be divided into inner banisters and outer barristers. By the end of the sixteenth century there had been established a practice of the appointment by the Sovereign, by letters patent, of King's Counsel from amongst the ranks of barristers. The first King's Counsel was Francis Bacon.[6] Inner barristers are to this day heard in England from within the bar of the court.

King's Counsel were originally appointed to assist, where necessary and when called upon to do so, the Attorney General and Solicitor General, the first and second law officers of the Crown. In addition, up until the early part of this century they required a dispensation

[4] W J V Windeyer, *Legal History,* 2nd ed., p 139
[5] Windeyer, op cit. p 140.
[6] *Halsbury's Laws of England,* 4th ed., vol 3(l) para 359.

to appear against the Crown[7]. Subject to those matters, the primary significance of the office was that they constituted a group of barristers recognised by the Sovereign as being of special eminence.

In 1670, during the reign of King Charles II, the Privy Council declared that King's Counsel took precedence over the serjeants-at-law.[8] This decision resulted in the gradual decline of the order of serjeants. ***It is of some interest to reflect that it was this assertion of the Sovereign's prerogative, giving precedence to King's Counsel appointed by the Executive Government***, which led to their dominance in the profession and to their ascendancy over the serjeants, who were appointed by the judiciary. [Emphasis added]

23. ***Halsbury's Laws of England***, 4th Edition, Vol 3(1) at paragraph 359, which was cited in ***Waters v Acting Administrator of the Northern Territory and Another***, 46 FCR 461 [1993] is further instructive:

> As the number of King's Counsel increased, they ceased in any real sense to be counsel to the Crown and became simply a class of counsel who, by eminence or favour had been given a rank superior to that of ordinary barristers

24. ***Mansingh v General Council of the Bar and Others*** [2014) 3 LRC 206 (relied upon by most, if not all participants in this matter) also acknowledges that the conferral of "silk" or the title "Senior Counsel" upon certain members of the Bar was always considered an exercise of the "*honours prerogative*" under the English law. Such prerogative powers were exercised by the Crown and not by the Courts.

25. Even further, *Lord Watson* in ***Attorney General for Dominion of Canada v Attorney General for Province of Ontario*** [1898] AC 247, noted at pages 251- 252 of the report that:

[7] Halsbury, op cit, para 433.
[8] Halsbury, op cit, para 359.

> The appointment of counsel for the Crown, and the granting of precedence at the bar to certain of its members, are matters which do not appear to their Lordships to stand upon precisely the same footing. In England the first of these rights has always been a matter of prerogative in this sense, that it has been personally exercised by the Sovereign with the advice of the Lord Chancellor, the appointment being made by letter patent… [Emphasis added]

23. It therefore cannot be disputed that the conferral of '*silk*' has been through the exercise of the prerogative power of the Sovereign, or those empowered to exercise it.

Present day – Powers of the President: *The law and analysis*

24. When considering the question of the preservation of that prerogative power, it is acknowledged that the President of Guyana is an Executive President, who possesses a wide range of powers, including those retained from both the Governor General and the Crown.

25. This office merges that of the ceremonial Head of State and the effective Head of Government. For instance, ***Article 99*** of the ***Constitution of the Co-operative Republic of Guyana*** ['Constitution'] provides that:

> (1) *The executive authority of Guyana shall be vested in the President*, and, subject to the provisions of this Constitution, may be exercised by him either directly or through officers subordinate to him.
>
> (2) Nothing in this article shall prevent Parliament from conferring functions on persons or authorities other than the President. [Emphasis supplied]

26. ***Article 89*** of the Constitution further provides that the President of Guyana:

> …shall be Head of State, the supreme executive authority, and Commander-in-Chief of the armed forces of the Republic.

27. The Constitution further imbues the President with a number of powers that are linked to the exercise of supreme executive authority, such as immunity from suit or criminal liability for anything done in an official

capacity, whether during or after the expiry of his/her term in office.[9] The general control and direction of the Government of Guyana is entrusted solely to the President, while as of the *1980 Constitution*, the only rule of the Cabinet is to '*aid or advise'* the President in carrying out that function.[10]

28. Authors *Michael Rosenfeld and Andras Sajo* in their book ***The Oxford Handbook of Comparative Constitutional Law,*** Oxford University Press, 2013, opined that in the case of a President who is both a Head of State and Head of Government, there is no higher degree of executive authority:

> But where these majorities coincide, the President holds together the constitutional powers of head of the state with those of chief of the executive, resulting from his leading the parliamentary majority, with the effect that both the appointment and the dismissal of the Prime Minister are at his disposal. **No higher concentration of political power is granted to a sole authority in the landscape of contemporary democracies, including those adopting the parliamentary model.**

29. The authors, *Tracy Robinson, Arif Bulkan* and *Adrian Saunders* in their work, ***Fundamentals of Caribbean Constitutional Law,*** Sweet & Maxwell, January 1, 2015, cites *Colin Munro*, ***Studies in Constitutional Law***, 2nd Edition, at page 257 of the text, that:

> [t]he legal basis for prerogatives is said to be the common law, but the common law does not create prerogatives, it ***recognises them***; the origins of prerogatives are outside the common law, in custom… … [n]ot all powers associated with the prerogative are codified in Caribbean constitutions or dealt with under legislation. ***The survival of prerogatives at common law*** in the independent states tends to be assumed by courts instead of being closely examined. [emphasis supplied]

[9] Constitution of the Co-operative Republic of Guyana, Article 182 (1)
[10] Constitution of the Co-operative Republic of Guyana, Article 106 (2)

30. The authors made note at page 73 of the text that under the common law, the prerogative powers were subsequently vested in the President upon the States becoming a Republic:

> On becoming republics, Guyana and Trinidad and Tobago removed the Crown as Head of State and at the same time ***vested the exercise of the prerogative in the republican state, exercisable by the new President***. [emphasis supplied]

31. Canadian Political Science scholar, *Dr. Bruce Hicks*, writing an article in the *Canadian Parliamentary Review*, Vol. 35, No. 2 [2012] titled, ***The Westminster Approach to Prorogation, Dissolution and Fixed Date Elections,*** posited that within the context of the wide powers of the Executive President in Guyana:

> There has **been a transfer to the executive President of prerogative powers** normally exercised by a ceremonial or quasi-ceremonial Head of State on the instructions of a Prime Minister or in his or her own discretion in the Westminster system.
>
> The Guyana Constitution thus establishes **a heavy concentration of power in an executive President, who is not responsible to Parliament and is shielded by extensive immunities.**

32. Therefore, as mentioned earlier, the powers to appoint Senior Counsel [King's/Queen's Counsel], were prerogative powers and recognised by the common law.

33. The authorities establish that prerogative powers developed by custom were received into Guyana and recognised through the common law and later preserved through statute. Particularly, ***Section 22*** of the ***Civil Law Act, Cap. 6:01*** of the Laws of Guyana, which was enacted in 1917, and a saved law, gives statutory recognition to the common law with respect to the prerogative powers conferred upon the Crown in Guyana. It reads:

> Except as specifically enacted, nothing in this Act contained shall be deemed to limit or restrict the ***royal prerogative*** as hitherto enjoyed by the British Crown under the Roman-Dutch law of

Guyana, and except as aforesaid that ***prerogative*** shall as from the date aforesaid comprehend all the pre-eminence and all the special dignities, liberties, privileges, and powers conferred upon the Crown by the ***common law*** of England. [Emphasis supplied]

34. ***Section 4*** of the ***Republic Act, Cap 1:02*** of the Laws of Guyana also provides that:

> (1) Where under any existing law any ***prerogative*** or privilege is vested in Her Majesty the Queen or the Crown in respect of Guyana that ***prerogative*** or privilege shall, on the appointed day, ***vest in the State*** and, subject to the Constitution or any other law, the ***President shall have power to do all things necessary for the exercise thereof***.
>
> (2) Where under any existing law any rights, powers, privileges, duties or functions are vested in or imposed on the Governor-General, those rights, powers, privileges, duties and functions shall, on the appointed day, ***vest in and be exercisable by the President***. [Emphasis supplied]

35. Renowned Guyanese legal luminary, *Dr Mohamed Shahabuddeen* in his work, ***The Legal System of Guyana***, wrote that:

> …The first local appointment definitely traced was that of Solicitor - General Kingdon in 1890. A few months later the secretary of State directed that 'Dr Carrington, the Attorney General', be also appointed 'to be one of Her Majesty's Counsel for British Guiana, with precedence over Mr. Kingdon's Letters Patent as a Queen's Counsel.' In the absence of any statutory form the oath taken by an English Queen's Counsel has been used.
>
> Before independence the appointment used to be made by letters patent issued by the Governor on instructions from the Queen. *Since Independence the practice has settled down for appointments to be made by the Governor General (now the President) on the advice of*

the Chancellor tendered by the Attorney General as the appropriate Minister. [Emphasis supplied]

Concluding the first issue:

36. It is therefore clear from a reading of ***Section 4(1)*** of the ***Republic Act*** that the President's powers include the exercise of all those prerogative powers once exercised by the Queen/Crown.

37. This Court is of the view that the authorities demonstrate conclusively that by virtue of a mixture of the application of the common law, the provisions of the ***Civil Law Act*** and the provisions of the ***Republic Act***, there exists a place for the exercise of the general prerogative powers which have been reposed in the President of Guyana.

38. This Court also agrees conclusively with the contention that there existed and continues to exist a prerogative power in the Crown recognised by law to appoint/confer upon members of the practicing Bar, the status of Senior Counsel.

39. That power by virtue of ***section 4*** of the ***Republic Act*** was transferred and vested in the President as Head of State of Guyana. Therefore, the President of Guyana had and continues to have the power to appoint members of the Bar to the dignity of Senior Counsel, to date.

(b) Whether His Excellency, The President has acted unconstitutionally in appointing Attorneys-at-Law, Senior Counsel in December 2019

The Arguments:

40. A principal contention by the Applicant is that the purported exercise and effect of the purported exercise of a Presidential Power to appoint Senior Counsel, trespasses on the doctrine of separation of powers, by seeking to dictate to the Judiciary how they must conduct the function of the administration of justice.

41. The Applicant further argues that the Judiciary is independent of Executive control – which was made even more clear with the advent of the ***1980 Constitution***. In these circumstances, he submits that the President

could not command the Court to give precedence and pre-audience to any Attorney-at-Law, and that would be an unconstitutional infringement on that independence.

42. Further, that the appointment of Silk by the President would infringe the entrenched assignment of sovereignty to the people insofar as there is an oath to serve the President, and no obligation to serve the State. Even further, ***Section 4*** of the ***Republic Act*** (cited above) is in discord with the ***1980 Constitution*** which gave sovereignty to the People, and specifically conferred independence from the Executive to the Judiciary.

43. Mr Hari Ramkarran SC also argues that ***Article 9*** of the ***1980 Constitution*** completely abrogated the President's prerogative power. The Article reads:

> ***Sovereignty belongs to the people***, who exercise it through their representatives and the democratic organs established by or under this Constitution. [emphasis supplied]

44. He contends that like the prerogative, the issue of sovereignty is of historic legal vintage, but that its modern connotation is quite clear. Learned Senior Counsel submits further that '*sovereignty belongs to the people*' simply means that 'the people' through their 'democratic organs' established by the Constitution, which includes Parliament, are the lawful and final arbiters of all laws and prerogatives.

45. He argues strongly that ***Article 9*** has completely destroyed all and any residual prerogative power the President may have had in the past and that '*sovereignty of the people*' is the supreme, or one of the supreme, democratic principles exercisable by Parliament and legally enforceable by the Courts in Guyana.

The law and analysis:

46. The case of ***Attorney-General for the Dominion of Canada v Attorney-General for The Province of Ontario***, on appeal from the Court of Appeal for Ontario**,** [1898] A.C. 247, is instructive on the point of precedence and pre-audience. *Lord Watson* posits definitively that:

> Beyond these limits the Sovereign has never in modern times professed to confer upon Crown Counsel, or other members of the bar, a right of precedence or pre-audience in the courts of England. ***These are matters which have been regulated in practice either by the discretion of the bench or by the courtesy of the profession***. [Emphasis supplied]

47. Also, this Court cannot treat the statements by *Kerr J* lightly, in ***In the Matter of an Application by Seamus Treacy and Barry Macdonald for Judicial Review (Northern Ireland)***, [2000] NI 330, when he said that:

> It appears to me that the issue of the warrant cannot be conclusive of the rights of the applicants to practice as Senior Counsel…
>
> In any event, even if the warrant had that effect, the applicants, although they might enjoy the title of Queen's Counsel, would not automatically be entitled to practice as members of the Senior Bar. As I have said above, the conferment of the title of Queen's Counsel is a matter for the Sovereign, acting in the advice of her ministers. **The precedence accorded to those who have been named in the Royal Warrant and the Letters Patent is a matter for the judges**. [Emphasis supplied]

48. *Kerr J.*, continues:

> The distinction which must be drawn between the office itself and the effect of achieving that office is also important … The consequence of being appointed Queen's Counsel is that one will be accorded pre-audience before the courts. That is a matter for the judges but this is related to the effect of appointment rather than the appointment itself. It is for the Queen (on the advice of the Lord Chancellor) to decide who is to be appointed Queen's Counsel and what the conditions of appointment should be. ***It is for the judges to decide what privileges and pre-audiences they will grant to reflect the eminence of those who are appointed to that office***. [Emphasis supplied]

49. Therefore, is it reasonable to conclude that the conferment of silk on an Attorney-at-Law, bestowing upon him/her the privileges of the title by the President, a member of the Executive, an infringement upon the independence of the Judiciary, and therefore said to be unconstitutional? Can it be said that the administration of justice has been compromised by the manner of appointment by the President?

50. In examining the positions taken by both *Lord Watson* and *Kerr, J.*, it is readily discerned that precedence and pre-audience before any Court, is a matter for the Judicial Officer in charge. Courtesies extended to Counsel, whether Senior Counsel or not, is a matter entirely within the remit of the Judicial Officer.

51. A Senior Counsel has no right of action, if for instance, a Judicial Officer does not afford him or her the right of precedence or pre-audience before the Court. In a civilised society and in a profession steeped in history and tradition, courtesies are usually extended to Senior Counsel and generally, to Senior Practitioners appearing before the Court.

52. This Court is of the view that there is no nexus between the appointment of Senior Counsel by the President, as he/she is empowered to do on their prerogative, as indicated above, and the contention that the independence of the judiciary is somehow compromised by such an appointment. Or further, that it is somehow an intrusion into the remit of the Judiciary, by the Executive. The appointment by the President in no way directs to any Judicial Officer, how he or she must treat the appointee when they appear before the Court.

53. It is also instructive at this juncture to note that ***Article 122A*** of the *Constitution* provides that:

> (1**) *All courts and all persons presiding over the courts shall exercise their functions independently of the control and direction of any other person or authority; and shall be free and independent from political, executive and any other form of direction and control***.

(2) Subject to the provisions of articles 199 and 201, ***all courts shall be administratively autonomous and shall be funded by a direct charge upon the Consolidated Fund; and such courts shall operate in accordance with the principles of sound financial and administrative management***. [emphasis supplied]

54. Has the Applicant, through the record before this Court, demonstrated that by exercising the prerogative to appoint members of the legal profession to the dignity of Senior Counsel, the President has:

i. prevented the court from exercising its functions independently of any person or authority direction or control?

ii. subjected the court to political or executive control? or

iii. interfered with the court's administrative autonomy, or prevented the court's funding from being a direct charge on the Consolidated Fund?

54. This Court has been unable to discern a circumstance on the record before it which any of the questions above are answered in the affirmative. Further there is no circumstance set out in the record which establishes an intrusion into the remit of the Judiciary as set out in ***Article 122A*** of the Constitution. It is the Court which remains in control of all its processes and not dictated to in any way by the exercise of the prerogative by the President.

Abrogation of the Prerogative:

55. This brings us to the argument on the complete abrogation of the prerogative by Mr Hari Ramkarran's SC. In treating with this argument, this Court notes ***Section 7*** of the ***Constitution of the Co-operative Republic of Guyana Act 1980***, which states:

(1) Subject to the provisions of this Act, the existing laws shall continue in force on and after the appointed day as if they had been made in pursuance of the Constitution but shall be construed with such modifications, adaptations, qualifications

and exceptions as may be necessary to bring them into conformity with this Act.

56. It is clear that both the ***Republic*** and ***Civil Law Acts*** of Guyana are existing laws. ***Section 7*** mandates that they continue to be in force as if they have been made pursuant to the Constitution.

57. The seminal text, ***Bennion on Statutory Interpretation***, *Section 6.10* on the issue of 'Implied Repeal' states:

> [t]he classic statement of the test for implied repeal was set out by A L Smith J in ***West Ham (Churchwardens, etc) v Fourth City Mutual Building Society*** [1892] 1 QB 654 at 658. *"The test of whether there has been a repeal by implication by subsequent legislation is this: are the provisions of a later Act so inconsistent with, or repugnant to, the provisions of an earlier act that the two cannot stand together*?'"

58. Moreover, ***Bennion*** continues:

> There is a general presumption against implied repeal or implied revocation of a common law rule. The effect of the presumption is that courts should, where possible, interpret the provisions of a later Act in a way that is compatible with the earlier one.
>
> The strength of the presumption against implied repeal varies according to the context. In modern times, when standards of legislative drafting are high, the presumption against implied repeal is stronger (since necessary repeals are usually made expressly). Moreover, the more weighty the enactment the stronger the presumption against its implied repeal.

59. This Court is of the view that Mr Ramkarran SC has not demonstrated on the record how the presumption of legality of provisions of the ***Republic Act*** are rebutted. The ***Republic Act*** must be read together with the ***Constitution***, and its enacting provisions, to give ***Section 4*** meaning and effect.

60. ***Bennion***, provides more guidance that:

> [T]he courts have held that the ordinary rule of implied repeal has no application to constitutional statutes…In the absence of express words the courts are likely to assume that Parliament did not intend to repeal a constitutional statute.

61. Clearly, the ***Republic Act*** is a constitutional statute. In ***King v Director of Prisons and Another*** [1992] 47 WIR 210, *Chief Justice George* at page 215 of the Report, recognized the ***Republic Act***:

> as a constitutional device…used to preserve existing laws.

62. ***Bennion***, continues that:

> The presumption against implied repeal is particularly strong where general provision in an Act covers a situation for which specific provision is made in an earlier Act. In this case, the presumption against implied repeal is strengthened by the further presumption that general provisions give way to the specific ones.

63. This Court is of the view that for the Constitution to have abrogated prerogative power, which was clearly contemplated to be continued in Guyana despite becoming a Republic, it must have expressly stated that such power would not continue.

64. This Court is further of the view that Mr Ramkarran SC has not surmounted the hurdle of the presumption against the implied repeal of ***Section 4*** of the ***Republic Act***.

Sovereignty of the People:

65. The Applicant further argues that the appointment of Silk by the President would infringe the entrenched assignment of Sovereignty to the People as mandated in ***Article 9*** of the Constitution – in that the President is not now entitled to exercise that power which once belonged to the Queen, as sovereign. ***Article 9***, is restated thus:

> Sovereignty belongs to the people, **who exercise it through their representatives and the democratic organs established by or under this Constitution.** [Emphasis supplied]

66. It therefore is clear that while the Constitution itself reposes sovereignty in the people, such sovereignty is to be exercised by representatives, one of whom is the elected President. As noted earlier, the ***Republic Act*** imbues the President with the authority to exercise prerogative powers, like the power to appoint Senior Counsel.

67. This Court is of the view that there is no inconsistency between the ***Republic Act*** and ***Article 9*** of the Constitution. The argument that ***Article 9*** is infringed by the exercise of the prerogative to appoint Senior Counsel by the President, therefore fails.

CONCLUSION:

68. To summarise, this Court does not find the complaints by the Applicant and Mr. Ramkarran to be meritorious. The President, at this juncture, is the repository of the prerogative power to appoint deserving Attorneys-at-Law to the dignity of Senior Counsel.

69. There are no issues of unconstitutionality in the appointment process as currently exists. **The orders prayed for are therefore refused**. The question of Costs will be determined after submissions by Counsel are received by the Court as to the applicability of an award of costs in these proceedings.

70. However, it cannot go unobserved that the manner of appointment to the dignity of Senior Counsel is somewhat opaque. This may lend itself to a perception that persons who are underserving of this esteemed honour may benefit from an appointment because of some patronage or another to the Executive.

71. Having said that, this Court must also say that there is nothing unsavory in the manner of appointment, as it follows on the traditions which has flowed from the exercise of that Royal Prerogative.

72. Notwithstanding, this Court feels that the time for reform of the process of appointment of Senior Counsel is now opportune. The challenge before this Court does not seek to vilify any of the appointees, or previous appointees, as being undeserving of the dignity of Senior Counsel. It has always been a challenge on the ***manner and process*** of appointment.

73. There is a need for increased transparency of the required criteria and the nomination and selection process of deserving Counsel to be bestowed the honour of taking Silk.

74. The exercise of this Royal Prerogative power is grounded in hundreds of years of history. We must recognize that our systems have evolved since then and we need to acknowledge that the institution of Senior Counsel, though rooted in tradition, can only continue to engender respect, if the public, who they serve, can have confidence that an appointee truly merits the award of the honour.

75. In this regard, this Court welcomes the remarks by the Attorney General when he indicated in his oral arguments that the review of the manner of appointments is near.

76. This Court also has taken notice of the proposal of *Mr. Robin Stoby SC*, in the submissions he caused to be filed on his behalf in this matter – himself having recognised that there is indeed an absence of a clear and definitive process for the identification and conferment of Silk on persons entitled to the appointment. This Court takes the opportunity to restate it *verbatim* for the record:

> Firstly: Annually the Chancellor together with the Chief Justice and other Senior Judges of the Court of Appeal and The High Court shall, at a meeting with an agenda item for this purpose, identify person(s) whom in their opinion have attained the necessary standing at the practicing Bar for the appointment of Silk.
>
> Secondly: After the identification of such person(s) at the hereinbefore mentioned meeting, the Chancellor shall forthwith thereafter meet with the members of the Inner Bar and share the name(s) of such person(s) identified and seek their views thereon.
>
> Thirdly: At this meeting the Chancellor and the members of the Inner Bar shall together confirm such person(s) who will thereafter be invited to formally apply indicating their willingness to accept conferment of Silk.

Fourthly: Such person(s) identified shall then be invited to apply.

Fifthly: The Chancellor shall thereafter upon receipt of the approved applications forthwith forward the list of name(s) of such persons who have been identified to the President who shall thereafter confer the appointment with the imprimatur and active participation of the Judiciary after the relevant administrative process.

Sixthly: The President after receiving the formal application shall make a formal public declaration of the name(s) of such person(s).

Seventhly: The Full Court shall convene and confer the appointment by way of a Full Court Hearing.

77. In this Court's view, the foregoing represents a good start towards demarcating a transparent and respected process for the appointment of Senior Counsel, which can serve to preserve the dignity of the honour. This Court therefore commends this proposal for consideration in the review process.

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Nareshwar Harnanan
Puisne Judge
17 December 2020