



**IN THE SUPREME COURT OF FIJI ISLANDS**

**ORIGINAL JURISDICTION**

***Miscellaneous Case No.1 of 2003***

**IN THE MATTER** OF SECTION 123 OF THE  
CONSTITUTION AMENDMENT ACT 1997

**IN THE MATTER** OF A REFERENCE BY THE  
PRESIDENT FOR AN OPINION IN QUESTIONS  
AS TO THE EFFECT OF SECTION 99 OF THE  
CONSTITUTION

**LAISENIA QARASE**

First Interested Party

**MAHENDRA PAL CHAUDHRY**

Second Interested Party

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**OPINION OF THE SUPREME COURT**

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His Excellency the President of Fiji  
for an opinion on questions  
relating to the interpretation of  
Section 99 of the Constitution  
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**PRESIDENT'S REFERENCE 2003**

**SUMMARY OF THE COURT'S OPINION**

*(This Summary is provided to assist in the understanding of the Court's Opinion. It does not comprise part of the reasons for that opinion. The full opinion is the only authoritative document.)*

- 1 Subsection 99(3) of the Constitution of Fiji requires that the Prime Minister to establish a multi-party Cabinet in the way set out in that section. The Prime Minister is required by subsection 99(5) to invite all political parties with 10% or more of the seats in the House of Representatives to be represented in the Cabinet (hereafter '*qualifying parties*').

2 Last year, on 18 July 2003, the Supreme Court dismissed an appeal from the Court of Appeal which had upheld a declaration made in the High Court of Fiji about the obligation of the Prime Minister under section 99. That declaration was as follows:

*“That as and from 10 September 2001 the [Prime Minister] was and is required and obliged by the Constitution to consult the leader of the Fiji Labour Party pursuant to section 99(9) of the Constitution and thereafter:*

*(i) to advise the President to appoint as Minister; and*

*(ii) to appoint to the Cabinet;*

*such number of parliamentary members of the Fiji Labour Party as is in proportion to their numbers in the House of Representatives.”*

3 Since the decision of this Court upholding that declaration in 2003, the Prime Minister and the leader of the Fiji Labour Party have disagreed about the numbers of parliamentary members of the Fiji Labour Party that the Prime Minister is obliged to have appointed to the Cabinet. That dispute turns on the interpretation of section 99. It turns particularly on the words of section 99(5) that the Prime Minister must invite all parties with 10% or more of the seats in the House of Representatives to be represented in the Cabinet *“in proportion to their numbers in the House”*. These are the critical words whose meaning is in contention.

4 In this case the only parties with 10% or more of the seats in the House of Representative are the Prime Minister's party, the **SDL**, (with 32 seats) and the Fiji Labour Party, the **FLP** (with 28 seats).

5 The Prime Minister contends that the words *‘in proportion to their numbers in the House’* in subsection 99(5) of the Constitution refers to the proportion of the number of seats held by a qualifying party in the House of Representatives to the total membership of the House ie **71 seats**. On this

basis, according to the Prime Minister, his party is entitled to 45% of the places in Cabinet and the FLP to 39%. In a proposed 36 member Cabinet this would translate into 16 positions for the SDL and 14 for the FLP leaving a balance of 6 positions which the Prime Minister claims to be entitled to fill.

6. The leader of the FLP, Mr Chaudhry, says that on the proper interpretation of section 99, the SDL and FLP is each entitled to a proportion of the places in Cabinet that is the same proportion which it has of the total number of seats held by the SDL and FLP combined ie. 60 seats. The FLP says that the words of section 99 require that each qualifying party with 10% or more of the seats in the House should be represented in the Cabinet according to the proportion which it holds of the total of all seats held by qualifying parties, including the Government Party. On this basis, according to Mr Chaudhry, the SDL would be entitled to 53% of the places in Cabinet and the FLP to 47%. This translates to 19 positions for the SDL and 17 positions for the FLP.
7. The dispute not having been resolved, the Prime Minister requested the President to refer to the Supreme Court, for its opinion, a number of questions about the proper interpretation of section 99 of the Constitution and, in particular, the numerical entitlements of the SDL and the FLP in a multi-party Cabinet. These questions were referred to the Court under section 123 of the Constitution. The Prime Minister and the leader of the FLP were represented before the Court by counsel on 11 May 2004 when the case was argued.
8. The Court has agreed by a majority of four of its five members, that neither of the interpretations advanced by the Prime Minister and Mr Chaudhry is correct.
9. The words in section 99(5) requiring representation of qualifying parties in the Cabinet in proportion to their numbers in the House refer both to the Prime Minister's party and every other party with 10% or more of the seats in the House of Representatives. They require that, for each party in the Cabinet, the number of its places in the Cabinet has the same proportion to the number

of its seats in the House. Put simply, if the Prime Minister's party had twice as many seats in the House as the **FLP**, it would be entitled to have twice as many places in the Cabinet as the **FLP**.

- 10 The Court is also of the view that it is open to the Prime Minister to appoint to the Cabinet Independent members of the House of Representatives and members of the Senate who are not members of a political party represented in the House of Representatives. Such appointments, not being members of political parties in the House of Representatives would not count as part of the entitlement of the Prime Minister's party under section 99(6). It is not necessary that a person be a member of a political party to be appointed a Minister. For any person who is a member of the House of Representatives or of the Senate is eligible for appointment as a Minister under section 99(2).
- 11 The interpretation of section 99 which we have adopted flows from the ordinary meaning of its words having regard to their context and purpose and to the overriding requirement of fair representation for parties in the Cabinet under section 99(4). It means that the Prime Minister is free to establish a Cabinet composed of his own party members and **FLP** members and, provided he ensures that the numbers of places held by each bears the same proportion to its seats in the House of Representatives, he may also appoint Independents or non-party Senate members as Ministers.
- 12 The Prime Minister might, of course, decide not to appoint any Independents to his Cabinet. In that case, in a 36 member Cabinet, on the interpretation of section 99 favoured by the majority of the Court, the Prime Minister would be entitled to **19** positions and the **FLP** to **17**. That reflects the numbers claimed by Mr Chaudhry. However Mr Chaudhry's proposition is only valid in the case of a Cabinet comprised solely of members of political parties with no Independents or non-party Senate members. The Prime Minister could decide, for example, to compose his Cabinet of **17** members from his own party. He would then, on the correct interpretation of section 99, have to appoint **15** members (rounded up from 14.8) from the **FLP**. He would then be

free to fill 4 places in Cabinet with Independents or non-party Senate members.

- 13 The reasons for the opinion of the majority, which are published today, set out in detail the basis for these conclusions. As can be seen, they do not support the contentions advanced by either the Prime Minister or Mr Chaudhry. They do however yield the same result as that advanced by Mr Chaudhry if the Cabinet is to be made up only of members of political parties represented in the House of Representatives.
- 14 The majority comprises myself and Justices Mason, French and Weinberg. Justice Gault differs from the majority view in that he considers that the Constitution does not permit the Prime Minister to appoint Independents or non-party Senate members to the Cabinet except arguably as part of the entitlement of the Prime Minister's party.
- 15 We should add that the interested parties and the Court were in agreement that the entitlement of each political party to places in the Cabinet is to be determined from time to time as the composition of the House of Representatives changes.
- 16 The questions posed by the President and the answers given by the Court are as follows:

*Q.1. On their proper construction, do the words "in proportion to their numbers in the House of Representatives" in sub-section 99(5) of the Constitution and in the declaration made by the High Court on 24 April 2002 refer to:*

- (1) *the proportion of:*
  - (i) *members of a party whose membership of the House of Representatives is at least 10% of the total membership of the House of Representatives;*  
*to*
  - (ii) *the total membership of the House of Representatives;*

**Answer:** No - This is the unanimous opinion of the Court.

- (2) the proportion of:
- (i) members of a party whose membership of the House of Representatives is at least 10% of the total membership of the House of Representatives; to
  - (ii) the total membership of all parties whose membership of the House of Representatives is at least 10% of the total membership of the House of Representatives; or

**Answer :** Justice Gault answers this question "Yes". The majority answers it, "yes, but only if the Cabinet is composed entirely of members appointed from political parties represented in the House of Representatives."

- (3) some other, and if so, what proportion?

**Answer:** The Majority answers this question "yes, the words refer to the proportion which the number of places which each party, including the Government party, is allocated in the Cabinet bears to the membership of that party in the House of Representatives."

**Q. 2.** Is the proportion of positions in Cabinet to which a party is entitled under subsection 99(5) to be determined:

- (1) as at the date of invitation;
- (2) from time to time as the composition of the House of Representatives changes; or
- (3) as at some other and, if so, what time?

**Answer:** From time to time as the composition of the House of Representatives changes. This is a unanimous opinion of the Court.

**Q. 3.** *Therefore, is the proportion of positions in Cabinet to which the FLP is currently entitled under subsection 99(5):*

(1) 39%

(2) 47%

(3) *some other, and if so what, percentage?*

**Answer:** *The majority opinion is “the FLP is entitled to a number of places in the Cabinet which bears the same proportion to its membership of the House of Representatives as the number of places occupied by the SDL bears to its membership of the House of Representatives.”*

17. On Justice Gault’s behalf I also publish his separate opinion.

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LAISENIA QARASE

First Interested Party

MAHENDRA PAL CHAUDHRY

Second Interested Party

Coram: Hon Justice Daniel Fatiaki, President of Supreme Court  
Rt Hon Justice Thomas Gault, Judge of Supreme Court  
Hon Justice Keith Mason, Judge of Supreme Court  
Hon Justice Robert French Judge of Supreme Court  
Hon Justice Mark Weinberg, Judge of Supreme Court

Hearing: Tuesday, 11th May 2004, Suva

Counsel: Mr Stephen Gageler SC ]  
Ms Nehla Basawaiya ] for the First Interested  
Ms Rakuita Vuniwaqa ] Party  
  
Professor George Williams ]  
Mr Gyaneshwar Prasad Lala ] for the Second Interested  
Ms Shoma Devan ] Party

Date of Judgment: Friday, 9th July 2004

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## OPINION OF THE COURT

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### Introduction and Background

- 1 On 17 October His Excellency the President of Fiji referred to the Supreme Court under Section 123 of the Constitution Amendment Act 1997 (“the **Constitution**”), questions about the effect of section 99 of the Constitution relating to the appointment of Ministers and the representation of political parties in the Cabinet. The section establishes a mechanism for implementing power sharing in Fiji through the creation of a multi-party Cabinet.
- 2 It has already been settled by the judgment of this Court delivered on 18 July 2003 that the Prime Minister is under a constitutional obligation to consult with the Leader of the Fiji Labour Party and to advise the President to appoint as ministers and appoint to Cabinet such number of parliamentary members of the Fiji Labour Party as is in proportion to their numbers in the House of Parliament. The questions referred to the Court relate to the numbers of persons to be so appointed.
- 3 The resolution of the questions referred to the Court depends upon the interpretation of section 99(5). That interpretation must be undertaken by reference to the meaning and context of the words used in section 99(5), the purpose of the provision, the drafting history of the Constitution and the relevant principles in the Compact which is set out in section 6.
- 4 The interested parties are the Prime Minister, Mr Laisenia Qarase, who is the leader of the Soqosoqo ni Duavata ni Lewenivua Party (**SDL**) and Mr Mahendra Pal Chaudhry, who is the leader of the Fiji Labour Party (**FLP**).

## The Questions in Context

- 5 The questions involve the method of calculating the apportionment of positions in a multi-party Cabinet.
- 6 Section 99 of the Constitution provides:

*99(1) The President appoints and dismisses other Ministers on the advice of the Prime Minister.*

*(2) To be eligible for appointment, a Minister must be a member of the House of Representatives or the Senate.*

*(3) The Prime Minister must establish a multi-party Cabinet in the way set out in this section comprising such number of Ministers as he or she determines.*

*(4) Subject to this section, the composition of the Cabinet should, as far as possible, fairly represent the parties represented in the House of Representatives.*

*(5) In establishing the Cabinet, the Prime Minister must invite all parties whose membership in the House of Representatives comprises at least 10% of the total membership of the House to be represented in the Cabinet in proportion to their numbers in the House.*

*(6) If the Prime Minister selects for appointment to the Cabinet a person from a party whose membership in the House of Representatives is less than 10% of the total membership of the House, that selection is deemed, for the purposes of this section, to be a selection of a person from the Prime Minister's own party.*

*(7) If a party declines an invitation from the Prime Minister to be represented in the Cabinet, the Prime Minister must allocate the Cabinet positions to which that party would have been entitled amongst the other parties (including the Prime Minister's party) in proportion, as far as possible, to their respective entitlements under subsection (5).*

*(8) If all parties (apart from the Prime Minister's party and the party (if any) with which it is in coalition) decline an invitation from the Prime Minister to be represented in the Cabinet, the Prime Minister may look to his or her own party or coalition of parties to fill the places in the Cabinet.*

*(9) In selecting persons from parties other than his or her own party for appointment as Ministers, the Prime Minister must consult with the leaders of those parties.*

7 The background facts are not in dispute and may be summarised as follows.

8 There are 71 members in the House of Representatives elected in accordance with the Constitution (section 51 in particular) to represent single-member constituencies. At the time of the hearing the composition of the House of Representatives in consequence of the general election and subsequent developments was:

SDL	32 members
FLP	28
Conservative Alliance Matanitu Vanua (CAMV)	6
New Labour Unity Party (NLUP)	2
United General Party	1
Independent	2

9 On 10 September 2001, the President appointed Mr Qarase as Prime Minister under section 98 of the Constitution. On that day Mr Qarase wrote to Mr Chaudhry extending an invitation to join Cabinet. Mr Chaudhry replied accepting such invitation and stating his availability to engage in a consultative process.

10 On and shortly after 12 September 2001, acting on the advice of the Prime Minister and under section 99(1) of the Constitution, the President appointed a Cabinet of 21 members of whom one was a member of the Senate and 20

were members of the House of Representatives. The 20 members from the House had the following allegiances:

SDL	16
CAMV	2
NLUP	1
Independent	1

11 On 24 April 2002 the High Court made a declaration in the following terms:

*“That as and from 10 September 2001 the [Prime Minister] was and is required and obliged by the Constitution to consult the Leader of the Fiji Labour Party pursuant to section 99(9) of the Constitution and thereafter:*

*(i) to advise the President to appoint as Minister; and*

*(ii) to appoint to the Cabinet;*

*such number of parliamentary members of the Fiji Labour Party as is in proportion to their numbers in the House of Representatives.”*

12 On 24 May 2002 the Court of Appeal dismissed an appeal from the judgment of the High Court.

13 On 10 March 2003, acting on the advice of the Prime Minister and under section 99(1) of the Constitution, the President appointed a further member of SDL to a position as a Minister within the Cabinet.

14 On 18 July 2003 the Supreme Court dismissed an appeal from the judgment of the Court of Appeal (*Qarase v Chaudhry* [2003] FJSC 1) (hereafter ‘*the 2003 Supreme Court Judgment*’).

15 Since that date, the Prime Minister and Mr Chaudhry have met and corresponded in relation to the formation of a multi-party Cabinet. The Prime Minister has indicated his intention to reconstitute the Cabinet by increasing its number from 22 to 36 and by selecting for appointment 14 members of

FLP. For various reasons, the invitation has not been accepted. One point of disagreement between the two party leaders concerns Mr Chaudhry's contention that section 99 of the Constitution entitles FLP to 17 positions in a Cabinet of 36. The underlying disagreement has thrown up the issues raised in Questions 1 and 3 in the President's Reference.

The Questions Referred and the Answers Proposed By the Interested Parties

16 The Questions referred are:

1. *On their proper construction, do the words "in proportion to their numbers in the House of Representatives" in subsection 99(5) of the Constitution and in the declaration made by the High Court on 24 April 2002 refer to:*

(1) *the proportion of:*

(i) *members of a party whose membership of the House of Representatives is at least 10% of the total membership of the House of Representatives; to*

(ii) *the total membership of the House of Representatives;*

(2) *the proportion of:*

(i) *members of a party whose membership of the House of Representatives is at least 10% of the total membership of the House of Representatives; to*

(ii) *the total membership of all parties whose membership of the House of Representatives is at least 10% of the total membership of the House of Representatives; or*

(3) *some other, and if so what, proportion?*

2. *Is the proportion of positions in Cabinet to which a party is entitled under subsection 99(5) to be determined:*

(1) *as at the date of invitation;*

(2) *from time to time as the composition of the House of Representatives changes; or*

(3) *as at some other and, if so, what time?*

3. *Therefore, is the proportion of positions in Cabinet to which the FLP is currently entitled under subsection 99(5):*

(1) 39%

(2) 47%

(3) *some other, and if so what, percentage?*

17 The Prime Minister proposes that Question 1 should be answered in accordance with its first suggested response. Mr Chaudhry proposes the second suggested response.

18 The parties agree that Question 2 should be answered in accordance with its second suggested response, a proposition with which this Court also agrees for reasons set out in the 2003 Supreme Court Judgment at [117]. Section 99 speaks continuously in the present. This is why we shall adopt the expression “*qualifying party*” to refer to parties entitled to receive invitations to be represented in Cabinet.

19 Question 3 sets out the mathematical consequences of the Court’s answers to the earlier Questions in light of the current representation of the political parties in the House of Representatives and the Prime Minister’s intention to have a Cabinet of 36. The Prime Minister proposes 39% (ie 14 FLP Cabinet positions) and Mr Chaudhry proposes 47% (ie 17 FLP Cabinet positions) as the answer to Question 3. (The slight variation between the figures and those stated in the President’s Reference reflects the agreed consequences of recent by-elections.)

### The 2003 Supreme Court Judgment

20 The 2003 Supreme Court Judgment discusses the background of section 99 and the interpretative principles governing constitutional litigation. It

reaffirmed principles drawn from *The President of the Republic of Fiji Islands v Kubuabola* [1999] FJSC 8 (hereafter the '1999 Supreme Court Opinion') and *In the matter of a Reference for an Opinion by his Excellency the President of the Republic of the Fiji Islands on the interpretation of sections 64 and 99 of the Constitution (Amendment) Act 1997* [2002] FJSC 11 (hereafter 'the 2002 Supreme Court Opinion'). The 2003 Supreme Court Judgment was a primary point of reference for the submissions of the parties, which only diverged in relation to par [142] thereof (set out below).

- 21 The outcome of the 2001 election was that the only parties with more than 10% of the total membership of the House of Representatives were **SDL** and **FLP**. The Prime Minister advised the President to appoint Ministers from **SDL**, **CAMV**, **NLUP** and Independents, taking the view that Mr Chaudhry's response to his invitation of 12 September 2001 was tantamount to a rejection of the invitation to **FLP** to be represented in Cabinet, thereby discharging the Prime Minister's obligation to **FLP** under section 99. This Court (agreeing with the Court of Appeal) found that the Prime Minister's invitation had been consistent with his obligation under section 99(5), but that the Prime Minister was not entitled to treat Mr Chaudhry's response as a rejection of the invitation or as dispensation from the constitutional duty to consult with Mr Chaudhry in relation to the selection of members of **FLP** for inclusion in the Cabinet. The ensuing declaration (made by the High Court, and upheld in the Court of Appeal and the Supreme Court) is set out above.
- 22 It is unnecessary to repeat at length this Court's discussion about the approach to the interpretation of the Constitution at paras [68]ff of the 2003 Supreme Court Judgment. For present purposes, it is sufficient to refer to the statement (at [71]), drawn from the 1999 Supreme Court Opinion, that "*the sharing of power was a central purpose of the 1997 Constitution*"; and the recognition (at [86]) that the system of multi-party representation in Cabinet was, in the words of the Joint Parliamentary Select Committee (JPSC), to be made subject to a "*constitutional threshold*" that was embodied in section 99. The Court also observed (at [93]) that the

Constitution itself established an "*equitable sharing of political power*" by the requirements for the composition of the Parliament in sections 51 and 64 and the requirements for the composition of the Cabinet in section 99: "*In the two manifestations of political power - legislative and executive - express provision was made for power sharing.*"

23 The construction of section 99 was expounded at paras. [97ff]. Because of relevance to the particular issues in this Reference we repeat the following paragraphs from the 2003 Supreme Court Judgment:

98. *Subsection 99(1) establishes the basic mechanism for the appointment and dismissal of Ministers. Appointment and dismissal is the function of the President and the President alone. But in carrying out the function he or she acts upon the advice of the Prime Minister. By virtue of subs 96(1) he or she can appoint or dismiss Ministers only upon that advice. The Prime Minister is therefore the sole repository of authority to provide to the President, advice on the appointment or dismissal of Ministers upon which the President acts. That authority is unimpaired by the obligation under subs 99(3), to establish a multi-party cabinet, for it is the Prime Minister who selects persons from parties other than his or her own party for appointment (subsection 99(9)).*

99. *Subsection 99(2) prescribes, as a qualification for ministerial appointment, membership of the House of Representatives or the Senate. It should be read with section 105(1)(d) which provides that the appointment of a Minister terminates if the Minister ceases to be a member of Parliament....*

100. *The primary obligation of the Prime Minister to establish a multi-party cabinet is created by subs 99(3). The text is explicit. He or she 'must' establish such a Cabinet. That obligation is to be discharged "in the way set out" in section 99. A literal interpretation of subsection 99(3) would read it as creating an unconditional obligation defining, by reference to the balance of section, the way in which that obligation is to be discharged. However as noted above, section 82 of the Constitution envisages the possibility (unlike the traditional Westminster model) that all parties are represented in cabinet and that accordingly there can be no leader of the opposition. The balance of*

*the section recognizes that it may not be possible for the Prime Minister to discharge the obligation it imposes. For it may be that all parties to whom invitations are extended under subsection 99(5) to be represented in the cabinet decline the invitation. In that event the Prime Minister "may look to his or her own party or coalition of parties to fill the positions in Cabinet." The obligation is thus qualified by the impossibility of its fulfilment where invitations are declined.*

....

104. *The provision for a "multi-party Cabinet" in section 99 of the Constitution represents a modification of the Westminster model....*

106. *Certain familiar incidents of cabinet government established under the Westminster system are apparent from the text of the Constitution. First there is the requirement that "the Cabinet is collectively responsible to the House of Representatives for the Governance of the State" (subsection 102(1)). Linked to that is the requirement that governments must have the confidence of the House of Representatives (section 97). The notion of collective responsibility has historically been expressed in terms of cabinet solidarity. That is to say, Ministers who are members of the Cabinet will publicly stand by decisions of the Cabinet and, if unable to do so, will resign. That this traditional concept informs the term "collectively responsible" in s.102 is reinforced by the terms of the Oath or Affirmation of Office that each person appointed as a Minister is required; by section 101, to make before the President. That Oath or Affirmation is set out above and includes a promise not to disclose Cabinet deliberations.*

107. *The objective of a multi-party Cabinet to which section 99(3) is directed, is capable of being achieved consistently with these constitutionally recognized attributes of Cabinet government in Fiji. For a Cabinet may consist of members of different parties who bring to it differing perspectives and policies and yet reach collective decision after discussion, negotiation and compromise. It may be that the convention of Cabinet solidarity will be satisfied in such a case by a dissenting Minister refraining from publicly criticizing a decision contrary to his own party policy. It is not to be expected, at this early stage of the implementation of the 1997 Constitution, that there will be settled conventions to cover all contingencies or difficulties. Conventions*

cannot be the subject of judicial prescription. They are matters for the elected representatives of the people to develop in working out the future governance of their nation. That, it is hardly necessary to say, mandates a degree of give and take and good faith on all sides.

....

109. Subsection 99(4) is a statement of the principles underpinning the way in which the Cabinet is to be composed. It gives content to the term "multi-party cabinet" in s99(3) by requiring that the composition of the Cabinet "...as far as possible fairly represents the parties represented in the House of Representatives". The term "as far as possible" reflects the reality that the parties may not be able to be represented in Cabinet in exact mathematical proportion to their seats in the House. It also reflects the practical limitation that some parties may decline the Prime Minister's invitation.

....

110. Subsection 99(5) then imposes upon the Prime Minister the precise obligation to "...invite all parties whose membership in the House of Representatives comprises at least 10% of the total membership of the House to be represented in the Cabinet in proportion to their numbers in the House." Again the obligation is emphatically expressed. The Prime Minister "must" extend the invitation to all eligible parties. The invitation to the parties contemplated by subsection 99(5) is an invitation "to be represented in the Cabinet". This is not simply an invitation for their members to be there without any agenda or policies of their own. This is a provision which advances the central constitutional purpose of power sharing.

111. Subsection 99(5) by referring to representation of the eligible parties allows that their representatives may take into Cabinet deliberations their own policies and agendas. If they do so however, they do so subject to the requirements of collective responsibility and confidentiality which are recognized in the Constitution as aids to effective government. This may mean a more difficult Cabinet to manage than a Cabinet whose members belong to the same party or a coalition that has worked out some consensus before its formation. But this is the kind of Cabinet that is envisaged by the Constitution and it cannot be rejected as unworkable in principle because of that difficulty.

112. *Division of opinion in cabinets is nothing new. The conventions of collective responsibility and cabinet confidentiality respond to division and allow conflict in Cabinet to be managed so that effective government is possible. The Prime Minister is entitled therefore to say that his own appointees intend to implement the policies of his party. That is not to prevent representatives of other parties from urging their own policies where they arise. Nor is it beyond the bounds of possibility that negotiated outcomes in the national interest will be reached. Section 99 aims to encourage debate on contentious policies including debate across party lines. It may also be observed that there is much in the routine business of government that will not involve any real clash of policy at all. Indeed much of the routine work of individual Ministers does not require references to Cabinet.*
113. *Subsection 99(7) provides for an imperfect form of multi-party cabinet where one or more, but not all, eligible parties decline the Prime Minister's invitation. The allocation of ministerial positions is re-determined in accordance with the proportions of the accepting parties inter se. Subsection (7) is of importance for the present case in that it refers to the "entitlements" of parties to "Cabinet positions." This lies against the proposition that the obligation to invite parties to be represented is no more than any obligation to treat and to negotiate in good faith. The purpose of the mandatory invitation under section 99(5) is, save when any party declines to participate, to ensure that each party is, in fact, represented in Cabinet. It is such actual representation that is described in mandatory language as an "entitlement" in section 99(7) and which is protected from dilution by sub-section 99(6) and (7).*
114. *Subsection 99(8) as earlier noted, recognizes that the Prime Minister's primary obligation may not be capable of being discharged.*
115. *Subsection 99(9) leaves the formal power of selection of persons from parties other than his or her own, in the hands of the Prime Minister subject to consultation with the leaders of those parties. In the ordinary course it is likely that the persons appointed will be appointed with the consent of their party or its leadership.*

116. *The structure of section 99 has a certain linear logic about it. It will, however, operate in the context of political posturing and negotiation. Negotiation between the Prime Minister and the leaders of various parties may take place in advance of any formal invitation or concurrently with its issue. There may be interrelated discussions about the formation of coalitions or the development of protocols or understandings in relation to certain areas of policy. The persons to be appointed as ministers and the portfolios allocated to them will also, in all probability, have a role to play in such negotiations. Equally, in determining whether or not to accept an invitation, parties will not doubt consider whether it might be preferable to remain out of Cabinet and in opposition. It must also be remembered that the appointment of the Prime Minister precedes the establishment of the Cabinet. That appointment may itself have been the product of negotiations leading to the formation of coalitions or undertakings of support.*

....

130. *As this Court said in the '1999 Supreme Court Opinion' at page 8:*

*"The Court is satisfied that the concept of power sharing in the Constitution requires invitation to the Cabinet, and consequently in effect to the Senate, to be issued to parties with at least 10% of House membership, other than the Prime Minister's own party. His own party is protected by his rights to establish his Cabinet (subject always to the principles in section 99) and to secure 9 Senate appointments."*

....

135. *The order made [on 24 April 2002] correctly states that the Prime Minister must consult with the Leader of the FLP under section 99(9) and advise the President to appoint the number of persons stated to the Cabinet. Subject to that obligation, the composition of the Cabinet, the identification of the persons to be Ministers and the operations of the Cabinet are not constitutionally prescribed. They are matters to be determined by political practice and perhaps eventually, by constitutional convention, which are inherently more flexible than constitutional prescription.*

136. *There is not, in our opinion, any aspect of the circumstances of the present case which suggests that this flexibility should be constrained by making such matters potentially justiciable in a constitutional context.*

The Constitution provides for a range of pertinent contingencies which may arise, including disagreement over policy.

137. *First*, there is express provision for the consequences of a party declining an invitation in subsection 99(7) and (8).
138. *Secondly*, the Prime Minister retains the authority to select persons for appointment as Ministers and to allocate portfolios [sections 103(1) and (2)]. This process of selection and allocation may well accommodate differences in policy. The right of a party leader to be consulted under section 99(9), although his or her views are entitled to weight and the process must be a genuine consultation, is not a right of concurrence. This contrasts with the right of that leader to nominate a member of Senate under section 64(2).
139. *Thirdly*, the Government, manifest in the Cabinet, must collectively retain the confidence of the House of Representatives under section 97.
140. *Fourthly*, the Cabinet is collectively responsible to the House of Representatives under section 102(1).
141. *Fifthly*, each Minister is individually responsible to the House of Representatives [section 102(2)].
142. Furthermore, when, as has occurred there are only two parties which have more than 10% of the membership of the House, the Prime Minister can ensure that the majority party has a majority in the Cabinet. [subsections 99(4), (5) and (6)]. It may also be noted that so long as the Prime Minister's Party has a majority of the total of parliamentary seats held by that party and all other eligible parties it will have an entitlement to a majority of the positions in the Cabinet. For assuming each eligible party accepts the invitation for representation in the Cabinet its entitlement to representation will be measured by the proportion of the number of parliamentary seats it holds to the total number of parliamentary seats held by the Government or Coalition party and all eligible parties: On that basis, in the present case, The Prime Minister's party has an entitlement to a majority position in Cabinet.
143. These structural elements should enable the creation of a workable government, without the necessity of a prior

*coalition agreement. Whether such an agreement is or is not desirable, and if it is desirable what should be the scope and detail of its content, is not a matter that should be constitutionalised. It can be left to the political exigencies of the times and the ultimate sanction of the ballot box. An agreement of this character is not pre-condition of membership of the multi-party Cabinet envisaged by section 99 of the Constitution.*

- 24 Mr Chaudhry has placed particular reliance upon para [142] above in his correspondence with the Prime Minister on behalf of **FLP** and in his submissions in this Court. The dicta in the third and fourth sentences were not the product of detailed submissions and close scrutiny of earlier precedent involved in the present Reference. As will appear, alternative scenarios and the position of Independents have triggered a full examination of the issues, including fresh issues perceived as likely to arise in the working out of this complex constitutional provision.

### The Competing Submissions

- 25 The focus of the dispute is the interpretation of section 99 (5), which provides:

*"In establishing the Cabinet, the Prime Minister must invite all parties whose membership in the House of Representatives comprises at least 10% of the total membership of the House to be represented in the Cabinet in proportion to their numbers in the House."*

- 26 We shall hereafter refer to parties whose membership in the House comprises at least 10% of the total membership of the House as "**qualifying parties**". But we emphasise that this does not pre-empt the issue whether the Prime Minister's own party is within the contemplation of subsection (5) either as a party entitled to be invited or as a party whose proportionate "entitlement" to Cabinet positions is somehow fixed by subsection (5).
- 27 The parties to this Reference agree that, in the current circumstances, subsection (5) requires the Prime Minister to invite **FLP** to be represented in the proposed Cabinet of 36. That obligation and **FLP**'s correlative entitlement

to receive an invitation stems from the fact that **FLP** is undoubtedly a qualifying party within the purview of subsection (5). The Prime Minister has made such an invitation.

28 The point of disagreement concerns the words "*in proportion to their numbers in the House*" and the identification of the denominator of the relevant fraction. The current numerator is agreed at 28, ie the present "*numbers in the House*" of **FLP**.

29 The Prime Minister's submission is that the correct denominator is 71, ie the present membership of the House, there being no current vacancies (*cf* section 50). This produces 39% which translates to an entitlement to 14 **FLP** positions in a proposed Cabinet of 36. Mr Chaudhry's submission is that, in the present circumstances, the correct denominator is 60, ie 28 plus 32, being the current numbers of the **FLP** and **SDP** parties, those being the only parties to have passed the 10% threshold referred to in subsection (5). This produces 47% which translates to an entitlement of 17 positions in the proposed Cabinet.

30 Mr Chaudhry submits that a direct and authoritative answer is given in para [142] of the 2003 Supreme Court Judgment (set out above). This, he submits, should be the end of the matter. The Prime Minister counters with reliance upon principles drawn from other portions of the 2003 Supreme Court Judgment and from the 1999 and 2002 Supreme Court Opinions. It was contended that para [142] was obiter, alternatively that it ought not to be followed in light of issues exposed and more fully debated in this Reference. Respect for precedent is important in constitutional matters. But the parties are entitled in the circumstances to have the underlying issues squarely addressed, if only as a prelude to addressing such precedential questions as emerge when the earlier decisions are closely analysed.

31 The Prime Minister submits that subsection (5) addresses a single matter in a composite manner. The matter is the entitlement of qualifying parties to be invited to be represented in the Cabinet in proportion to their numbers in the

House. The subsection imposes a duty on the Prime Minister to make an invitation to all qualifying parties and confers a correlative right on those parties to receive such an invitation. The invitation is a mandatory first step in the establishment of a multi-party Cabinet by the Prime Minister through the processes of section 99 as a whole.

32 According to the Prime Minister, the (qualifying) parties referred to in subsection (5) exclude the Prime Minister's own party, a proposition for which senior counsel for the Prime Minister cited the 1999, 2002 Opinions and 2003 Supreme Court Judgment . (see para [130] of the 2003 Judgment, set out above and the passages from the earlier Opinions set out below).

33 The identification of parties entitled to be invited in accordance with subsection (5) turns upon the percentage of seats held by them in the House. By definition, the denominator of the relevant fraction for that exercise is the membership of the House as a whole, ie 71 members (unless there are casual vacancies). Because the latter part of subsection (5) confers on the invited party an entitlement to proportionate representation in Cabinet (subject to the following subsections), the Prime Minister submits that it is natural and reasonable to construe the content of the ensuing entitlement in the same way, and as based upon the same denominator. As Mr Gageler SC put it in his submissions to this Court:

*“That is, as a matter of construction the reference to their numbers can only refer to the numbers of each qualifying party, which necessarily excludes the Prime Minister's party; and the reference to the proportion of their numbers in the House, in our submission can only be read distributively in the same sense as the first part of the same sentence. So, ... for each qualifying party the proportion referred to is the proportion of its membership in the House to the total number of members in the House. That is, for both parts of the same sentence, the qualification part and the entitlement part, one uses the same numerator and the same denominator.”*

34 It was further submitted on behalf of the Prime Minister that this approach to subsection (5) was in no way undermined by the later subsections.

Subsections (6), (7) and (8) refer to the "*Prime Minister's (own) party*", but the provisions were said to have their own work to do in the context of addressing the consequences of the Prime Minister selecting a member of a non-qualifying party to be a Minister following, and in the context of, the making of an invitation to a qualifying party and of a party or parties declining invitation(s) to be represented in the Cabinet [subsection (7) and (8)]. On the Prime Minister's submission, subsection (6) had its own work to do in relation to the later subsections. On this analysis, subsections (6) to (8) do not enlarge the operation or scope of subsection (5) which, according to the Prime Minister, does not contemplate the Prime Minister issuing an invitation to his or her own party.

35 The Prime Minister responded to submissions from Mr Chaudhry based upon section 64 of the Constitution and the parallels drawn between that section and section 99 in earlier Opinions of this Court. It was contended that section 64(2) appears in a different context, serves a different function and uses different language. We shall refer to these submissions in more detail below. For present purposes, it suffices to point out that the key distinction drawn in the Prime Minister's submission between section 64 and section 99 is that section 64(2) makes an exhaustive allocation of a defined number of seats (in the Senate), whereas section 99(5) deals only with the entitlement of qualifying parties (excluding the Prime Minister's party) to participate in the Cabinet.

36 Implicit in these submissions (and later made explicit in Mr Gageler's answer to questions from the Bench) is the corollary that sub-sections (6) to (8) of section 99 are not exhaustive as to the distribution of Cabinet positions. They perform their own work according to their terms, spelling out the entitlements of fair representation [*cf* subsection (4)] in a multi-party Cabinet. When that work is done, the Prime Minister is free to fill the residue of unallocated Cabinet positions, as he or she wishes, in the manner contemplated by subsections (1), (2) and (9). On this approach, no part of section 99 confers any '*entitlement*' upon the Prime Minister's party to any quota or proportion of Cabinet positions. The Prime Minister is simply free to appoint anyone who

is a member of Parliament to the Cabinet positions that are unallocated to qualifying parties through the (limited) operation of subsection (5), as qualified by the later subsections.

- 37 This submission can be illustrated by applying the Prime Minister's approach to section 99 to the current membership of the House. On the Prime Minister's approach, 14 Cabinet positions are to be offered to **FLP** in relation to his proposed Cabinet of 36. If that invitation is declined, then subsection (7) and (8) will work out the entitlements of all parties (including the Prime Minister's) to the redistributed 14 Cabinet positions. Some will pass to the Prime Minister's party by right pursuant to subsection (7), others to that party at the Prime Minister's option pursuant to subsection (8). Subsection (6) defines the consequences of the Prime Minister selecting for appointment to Cabinet a person from a non-qualifying party, but only as necessary "*for the purposes of this section*". This exercise will leave 22 positions unaffected by the provisions of subsections (5) to (8). According to this submission, the Prime Minister is, and always was, free to allocate these 22 positions as he wishes, to members of his party, members of coalition parties, Independents or even members of **FLP**. The Prime Minister's submission is that only 14 Cabinet positions are controlled by the mechanism spelt out in subsections (5) to (8). The balance of Cabinet positions may be offered to any member of the House or Senate, at the Prime Minister's discretion [subject to compliance with subsection (9) where applicable].
- 38 On this approach, there is no undistributed residue of Cabinet positions, because the generality of the language of subsections (1) to (3) ensures that the Prime Minister is constitutionally able to fill the Cabinet of his chosen size. This approach also treats subsection (4) as essentially prefatory to what follows, but without being a substantive provision that assists Mr Chaudhry. [Mr Chaudhry did not place any direct reliance on subsection (4) in his contentions on the Reference.]
- 39 The Prime Minister sought to demonstrate the impracticability of the interpretation for which Mr Chaudhry contends. He reminded the Court of its

observation in the 2003 Supreme Court Judgment (at [68] citing from the 1999 Supreme Court Opinion) that: "*the Constitution has been drawn up with an eye to political realities and likelihoods*". The Constitution also directs preference, in the interpretation of a provision, for a construction that would promote the purpose or object underlying the provision, taking into account the spirit of the Constitution as a whole [cf section 3(a)].

40 These general observations were the prelude to a more specific submission about the capacity of Mr Chaudhry's interpretation to undercut accepted principles and practices of Cabinet government. Examples were given of the spectre of unworkability of a system whereby a Prime Minister might find Ministers from his or her party and coalition partners invariably outnumbered in Cabinet. Thus, to take the clearest hypothetical example, assume five parties with members in the House of Representatives: Party A with 40% of the seats, Party B with 45% and Parties C, D and E with 5% each. Parties A, C, D and E form a coalition and the leader of Party A becomes Prime Minister. On Mr Chaudhry's interpretation of section 99, Party B would be entitled to be offered 52% (ie 45/85) of Cabinet positions whereas, on the Prime Minister's interpretation, Party B would be offered 45% of Cabinet positions.

41 According to the Prime Minister, the framers of the Constitution can hardly be thought to have intended to create the possibility of such a situation, given their adoption of the core institution of responsible Cabinet government (see subsections 98, 102 of the Constitution). Furthermore, the Cabinet produced in the hypothetical example would not "*fairly represent*" the parties represented in the House [cf section 99(4)]. Mr Chaudhry responds that this is a hypothetical situation and that the current dispute does not involve him claiming a majority of Cabinet positions for FLP. He also refers to general statements in the 2003 Supreme Court Judgment as to the novel and evolving framework presented by the Constitution.

42 Mr Chaudhry submitted that section 99(5) provided that the proportion of positions for which FLP was entitled to receive an invitation in a proposed Cabinet is to be calculated by taking the proportion of the numbers of

members of that party to the total membership in the House of Representatives of all qualifying parties plus the Prime Minister's own party. The submission accepts that subsection (5) does not in terms state what the membership of qualifying parties is to be factored against to determine their representation in the Cabinet. But this is said to be clearly implicit because, if subsection (5) does not include the Prime Minister's own party as a factor in the apportionment, there is no other mechanism in the Constitution for determining how many Cabinet positions the Prime Minister should have.

43 According to Mr Chaudhry, section 99 is exhaustive in setting out in detail how representation in Cabinet is to be determined. The section does not contemplate that there could be membership in Cabinet other than in accordance with its terms, which deal exhaustively with the allocation of Cabinet positions, including allocation as between qualifying and non-qualifying parties. This submission denies the Prime Minister's suggestion that there is an unallocated residue of Cabinet positions that are not addressed in the apportionment formula contained within the later subsections.

44 Counsel for Mr Chaudhry recognised that his submission also excluded any entitlement of the Prime Minister to appoint Independents or Senators into the Cabinet.

45 Mr Chaudhry supported his interpretation by reference to three textual and contextual considerations lying outside the four corners of subsection (5).

46 Mr Chaudhry submitted that the defect of the Prime Minister's interpretation is that it leaves some Cabinet positions unaccounted for. The example was given of a Cabinet of 20 positions formed at the present time when the only major parties are **SDL** (32 seats representing 45% of 71, translating into 9 out of 20 Cabinet positions) and **FLP** (28 seats representing 39% of 71, translating into 8 out of 20 Cabinet positions). This approach left three (3) Cabinet positions unaccounted for, in the sense that section 99 says nothing about how those positions should be allocated. By contrast, Mr Chaudhry's