MISC80/21

IN THE SUPREME COURT OF SAMOA

HELD AT MULINUU

IN THE MATTER:	Articles 44 & 47 of the Constitution of the Independent State of Samoa and of the Declaratory Judgments Act 1988.
BETWEEN:	**FAATUATUA I LE ATUA SAMOA UA TASI (F.A.S.T. PARTY)** *First Applicant*
A N D:	**SEUULA IOANE,** candidate for the Constituency of Alataua i Sisifo *Second Applicant*
A N D:	**ELECTORAL COMMISSIONER** *First Respondent*
A N D:	**ALIIMALEMANU MOTI MOMOEMAUSU ALOFA TUUAU**, Candidate of the Constituency of Alataua i Sisifo for the General Elections 2021 *Second Respondent*

Coram: Justice Niavā Mata Tuatagaloa
Justice Vui Clarence Nelson
Justice Lesātele Rapi Vaai

Counsel: P. Chang & M. Lui for the Applicants
M. Betham-Annandale & A. Iati for the First Respondent
M. Leung-Wai & M. Alai for the Second Respondent

Hearings: 28 April & 07 May 2021

Judgment: 17 May 2021

JUDGMENT OF THE COURT

Introduction

[1] This proceeding is concerned with the interpretation of Article 44 of the Constitution, in particular Articles 44(1) and 44(1A).

[2] Article 44 reads:

> **44. Members of the Legislative Assembly - (1)** Subject to the provisions of this Article, the Legislative Assembly shall consist of one member elected for each of 51 electoral constituencies having names, and comprising of villages or sub-villages as are prescribed from time to time by Act.
>
> **(1A)** Subject to this Article, women Members of the Legislative Assembly shall:
>
> (a) consist of a minimum of 10% of the Members of the Legislative Assembly specified under clause (1) which for the avoidance of doubt is presently 5; and
>
> (b) be elected pursuant to clause (1) or become additional Members pursuant to clause (1B), (1D) or (1E).
>
> **(1B)** If, following any general election:
>
> (a) all members elected under clause (1) are men, the prescribed number of women candidates (if any) with the highest number of votes shall become additional Members; or
>
> (b) less than the prescribed number of women candidates are elected under clause (1), the remaining prescribed number of women candidates (if any) with the highest number of votes shall become additional Members for the purposes of clause (1A).
>
> **(1C)** Clause (1B) does not apply if the prescribed number of women are all elected under clause (1).
>
> **(1D)** If the seat of an additional Member becomes vacant, it shall, despite Article 48, be filled by the woman candidate (if any) who has the next highest number of votes at the last election or general election.
>
> **(1E)** Subject to Article 48, if a seat under clause (1) held by a woman becomes vacant, to which a man is elected to fill that vacant seat, the woman candidate (if any) with the highest number of votes from that election or the last election or general election shall become the additional Member.
>
> **(1F)** If, in the selection of the required number of women under clause (1B), (1D) or (1E), two (2) or more candidates have equal number of votes, the additional Member shall be selected by lot before the Electoral Commissioner with the presence of the candidates or their authorised representatives and at least two (2) police officers.
>
> **(1G)** If a woman candidate becomes an additional Member of a constituency (irrespective of a woman candidate being elected to that constituency), no other woman candidate from the same constituency shall become an additional Member unless there is no other woman candidate from any other constituency to make up the required prescribed number.
>
> (2) *(repealed by the Constitution Amendment Act 2015, No.19).*

(3) Subject to the provisions of this Constitution, the mode of electing members of the Legislative Assembly, the terms and conditions of their membership, the qualifications of voters, and the manner in which the roll for each electoral constituency shall be established and kept shall be prescribed by law.

(4) Members of the Legislative Assembly (including additional Members) shall be known as Members of Parliament.

(5) In this Article, unless the context otherwise requires:

"Additional Member" means a woman who is a Member of Parliament by virtue of clause (1B), (1D), or (1E) for the purposes of clause (1A);

"Highest number of votes" means the percentage of the total valid votes in a constituency polled by a woman candidate;

"Prescribed number" means the minimum number of woman Members of Parliament specified under clause (1A).

[3] Articles 44(1) and 44(1A) were introduced by two Constitutional amendments:

(a) Constitution Amendment Act 2013 No. 17 which added clauses 44 (1A) to 44 (1G). These clauses as gathered from paragraph [2] above prescribe the requirement of a minimum of 10% of women members of the Legislative Assembly. At the time there were 49 Members of Parliament. The amendment also provided the mechanism for choosing the members.

(b) Constitution Amendment Act (No. 3) 2019 No. 10 which amended clause 1 to increase the number of Members of the Legislative Assembly from 49 to 51.

Background

[4] The General Election to choose Members of the Legislative Assembly was held on Friday the 09th April 2021. Final count of the votes by the First Respondent was completed on 16th April and the Warrant of Election of the 51 members was presented to and signed by the Head of State the same day. Five women were elected.

[5] It is common ground that on the 16th April the FAST Party and HRPP Party held 25 seats each, with one Independent member.

[6] On the evening of the 20th April the First Respondent announced on the Electoral Commissioner's Facebook account that Article 44(1A) of the Constitution has been activated and the Second Respondent was appointed to make up the 10% representation of women. The Warrant of Appointment was signed by

the Head of State at about 9.15pm the same evening. The appointment of the Second Respondent gave the HRPP Party a majority of 26 to 25.

[7] It is the appointment which led to the inception of this proceeding to challenge the activation of Article 44(1A) to appoint the Second Respondent. The amended notice of motion seeks declarations:

(a) Declaring that the activation of Article 44(1A) is not within the interpretation of the Constitution and/or that it is not within the law, is unlawful and is unconstitutional;
(b) Declaring that the Warrant or Writ of Appointment or Election of the Second Respondent as a Member of Parliament is unlawful, unconstitutional and therefore void;
(c) Declaring that the Second Respondent has no right to be or to remain as a Member of Parliament.

[8] The First and Second Respondents opposed the Applicants' notice of motion.

[9] Before we addressed the substantive issue there were preliminary applications that the Court had delivered oral rulings upon and indicated we would deliver our reasons in due course. These are:

(i) Application by First Applicant for Joinder of the Second Applicant (Seuula Ioane);
(ii) Motion to Strike out filed by the First Respondent; and
(iii) Motion by First Respondent for Orders to Withdraw and Discontinue and/or Stay Proceedings

Application for Joinder of Second Applicant

[10] The Applicant sought to have the elected candidate of the same Constituency (Alataua Sisifo) to be joined as the Second Applicant to the Motion for Declaratory Orders.

[11] The First Respondent opposed the application saying that the intending Second Applicant does not have standing to be joined. Counsel for the Second Respondent neither opposed nor consented to the application.

[12] The Application for Joinder will be dealt together with the Motion to Strike out filed by the First Respondent for the First Respondent is raising the issue of "legal standing" to oppose the Application for Joinder and also as the ground for its Motion to Strike Out.

Motion to Strike Out/Application for Joinder

[13] The Court on 28 April 2021 heard both the Motion and Application and unanimously dismissed the motion to strike out and at the same time granted the application to join Seuula Ioane as Second Applicant. These are the Court's reasons.

[14] The First Respondent filed a motion to strike out on the basis that the applicants' have no standing to seek the declarations sought.

[15] The First Respondent says that the Applicants do not have standing under section 4 of the Declaratory Judgments Act 1988 and/or pursuant to Article 47 of the Constitution. The First Respondent also rely heavily on the New Zealand case of *Tuner v Pickering*[1] a case on the jurisdiction of the Court to issue a declaratory relief.

[16] Section 4 of the Declaratory Judgments Act 1988 and Article 47 of the Constitution reads relevantly:

> **4. Declaratory orders by motion – (1)** Where a person:
> (a) has done or desires to do an act the validity, legality, or effect of which depends on the construction or validity of a statute……; or
> (b) claims to have acquired a right under a statute, ……or to be in any other manner interested in the construction or validity thereof;
> the person may apply to the Supreme Court by motion for a declaratory order determining a question as to the construction or validity of such statute, regulation, bylaw, deed, will, document or instrument of title, agreement, memorandum, articles, or instrument, or of any part thereof.

[1] *Tuner v Pickering* [1975] 1 NZLR 84.

Article 47:

> **47. Decisions on questions as to membership** – All questions that may arise as to the right of any person to be or to remain a Member of Parliament shall be referred to and determined by the Supreme Court.

[17] The First Respondent sought to strike out in its entirety the Applicants' motion for declaratory orders and the affidavit of Laaulialemalietoa Leuatea Schmidt dated 21 April 2021 pursuant to the inherent jurisdiction of the Court.

[18] The Applicants on the other hand submitted that they have standing under section 4(1)(b) of the Declaratory Judgments Act 1988 and Article 47 of the Constitution. They clarified that they are each "a person …claiming to be in any other manner interested in the construction or validity" of Article 44 (1A). That Article 47 entitles them to bring any or all questions to the Supreme Court as to the right of any person, i.e., the Second Respondent to be (or remain) a Member of Parliament through Article 44(1A).

[19] The Court having considered the written submissions of Counsels as well as their oral arguments is of the view that the notice of motion to strike out is misconceived and fails to understand the purpose and operation of Article 44(1A). The Court unanimously dismissed the motion to strike out for the following reasons:

(i) The political party Faatuatua i le Atua Samoa ua Tasi (F.A.S.T.) is a 'person' by definition under the Acts Interpretation Act (section 2);
(ii) The Second Applicant is a citizen of Samoa, and he is the elected candidate in the general elections of 9 April 2021 for the Alataua Sisifo Constituency;
(iii) Both the First Applicant and Second Applicant can seek declaratory orders pursuant to section 4(1)(b) of the Declaratory Judgments Act 1988;
(iv) Both the First Applicant and the Second Applicant pursuant to Article 47 of the Constitution can seek from the Supreme Court to determine any question as to the validity or legality of any person to be (or remaining) as a Member of Parliament.

Motion for Orders to Discontinue, Withdraw and/or Stay Proceedings (filed on 6th May 2021)

[20] The Court on 7th May 2021 after hearing Counsels submissions dismissed the motion to discontinue, withdraw and/or stay the Motion by the Applicants concerning the interpretation of Article

44(1A) of the Constitution and made no order as to costs. The proceedings of this Motion (in summary) are as follows:

[21] Before the Court was to hear the Motion for Declaratory Orders filed by the First Applicant which initiated all these proceedings, the Head of State issued a proclamation for fresh elections thus invalidating or cancelling all Warrants of Election for the elected candidates of the General Elections; including the Warrant of Appointment/Election of the Second Respondent.

[22] The First Respondent as a result of the Proclamation of the Head of State filed with the Court a Motion for Orders to Discontinue, Withdraw and/or Stay this proceeding on the grounds:

(a) The Warrant of Election dated 20 April 2021 of the Second Respondent which is the subject of the Applicants' application has been revoked by the Head of State by way of Writ for General Election 2021 dated 4 May 2021;
(b) With the revocation of the Warrant of Election of the Second Respondent, the Applicants application seeking orders to declare void the said Warrant is redundant; and
(c) The proceedings have been rendered defunct by operation of the declarations by the Head of State voiding the results of the 9th April 2021 General Elections through revocation of the Warrants of Election including that of the Second Respondent, dated 20th April 2021.

[23] The First Respondent submitted that it is a futile exercise for the Court to continue to entertain the Applicants' Motion when the factual basis by which its motion is based have been made redundant. To continue with it would be more of an academic exercise.

[24] The Applicants opposed the motion saying that may be so but there still remains the issue as to the interpretation of Article 44(1A). That the issue as to the interpretation of Article 44(1A) is crucial and of great public interest and the Court must deal with it.

[25] Counsel for the Second Respondent agrees with the Applicants that there is an important question before the Court, the issue of interpretation of Article 44(1A). Article 44(1A) is a new provision in the Constitution and this is the first time that it has become the subject of judicial consideration. It is important for the Court to decide or rule on it.

[26] As mentioned earlier the Court in an oral ruling dismissed the motion by the First Respondent; these are the reasons:

(a) The issue of the correct interpretation of Article 44(1A) is of great importance;
(b) The Court can and should provide a ruling on it independent of any other motion to be filed;
(c) The Court has authority both statutory[2] and inherent to deal with the issue regardless of the events that has taken place which may be subject to different proceedings from the present proceedings.

[27] This brings us to the substantive issue on the interpretation of Article 44(1A).

Interpretation of Article 44(1A)

[28] Essentially the issues for the Court to determine are:

(a) Whether the First Respondent acted unlawfully when he activated Article 44(1A); and
(b) Does the First Respondent have the mandate to implement Article 44(1A) and if so, what is the timeframe to invoke Article 44(1A).

Constitution – Interpretation principles

[29] At first level, it is still a matter of determining what the words mean. This was emphasized by the Court of Appeal in *Attorney General v Saipaia Olomalu*,[3] *Mulitalo v Attorney General*[4], and *Jackson & Ors v Attorney General*.[5] It is the Court's function to give primary attention to the words used, and the Court does not have the power and ability to go beyond the clear and unequivocal words used. The approach to interpreting the Constitution was set out in *Attorney General v Saipaia Olomalu*:

> "We have already indicated our agreement that the Constitution should be interpreted in the spirit counselled by Lord Wilberforce in Fisher's case. He speaks of a constitutional instrument such as this as sui generis; in relation to human rights of 'a

[2] Declaratory Judgments Act 1988, ss10-12.
[3] *Attorney General v Saipaia Olomalu* [1980-1993] WSLR 41.
[4] *Mulitalo v Attorney General* [2001] WSCA 8.
[5] *Jackson & Ors v Attorney General* [2009] WSSC73.

> generous interpretation avoiding what has been called the austerity of tabulated legalism'; of respect for traditions and usages which have given meaning to the language; and of an approach with an open mind. This involves, we think, still giving primary attention to the words used, but being on guard against any tendency to interpret them in a mechanical or pedantic way. In this spirit we turn to the provisions of the Constitution now relevant."

[30] A similar approach was echoed by Barwick CJ, of the High Court of Australia in *Attorney General; Ex rel McKinlay v The Commonwealth*[6]:

> "The problem which is thus presented to the Court is a matter of the legal construction of the Constitution of Australia itself a legal document, an Act of the Imperial Parliament. The problem is not to be resolved by resort to slogans or to political catch-cries or to vague and imprecise expressions of political philosophy."

He later on went to say:

> "The only true guide and the only course which can produce stability in constitutional law is to read the language or the Constitution itself, no doubt generously and not pedantically but as a whole and to find its meaning by legal reasoning."

[31] In another Australian High Court decision, *Theophanius v The Herald and Weekly Times*[7], Brennan J said at paragraph [6] (excluding footnotes):

> "The Constitution speaks continually to the present and it operates in and upon contemporary conditions. But in the interpretation of the Constitution, judicial policy provides no leeway for judgment as it does when the Court is developing the common law. Nor can the Court find implications in the text by referring to extrinsic sources."

Article 44(1A) – The Applicants submissions

[32] It is common ground that the purpose of Article 44(1A) is an attempt to increase the representation of women in the Legislative Assembly.

[33] It was submitted that the words of the Article are plain, clear and unambiguous. Counsel submitted that the Article clearly defined the 10% of women in the 51 seats of the Legislative Assembly

[6] *Attorney General; Ex rel McKinlay v The Commonwealth* (1975) 135 CLR 1 at 17.
[7] *Theophanius v The Herald and Weekly Times* (1994) 182 CLR 104.

as being 5. The word presently does not refer to the date of the amendment (which was 2013) which added Article 44(1A). It is contended the Acts Interpretation Act makes clear an Act is considered as speaking from time to time and is a matter as expressed in the present tense; the Act applies to the circumstances as they arise. The Constitution which is a speaking and living document could not be interpreted to refer only to the date it was enacted.

[34] It was also contended that since 10% of 51 is 5.1 and there can be no 0.1 person, the rounding to 5 was practical. If Parliament had intended to increase 5 women members to 6 when it increased the membership from 49 to 51 it would have done so. The Explanatory Memorandum and the Parliamentary Hansard, counsel submitted, supports her contention.

[35] It was also submitted that the discussions recorded in Hansards of the Constitutional Amendment Bill 2012 which introduced Article 44(1A) indicated that a set number of women rather than percentage was the common factor in the discussion.

Submissions by the First Respondent

[36] Madam Attorney General for the First Respondent submitted that the words of Article 44(1A) are not plain and not clear. The Article articulates a formula to calculate women members in the Legislative Assembly which is 10% of the seats in the Assembly. It is stated at paragraph [20] of the submissions:

> "In 2013, at that particular point in time when the Constitutional Amendment was made the additional words "for the avoidance of doubt, is presently 5…" were added, for clarity since 10% of 49 is 4.9. The fix number was included to ensure there was no doubt as to the number of women that must sit in Parliament following the 2016 General Election. However, it is submitted that the intention of Parliament would be contradicted if such a fix number is to continue to be taken as the maximum number or limit of women members in Parliament."

[37] The Explanatory Memorandum and Parliamentary discussions of the 2013 Amendment Bill recorded in the Hansard, it was submitted confirmed the intention of Parliament so that 5 women was identified to ensure compliance with the Constitutional requirement of 10% minimum in 2013 with 49 members, but the same cannot be said for a 51 member Legislative Assembly.

[38] The Court was also invited to consider the Legislative history of amendments of Article 44. The five amendments from 1960 to 2019 it was submitted recorded the reality of the overall number of members of the Legislative Assembly has changed and will continue to change. The reality will mean that the number of women representatives will also change proportionally to the overall number of Members of Parliament.

Submissions by the Second Respondent

[39] Mr. Leung-Wai for the Second Respondent contended that Article 44(1A) provides in unambiguous terms a formula of a minimum of 10% for the members; not nearly 10%; not almost 10% nor round – up to 10%; and applying this formula to the 51 member Assembly justifies 6 women membership not 5. Six women is 11.8% of 51 whilst 5 women amounts to 9.8%.

[40] The words "presently 5" it was submitted refers to the 2013 amendment which introduced Article 44(1A) so that the number 5 is an example of how the formula applied in 2013, but not how it is to apply at all times. He contended at paragraph [28] of his submissions:

> "…if 'presently' is taken to mean 'at the time of the introduction of that clause' all words in the Article are able to be given effect and there is no inconsistency. The phrase 'which for the avoidance of doubt is presently 5' demonstrated the application of the formula at the time."

[41] It was submitted that extrinsic materials such as the Explanatory Memorandum of the Bill, the Parliamentary Committee's report and the second reading speech made to Parliament during the passage of the Bill as recorded in the Hansard support the conclusion. At paragraph [31] of the written submissions it is stated:

> "The Article 44(1A) achieves its purpose by enshrining a baseline proportion (10%) below which the number of women cannot fall, and prescribing from this baseline is to be achieved if it is not achieved by the ordinary election of members under clause 1."

[42] In respect of the 2019 amendment which increased the number of seats from 49 to 51 it was contended that the 2019 amendment did not alter the interpretation of Article 44(1A) which mandated for a minimum of 10% women in Parliament. The reference to 5 women was an example to avoid doubt at the time of the 2013 amendments and does not apply to the 51 members introduced by the 2019

amendment. The second reading speech to Parliament during the passage of the Bill, it was submitted, supports counsel's contention.

Discussion of Article 44(1A)

Tuatagaloa J and Vaai J

[43] The Constitution speaks of Members of the Legislative Assembly as men and women members who were duly elected by their Constituents to be their voice and representatives in the Assembly. Counsel for the Second Respondent who was the Attorney General at the time the 2013 Constitution Amendment was enacted told the Court that Samoa is the only country to enact Article 44(1A) to promote the increase of women representation in the Legislative Assembly in a context where ordinary elections had consistently resulted in the low representation of women.

[44] In enacting Article 44(1A), Madam Attorney General in the introductory part of her written submissions said that this measure is in line and meets Samoa's obligations under the Convention on the Elimination of All Forms of Discrimination Against Women ("CEDAW") which Samoa ratified in 1992.

[45] The Court notes that Articles 44(1) and 44(1A) are both subject to the provisions of Article 44. It also notes that if the elected women members do not amount to 10%, only the women who were candidates are entitled to be appointed to become additional members as provided under Article 44(1B) to 44(1G).

[46] The Court also notes that if the 10% is not achieved and there are no or there are insufficient women candidates to make up 10%, then the 10% minimum prescribed in Article 44(1A) cannot be achieved. This is due to the wording of Article 44(1B) which uses the words "if any" twice. The clause reads:

> **(1B)** If, following any general election:
> (a) all members elected under clause (1) are men, the prescribed number of women candidates (if any) with the highest number of votes shall become additional Members; or
> (b) less than the prescribed number of women candidates are elected under clause (1), the remaining prescribed number of women candidates (if any) with the highest number of votes shall become additional Members for the purposes of clause (1A).

[47] Of particular significance is the fact that Article 44(1A) prescribes the minimum number of women members to be 10% but does not provide a formula or a method to resolve a doubt or uncertainty when the 10% does not amount to a round figure bearing in mind it is dealing with the percentage of human beings. In the 2013 Amendment, Parliament resolved the uncertainty caused by the 4.9 figure as the 10% of the 49 members by inserting the words: "which for the avoidance of doubt is presently 5." This phrase was retained and was not removed when in 2019 Article 44(1) was amended by increasing the membership from 49 to 51.

[48] The uncertainty was obviously acknowledged and recognised in 2013 and it was resolved by inserting the words: "which for the avoidance of doubt." It was obviously and undoubtedly considered in 2019 when membership was increased from 49 to 51.

[49] To adopt the formula of calculation of the 10% minimum of 51 advanced by the First and Second Respondents in our respectful view tantamounts to a pedantic interpretation, becoming excessively concerned with irrelevant details, in an attempt to justify the unlawful addition of the Second Respondent four days after the publication of election results and execution of Warrants of Appointment by the Head of State.

[50] If the membership of the Legislative Assembly is to be increased it could only be done by amending Article 44(1A); until that is done the present wording, effect and meaning of Article 44(1A) shall continue to the next General Election. The 10% minimum representation based on the 51 membership remains at 5 until Articles 44(1) and 44(1A) are amended.[8]

[51] The plain unambiguous meaning of the words in Article 44(1A) does not support the argument by the First Respondent that an increase in the number of seats in the Legislative Assembly will automatically result in the increase in minimum number of women representation. A further increase in membership from the current 51 to say 60 will not justify an automatic increase of the minimum number of women from 6 to 7 because 7 is not 10% of 60. The misconceived contention by the First Respondent was obviously grounded on the introductory speech and the second reading speech during the passage of the Bill in Parliament which used the words "automatic increase." Indeed, there was no automatic

[8] There is reference in Hansard 2012/2013 at the time of Government having turned their minds to the seats of Parliament increasing in the near future which it did in 2019 and yet there was no change to the words of Article 44(1A).

increase from 5 to 6 when the 2019 amendment increased the membership from 49 to 51. Five women members was retained by Article 44(1A) to remove any doubt.

Use of Extrinsic Material

[52] The authorities we have earlier referred to emphasised that respect must be paid to the language used. If the words in themselves are precise and unambiguous, then no more is necessary to expound those words in their natural and ordinary sense.

[53] Both the First and Second Respondents have relied extensively on the use of Parliamentary debates and materials as an aid to advance their interpretation of the Constitution. The authorities and the Acts Interpretation Act 2015 recognise the use of extrinsic materials but only after other options have been explored and exhausted. Excessive reliance on speeches during the passage of the Bill should be avoided particularly if they tend to compromise the principles of Constitutional interpretation.

[54] We note that the records of Hansard and the introductory speeches which introduced the Bills gave cogent aid to the interpretation. But we remind ourselves of the warning given by the Court of appeal in *Attorney General v Saipaia Olomalu*[9] that it would not be right to allow Parliamentary materials and debates to alter or change the clear meaning of the words in a Constitution as determined with due regard to their content.

[55] In any event the Parliamentary proceedings, particularly the ones relating to the introduction of the 2019 Amendment were used to confirm the interpretation already reached by the Court. Specifically, the materials gave the Court satisfaction that Article 44(1A) was considered and noted when the 2019 Amendment was introduced.

Invocation of Article 44(1A)

[56] We reject the contention by the Applicants that the First Respondent does not have the mandate to activate Article 44(1A). The First Respondent can activate Article 44(1A).

[9] *Attorney General v Saipaia Olomalu* [1980-1993] WSLR 41.

[57] Article 44(1B) specifically provides that the addition of women members to satisfy the 10% requirement is to take place following the election. If section 84 of the Electoral Act 2019 provides the same process for Article 44 (1A) when activated, then section 84 requires the First Respondent to "immediately" declare the results of the poll and report to the Head of State, after the ballot papers have been dealt with, following the General Election.

[58] We also reject the submission by the Applicants that Article 44(1A) should be activated after the election petitions and the resulting by-elections, if any, have been finally resolved. The submission contravenes the spirit of the Electoral Act, particularly in relation to the processes and events which follow the publication of the results of the election.

[59] If election petitions are filed to challenge the result of the General Election, time is of the essence in respect of the filing, service, publication and hearing of the petition. Section 115(8) specifically directs the Court to give priority for determination of election petitions over all matters before the Court which are not election petitions.

[60] We agree with counsels for the First and Second Respondents that Article 44(1A) should be activated after the final count of the ballot and before reporting to the Head of State. Section 84 of the Electoral Act referred to in paragraph [57] above cannot be complied with by the First Respondent unless he activates 44(1A) if it needs to be activated.

[61] We make the following observations:

(i) A formula or method of calculation of minimum 10% should be included either in Article 44(5) or in the Electoral Act. The inclusion of a formula or method of calculation would (in our view) resolve any doubt or uncertainty as to the number of women to come through Article 44(1A);

(ii) Some clarity as to the 'process' to be followed when Article 44(1A) is activated. There is no process provided in regards to a woman candidate appointed pursuant to Article 44(1A). Section 84 of the Electoral Act refers to successful candidates or elected candidates. Section 2 of the Electoral Act defines the word "election" means the election

of a Member in a general election or by-election to represent a constituency. The woman candidate coming in through Article 44(1A) is (in our view) not "elected";

(iii) We note with concern the passage of the 2013 Amendment and 2019 Amendment through Parliament as if an ordinary legislation were being amended. Articles of the Constitution are entrenched, a 2/3rd majority of the members including vacancies is required. That is because the Constitution was not made to serve a temporary and restricted purpose, but was framed and adopted as a permanent and comprehensive code of the law. We express the view that future amendments should be accorded a comprehensive process including full and extensive prior consultation. Such is what is needed and required when a Constitution is amended if it is to be sustainable in the long term.

Nelson J

[62] I have had the benefit of reading the joint judgment of my distinguished colleagues Vaai, J and Tuatagaloa, J. I concur with their conclusion that the appropriate person to activate Article 44(1A) is the First Respondent and that his doing so in the late evening of 20 April 2021 some four days after his official declaration of the General Election results was unconstitutional and that accordingly the Warrant of Election issued by the Head of State dated 20 April 2021 appointing the Second Respondent as a Member of Parliament pursuant to Article 44(1A) has no foundation or basis in law.

[63] However my reasons for so concluding are different and therefore the necessity for a separate judgment.

[64] The background, the various Strike out motions, arguments advanced and relevant law have been adequately canvassed by my learned colleagues. There is no doubt:

(i) as to the purpose of Article 44 (1A), viz to provide for a minimum number of seats to be occupied by women in Parliament and to allow for an automatic increase in that number as the total number of seats in Parliament grows. As clearly articulated by the Honourable Prime Minister when introducing the Constitutional Amendment in Parliament in 2012:

> "O le sini Autu o le Tulafono Tau Faaofi o le faatulagaina lea o se fuainumera aupito maualalo o Sui Usufono tamaitai o le Palemene……ua teuteuina ai le Mataupu 44 o le Faavae e faatulaga ai se fuainumera aupito i maualalo o sui tamaitai i totonu o le Palemene.
>
> O le fuaiupu (1A) ua fuafua e faatulaga ai le fuainumera aupito i maualalo o Sui Usufono tamaitai i le Palemene lea e 10% o Sui Usufono o le Fono Aoao Faitulafono e pei ona faamaoti mai i le mataupu 44(1). O le fuainumera aupito i maualalo o Sui Usufono tamaitai o le a toalima (5) i lalo o le aofaiga o i ai nei o Sui Usufono o le Palemene e 49. O le fuainumera aupito i maualalo o Sui Usufono tamaitai i totonu o le Palemene o le a faaopoopoina loa e aunoa ma se faatuai pe afai o le a faapena foi ona faaopoopoina le aofaiga atoa o Sui Usufono o le Palemene."

The English version:

> "The object of the Bill is to fix a minimum number of women Members of Parliament and amends Article 44 of the Constitution to fix a minimum number of women representatives in Parliament.
>
> The proposed clause (1A) sets out the minimum number of women representatives in Parliament, which is 10% of the Members of the Legislative Assembly specified in Article 44(1). The minimum number of women will be five (5) members under the current 49 Members of Parliament. The minimum number of women representatives in Parliament will automatically increase if the overall number of Members of Parliament is increased."

(ii) that the applicable principles of Constitutional interpretation as averted to by my learned friends laid down by the Privy Council in *Ministry of Home Affairs v Fisher*[10]and accepted by our Court of Appeal in the landmark case of *Attorney General v Olomalu*[11] and applied in subsequent cases such as *Mulitalo v Attorney General*[12] and *Jackson v Attorney General*[13] require that the Constitution be treated as a document "sui generis calling for principles of interpretation of its own suitable to its character" and that it calls for a generous interpretation avoiding what has been called 'the austerity of tabulated legalism.';

[10] *Ministry of Home Affairs v Fisher* (1980) AC 319.
[11] *Attorney General v Olomalu* [1980] WSCA 1.
[12] *Mulitalo v Attorney General* [2001] WSCA 8.
[13] *Jackson v Attorney General* [2009] WSSC 73.

(iii) that the special character of a Constitution is such that some of its provisions are –

> "Not described with the particularity that would be appropriate to an ordinary Act of Parliament nor are they expressed in words that bear precise meanings as terms of legal art. They are statements of principles of great breadth and generality, expressed in the kind of language more commonly associated with political manifestos or international conventions".

(iv) statements of "great breadth and generality" are a common feature of Constitutions and as observed by the Supreme Court of Canada:

> "The task of expounding a constitution is crucially different from that of construing a statute. A statute defines present rights and obligations. It is easily enacted and easily repealed. A constitution, by contrast, is drafted with an eye to the future. Its function is to provide a continuing framework for the legitimate exercise of governmental power and, when joined by a bill or charter of rights, for the unremitting protection of individual rights and liberties. Once enacted, its provisions cannot easily be repealed and amended. It must, therefore, be capable of growth and development over time to meet new social, political and historical realities often unimagined by its framers. *The judiciary is the guardian of the Constitution* (emphasis mine) and must in interpreting its provisions bear these conditions in mind: *Hunter v Southam Inc* (1985) 11 DLR (4th) 641 (SCC) at page 649 (Dickson, J.). (cited with approval in *De Klerk & Anor v Du Plessis & Others* Judgment of the Supreme Court of South Africa (Transvaal Provincial Division), 1994 (6) BCLR 124 (T) at 128; and *Khala v The Minister of Safety and Security* Judgment of the Supreme Court of South Africa (Witwatersrand Local Division), 1994 (2) BCLR 89 (W) at 92)."

(v) in the words of the Court of Appeal in *Pita v Attorney General*:[14]

> "A constitution states principles for an expanding future, not rules for the passing hour."

[65] Bearing these in mind I turn now to the essential questions posed by the Applicants.

[14] *Pita v Attorney General* [1995] WSCA 6.

Interpretation of Article 44(1A)

[66] The difficulty with the Applicants interpretation is two-fold: firstly it is in my humble view contrary to the express words of Article 44(1A)(a) which requires that the "minimum" representation be "10%" of the membership of the Legislative Assembly which is currently 51. Two simple mathematical calculations pertaining to Article 44(1A) are relevant. These yield two separate and distinct results: Firstly, 10% of 51 Members of Parliament is 5.1 and it is of course not possible to have a fraction of a person. The Applicants argue therefore it must be rounded-off to the nearest whole number which in this case is back down to "5". This is a standard mathematical approach and the Applicants argue it is consistent with Article 44(1A)(a) which provides at the end that "for the avoidance of doubt" the 10% minimum is " presently 5".

[67] This however overlooks the second and more important mathematical calculation required to be carried out in order to establish as a matter of fact whether "5" Members of Parliament is indeed 10% of the current 51 Members and thereby complies with Article 44(1A) minimum. In that regard the answer is "no" because 5 out of 51 is only 9.8%. Having 5 women Members of Parliament does not therefore meet the 10% minimum mandated by Article 44(1A)(a), emphasis being on the word "minimum". The view of the Electoral Commissioner is that only by increasing it from "5.1" to "6" can the 10% minimum therefore be met. Anything below that means a less than 10% representation.

[68] The Applicants view also overlooks two other critical aspects: firstly the reference to "5" was inserted to cater for a Parliament of 49 Members of Parliament, 10% of which was "4.9". That is why the use of the words "presently" and "for the avoidance of doubt". "Presently" must carry its ordinary and natural meaning and Article 44(1A)(a) was intended to apply specifically to the 2016 General Election: see section 1(3) of the Constitution Amendment Act 2013 which provides that Articles 44(1A) to (1G) are to commence "on polling day of the next General Election as appointed by the Head of State under Article 64 of the Constitution."

[69] Secondly and perhaps more significantly the Applicants view is contrary to the express purpose of Article 44(1A) viz to encourage and promote female representation in Parliament by fixing an appropriate minimum and to provide in the words of the Honourable Prime Minister for an "automatic increase" in that number as the overall number of Members of Parliament increases. To adopt the

Applicants interpretation would mean not until the overall number of Members reaches the 55-60 range would there then be an increase in women representation. That could not have been and in my view was not Parliaments intent when enacting Article 44(1A). Their intent must have been to trigger an increase sooner rather than later.

[70] I am therefore in agreement with the methodology employed by the First Respondent to calculate the minimum number of women Members of Parliament and in this respect I differ from my learned colleagues.

Activation of Article 44(1A)

[71] It seems plain enough that there is no provision Constitutional or otherwise governing the point in time when the Electoral Commissioner must consider whether Article 44(1A) needs to be activated and if so, how. The Applicants note quite correctly that Article 44(1A) makes no mention of the Electoral Commissioner, the Head of State or any warrant to be signed by the Head of State.

[72] This is perhaps not surprising given that Constitutional provisions are generally aspirational containing "principles of great breadth and generality" with the more prescriptive function of detail being left to be determined by Act of Parliament. Thus Article 44(3) provides that "the mode of electing members of the Legislative Assembly, the terms and conditions of their membership, etc……. *shall be prescribed by law*" (again my emphasis).

[73] There is obviously a gap in this regard as the Electoral Act 2019, for all intents and purposes the relevant law, in section 84 addresses only the issue of the Electoral Commissioners official declaration of the results of the poll and the Head of State in reliance thereon by warrant declaring the successful candidates to be elected as Members of Parliament. No reference of any kind to a declaration by either party of the election of an Additional Member pursuant to Articles 44(1A) to 44(1G) or as to how this is to be implemented.

[74] The Electoral Commissioners view seems to be that he is authorised to activate Article 44(1A) at any time considered appropriate by him and that the Head of State has the power to declare or otherwise appoint such Additional Member by warrant based on said recommendation. He deposes that for the

2016 General Election this was done when all the other successful candidates were declared but for the 2021 General Election this did not occur to him until some four days later.

[75] I have no reason to doubt his explanation. It seems to me the Commissioner and his staff have been trying to undertake their mandate and preserve their independence and integrity as best they can under extremely challenging circumstances. But it is unfortunate that he undertook such a significant and potentially contentious act at a point in time when the seats held by the two main parties that competed in the 2021 General Election were in equilibrium awaiting an announcement the following day of which party the sole elected Independent candidate would favour. This only reinforces the need to have decisions of this nature by a statutorily constituted office made on a proper and clearly defined statutory basis free from the furnace of partisan politics and the taint of political bias.

[76] Any statutory framework would also need to take into consideration the time when such activation should occur. There is a case to be made that if it is invoked too early following the election process and before any electoral challenges are determined, there may be no need for an Additional Member to make up the minimum 10% of women composition of the Legislative Assembly required by Article 44(1A).

[77] It would indeed be a curious anomaly as a result of electoral and other challenges the Assembly significantly or even marginally comprised more than 10% women but an Additional Member had already been appointed. But perhaps it can be argued that is in accord with the intent and purpose of Parliament in enacting Article 44(1A).

[78] Whatever the case may be, these are matters best left to the Legislature to consider and resolve for that is their province, not ours. What is clear is these gaps and issues require to be addressed by Parliament and the court should take care not to usurp that function. For the present I am of the view that no power or authority exists under the law sanctioning the actions taken by either the Electoral Commissioner or the Head of State for no-one sits above the law of the land.

[79] On the issue of when Article 44(1A) should be activated, I am inclined towards the view expressed by my colleagues, viz that Article 44(1B) requires the exercise be undertaken "following any General Election" and that it would be contrary to the spirit and purpose of the electoral laws to delay

such consideration until all electoral challenges and possible by-elections are finally determined. But as noted above this is an area that requires further and careful scrutiny by our lawmakers.

Conclusion

[80] We unanimously make the following declarations.

1) Article 44(1A) should be activated by the Electoral Commissioner.
2) Article 44(1A) should be activated after the final count of the ballot papers and before reporting to the Head of State.
3) The activation by the Electoral Commissioner of Article 44(1A) on the 20th April 2021 was unconstitutional and that the Warrant of Election issued by the Head of State appointing the Second Respondent as Member of Parliament is void.

[81] Giving due weight to the importance of the Constitutional issues raised, the Court orders the following costs against the First Respondent.

1) Costs of $6000 for both Applicants; and
2) Costs of $3000 for the Second Respondent.

[82] The costs to be paid within 14 days.

Justice Tuatagaloa

Justice Nelson

Justice Vaai

THE SEAL OF THE SUPREME COURT SAMOA