**IN THE SUPREME COURT OF SAMOA**
**HELD AT MULINUU** **CP No 125/22**

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| **IN THE MATTER OF** | Articles 2, 4, 9(1), 43, 44, 45, 46, 47, 53, 62 and 70 of the Constitution, the Remuneration Tribunal Act 2003, the Legislative Assembly Powers and Privileges Ordinance 1960 and the Standing Orders of the Parliament of Samoa UNDER Rules 188, 192 and 196 of the Supreme Court (Civil Procedure) Rules 1980, the Declaratory Judgments Act 1988 and the Government Proceedings Act 1964 |
| **BETWEEN** | HON. TUILAEPA LUPESOLIAI DR SAILELE MALIELEGAOI MP<br>**First Applicant** |
| **AND** | HON. LEALAILEPULE RIMONI AIAFI MP<br>**Second Applicant** |
| **AND** | THE SPEAKER OF THE LEGISLATIVE ASSEMBLY<br>**First Respondent** |
| **AND** | ATTORNEY GENERAL<br>**Second Respondent** |

Counsel: R. E. Harrison K.C., S. Ainuu, and M. Lemisio for First and Second Applicants
T. B. Heather-Latu and B. Keith for First Respondent
R. M. Lithgow K.C., D. J. Fong, V. Leilua for Second Respondent

Hearing: 24 April 2023
Judgment: 4 July 2023

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**RESERVED JUDGMENT OF THE COURT**

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## INTRODUCTION

1. Tuilaepa Lupesoliai Sailele Malielegaoi ("**the First Applicant**") and Lealailepule Rimoni Aiafi ("**the Second Applicant**") are the leader and secretary respectively of the Human Rights Protection Party ("**the HRPP**"). Following the General Election held on the 9th April 2021, the First Applicant was again duly elected as Member of Parliament ("**MP**") for the electoral constituency of Lepā, which he has represented for over 30 years. Throughout many of those years, the First Applicant had been the Prime Minister of Samoa. However,

the General Election resulted in a change of government with the First Applicant and his party no longer occupying the Treasury benches but the Legislative Assembly's Opposition bench. The First Applicant was elected by his party as the Leader of the Opposition. The Second Applicant was duly elected as MP for the electoral constituency of Faleata No. 3, a seat that he has held for many years.

2. On the 24th May 2022, the Legislative Assembly of Samoa ("**the Assembly**") found the Applicants' committed contempt of Parliament and suspended them for an unspecified period, "*se'i iai se aso*". On the 30th August 2022, the Supreme Court held that the suspension of the Applicants was void on the grounds that the decision to suspend the Applicants breached their fundamental right to be heard guaranteed by article 9(1) of the Constitution of the Independent State of Samoa ("**the Constitution**").[1]

3. Following the Supreme Court's voiding of the Applicants' initial suspension, the Speaker of the Assembly, the Hon. Papalii Oloipola Masipau ("**the First Respondent**") directed the Privileges and Ethics Committee of the Assembly ("**the PEC**") to reconvene "*to take necessary steps in accordance with Article 9(1) of the Constitution so as to determine a penalty for the alleged members*."[2] Following the tabling of the PEC's Second Report and Recommendations (undated), the Assembly on 18th October 2022 suspended the Applicants for 24 months without remuneration and allowances ("**the second suspension**").

4. In this second proceeding, the Applicants pursue four specific claims challenging (i) the Assembly's contempt of Parliament decision made on 24th May 2022 ("**Liability**"); (ii) the second suspension from Parliament for 24 months; (iii) the denial of their remuneration and allowances made on 18th October 2022 ("**Penalty**"); and (iv) amendments made to the Standing Orders by the Assembly by the insertion of Standing Order 187(7) and 187(8).

**BACKGROUND**

5. Much of the background is undisputed and set out also in *Malielegaoi v Speaker of the Legislative Assembly* [2022] WSSC 35 (30 August 2022) ("**TM1**") paragraphs 6 - 30. On the 22nd March 2022, the Supreme Court in *Fa'atuatua i le Atua ua tasi (FAST) Incorp v*

[1] *Tuilaepa Malielegaoi and anor v Speaker of the Legislative Assembly* [2022] WSSC 35.
[2] Privilege and Ethics Committee Secondary Report and Recommendations (undated), p.2.

*Malielegaoi* [2022] WSSC 7 ("**the Contempt Decision**") found the Applicants guilty of contempt of Court. We do not propose to repeat in full the contemptuous statements attributed to the Applicants, which are set out in the Contempt Decision and referred to in TM1. However, relevant to these proceedings are various statements referred to by the Court attributed to the Applicants (referred to also in TM1):

> "We set out some of the most egregiously denigrating and insulting extracts from these statements:
> (a) Public statement made on 28 July by First Respondent:
> "But the power of FAST and the Judiciary have been combined. So we only come in and go under... come in and go under as the decisions favour that side."
> (b) Statement of First Respondent in panel discussion on 'Good Morning Samoa' on 30 July 2021:
> "Is this what Fiame and La'auli want? The Chief Justice comes and becomes King of Samoa? These are very shameful."
> (c) Statements in panel interview broadcast on TV1 and other media on 30 July 2021:
> "Major things have occurred. Act of treason against the Head of State. I can also say acts of treason against Parliament."
> ...
> "It can be said that the leadership of FAST and the Judiciary are colluding. So where is justice? Justice is achieved through your being independent. You don't favour any side. And if you know you are closely related to someone, you resign."
> (d) Public statements in a live-streamed broadcast from Petesa on 1 August 2021:
> "What has happened is that our government is facing an act of treason from the judiciary."
> ...
> "What's happening now? The Judiciary has shown pride. It has gone reckless. It has jumped up."
> ...
> "It must be clear that is treason."
> ...
> "Where they used a swearing in already ruled unlawful and unconstitutional and of no effect by the Supreme Court. That is what is known as a 'coup d'etat'. But this coup is usually carried out by the military, countries with armies such as Fiji. But this coup is carried out by the judiciary."
> (e) Public statements in a live-streamed programme on 5 August 2021:
> "I advised the Judiciary, this guy who is the Chief Justice, and especially these two. You can't escape to another planet."
> ...
> "Any Judge who does something like that, is a Judge who is tricky and does bad tricks."
> (f) Public statement on 27 August on a large billboard:
> "... there is no more independence in the Judiciary ..."

6. After receipt of the Contempt Decision, the Deputy Prime Minister Hon. Tuala Tevaga Iosefo Ponifasio ("**the Deputy Prime Minister**") lodged a complaint with the First Respondent, relying on the findings in the Contempt Decision.

7. The Applicants were given a copy of the complaint; they responded with a joint statement (two pages), which was then added to in a three-page document entitled "Detailed response to complaint by Hon. Deputy Prime Minister." The Applicants detailed response relied on three grounds:
    a) The Supreme Court had already ruled on the subject matter of the complaint.
    b) The complaint was contrary to the terms of the Harmony Agreement between FAST and HRPP; and
    c) The complaints were not matters of privilege and therefore did not attract Standing Orders 178, 185, and 186.

9. The First Respondent considered the complaint raised a matter of privilege and referred the matter to the PEC.

10. PEC membership comprised both government and opposition MPs, with government MPs forming the majority; its terms of reference was to consider whether the matters complained of breached any privilege; if an offence had been committed; whether there had been a breach of the Legislative Assembly Powers and Privileges Ordinance 1960 ("the Ordinance"); punishment; and to make appropriate recommendations on the matter.

*The PEC 24th May 2022 inquiry recommendations to the Assembly*

11. The PEC held two inquiries, as we are about to discuss. In the first inquiry the PEC interviewed both Applicants as to the issue of liability. However, neither of the Applicants were given the opportunity to speak to the proposed penalty, in breach of their fundamental rights under the Article 9 of the Constitution of the Independent State of Samoa **("the Constitution"**). This was fatal to the PEC recommendation to the Assembly as to penalty. Accordingly, the Supreme Court in TM1 voided the Applicants suspensions.

12. While the Supreme Court on the 30th August 2022 voided the first decision to suspend the Applicants, the Court noted that "[i]t may be that the Assembly may wish to revisit the penalty aspect, consistently with the Constitution, but that is entirely a matter for that body."[3]

[3] Above n.1 at [112].

*The PEC 18 October 2022 inquiry recommendation as to penalty*

13. The second PEC inquiry focussed on penalty.

14. This inquiry involved interviewing both Applicants and the Deputy Prime Minister. The PEC made the following recommendations that were adopted by the Assembly on 18th October 2022:[4]

> a) To **suspend** the Member of Parliament for Lepā and Member of Parliament for Faleata No. 3 from the service of the Assembly for the period of **24 months**.
> b) That **no salary or allowance** is payable to these members as provided for in Standing Order 187(5).
> c) To give these Members of Parliament the chance to voice their opinions on the penalty as provided for in the Constitution.
> d) The Member who is suspended from the service of Parliament must not do the following:
> e) Enter the Chamber and Parliamentary precincts;
>  i. Serve on a Parliamentary Committee; and
>  ii. Lodge a question or notice of motion from Parliament.
>
> (emphasis added)

**Jurisdiction**

15. The First Respondent contends that three of the Applicants' claims are barred by issue estoppel and / or abuse of process being: (i) the contempt of Parliament decision; (ii) their 24 months suspension from Parliament; and (iii) the denial of their remuneration and allowances.[5] The First Respondent pleads that these claims were raised or required to be raised in TM1.[6]

16. Mr Lithgow raises two broad questions. The first is the jurisdiction of the Court under the Constitution and the principles of non-intervention, following in particular, *Ah Chong v Legislative Assembly* [1996] WSCA 2. The second, in general terms is the application of the doctrine of res judicata and abuse of process applying to the Applicants claims. We begin, in reverse order, first by discussing the doctrine of estoppel by *rem judicata*, or "a matter judged" and the related issue of abuse of process. Second, we turn to the separation of powers and the principles of non-intervention.

[4] We note two of the PEC members, from the opposition, declined to sign the PEC's recommendations.
[5] Statement of Defence for the First Defendant, 4th March 2023 at para [38].
[6] Ibid.

*Res Judicata and Abuse of Process*

17. For over 150 years, the relevant authority oft cited for the principle of finality in litigation is the judgement of Wigram V.-C. in *Henderson v Henderson* (1843) 3 Hare 100, 115: -

> "… when a given matter becomes the subject of litigation in, and of adjudication by, a court of competent jurisdiction, the Court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward as part of the subject in contest, but which was not brought forward… The plea of res judicata applies, except in special cases … to every point which properly belonged to the subject of litigation, and which the parties exercising reasonable diligence, might have brought forward at the time."

18. In terms of abuse of process, the English courts have sounded their caution to this principle being applied in a dogmatic way. Delivering the leading speech in *Johnson v Gore Wood & Co.* [2001] 1 All ER 481, Lord Bingham of Cornhill, stated at 499:

> "…But Henderson v. Henderson abuse of process, as now understood, although separate and distinct from cause of action estoppel and issue estoppel, has much in common with them. The underlying public interest is the same: that there should be finality in litigation and that a party should not be twice vexed in the same matter. This public interest is reinforced by the current emphasis on efficiency and economy in the conduct of litigation, in the interests of the parties and the public as a whole. The bringing of a claim or the raising of a defence in later proceedings may, without more, amount to abuse if the court is satisfied (the onus being on the party alleging abuse) that the claim or defence should have been raised in the earlier proceedings if it was to be raised at all. I would not accept that it is necessary, before abuse may be found, to identify any additional element such as a collateral attack on a previous decision or some dishonesty, but where those elements are present the later proceedings will be much more obviously abusive, and there will rarely be a finding of abuse unless the later proceeding involves what the court regards as unjust harassment of a party. **It is, however wrong to hold that because a matter could have been raised in early proceedings it should have been, so as to render the raising of it in later proceedings necessarily abusive. That is to adopt too dogmatic an approach to what should in my opinion be a broad, merits-based judgment which takes account of the public and private interests involved and also takes account of all the facts of the case, focusing attention on the crucial question whether, in all the circumstances, a party is misusing or abusing the process of the court by seeking to raise before it the issue which could have been raised before.** As one cannot comprehensively list all possible forms of abuse, so one cannot formulate any hard and fast rule to determine whether, on given facts, abuse is to be found or not. Thus while I would accept that lack of funds would not ordinarily excuse a failure to raise in earlier proceedings an issue which could and should have been raised then, I would not regard as necessarily irrelevant, particularly if it appears that the lack of funds has been caused by the party against whom it is sought to claim. While the result may often be the same, it is in my view preferable to ask whether in all the circumstances a party's conduct is an abuse than to ask whether the conduct is an abuse and then, if it is, to ask whether the abuse is excused or justified by special

circumstances. Properly applied, and whatever the legitimacy of its descent, the rule has in my view a valuable part to play in protecting the interests of justice."

(added emphasis)

19. Lord Millett in *Johnson v Gore Wood* at 525 went on to conclude:

> *"*While the exact relationship between the principle expounded by Sir James Wigram and the defences of res judicata and cause of action and issue estoppel may be obscure, I am inclined to regard it as primarily an ancillary and salutary principle necessary to protect the integrity of those defences and prevent them from being deliberately or inadvertently circumvented."

20. In *Fiso v Reid* [2002] WSCA 2 (2 December 2002), the Samoa Court of Appeal in which Lord Cooke of Thorndon was at the time President adopted the key parts of Lord Bingham and Lord Millett's speech cited above.[7] The Court of Appeal also referred with approval to "a broad merits based approach", which it applied to the proceedings before it and which took into consideration issues of abuse of process as expressed in *Johnson v Gore Wood*. Further, as Mr Harrison submitted in this case, the Court of Appeal recognised and contemplated the application of the special circumstances exception to the rule in *Henderson v Henderson*.

21. Relevant also to these proceedings on the issue of abuse of process is whether matters pleaded here could and should have been brought in the original proceedings determined in TM1 as contended by the First Respondent. Lord Bingham in *Johnson v Gore Wood* stated:

> "Thus the abuse in question need not involve the reopening of a matter already decided in proceedings between the same parties, as where a party is estopped in law from seeking to re-litigate a cause of action or an issue already decided in earlier proceedings, but (as Somervell L.J. put it in *Greenhalgh v. Mallard* [1947] 2 All E.R. 255 at 257) may cover
>
> > "issues or facts which are so clearly part of the subject-matter of the litigation and so clearly could have been raised that it would be an abuse of the process of the court to allow a new proceeding to be started in respect of them."
>
> …
>
> In *Brisbane City Council v. Attorney-General for Queensland*, above, the Privy Council expressly endorsed Somervell L.J.'s reference to abuse of process and observed, at page 425:

[7] His Honour Cooke P (as he was in the Samoa Court of Appeal) together with two other distinguished jurists Sir Maurice Casey and Sir Gordon Bisson presided in ***Fiso v Reid***. Lord Cooke of Thorndon was also one of the five distinguished jurists who delivered an Opinion in ***Johnson***, and his Lordship agreed with Lord Bingham on the subject of abuse of process.

> "This is the true basis of the doctrine and it ought only to be applied when the facts are such as to amount to an abuse: otherwise there is a danger of a party being shut out from bringing forward a genuine subject of litigation."'

22. The New Zealand Court of Appeal in *Craig v Stringer* [2020] NZCA 260, at [19] noted the explanation of the juridical difference between the doctrine of res judicata and the Henderson v Henderson principle given by Lord Sumption in *Virgin Atlantic Airways Ltd v Zodiac Seats UK Ltd* [2013] UKSC 46:

> "Res judicata is a rule of substantive law, while abuse of process is a concept which informs the exercise of the court's procedural powers. In my view, they are distinct although overlapping legal principles with the common underlying purpose of limiting abusive and duplicative litigation. That purpose makes it necessary to qualify the absolute character of both cause of action estoppel and issue estoppel where the **conduct is not abusive**."
> (emphasis added)

23. As the New Zealand Court of Appeal in Craig v Stringer correctly observe – the starting point is that citizens are entitled to have access to the courts to resolve their differences and that this is fundamental to the preservation of the rule of law. In the circumstances of the issues before their Honours the Court observed:

> "[15] However, consistent with this principle of preserving access to the courts for the resolution of genuine disputes, access is properly denied where the litigant seeks to misuse the court's processes for an improper purpose such as to vex, harass or embarrass the other party rather than for the genuine purpose of seeking to vindicate legal rights."

24. We should also note our regard to the duty the court has to prevent its processes from being abused – as explained by Lord Diplock in *Hunter v Chief Constable of the West Midlands Police* [1982] AC 529 (HL) at 536, as cited in Craig v Stringer at para [15]:

> "[Abuse of process] concerns the inherent power which any court of justice must possess to prevent misuse of its procedure in a way which, although not inconsistent with the literal application of its procedural rules, would nevertheless be manifestly unfair to a party to litigation before it, or would otherwise bring the administration of justice into disrepute among right-thinking people. The circumstances in which abuse of process can arise are very varied;...It would, in my view, be most unwise if this House were to use this occasion to say anything that might be taken as limiting to fixed categories the kinds of circumstances in which the court has a duty (I disavow the word discretion) to exercise this salutary power."

*Principles of Non-Intervention and the Separation of Powers*

25. The second issue concerns the rights and privileges of Parliament, and the doctrine of separation of powers. The Court of Appeal in *Ah Chong v Legislative Assembly of Samoa* [1996] WSCA 2 referred to the principles of non-intervention and held:

> "There is a well-settled principle that what is said or done within the walls of a legislative assembly cannot be questioned in the Courts. It is recognised that the respective constitutional roles of the Courts and Parliament normally require the Courts to refrain from intervening in Parliamentary proceedings. Conflicts between the judicial and legislative organs of the State are to be avoided as far as possible. Generally speaking, a body such as the Legislative Assembly of Western Samoa is left free to regulate and determine its own internal procedure from time to time.
>
> This principle is accepted in all comparable jurisdictions....
>
> **Of course, like all principles this one has its limits and they are not always easily discernible. One limit must be that a written constitution such as that of Western Samoa may place upon the Courts some duty of scrutinising Parliamentary proceedings for alleged breaches of constitutional requirements.** Thus, while normally it is for a legislative assembly to determine the effect of its own orders and to depart from them if the Assembly sees fit, a Constitution may displace that presumption by making compliance with the standing orders a condition of the validity of the legislation or, no doubt, of the validity of other steps taken by the assembly. But we agree with McLelland J. in Namoi Shire Council v. Attorney-General for New South Wales [1980] 2 N.S.W.L.R. 639, 645, that the Court would lean against such an interpretation, an approach also to be seen as suggested by the Niue Court of Appeal in the judgment already cited. In the present case Sapolu C.J. would have required 'irresistible clarity'. Possibly, in our respectful opinion, that puts the test a little high, but certainly any real ambiguity would be resolved in favour of non-intervention."
>
> (emphasis added)

26. In TM1, the full bench of the Supreme Court examined Parliamentary privilege and the principle of non-intervention and added:

> "49. Respectfully, it appears to us the principle of non-intervention and the rights and privileges of Parliament are two sides of the same coin, concerned with the separation of powers. There is in fact one significant difference - Parliamentary Privilege is absolute; as noted above in the passage from the learned authors in Erskin May, which draws on Blackstone in *Commentaries on the Laws of England*, 17th ed. (1830), vol 1, p.165, referred to by Sapolu CJ in the *Ah Chong* (SC):
>
> > 'the whole of the law and custom of Parliament has its original from this one maxim, that whatever matter arises concerning either House of Parliament, ought to be exercised, discussed, and adjudged in that House to which it relates, and not elsewhere.'
>
> 50. However, the absolutism does not appear to apply in Samoa. The Court of Appeal in *Ah Chong* held that the Constitution of Samoa imposes a duty on the Court to scrutinize Parliamentary proceedings for alleged breaches of constitutional requirements. A similar approach appears to be developing in England, where the United Kingdom's Supreme Court

in *R (Miller) v The Prime Minister and others*, considered whether the Courts could look into the lawfulness of advice which had been given by the Prime Minister to Her Majesty the Queen to prorogue Parliament. The Court held:

> 39. Although the United Kingdom does not have a single document entitled "The Constitution", it nevertheless possesses a Constitution, established over the course of our history by common law, statutes, conventions and practice. Since it has not been codified, it has developed pragmatically, and remains sufficiently flexible to be capable of further development. Nevertheless, it includes numerous principles of law, which are enforceable by the courts in the same way as other legal principles. In giving them effect, the courts have the responsibility of upholding the values and principles of our constitution and making them effective. **It is their particular responsibility to determine the legal limits of the powers conferred on each branch of government, and to decide whether any exercise of power has transgressed those limits.** The courts cannot shirk that responsibility merely on the ground that the question raised is political in tone or context."
>
> (emphasis added)

25. We respectfully acknowledge the general principle that where there is an alleged breach of Standing Orders – the Court has generally declined to intervene – the remedy for a Parliamentary wrong, if one has been committed, must be sought from Parliament.[8] We will discuss the application of this principle below, in the context of the nature and the constitutional context of the penalty decision.

**Res Judicata and Abuse of Process**

27. The First Respondent pleads the contempt of Parliament decision, the Applicants suspensions for 24 months and the denial of the Applicants remuneration and allowances is barred on the basis it is res judicata (issue estoppel) and /or an abuse of process. In the First Respondent's written submissions however, the First Respondent recognises that the Applicants second, third and fourth claims are newly before the Court but that the first claim (liability) takes issue with questions of law and particular findings already determined by the Supreme Court in TM1.[9]

28. Dealing first with the second and third claims brought by the Applicants; these are claims newly before the Court because the second suspension ceasing of payment of remuneration

[8] p. 743, **No examination of internal workings,** McGee, Parliamentary Practice in NZ.

[9] Submissions for the First Respondent, 20 April 2023 at para [21].

and allowances was made on the 18th October 2022, after TM1 was delivered on the 30th August 2022; they were therefore not determined in TM1. Accordingly, to now litigate the second suspension and cessation of the payment of remuneration and allowances is not barred res judicata nor does it constitute an abuse of process.

29. The more difficult question is whether the challenge to the Contempt of Parliament finding is barred res judicata or constitute an abuse of process. To determine this question, it is necessary to refer to the pleadings and to what was decided in ***TM1***. We will then analyse what is raised in this second proceeding and discuss whether the second proceeding may be brought.

**The pleadings in *TM1***

30. Relevant to the first claim in the present proceeding, the Applicants pleaded in ***TM1***:[10]

> "1. [The Court to make] Declaratory orders that the decision of the Speaker and the Legislative Assembly issued on 24 May 2022 to suspend indefinitely the Applicants as Members of the Parliament:
>
> i. is illegal and unlawful as being contrary to the Constitution and laws of Samoa; or
> ii. be declared void or invalid.
>
> AND/OR ALTERNATIVELY…
>
> Upon the grounds:
>
> …
>
> (C) The Applicants did not breach any privilege or ethics and nor were they in contempt of Parliament;
>
> (D) The Speaker erred in law when:
>
> i. he referred the complaint of breach of privilege against the Applicants to the Privileges and Ethics Committee when such complaint lacked legal basis (illegality);
>
> ii. …
>
> (E) The privileges and Ethics Committee acted illegally due to the following factors:
>
> i. …
>
> ii. The complaint of breach of privilege lacked legal basis so ought to have been dismissed;
>
> iii. The complaint was a complaint for breach of privilege but was wrongly treated as breach of ethics and contempt of Parliament;

[10] Amended Notice of Motion for Declaratory Orders and/or Coercive Orders, 24th June 2022; *Tuilaepa Malielegaoi and anor v Speaker of the Legislative Assembly* [2022] WSSC 35 at [31] and [32].

iv. The Committee erroneously recommended to Parliament penalties that applied to ethics and contempt of Parliament;

v. The Committee erroneously recommended to Parliament penalties that applied to contempt of Parliament when the complaint was for breach of privilege.

(F) The Applicants are being deprived from participating and representing their electoral constituencies when Parliament convenes, particularly during this juncture where the budget is to be discussed and debated;

**What was decided?**

31. Of relevance to the issues in this matter, we note the TM1 pleadings demonstrate the Applicants were alert to and pleaded the following issues:
    a) They challenged the finding of breach of Parliamentary privilege;
    b) They challenged the finding of contempt of Parliament;
    c) They sought remedy of a declaration that the findings were contrary to the Constitution and the laws of Samoa.

32. However, it appears they did not contest the finding of contempt of Parliament.[11] As the Court in TM1 found, *"the contempt of Parliament, was not itself directly challenged"* and on that basis, there was no reason *"to consider much less disturb that finding."*[12] Further, as this finding makes clear, the Court in TM1 did not determine whether the finding of contempt of Parliament was lawful. In our respectful view, the doctrine of res judicata in terms of cause of action estoppel does not apply because the Court did not determine the issue. Similarly, we do not view issue estoppel applying to these proceedings as the Court in TM1 did not consider and determine the *issue* of the legality of the determination by Parliament that the Applicants had been in contempt of Parliament either on the basis of inconsistency with the Constitution or other legal basis.

33. The question however remains, in terms of a related principle; whether the present claim challenging liability, *should and ought* to have been raised in TM1? As we understand the nature of the pleadings, the Applicants were clearly alert to and disputed the determination by Parliament that they were in contempt of Parliament. There is an express pleading to that effect, as discussed above. In *Henderson v Henderson* (supra), it was recognized that parties

[11] This is acknowledged by the Applicants, see: Outline of Submissions of Counsel for Applicants, at [43].
[12] *Tuilaepa Malielegaoi and anor v Speaker of the Legislative Assembly* [2022] WSSC 35 at [112].

are required *"to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward as part of the subject in contest, but which was not brought forward…"*

34. As we have noted in this proceeding, despite expressly pleading and disputing Parliament's finding of contempt, remedies based on the Constitution and general law, the Applicants did not pursue their challenge in the TM1 proceedings. Instead, the Applicants' only pursued the challenge against the legality of the penalty meted out to them. That was a decision made by the Applicants. In the present proceedings, the Applicants seek to challenge matters that they have already challenged, but did not argue. We note Mr Harrison referred us to *Reed v Matailiga* [2005] WSSC 1, in his bundle of additional authorities. That decision however does not appear to assist the Applicants. On the contrary, the Chief Justice considered it material that an abuse of process could not be maintained against a party who did not raise an issue in the first proceeding because she "could not raise an issue she did not believe in".

35. The authorities refer to whether *"the claim or defence should have been raised in the earlier proceedings"*, not on whether it was argued. The challenge to the contempt claim – as being inconsistent with the Constitution and law of Samoa was earlier expressly pleaded, but then not pursued at trial. It is quite different to whether it "could" or "should" have been raised because the issues or challenges were raised. The focus is on the conduct of the parties and whether in all the circumstances a party's conduct is an abuse. In our respectful view, the protection of the court's procedural power tells against the first claim in the first part of the Applicants second proceeding. That there might be different ways to argue the issues which were earlier raised – "important purely legal argument not previously ruled on" does not in our respectful view mean that the public interest in the finality of litigation should give way to those new arguments being raised. In the circumstances of this case, we do not see any special circumstances that would justify departure from the settled principles we have discussed above. All that has changed since the issues were last before the Court in TM1 is that a new penalty was imposed. There were no explanations offered by the Applicants themselves as to any factual matters which might lend support to a finding of special circumstances. Whilst we acknowledge Mr Harrison's seniority at the bar, and we mean no disrespect, but we would not consider it helpful to the administration of the law in Samoa that a change of counsel; the conduct of the litigation under "considerable pressure of time"; a "re-evaluation " of the overall legal position; or a lack of prejudice to the respondent, are

to be regarded as relevant factors in inferring special circumstances. In this case, for instance, the Applicants instructed a former Attorney General of Samoa, and a senior lawyer from Australia who is reasonably well known in this court.

36. We consider that, though pleaded more expressly the same issues are being raised in this proceeding as had been raised in TM1 – the finding of contempt; absent the existence of special circumstances the second challenge against the finding of contempt pleaded in this proceeding in the first part of the first claim is an abuse of process.

37. However, if this court has erred on this issue, we take the opportunity to set out our views on the various claims.

**THE APPLICANTS FIRST PLEADED CLAIM – CONTEMPT OF PARLIAMENT FINDING**

38. The hallmark of the first pleaded claim is the number of alternative arguments set out in paragraphs 23 to 25 of the first amended statement of claim. The Applicants argue the contempt of Parliament finding made on 24 May 2022 was and is unconstitutional and/or unlawful as being made beyond the lawful powers of the Assembly. The first amended statement of claim particularises this argument in summary as follows:

    a) Standing Orders ("SO") 185-187 purporting to create and sanction categories of contempt of Parliament/Assembly, were and could not lawfully have been made because they are inconsistent with their empowering provisions – articles 53 and 63.
    b) In the alternative, even if SO 185-187 were lawful, in purporting to create and sanction categories of Contempt of Parliament/Assembly involving the conduct of Members of Parliament not in the course of the business of the Assembly, it could not lawfully do so made pursuant to the powers conferred by article 53 of the Constitution to "make, amend and repeal Standing Orders **regulating its procedure".**
    c) In the alternative SO 185-187, particularly SO 187, even if lawful, could not be lawful because these SO's confer powers of sanction which are unconstitutional as they interfere with rights of the Member (and his constituency) enjoyed under Part V of the Constitution, in particular Articles 44-47 and 59.
    d) As a further alternative, if the contempt of Assembly powers conferred by s. 21 of the Ordinance 1960 were available to the Assembly, then the powers of sanction under

s.21(4) and (5) extending to suspension and denial of remuneration impose an unconstitutional interference with the rights of the Member (and his constituency), enjoyed under Part V of the Constitution, in particular Articles 44-47 and 59.

e) As a further alternative, the Contempt of Parliament finding was and is unconstitutional and/or unlawful as it was without legal or factual merit and/or unreasonable and/or made in bad faith and/or with predetermination and not by an impartial Tribunal established under law (contrary to Article 9(1) of the Constitution, and or contrary to established Samoan customs (Article 71 of the Constitution) for reasons:

   i) The Privileges and Ethics Committee and the Legislative Assembly erroneously treated the contempt of Court in relation to both applicants, as comprising contempt of Parliament.

   ii) The Legislative Assembly was in error in treating contempt of Parliament as having been established by alleged breaches of SOs 14, 15, 186(a), 186(j), and s. 21(1)(d) of the Ordinance.

   f) As a further alternative, the Legislative Assembly's adoption of the Privileges and Ethics Committees to make its contempt of Parliament finding was an error in fact and in law and/or unreasonably and in bad faith in disregarding the Harmony Agreement as only applying to matters brought before the Court

39. We will deal with each strand of the first claim challenging the contempt of Parliament finding as pleaded. The first strand challenges the Constitutional validity of SO 185 – 187. As a Constitutional challenge to SO185 – 187, this does not fall within the scope of the principles of non-intervention.

40. The crux of the first strand of the Applicants contention is that the schema of the Constitution dealing with the ambit of Standing Orders and privileges, immunities and powers of the Legislative Assembly are clearly laid out. Articles 53 and 62 of the Constitution, read together, "constitute a code governing and limiting the extent to which the Legislative Assembly may assume powers in relation to its internal affairs, and its own "privileges, immunities and powers" more generally."[13] Articles 53 and 62 provide:

> **"53. Standing Orders** - Subject to the provisions of this Constitution, the Legislative Assembly may make, amend and repeal Standing Orders regulating its procedure.

[13] Outline of Submissions of Counsel for Applicants, at para [84]

> **62. Privileges of Legislative Assemble** – The privileges, immunities and powers of the Legislative Assembly, of the committees thereof and of Members of Parliament may be determined by Act.
> **PROVIDED THAT** no such privilege or power may extend to the imposition of a fine or to committal to prison for contempt of otherwise, unless provision is made by Act for the trial and punishment of the person concerned by the Supreme Court.
> (See the Legislative Assembly Powers and Privileges Ordinance 1960)" (emphasis added)

41. Mr Harrison submits that the power to make, amend and repeal Standing Orders are conferred by article 53 of the Constitution and the scope of that power is derived from the expression "regulating its procedure" and other provisions in the Constitution. Article 53 limits the scope of Standing Orders to dealing with "rules of procedure" only. Where privileges, immunities and powers of the Legislative Assembly are to be determined, that is to be by Act pursuant to article 62. This, it is argued, is consistent with article 62 of the Constitution which Mr Harrison adds "is well capable of supporting the (constitutionally compliant) creation of substantive rules, including potential penalties."[14] The interpretation of articles 53 and 62 in this way is said to be consistent with how the word "procedure" is applied elsewhere in the Constitution.

42. For the Applicants, it is submitted that the challenged contempt of Parliament finding was a decision made pursuant to powers purportedly conferred by SO 185 and 186.[15] However, article 53 does not confer on the Legislative Assembly a broader power for Standing Orders to address "substantive rules of conduct, whether for Members of Parliament or for others, nor the sanctioning of conduct for breach."[16] Mr Harrison submits that it is common ground that the contempt of Parliament finding was a decision purportedly made pursuant to Standing Orders 185 and 186. The contempt decision must therefore stand or fall on the question of the constitutionality of those Standing Orders.

43. In his submissions, Mr Keith reframes the contention with reference to TM1 and *Kalauni v Jackson* [1996] NUCA 1. Samoa's laws of Parliamentary practice and Parliamentary privilege are drawn from the *Legislative Assembly Powers and Privileges Ordinance 1960*, the Standing Orders and parliamentary usage. In TM1, the Court rejected the Ordinance as the sole source for findings of contempt of Court. For the reasons set out in TM1, we agree.

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[14] Outline of Submissions of Counsel for Applicants, at [70]
[15] Outline of Submissions of Counsel for Applicants, at [63].
[16] Outline of Submissions of Counsel for Applicants, at [68].

44. Statutory interpretation can be approached in two ways, broadly or restrictively.[17] The constitutional interpretation approach advanced by Mr Harrison in terms of article 53 is, it seems, a literal and restrictive one. In a line of authorities focusing on fundamental rights beginning with *AG v Sapipa'ia (Olomalu) & Ors* (1980 – 1993) WSLR 41 (16 July 1982), Samoan Courts have approached constitutional interpretation in this way:

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

45. We also note the caution in *re the Constitution, Mulitalo v Attorney-General of Samoa* [2001] WSCA 8 (20 December 2001), the Court of Appeal there stated however that "*[a]lthough the Constitution is the supreme law and although it is to be read generously, the Courts do not have the power or ability to go beyond the clear and unequivocal words used."*

46. In our respectful view, the restrictive interpretation of article 53 contended by Mr Harrison cannot be correct. With reference to the survey of authorities in TM1, as submitted by Mr Keith, articles 53 and 62 are to be interpreted in light of common Parliamentary usage. It cannot be doubted that the privileges of Parliament include the right of Parliament to control its own proceedings. As the learned authors in McGee state, that right of Parliament "must be regarded as so essential a part of a legislature's ***procedure*** that it inheres in the very notion of being a legislative chamber."[18] The learned authors add that while there is no formal legal definition of what amounts to contempt, "the house is the judge of whether a set of circumstances constitute a contempt."[19] We agree with Mr Keith that the longstanding sharing of matters of privilege between Standing Orders and the Ordinance is not inadvertent or an unlawful error.[20] *"Procedure"* in our respectful view as it is used in article 53 is not limited to a narrow view of "rules of procedure" but more broadly, to procedures that provide

[17] *Fatupaito v Public Service Board of Appeal* [1980] WSLawRp3 [1980 – 1993] WSLR 10 (15 October 1980).
[18] Mary Harris and David Wilson (editors) *McGee Parliamentary Practice in New Zealand* (4th ed, Oratia Books, Auckland, 2017) at 742.
[19] At 763. See also Mutasa where statements made outside of Parliament, in South Africa, were held by the Zimbabwe Parliament to be in contempt.
[20] Refer to SO2

for the control of the conduct of Members of Parliament (and others) and to punish for contempt, amongst others, to enable Parliament to control its proceedings.

47. The second strand of the Applicants argument is that the power to *"make Standing Orders regulating its procedure"* pursuant to article 53 cannot extend to "to proscribing or sanctioning conduct whether of Members of Parliament or others, not occurring or in relation to the proceedings (as such) of the Legislative Assembly."[21] Standing Orders 185 – 187 are beyond the scope of article 53.

48. It is clear from the complaint by the Deputy Prime Minister in his letter to the First Respondent of the 28th April 2022 that while the contempt decision related to the contempt of Court, the complaint was concerned with the conduct of the First and Second Applicants as it affected Parliament, which was referred to in the contempt decision. In the PEC's first report, it is also clear that the PEC was concerned with the statements made by the Applicants and directed towards the legitimacy of the Parliament and the formation of what was allegedly an unconstitutional government.[22]

49. The right of Parliament to control its own proceedings must, in our view, include the power to hold in contempt those (whether Members of Parliament or not) that "obstructs or hinders Parliament in the performance of its function" or which has a tendency to do so.[23] Where statements are made that reflect on the character or conduct of the Assembly that obstruct or hinder Parliament in the performance of its function or which has a tendency to do so, Parliament has the power to treat such conduct as contempt.

50. The third strand of the Applicants' first claim is that Standing Orders 185 and 186 are invalid because they by "tendency of the categories of contempt created" derogate from the constitutional right and status of an elected Member of Parliament. Reliance is placed in article 44 of the Constitution dealing with Members of the Legislative Assembly, which provides as follows:

> "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

[21] Outline of Submissions of Counsel for Applicants, at para [68].
[22] Privileges and Ethics Committee Report on the Official Complaint by the Deputy Prime Minister against Members from the Electoral Constituencies of Lepā and Faleata Number 3 pp 25 – 26.
[23] Standing Order 185(a).

> constituencies having names, and comprising of villages or sub-villages as are prescribed from time to time by Act.
>
> …
>
> (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." (emphasis added, Applicant)

51. In terms of Standing Orders and the privileges, powers and immunities of the Assembly, Mr Harrison describes articles 53 and 62 as *occupying the field*. If we correctly understand the epithet, it means that where the Constitution provides its own mechanism, then that in and of itself replaces the otherwise relevant common law principles. He submits Articles 53 and 62 constitute a code governing and limiting the extent to which the Assembly may assume powers in relation to its internal affairs and more generally, its privileges, immunities and powers. In terms of the Standing Orders, Learned Counsel argued that the power to make these arise under art 53, and that the power is limited to making standing orders "regulating its procedure". Mr Harrison argued that Articles 185-187 purported to provide for contempt or Parliament and penalties (which were substantive matters), and that these rules went beyond the authority given to Parliament to make rules with respect to procedure.

52. Key to this submission by the Applicants is that the court in TM1 was wrong to hold that the privileges of Parliament are found in both statute – the Ordinance, and in the Assembly's own customs. Mr Harrison submitted at paragraph 95 of his written submissions:

> "Accordingly, the applicants' position is the Full Court's conclusion at [59], that "the privileges of Parliament are found in both statute - the Ordinance, and in the Assembly's own customs [so that] it is clear that the Parliament has a privilege to punish its Members for contempt and to discipline its Members", is with respect wrong. If and to the extent necessary (if any), given the Legislative Assembly's and the respondents' sole reliance on Standing Orders 185 - 187, it should be revisited in light of the foregoing arguments."

53. The Applicants argument turns on their challenge to Sapolu CJ's first instance decision in ***Ah Chong v Legislative Assembly*** [1996] WSSC 3. It was submitted the Court erred in holding that article 111 of the Constitution introduced into Western Samoa the long and well-established common law privileges of Parliament. The article provides:

> ""Law" being in force in Samoa; and includes this Constitution, any Act of Parliament and any proclamation, regulation, order, by-law or other act of authority made thereunder, **the English common law and equity** for the time being in so far as they are not excluded by any

> other law in force in Samoa, and any custom or usage which has acquired the force of law in Samoa or any part thereof under the provisions of any Act or under a judgment of a Court of competent jurisdiction." (emphasis added)

54. Mr Harrison submits that the reference to the English common law and equity does not mean that the English common law and equity is therefore a source of law in Samoa as decided in ***Ah Chong***. Mr Harrison says that this is because "*the adoption of a definition of "Law" in the Constitution merely defines that expression for the purposes of any other provision where it is utilised.*" Further, as we understand the submission, articles 53 and 62 by their terms act to exclude English common law and equity (and by extension) English Parliamentary customs and practice from application in Samoa insofar as they are inconsistent with those articles.

55. Learned counsel also argued that the definition of law "*in fact primarily operates as part of the definition of "Existing Law", for the purposes of Article 114*." The argument advanced is that the existing law is expressed to continue, until repealed by Act, and continue in force but is subject to the provisions of the Constitution. Mr Harrison concludes:

> "93. It necessarily follows from this that the question whether common law Parliamentary privilege exists in Samoa is dependent not on either the Article 111 definition of "Law", or for that matter Article 114, but on the correct interpretation of Article 62 and in turn the Ordinance, being the sole "Act" (as defined) operating in terms of that Article."

56. Respectfully, we consider that art 111 goes considerably further than Mr Harrison submits. The opening words *"Law" being in force in Samoa includes*... in our view, means the particularised sources of law are **in force** in Samoa. In relation to the English common law and equity, it is in force, for the time being, in so far as they are not excluded by any other law in force in Samoa or any custom or usage which has acquired the force of law in Samoa or under a judgment of a Court of competent jurisdiction.

57. In terms of English common law and equity (and Parliamentary customs, practice procedure), these are not excluded, in our assessment, from application in Samoa by virtue of articles 53 and 62. The powers provided for in articles 53 and 62 are discretionary and do not occupy the filed. That is clear from the plain wording of each of the articles, which use the word "may", not "shall". It appears that under Mr Harrison's interpretation, unless standing orders and privileges are made in accordance with arts 53 and 62, then they are unconstitutional and unlawful. In other words, those parts of arts 186 – 187 that are not regulatory or procedural

(in its narrow terms) in nature, or privileges made by an Act, they would be unconstitutional and unlawful.

58. Respectfully, this submission in our view is the kind of tabulated legalism the Court of Appeal urged against in ***AG v Saipaia Olomalu*** [1982] WSCA 1. In our view a generous interpretation of a constitution counselled in ***Saipaia Olomalu*** must be all the more important when interpreting provisions establishing government. In rejection of Mr Harrison's limited interpretation of the Constitution which rejects the English common law as a source of law, what is plain to us is that the Constitution has provided for a Westminster model "Parliament". Even if the English common law did not apply, the court might turn nevertheless to the English common law to understand the nature of the law-making body provided for in our Constitution.

59. Parliament has common law privileges which are essential to its functions and authority, which *Erskine May* has defined as being a "necessary means to fulfilment of functions".[24] There is no reason to suggest that the framers of the Constitution did not also intend for Samoa's Parliament to have these privileges, which are inherently necessary to the fulfilment of the function of making laws, in this case, laws for Samoa. As the Learned Professor Joseph observed:[25]

> "[Parliamentary privileges] are part of the common law in that their existence and validity are recognised by the courts, although they are enforced not by the courts but by Parliament itself. They impart to Parliament a judicial function, coupled with an unreviewable power to commit or censure. The lex parliament is an historical emanation which makes the House judge in its own cause, contrary to the modern principles of fairness and natural justice."

60 For the reasons set out above, we do not accept the claim that Standing Orders 185 – 187 are unconstitutional and or unlawful. The current Standing Orders contain both "procedural", as in administrative or process rules, and "substantive" rules (such as the ones complained about). Parliament has relied on art 53 and on its own powers inherent to its law-making function to make these standing orders.

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[24] Philip A Joseph *Joseph on Constitutional and Administrative Law* (5th ed, Thomson Reuters New Zealand Ltd, Wellington, 2021 at 14.2.1

[25] Above n2

61 The fourth strand of the Applicant's challenge to the contempt findings pleads the lack of both legal and factual merits to the determination on constitutional (articles 9(1) and 71) and judicial review grounds.[26] In terms of article 9(1) of the Constitution, not much is expressly said by the Applicants in relation to the contempt determination. This may be because the first Parliamentary decision which included the contempt of Parliament finding was based on the PECs 24th May 2022 Inquiry recommendations made to the Parliament which was constituted by members of both the HRPP and FAST. Nevertheless, we find no basis in the challenge to the contempt finding by virtue of that determination not being made by an independent or and impartial tribunal. As we have said, the PEC that submitted the report of the 24th May 2022 recommending a finding of contempt of Parliament consisted of both FAST and HRPP MPs.

62 Further, the underlying theme of the Applicants contention is that as a Parliamentary chamber consisting of FAST and HRPP members, the Parliament cannot be independent and would be driven along party lines. This contention would potentially render all determinations of contempt of MPs by the Parliament liable to being set aside as in breach of article 9(1). That cannot be the case; would result in the diminution of the principles of non-intervention; and render Parliament's ultimate sanction of contempt ineffective. The Samoan Parliament, like similar Westminster models of Parliament, entrusts to its Parliamentarians the proper exercise of the contempt powers of Parliament.

63. In his submissions, Mr Harrison however frames the challenge to be:

> "in relation to its lack of both legal and factual merits, and (if necessary) on traditional judicial review grounds. The latter asserts in particular unreasonableness, bad faith and pre-determination and/or lack of partiality."

64 Insofar as this challenge raises judicial review grounds and the factual merits of the Assembly's contempt determination, we consider the doctrine of the separation of powers applies: *Ah Chong*.[27] This is reinforced by the principle referred to by the learned authors in McGee, citing *British Railways Ltd v Pickin*[28] (except where the Constitution is breached), "the remedy for a Parliamentary wrong, if one has been committed, must be sought from

[26] Paragraph 24, First Amended Statement of Claim.
[27] Above para 23
[28] [1974] AC 765 (HL).

Parliament and cannot be gained from the courts."[29] Generally, the courts do not sit in judgment of individual actions taken in the course of the Parliamentary process.[30] This applies to the complaint concerning the use by Parliament of the contempt of court decision to found contempt of Parliament for example.[31]

65 Mr Harrison further submits that Parliament erred in finding a contempt when Parliament had not even been convened at the time of the statements. The statements referred to in the Contempt Decision and attributed to the Applicants were made in July and August 2021. The Court of Appeal on the 23rd July 2021 in **TM1** held that the swearing in ceremony and the convening of Parliament on the 24th May 2021 was valid and Constitutional. Parliament had convened on the 24th May 2021 as determined by the Court of Appeal in **TM1**.[32]

66 The Applicants also raise article 71 of the Constitution and contend that the Harmony Agreement "was and now is in play…" With respect, article 71 provides that "subject to the provisions of the Constitution, customs may be taken into account in all ***courts*** under this Part". (emphasis added) First, the taking into account of customs is discretionary denoted by the use of the word "may". Second, there is no duty on the part of Parliament created by article 71 to take into account "custom". Specifically, article 71 deals with Courts. Third, the Committee's report did nevertheless consider the Harmony Agreement and found itself relevant only for the purposes of the Court proceedings. We see no basis pursuant to article 71 to disturb this conclusion.

**THE APPLICANTS SECOND PLEADED CLAIM**

67 The Court decided in ***TM1*** the penalty in the first suspension was void by reason of a breach of the Applicants rights to natural justice preserved under Article 9(1) of the Constitution. In this second proceeding, the Applicants claim at paragraph 27 of the first amended statement of claim that the second suspension decision was and is unconstitutional and/or

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[29] Mary Harris and David Wilson (editors) *McGee Parliamentary Practice in New Zealand* (4th ed, Oratia Books, Auckland, 2017) at 743.

[30] Mary Harris and David Wilson (editors) *McGee Parliamentary Practice in New Zealand* (4th ed, Oratia Books, Auckland, 2017) at 717. Although the contempt of Parliament finding emanates from matters dealt within in the Contempt of Court decision, the complaint by the Deputy Prime Minister

[31] From the Deputy Prime Minister's complaint and the PEC's First Report, concern in terms of contempt of Parliament were nevertheless the findings of the Court in relation to the Applicants' statements reflecting on the incoming Parliament, not the Court.

[32] See also above n19

unlawful and beyond the lawful powers of the Legislative Assembly, for all or any of the following reasons:

a. The validity of the law governing the second suspension is dependent on the validity of the law concerning the contempt of Parliament finding, and both rely on pleadings of illegality and invalidity, set out in paragraphs 21 and 22 as noted in the pleading. It appears to us that there is a typographical error in the Applicants' pleadings. Paragraph 21 refers to the Applicants' alleged expressions of regret and contrition, and paragraph 22 refers to an issue concerning the denial of remuneration. It appears the reference to paragraphs 21 and 22 is meant to be to 23 and 24 – both of which set out the grounds of the pleadings of unconstitutionality and illegality. At least, that is how we intend to read the pleading, because otherwise it does not make sense.
b. In the alternative, the suspension of the Applicants is unconstitutional and unlawful by reason of their excessive duration amounting to an unlawful **de-facto expulsion or disqualification** from Parliament and therefore contrary to Part v of the Constitution, articles 44 – 48 and 59.
c. The suspensions were unduly harsh and disproportionate.

68 Dealing first with the Applicant's contention that the second suspension is illegal and invalid by reason of the invalidity of the Standing Orders founded on the first pleaded claim, we respectfully find no merit to this argument for the reasons we have set out at length on the first pleaded claim.

69 The second strand of the Applicants' challenge to their suspension is that the two (2) year suspension imposed is unconstitutional and unlawful due to its excessive duration constituting a de-facto expulsion or disqualification from Parliament. There is no power of suspension under SO 186, however there is a power to suspend *for such a period as it [the Assembly] may determine* under SO 187(4). We consider that the Assembly has the power to suspend a member for breaching SO 186, under SO 187(4).

70 We now turn to the duration of the suspension and whether it is invalid for the reasons articulated by the Applicants. Mr Harrison argues that the period of suspension cuts across the Constitutional rights in arts 44 - 48 and 59. We do not consider these rights are fundamental rights as are set out in Part II of the Constitution. However, that does not mean that they are not constitutional rights capable of being enforced by the Court by way of a

declaration of inconsistency with the constitution, as it does with respect fundamental rights. Intra mural decisions of the Parliament are open to challenge on Constitutional grounds.

71 The nub of the Applicants contention is that the combined effect of the duration of the first suspension decision and the second suspension decision of two (2) years resulting in a cumulative suspension of approximately two years and three months (of a Parliamentary term of five years) – is an unconstitutional interference with their status as Members of Parliament and those they were elected to represent.

72. There is no question in our view that a suspension of 2 years, on top of an initial suspension of 3 or so months, is a material departure from the range of suspension periods provided for in the Standing Orders under SO 92 – the naming of a member; they range from 24 hours to 28 days. The Second Applicant in a supplementary affidavit dated 3 February 2023 referred to the PEC's 2020 recommendation of a suspension for 3 months for a breach of ethics; and the suspension of Asiata Saleimoa for 4 months. We consider the suspensions in this matter to be a material departure from the length of these two suspension examples. An expulsion is defined as "the act of expelling: the state of being expelled".[33] This definition does not refer to any de-facto permanency of the expulsion, which seems to be the true gist of the Applicants' complaint coupled with interference with their status as Members of Parliament and representation of their constituencies. The duration of the suspension is to such an extent that it derogates from their constitutional duty as Members of Parliament and as to the composition of Parliament.

**What is the penalty?**

73. When considering the penalty, we are bound by the Court of Appeal's decision in ***Ah Chong v Legislative Assembly*** [supra], that the principle of non-intervention means the Assembly is left to regulate and determine its own internal procedure from time to time, except where there are alleged breaches of the Constitution.

74. The Applicants are representatives of the Electoral Constituencies of Lepā and Faleata No. 3. What does it mean to be a representative mean? We refer to the High Court of Australia's decision in ***Horne v Barber*** [1920] HCA 33, 27 CLR 494, a case concerned with what it

[33] Merriam-Webster Online dictionary.

meant to discharge of a member of Parliamentary duties. The Court, per Isaacs J, observed these principles:[34]

> "When a man becomes a member of Parliament, he undertakes high public duties. Those duties are inseparable from the position he cannot retain the honour and divest himself of the duties. One of the duties is that of watching on behalf of the general community the conduct of the Executive, of criticizing it, and, if necessary, of calling it to account in the constitutional way by censure from his place in Parliament-censure which, if sufficiently supported, means removal from office. That is the whole essence of responsible government, which is the keystone of our political system, and is the main constitutional safeguard the community possesses."

These principles have more recently been affirmed by the Australian High Court in ***Re Lambie*** [2018] HCA 6, at para 24.

75. In Samoa, that Parliament is established as a representative legislature is reflected in the preamble of the Constitution which provides, among other important statements of principle and aspiration:

> "**WHEREIN** the State should exercise its powers and authority through the chosen representatives of the people"

76. That the State is to exercise its powers and authority through chosen representatives of the people is then expressly prescribed in Article 44(1) Part V, supra.

77. As chosen representatives for their constituencies, the important role of Members of Parliament in the governance of the State on behalf of whom they represent can be seen from the Constitution itself. The provisions of Part V of the Constitution include, through the chosen representatives of each constituency, the power to make laws for the whole or any part of Samoa and having effect outside as well as within Samoa (art.43); voting (art 58); and the right to introduce bills (art 59).

78. The Court in TM1 has already determined that an intramural decision may be declared void for breach of a fundamental right secured by the Constitution. The question now is whether a breach of the Constitution per se, which does not involve a fundamental right, give rise to the voiding of an intramural decision? We consider that such breaches can. This Court has

[34] At p 500

the duty to protect the Constitution; it does so by declaring void **any existing law**, and **any law passed after the date of the coming into force of the Constitution** which is **inconsistent** with the Constitution (the supreme law of Samoa: art 2(1)): Art 2(2). Article 2(2) of the Constitution is not limited to the protection of fundamental rights.[35]

79. There are two aspects that arise from the suspensions imposed by Parliament on the First and Second Applicants – first is an intramural perspective, being the discipline of members; and second, a public law consequence, being the suspension of representative government for the relevant electorates, a keystone of our political system. The question this court is asked to determine is whether the mere fact that a decision is intramural means that it is beyond the reach of the Court? Although the Niue Court of Appeal in ***Kalauni v Jackson*** [1996] NUCA 1, did not decide this issue, their Honours observed:

> "It is true of course that the details of constitutions differ. There may for instance be more room for Court review where a Constitution prescribes in greater detail matters relating to law making or membership. But the cases all recognise that a line must be drawn between those matters which are intramural and which must be left to the judgment of the legislative bodies and those which engage the public law of the land and rights and duties arising under it."

80. There are two steps to then consider in the context of this case:
    a. is there an intramural decision?
    b. if yes, is the decision beyond the reach of the Court?

81. Control of its own procedures and the discipline of its members are matters which are traditionally regarded as intramural. The suspension of the First and Second Applicants are an intramural decision and first question must therefore be answered in the affirmative.

82. The second question then is, are the suspensions of the First and Second Applicants beyond the reach of the Court? The First Respondent responsibly accepts that "there is clearly a limit to the permissible extent of suspension and that can be determined or questioned by the Court."[36] Mr Keith however submits that limit has not been reached and the principles of non-intervention apply – for two reasons; (a) the conduct of the First and Second Applicants

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[35] The Court of Appeal in ***TM1*** did just that in relation to the Head of State by effectively (though not expressly) voiding for example purported Proclamations by the Head of State deferring the convening of the Legislative Assembly to the 2nd August 2021. Paras [60] and [62].

[36] Submissions for the First Respondent, para 30.2

was extraordinary and (b) the Assembly received submissions on penalty and in light of those submissions determined a suspension of two years.

83. We agree with Mr Keith that there is clearly a limit to the permissible extent of a suspension and can be determined or questioned by the Court. We however do not agree that in this instance the principle of non-intervention applies to the suspension decision. Mr Keith's submissions focus on the Applicants' conduct, but fails to balance that conduct against the interests of the people of the two affected constituencies, in light also of article 44(1) of the Constitution and Samoa's system of representative and responsible government.

84. Article 44 of the Constitution expressly provides for the Legislative Assembly to consist of one member for each of the 51 electoral constituencies. Those Members of Parliament, as representatives of the people from each constituency, exercise the powers of the State "to make laws for the whole or any part of Samoa". The State, through Parliament, may thus make laws not only for the whole of Samoa but any part which of course can include the Constituencies which the First and Second Applicants represent.

85. The centrepiece of a modern democracy is a representative legislature.[37] That is given Constitutional effect in Samoa by article 44. By suspending the First and Second Applicants for approximately two years and three months in total, Parliament has removed from the Legislative Assembly, and its grounds, the representatives of the electoral Constituencies of Lepā and Faleata No. 3 for that period. In doing so, the electoral Constituencies of Lepā and Faleata No. 3 are being denied and therefore deprived for two years and three months of their voice through their chosen representative on matters concerning:

    a. The making of laws affecting not only Samoa as a whole but those that may directly affect their constituencies;
    b. Affairs of State as debated in Parliament for the good of the country;
    c. Holding the government to account particularly with respect to the budget and other performance issues; and
    d. Issues of relevance to their particular constituencies such as funding for roading and other social services, including health, education and housing, that may affect them for two years and three months.

[37] Joseph 1.6.4

86. We consider the second suspension breaches article 44(1) of the Constitution. The unprecedented duration of the long suspension is a material breach of article 44(1) and Samoa's system of representative and responsible government enshrined in the Constitution because it denies the Parliament of representation from these two constituencies and the people of those constituencies with their voice in Parliament.

87. There is in our respectful view no question that the actions of the First and Second Applicants condemned in the Contempt decision, TM1 and by Parliament by these suspensions were reprehensible. That much has been made clear by both the Courts and Parliament. However, the Court is being asked to determine whether these long unprecedented suspensions are consistent with Constitution and Samoa's system of representative and responsible government. On that footing, we say that the two year suspension is inconsistent and therefore void from the outset.[38]

88. Does, this mean that a member can never be suspended? Obviously not, each case turns on its merits. However, suspensions must not deny Parliament of effective representation from electoral constituencies, and or the voice of the people of those electoral constituencies. Such denial is also a denial of the democratic system of representative and responsible government established in the Constitution. In other words, intramural decisions concerning the penalty for contempt of Parliament are limited by the requirements of the Constitution.

**THE APPLICANTS THIRD PLEADED CLAIM – DENIAL OF REMUNERATION**

89. When reporting to Parliament on the second suspension, the PEC recommended that the Applicants suspension be without pay pursuant to Standing Order 187(5). It is confirmed by the affidavit material before us and not in dispute that the Applicants remuneration and entitlements have been withheld. The Applicants challenge the determination by Parliament to withhold their remuneration and entitlements as contrary to the provisions of the *Remuneration Tribunal Act 2003* ("RTA 2003"). Members of Parliament hold "public

[38] The importance of the representation of all Constituencies in Parliament in accordance with article 44(1) is denoted by the use of "shall". In the United Kingdom, the importance of representation of constituencies in Parliament following the suspension of an MP is underscored by the Recall of MPs Act 2015 (UK) which provides a mechanism for an MPs constituency to force a by-election if their MP is suspended for more than 10 sitting days.

office".[39] The Applicants assert that "Government" is bound by the RTA 2003 and except insofar as a contrary intention appears, applies to all Acts.[40] Pursuant to section 3(3) of the RTA 2003, the "provisions of the Act (RTA 2003) shall prevail over any other Act that 'provides for salary, allowances and other benefits of an Office to be determined in a manner consistent with the provisions of this Act."[41] The RTA 2003 makes no provision for the suspension of remuneration and allowances for MPs (which it does for Cabinet Ministers) and imposes a positive obligation for the payment of these during the Parliamentary term.

90. The First Respondent's case is that the withholding of remuneration pursuant to Standing Orders 187(5) while a MP is suspended is not inconsistent with the RTA 2003. In short, the First Respondent submits that:

    a. As reflected in the Ordinance and comparative Parliamentary Practice, the withholding of remuneration is an accepted part of suspension, considered to be within the jurisdiction of Parliament; and
    b. The RTA 2003 makes no provision for the suspension of pay for Members of Parliament but does so for Ministers.

91. In our respectful view, it is within the providence of Parliament to withhold the payment of remuneration and allowances of a suspended MP. Although as Mr Harrison contends, the RTA 2003 binds government, "government" is defined in the Acts Interpretation Act 2015 as:

> "Government" means the Executive Government of Samoa, and includes: (a) the Cabinet; and (b) the Prime Minister; and (c) Ministers; and (d) all Ministries, departments and other administrative units of a Ministry or the Government, however described or established, including its officers and employees; and (e) any government statutory body or government corporation or other government entity.

92. The definition of "Government" in the RTA 2003 does not add to or derogate from this definition.

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[39] Section 3(h), RTA 2003.
[40] Section 3(2), RTA 2003.
[41] Outline of Submissions of Counsel for Applicants, at para [141].

93. By virtue of the definition of "government", the RTA 2003 does not bind Parliament but the executive branch only. Further, section 3(3) of the RTA 2003 expressly refers to the provisions of the RTA 2003 prevailing over inconsistent provisions of any other Act. Standing Orders are not an Act of Parliament. In this context, although an "Act" is defined to include "subsidiary legislation" and "subsidiary legislation" is defined to include an "order", an "order" to qualify as "subsidiary legislation" must be made under "an Act of Parliament or Ordinance".[42] The Constitution was enacted by the people through their representatives at the Constitutional Convention. The Preamble to the Constitution states:

> "**AND WHEREAS** the Constitutional Convention, representing the people of Samoa, has resolved to frame a Constitution for the Independent State of Samoa
>
> …
>
> **NOW THEREFORE**, we the people of Samoa in our Constitutional Convention, this 28th day of October 1960, do hereby adopt, enact and give to ourselves this Constitution." [Discussion re this aspect of the position and whether to retain]

94. Although the Assembly is under the law and is duty bound to observe any law that applies directly to it, there is also a delicate Constitutional balance in the roles of the three arms of government.[43] In *McGee*, the delicate balance between the legislature and courts was framed in the following way:[44]

> "The House generally avoids setting out the detail of its procedures in legislation. On the other hand, the courts exercise restraint from venturing into the House's internal workings, even in respect of powers or duties conferred or imposed by a statute. The House's freedom from outside interference requires that it respect and observe the law."

95. In our respectful view, the provisions of the RTA 2003 does not override Standing Order 187(5).

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[42] AIA 2015, section 3(3).

[43] Mary Harris and David Wilson (editors) *McGee Parliamentary Practice in New Zealand* (4th ed, Oratia Books, Auckland, 2017) at 9.

[44] Mary Harris and David Wilson (editors) *McGee Parliamentary Practice in New Zealand* (4th ed, Oratia Books, Auckland, 2017) at 8.

**THE APPLICANTS FOURTH PLEADED CLAIM – CHALLENGE BY APPLICANTS TO PURPORTED AMENDMENT BY LEGISLATIVE ASSEMBLY OF STANDING ORDER 187(7) and (8)**

96. On or about the 27 January 2023, the Legislative Assembly purportedly amended Standing Order 187 by insertion of new sub-paragraphs (7) and (8) which state:

> "7) Any member who is suspended from the Legislative Assembly due to breach of Parliamentary Privilege or guilty of contempt of Parliament cannot do the following:
>
> i. Attend any work of the Assembly or Parliamentary Committees;
>
> ii. Enter Parliamentary precincts;
>
> iii. Question any parliamentary matter;
>
> iv. Make any public announcement through any medium which aim to denigrate the Legislative Assembly, Speaker or Committees;
>
> v. Write to the Speaker or any Member of the Assembly regarding any Parliamentary matter.
>
> (8) If a member does not abide by the conditions under (7), the Legislative Assembly may by motion add another period of suspension of the suspended member."

97. Mr Harrison submits the amendments were plainly directed at the Applicants. When the amendments to SO 187(7) and 187(8) were laid before the Legislative Assembly, the rationale stipulated for the amendments were:

> "To resolve the current problem whereby Suspended members somewhat ridiculing the work of the Speaker and Parliament.
>
> To further clarify the limits given to a member who is suspended from Parliament."

98. The Applicants challenge the constitutionality of SO 187(7) and 187(8) relying on arts 11(1), 13(1)(a), 15(1) and 15(2) of the Constitution. At the hearing, Mr Harrison stressed reliance on the right of free speech (art 13(1)(a)) and the right to be free from discriminatory legislation (art 15(1) and 15(2)).

99. We will deal first with article 13(1) of the Constitution. Article 13(1)(a) relevantly provides:

> **"13. Rights regarding freedom of speech, assembly, association, movement and residence - (1)** All citizens of Samoa shall have the right:
>
> (a) to freedom of speech and expression;
>
> ….
>
> **(2)** Nothing in sub-clause (a) of clause (1) shall affect the operation of any existing law or prevent the State from making any law in so far as that existing law or the law so made imposes reasonable restrictions on the exercise of the right conferred under the provisions of that sub-clause in the interests of national security, friendly relations with other States, or public order or morals, for protecting the privileges of the Legislative Assembly, for preventing the disclosure of information received in confidence, or for preventing contempt of Court, defamation or incitement to any offence.
>
> (3) …"

100. Article 13(1)(a) of the Constitution expressly protects the right of every Samoan to freedom of speech and expression subject only to reasonable restrictions in accordance with article 13(2).[45] It is also well recognized that the freedom of speech and expression guaranteed by article 13(1)(a) is a key feature of democratic societies, the importance of which cannot be overstated. In *Lange v Australian Broadcasting Corporation* [1997] HCA 25 the Australian High Court when dealing with the implied constitutional right to freedom of speech in the Australian Constitution stated:

> "Freedom of communication on matters of government and politics is an indispensable incident of that system of representative government which the Constitution creates by directing that the members of the House of Representatives and the Senate shall be "directly chosen by the people" of the Commonwealth and the States, respectively."[46]

101. Courts in democratic societies have an important role to play to ensure that these rights are not undermined. In *R (Prolife Alliance) v British Broadcasting Corporation* [2004] 1 AC 185, [6], Lord Nichols with whom Lord Millett and Lord Scott concurred (at least on the law), stated:

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[45] Samoa Observer Co (Apia) Ltd v Oeti [2020] WSCA 7 (4 September 2020) at para. [52].

[46] See also: *Levy v State of Victoria* [1997] HCA 31.

> "*Freedom of political speech is a freedom of the very highest importance in any country which lays claim to being a democracy. Restrictions on this freedom needs to be examined rigorously by all concerned, not least the Courts."*

102. In *Australian Capital Television v The Commonwealth* (1992) 177 CLR 106 at 146, Mason CJ also stressed the important role Courts play to very carefully scrutinise any purported need to restrict freedoms to communicate for the protection of political processes (at p. 145):

> "The enhancement of the political process and the integrity of that process are by no means opposing or conflicting interests and that is one reason why the Court should scrutinise very carefully any claim that freedom of communication must be restricted in order to protect the integrity of the political process. Experience has demonstrated on so many occasions in the past that, although freedom of communication may have some detrimental consequences for society, the manifest benefits it brings to an open society generally outweigh the detriments. All too often attempts to restrict the freedom in the name of some imagined necessity have tended to stifle public discussion and criticism of government. The Court should be astute not to accept at face value claims by the legislature and the Executive that freedom of communication will, unless curtailed, bring about corruption and distortion of the political process."

103. The question posed by Mr Keith in terms of the amendments to the Standing Orders "is whether the expressed restrictions are properly part of, and can be justified as necessary for, the Assembly's regulation of its own affairs to ensure orderly conduct."[47] Mr Keith argued that amendments to the Standing Orders are focussed on further disruption to the orderly function of the Legislative Assembly by suspended MPs. In this context, that "[i]t is plainly disruptive if a Member, having been suspended, continues to intervene or attempt to intervene in or undermine parliamentary proceedings and decisions (see particularly SO 187(i) and (iii)..."

104. As earlier stated "what is said or done within the walls of a legislative assembly" is a matter for Parliament and reflected in the powers expressly vested for example in the First Respondent by sections 14 and 15 of the *Legislative Assembly Powers and Privileges Ordinance 1960*. In this context, we have no difficulty finding that Standing Order 187(7)(i) and (ii) do not offend the Constitution and that the prohibition on suspended MPs from entering Parliamentary precincts under SO187(1)(ii) does not breach article 15(1) on the grounds of political opinion. This finding is not inconsistent with United Kingdom practice where the effect of suspension is that Members of Parliament "cannot enter the parliamentary

[47] Submissions for the First Respondent, [41.1].

precincts (which comprise the whole parliamentary estate, not just the Palace of Westminster), or take part in select committee meetings inside or outside the precincts."[48]

105. Standing Orders 187(iii) - 187(v) however prohibit suspended MPs from questioning any Parliamentary matter, making any public announcements "through any medium which aim to denigrate the Legislative Assembly, Speaker or Committees" and extend to prohibiting suspended MPs from writing to the Speaker or any MP regarding any Parliamentary matter. The standing orders extend well beyond the walls of Parliament and are all encompassing prohibiting the questioning of "any Parliamentary matter" by suspended MPs. These standing orders significantly restrict the freedom of speech and expression of suspended MPs on matters of governance and politics, a freedom enjoyed by the rest of the population and which forms an indispensable part of representative government. Taken to its logical conclusion, the standing orders would extend for example to prohibit suspended MPs from questioning their own suspensions from Parliament in any forum to writing to the Speaker or other MPs on that very question. The standing orders extend well beyond what Mr Keith submitted addresses "plainly disruptive if a Member, having been suspended, continues to intervene or attempt to intervene in or undermine parliamentary proceedings and decisions." The standing orders infringe article 13(1) of the Constitution and do not constitute "reasonable restrictions on the exercise of the right" of freedom of speech and expressions "for protecting the privileges of the Legislative Assembly". These restrictions, in answer to Mr Keith's question, are not necessary for the Assembly's regulation of its own affairs to ensure orderly conduct.

106. We also see no merit in the submission by Mr Keith that given the rights involved, the terms of the SOs "are to be strictly construed in light of their purpose." As Mr Keith pointed out with reference to *Wilson v First County Trust Ltd* [2004] 1 AC 816:

> "In particular, it is a cardinal constitutional principle that the will of Parliament is expressed in the language used by it in its enactments. The proportionality of legislation is to be judged on that basis. The courts are to have due regard to the legislation as an expression of the will of Parliament."

[48] House of Commons, Committee on Standards, *Sanctions in respect of the conduct of Members* (2020) at para [33].

107. There is no restraint to the construction to be applied to standing orders 187(iii) - 187(v) in the words used by Parliament as submitted by Mr Keith. The proportionality of the standing orders is to be judged on the basis of the language used. We accordingly hold that amended Standing Order 187(7)(iii) - 187(7)(v) inclusive are in breach of art 13 of the Constitution, and therefore declare them to be void.

**CONCLUSIONS**

108. For the foregoing reasons:

a. We find that Legislative Assembly's suspension of the First and Second Applicants for two years breaches article 44(1) of the Constitution and the framework of Samoa's Constitution of responsible and representative government and the suspensions are therefore void;

b. In the light of the decision above in a., the Applicants are entitled to be paid their remuneration and the allowances that were withheld on account of the terms of the suspensions. Given our decision, our discussion on the Applicants' third claim is obiter and offered to provide clarification of the legal position on the effect of a suspension on an MP's remuneration and allowances.

c. SO 187(7)(iii) - 187(7)(v) inclusive breach article 13 of the Constitution therefore also declare them to be void; and

d. As to costs, the First and Second Applicants are to file Memoranda as to costs within 14 days. The First and Second Respondents to file Memoranda as to Costs in response within a further 14 days.

S. Perese

**CHIEF JUSTICE PERESE**

THE SEAL OF THE SUPREME COURT SAMOA

**JUSTICE CLARKE**