H.C.J 65/51

JABOTINSKEY AND KOOK

v.

WEIZMANN

In the Supreme Court sitting as the High Court of Justice.
[July 20, 1951]
Before: Smoira P., Dunkelblum J., Cheshin J., Agranat J., and Silbefg J.

Administration of Justice - Limits of judicial power - Failure by President of State to perform statutory duty as to formation of new *Government - Not justiciable - Mandamus - Application for order nisi - Intervension* by *Attorney-General.*

The High Court will not issue an order of mandamus against the President of the State directing him as to the method of carrying out his duties under section 9 of the Law of Transition, 1949. Such a matter is not justiciable.

By section 11(d) of the above-mentioned Law "The Government which receives a vote of no-confidence from the Knesset, or which has decided to resign, shall immediately tender its resignation to the President of the State, but it shall continue to exercise its functions pending the constitution of a new Government in accordance with the provisions of this Law." Section 9 provides that "after consultation with representatives of the party groups in the Knesset, the President of the State shall entrust a member of the Knesset with the task of forming a Government." The Government having resigned on February 14, 1951, following upon a vote of no confidence, the President held consultations with the representatives of the parties and entrusted the Prime Minister with the task of forming a new government. When the latter declined to do so, the President notified the Speaker of the Knesset that as a result thereof and of the consultations he had held, he had reached the conclusion that pursuant to section 11(d) of the Law of Transition the Government which had resigned must remain in office until the formation of a new Government after general elections.

The petitioners, members of the Knesset, contended that under section 9 it was the duty of the President, once one member had declined to accept the task of forming a new government, to entrust it to any other of the remaining 119 members of the Knesset, before concluding that it was necessary to hold general elections. They applied for an order of mandamus.

Held: The President although in a sense the highest public officer in the State, is not *semble a* "public officer" for the purposes of that part of section 7 of the Courts Ordinance, 1940[1)], which empowers the Supreme Court. sitting as a High Court of Justice to give orders to public officers in connection with the execution of their duties. Notwithstanding that the jurisdiction of the High Court under Article 43 of the Palestine Order in Council, 1922[2)], "to hear... matters necessary to be decided for the administration of justice", is wider than that conferred by section 7, it does not extend to the subject of the petition, which raises a matter that is not amenable to judicial determination and decision, but is one affecting the executive and political, and not the ministerial, powers of the President.

Joint Anti-Fascist Committee v. Attorney-General of the United States (71 S. Ct. 673) referred to.

The Attorney-General appeared at the hearing of the petition to object to the issue of the order nisi by virtue of his powers under section 6 of the Law of Procedure (Amendment) Ordinance, 1934, which gives him the right to intervene in any matter pending before "any civil or criminal court" if it appears to him that the rights of the Government of Israel are involved or that it is necessary to do so in the public interest.

Held, overruling an objection to his appearance, that the High Court is a "civil court" within the meaning of section 6, and that rule 4 of the High Court Rules, 1947, which provides that an application for an order nisi will be heard *ex parte,* does not bind the court to hear the application in the presence of the petitioners alone. The very nature of the petition justified the intervention of the Attorney-General at the present stage in the proceedings.

English case referred to:

(1) *The Parlement Belge*; (1879-80), 5 *P.D.* 197.

American cases referred to:

(2) *U.S. v. Aaron Burr*; (1807), *Robertson's Rep.*, I, 121.

1) Courts Ordinance, 1940, s. 7:
The High Court of Justice shall have exclusive jurisdiction in the following matters:
(a) .....……
(b) Orders directed to public officers or public bodies in regard to the performance of their public duties and requiring them to do or refrain from doing certain acts;

2) Palestine Order in Council, 1922, art. 43:
.....The Supreme Court, sitting as a High Court of Justice, shall have jurisdiction to hear and determine such matters as are not causes or trials, but petitions or applications not within the jurisdiction of any other Court and necessary to be decided for the administration of justice.

(3) *Bandini Petroleum Co. v. Superior Court*; 52 S. *Ct*. 103.

(4) *Allen-Bradley Local No*. 1111 *ect. v. Wisconsin E. R. Board*; 62 *S. Ct*. 820.

(5) *Tennessee Pub. Co. v. American National Bank*; 57 *S.Ct*. 85.

(6) *Joint Anti-Fascist Refugee Committee v. Attorney-General of the United States*; 71 *S. Ct*. 673.

(7) *Aetna Life Ins. Co. of Hartford, Conn. v. Haworth*; 57 *S. Ct*. 461.

(8) *David Muskrat v. United States*; 1911, 31 *S. Ct*. 250.

(9) *Mississippi v. Johnson*; (1867), 4 *Wall*. 475, *L. ed.* 437.

(10) *McCulloch v. Maryland*; (1819), 4 *Wheat.* 316, 4 *L. ed*. 579.

S. Fishelev for the first petitioner.

R. Nohimovsky for the second petitioner.

H. H. Cohn, Attorney-General (with Naomi Salomon) intervening.

SMOIRA P., giving the judgment of the court.

This is an application for an order nisi against the President of the State, requiring him to appear and show cause why he should not call upon a member of the First Knesset[1)] to form a new government and, if he fail, why one member after another should not be called upon until one of them finally succeeds in constituting a government which will enjoy the confidence of the Knesset. The petition is based upon an expression of no-confidence by the Knesset on February 14, 1951, in the government headed by Mr. Ben-Gurion, and upon the submission to the President of the government's resignation on the same day.

The following facts are set out in the petition.

The Prime Minister submitted the resignation of the government to the President on February 14, 1951, and on February 18 and 19, 1951, the President held consultations with the representatives of the various parties in the Knesset. On February 21, 1951, the Prime Minister visited the President and on February 25, 1951, the President sent a letter to the Prime Minister which concluded as follows:

1) parliament or Congress.

"...I have decided, before invoking the final remedy - the remedy of elections - to request you to make a further effort to reach a stable and satisfactory solution, within the framework of the present Knesset, and to form a new government which will enjoy the support of the majority of its members.

I know that this will not be easy to achieve in the present situation, but I am convinced that it is my duty to request it of you.

I would ask you to inform the other parties with whom you will consult of my request, and to convey to them my hope that they will cooperate with you so that a stable and satisfactory arrangement may be reached. I pray that you may succeed."

The Prime Minister, in his reply to the President's letter of February 27, 1951, wrote:

"If, Mr. President, you see any prospect of the formation of a government which will enjoy the confidence of a majority of the Knesset, it is for you to approach the representatives of any of the parties which voted against the present government. If any one of them succeed in forming a government, I shall gladly hand over my office to him with my sincere good wishes for success in his task.

If this should not be possible and the majority of Mapam Herut. the United Religious Front, the Communists and the General Zionists[1)] who voted against the government, are unable to form a government, even for a period of transition, then section 11(d) of the Law of Transition, 1949, will come into operation. This obliges the present government, of which I have the honor to be the head, to remain in office until the formation of a new government, after elections."

1) Mapam and the Communists are left-Wing parties and the others Right-Wing parties.

On March 5, 1951, the President sent a note to Mr. Yosef Sprinzak, the Speaker of the Knesset, in which he wrote, inter alia : -

> "After reading the reply of Mr. Ben-Gurion and as a result of the consultations with representatives of the parties in the Knesset, I have reached the conclusion that the government which resigned should remain in office in accordance with the Law of Transition until the formation of a new government after the elections."

On March 21, 1951, the petitioners requested an interview with the President. They were informed that his state of health did not permit him to receive them and on March 28, 1951, the petitioner, Eri Jabotinsky, sent a letter to the President's private secretary in these terms: -

> "We wished to try and convince the President that it is his duty to impose upon one of the members of the Knesset the task of forming a government which would function until the convening of the Second Knesset but which would in the meantime enjoy the confidence of the present Knesset. I do not think there is any point in stating my grounds to the President here. The majority of them are known from the debates in the Knesset and from the press - in particular Ha'aretz. The Law of Transition lays down the President's duty in this matter in clear terms. The letters of the President to Mr. Ben-Gurion and to the Speaker of the Knesset also show clearly that the President has not yet imposed the task of forming a government upon any member of the Knesset and that after his failure with Mr. Ben-Gurion, he discontinued his efforts. These points are all well known. As far as the political arguments which we wished to raise in our conversation with the President are concerned, his state of health will no doubt prevent him from considering them in the period permitted by the present circumstances.
>
> In view of the impossibility of discussing the matter fully with the President I am now considering bringing the case at the beginning of

> next week before the Supreme Court - the only body which can determine the legality of the position. I would ask you to convey to Dr. Weizmann that, in so doing, I have no intention of offending him personally in any way whatsoever. I have long been of opinion that our Supreme Court should gradually become the final arbiter in constitutional questions affecting the State. The seriousness of the matter now in issue and the need for its legal clarification create the opportunity for the Supreme Court to enter upon this task."

On April 16, 1951, the petitioners lodged this application. They submit that the President of the State had no authority to approach the Knesset directly on a political or legal-constitutional question. Their main contention is that the President has contravened the provisions of section 9 of the Law of Transition, 1949, in that for a lengthy period of more than two months he has failed to discharge his legal and constitutional duty of imposing upon one of the members of the Knesset the task of forming a new government.

The petition also contains the following submissions:

The President infringed the rights of the Knesset when, without first finding out whether the member whom he called upon would accept the task, he charged that member of the Knesset with the task of forming a new government and did not see fit to charge any of the other 119 members of the Knesset with the same task.

In consequence of the failure of the President to fulfil his duty, a situation has been created which is inconsistent with the law of the State. In addition, the government which has resigned - which is in fact continuing to function without enjoying the confidence of the First Knesset - is an illegal government. It is the duty of the President, no matter what the consequences may be, to bring about the formation of a new government which will enjoy the confidence of the Knesset. The present situation destroys parliamentary and democratic rule and violates the principle of the collective responsibility of the government towards the Knesset. If the same government in which the Knesset has no confidence, continue functioning, then the Knesset will he given no opportunity of expressing again its lack of confidence. It has done so once and no new vote will add anything. As a result, the

government which has resigned has in fact the full power of doing what it likes, untrammeled by law or the opinion of the Knesset.

The petitioners do not see a remedy for the situation in the fact that July 30, 1951, has been fixed by law as the date for the elections to the Second Knesset. They submit that for a period of approximately five months - until the formation of a new government after the elections and the convening of the Second Knesset - an illegal situation will continue.

The Knesset cannot force the President to discharge his legal and constitutional duty. It is only the Supreme Court, sitting as the High Court of Justice, which can order the President to charge a member of the Knesset with constituting a new government.

This is a summary of the petition.

The Attorney-General, having learned of the presentation of this petition, appeared on the day of the hearing and asked leave, in terms of section 6 of the Law of Procedure (Amendment) Ordinance, 1934, to submit his arguments in the matter since it appeared to him that the rights of the Government of Israel were involved and it might be injurious to the public interest to hear the petition in his absence.

He raised the preliminary point that no petition of any kind against the President of the State could be entertained by this court. Mr. Nohimovsky objected to the appearance of the Attorney-General at this stage - namely, before the issue of an order nisi. He submitted that although the Supreme Court, sitting as the High Court of Justice, is a "civil court" within the meaning of Article 38 of the Palestine Order in Council[1)], it is not a civil court within the meaning of section 6 above, where the expression is employed in contradistinction to a "criminal court." He further submitted that in terms of rule 4 of the High Court Rule, 1937, a petition for an order nisi is to be heard *ex parte.*

The court rejects these arguments of Mr. Nohimovsky for two reasons.

1) Palestine Order in Council, 1922 (as amended 1935), Article 38:
Subject to the provisions of this part of this order or any Ordinance or rules, the civil courts hereinafter described, and any other courts or tribunals constituted by or under any of the provisions of any ordinance, shall exercise jurisdiction in all matters and over all persons in Palestine.

(a) Section 6 referred to above speaks of "any civil or criminal court," and there is no reason for excluding the High Court of Justice from the expression "civil court" in the comprehensive sense in which it is used in Article 38 of the Order in Council. In our opinion, the very nature of the petition brought before this court requires that the Attorney-General should be afforded the right of intervention, even at this stage.

(b) It is true that the Rules of 1937 provide that an application for an order nisi should, as a general rule, be made *ex parte.* They do not, however, bind the court to hear such au application in the presence of the petitioner alone.

The Attorney-General submitted two arguments: -

(1) That this court will not entertain an application against the President of the State;

(2) That this court has no jurisdiction to hear the petition.

The first argument is that the President of the State enjoys general immunity and cannot be brought before the courts. The second argument is that in accordance with the existing law, this court has no jurisdiction to deal with the present petition.

(In the course of his argument counsel here referred to the Bible, the Talmud, and the works of Maimonides, but the court, holding that these sources were not relevant in the case, continued:)

In passing to more mundane sources, the Attorney-General compared the position of the King of England and his immunity from all claims before the courts with that of our President. As authority for this proposition he relied upon Blackstone, as quoted in the case of the *Parletment Belge* (1). We there find statements such as these: "Our king", says Blackstone, "owes no kind of subjection to any other potentate on earth. Hence it is that no suit or action can be brought against the king, even in civil matters, because no court can have jurisdiction over him ...authority to try would be vain and idle without an authority to redress, and the sentence of a court would be contemptible unless the court had power to

command the execution of it, but who shall command the king?" And in the same judgment Brett L.J., relying upon Blackstone, states that the real principle upon which the immunity is based is that the exercise of such jurisdiction would be incompatible with the king's regal dignity. The Attorney-General also wished to deduce from Article 46 of the Palestine Order in Council that the principle, precluding the bringing of the king before the courts as incompatible with his dignity, also applies to the President of the State of Israel and that this court may not therefore enquire into the actions of the President.

These arguments moved Mr. Fishelev, counsel for the petitioners, to contend that these principles apply to an absolute monarchy and have no place in the democratic regime of the State of Israel.

We too are of the opinion that the writings of Blackstone on the position of the King of England have no relevance here. An apt answer to this approach was given in the year 1807 by Chief Justice Marshall of the United States in his judgment in the case of *United States v. Aaron Burr* (2). The question that arose in that case was whether it was possible to summon the President of the United States as a witness for the defence and to order that he appear. Marshall C.J. said, inter alia: -

> "Although he (the King) may, perhaps, give testimony, it is said to be incompatible with his dignity to appear under the process of the court. Of the many points of difference which exist between the First Magistrate in England and the First Magistrate in the United States, in respect to the personal dignity conferred upon them by the constitutions of their respective nations, the court will only mention two. (1) It is a principle of the English Constitution that the King can do no wrong, that no blame can be imputed to him, that he cannot be named in debate. By the Constitution of the United States the President, as well as every other officer of the government, may be impeached and may be removed from office on high crimes and misdemeanors. (2) By the Constitution of Great Britain the Crown is hereditary and the monarch can never be a subject. By that of the United States, the President is elected from the mass of the people, and, on the expiration of the time

> for which he is elected, returns to the mass of the people again. How essentially this difference of circumstances must vary the policy of the laws of the two countries in reference to the personal dignity of the executive chief, will be perceived by every one."

I shall not add any comments of my own to these dicta of the distinguished Chief Justice of the United States. Every one will appreciate that in regard to the question of immunity before the courts, the position in this country is analogous to that in the United States and not to that in England.

Whether the President is to enjoy immunity is not to be gathered by reference to the immunity of a monarch. In view, however, of the decision which we have reached on the question of jurisdiction, we need not decide in this case whether the President enjoys immunity or not.

As I have said, the Attorney-General, in the course of his argument, placed the emphasis upon this court's lack of jurisdiction to deal with the petition and grant a mandamus against the President and it is, in our opinion, the answer to the question whether this court has jurisdiction which determines the fate of this petition.

On this question too, lengthy arguments were addressed to us, and points raised which are irrelevant. It is our first task, therefore, to limit the scope of our consideration. The matter before us is a constitutional one. It is an accepted rule, as laid down also in the United States, that "Constitutional questions are not to be dealt with abstractly", *Bandini Petroleum Co. v. Superior Court*; (3), at p. 108. "It is a familiar rule that the court will not anticipate the decision of a constitutional question upon a record which does not appropriately present it", *Tennessee Pub. Co. v. American National Bank*; (5), at p. 87.

In the light of this principle we shall confine our discussion:

(a) to the subject-matter of the case, namely, the alleged contravention of section 9 of the Law of Transition, as argued by the petitioners;

(b) to the prayer, namely, the granting of a writ of mandamus against the President.

The basic provision defining the jurisdiction of this court in the matter before us is section 17 of the Law and Administration Ordinance, 1948, which lays down that: -

> "So long as no new law concerning law courts has been enacted, the law courts existing in the territory of the State shall continue to function within the scope of the powers conferred upon them by law."

It follows that, in the absence of a law extending its jurisdiction, the High Court of Justice in the State of Israel has no wider powers than those which were enjoyed by it in the time of the Mandate. Counsel for the petitioners emphasised, in fact, that they do not ask us to assume powers wider than these, but they request that we exercise the jurisdiction conferred upon us by law. Their submission, so they say, is *de lege lata.*

The law relating to the jurisdiction of this court is to be found in Articles 38 and 43 of the Order in Council of 1922 and section 7 of the Courts Ordinance of 1940. Nothing relevant to the present case can be learned regarding jurisdiction from Article 38, which merely provides that the courts "hereinafter described shall exercise jurisdiction in all matters and over all persons" in the country. This jurisdiction is defined, however, in Article 43 of the Order in Council and in section 7 of the Ordinance.

As I shall explain later there is no necessity for us to determine the extent of our jurisdiction under section 7(b) of the Courts Ordinance. 1940, which confers jurisdiction upon this court to issue orders of mandamus and injunctions against public officers and public bodies. We are in fact of the opinion that the President of the State is not a "public officer" within the meaning of the definition in the Interpretation Ordinance of 1945, though he is, in a wider sense, the highest public officer in the State.

As I have said, however, there is no need for us to determine our jurisdiction under section 7(b) of the Courts Ordinance since this court has decided on numerous occasions that the limits of its jurisdiction under Article 43 of the Order in Council are wider than the limits laid down in section 7 of the Ordinance.

I agree with the submission of counsel for the petitioners that we must decide the question of our jurisdiction *de lege lata*. With this, however, we put an end to all their submissions based upon the constitutions of other countries. The doctrine of impeachment, in the various forms which it assumes in different countries, has no relevance for us in this case. It is inconceivable that this court would assume to itself a power such as that of impeachment without a specific provision in the law to that effect. Counsel for the petitioners conceded, moreover, that the purpose of impeachment is to remove the head of the State from his office by reason of the commission of an offence such us treason or some other serious offence. This is stated expressly in the constitution of the United States, and this is the interpretation given to the expression "haute trahison" in the French constitution. And the petitioners have stated repeatedly that they do not seek the removal of the President but an order of mandamus.

We return to the only question before us, namely, whether this court has jurisdiction to issue a mandamus against the President of the State in respect of his alleged failure to act in accordance with section 9 of the Law of Transition, 1949. We can decide this question *de lege lata* only on the basis of Article 43 of the Order in Council. We do not accept the contention that us the President is not mentioned in the Law and Administration Ordinance of 1948, for that reason alone we have no jurisdiction to deal with the petition. The whole force of statute law - which provides for the norm and not for exceptions - lies in its power to create machinery for dealing with situations which do not yet exist when the law is promulgated. Section 11 of the Law and Administration Ordinance, 1948, provides expressly, moreover, that the existing law shall remain in force subject to such modifications as may result from the establishment of the State and its authorities. The fact, therefore, that the high office of President of the State did not actually exist when the Law and Administration Ordinance was enacted does not stand in the way of our applying the law today to the President. Had the petition on its merits fallen within the provisions of Article 43 of the Order in Council of 1922 it would have been possible and necessary to entertain it.

The field of enquiry is narrowed down to this: is the subject-matter of the petition and the prayer among the "matters necessary to be decided for the administration of justice?" Is

the present petition a matter which calls for *judicial decision?* Some assistance in clarifying this problem may be derived from an examination of authorities in the Supreme Court of the United States .

In terms of Title 3 Section 2 of the American Constitution, "cases and controversies" are made amenable to judicial decision, and these expressions - and the limits of judicial power in general - have been defined in a long list of cases. The most recent judgment is that of Justice Frankfurter of April 30, 1951, in the case of *Joint Anti-Fascist Refugee Committee v. Attorney-General of the United States* (6). Let me cite some extracts from this judgment: -

> "...in a case raising delicate constitutional questions it is particularly incumbent first, to satisfy the threshold enquiry whether we have any business to decide the case at all. Is there, in short, a litigant before us who has a claim presented in a form and under conditions 'appropriate for judicial determination'?" *Aetna Life Ins. Co. of Hartford , Conn. v. Haworth,* (7).

At first sight there is a distinction between the language of the American Constitution which makes "cases and controversies" amenable to judicial determination, and the language of Article 43 which employs the expression "matters." But it has been held in the United States that the expression "cases" is wider than the expression "controversies". See *David Muskrat v. United States* (8) at p. 954.

> "The judicial article of the Constitution mentions cases and controversies. The term "controversies", if distinguishable from "cases", is so in that it is less comprehensive than the latter, and includes only suits of a civil nature."

Mr. Nohimovsky, counsel for the petitioner, emphasised the wide term "matters", from which he sought to derive our jurisdiction. Even if we assume that the term "matters" is wider than "cases and controversies" we have still to enquire what are the matters which are submitted to our jurisdiction. They are only those "matters... *necessary to be decided*

for the administration of justice." By the addition of these words the legislature has set limits to the area of "matters" in the ordinary meaning of that expression. In regard to this it was submitted by counsel for the petitioners that we must interpret the expression "justice" by reference to philosophical, religious and moral sources. We are not prepared to adopt this system of interpretation which is completely unlimited in scope and obscures the limits of judicial power.

Justice Frankfurter said the following in connection with this problem in his judgment referred to above: -

> "Limitation on 'the Judicial Power of the United States' is expressed by the requirement that a litigant roust have 'standing to sue', or more comprehensively, that a Federal Court may entertain a controversy only if it is 'justiciable'. Both characterizations mean that a court Grill not decide a question unless the nature of the action challenged, the kind of injury inflicted, and the relationship between the parties are such that judicial determination is consonant with what was generally speaking the business of the Colonial Courts and the Courts of Westminster when the Constitution was framed. The jurisdiction of the Federal Courts can be invoked only under circumstances which to the expert feel of lawyers constitute 'a case or controversy'. The scope and consequences of the review with which the judiciary is entrusted over executive and legislative action require us to observe these bounds fastidiously."

With all respect to the learned judge, I find in these remarks an excellent definition of the limits of judicial power. The reply to the question what are the matters which are necessary to be decided for the administration of justice cannot be drawn from the wide sea of philosophical, religious and moral relationships. To do w would be to widen those limits so as to include every matter necessary for human progress. On the other hand such limits cannot be defined by a purely geometrical formula. In leaving the matter to be decided by "the expert feel of lawyers" the learned judge readily concedes the intellectual impossibility of an accurate and absolute definition. We, as judges, must find the answer to the question whether the matter, in the language of the United States judgment, is

"appropriate for judicial determination" or, in the language of our Article 43, is "necessary to be decided for the administration of justice", by bringing to bear our legal and judicial understanding.

We also attach importance to the words of Justice Frankfurter relating to the "business of the Colonial Courts and the Courts of Westminster". We find in this remark the connecting link between the language of the American Constitution and that of Article 43 of the Order in Council.

The question before us, therefore, is whether the petitioners have placed before the court a matter which is justiciable, a matter which is proper for judicial determination.

The complaint of the petitioners is that the President of the State has failed to comply with section 9 of the Law of Transition or, at the least, that he has not exhausted the possibilities envisaged in that section by making repeated attempts to impose the task of forming a new government upon one of the remaining 119 members of the Knesset after the first member upon whom that task was imposed failed in his attempt. The petitioners ask us to order the President to continue imposing the task of forming a government upon members of the Knesset until one of them who undertakes this mission succeeds in forming a new government which enjoys the confidence of the Knesset.

According to the reasoning which underlies the petition it will be the duty of this court to examine and determine whether, in his first or second or third attempt to do what is requested of him, the President of the State has discharged the duty imposed upon him by section 9 of the Law of Transition, or whether he must continue in his attempts. In order to decide the matter this court will have to consider the effectiveness of the imposition of the task in question upon one or other of the members of the Knesset. It is sufficient to point out the consequences of such a process in order to show that the present petition falls completely outside the limits of judicial determination.

If the "expert feel of lawyers" is to be invoked, it may be said generally that the whole subject of the duty of forming a government in accordance with section 9 of the Law of Transition is non-justiciable and beyond the scope of judicial determination. The

relationships involved are in their very nature outside the field of judicial enquiry; they are relationships between the President of the State, the government and the Knesset, that is to say, the executive and parliamentary authorities. If the question of a failure to comply with section 9 should arise, the remedy must be found through parliamentary means, that is to say, in the reaction of the Knesset to a government which, in its opinion, does not even possess the right to exist in transition in accordance with section 11(d) of the Law of Transition. That section provides that the government, after its resignation, shall continue in office until the formation of a new government in accordance with the provisions of that Law.

It is highly significant that counsel for the petitioners did not cite a single authority from other countries in which a court directed the President of the State, in any form whatsoever, to follow a particular course in the discharge of his executive functions.

We have reached the conclusion that the matter before us is not one which is amenable to judicial determination and decision. We point with satisfaction to the accord between our decision and those of the Supreme Court of the United States which, as is well known, has considerable experience in examining the boundaries between the respective functions of the three authorities of the State. Counsel for the petitioners invited us to follow in the footsteps of the Supreme Court of the United States, and strongly relied upon a saying that that court is in fact the Constitution. Just because of that, however, it is desirable to point to the care taken by the American Supreme Court not to overstep the boundary. Here are some examples.

In the case of *Mississippi v. Johnson* (9), the court was asked to issue an injunction against the President of the United States restraining him from enforcing a law passed by Congress relating to the administration of the State of Mississippi. It was argued by the petitioners that the law in question was *ultra vires* the Constitution of the United States.

Chief Justice Chase drew a distinction in his judgment between the ministerial and the executive and political duties of the President of the United States, and said:-

> "An attempt on the part of the judicial department of the Government to enforce the performance of such (executive and political) duties by the President might be justly characterized, in the language of Chief Justice Marshall, as 'an absurd and excessive extravagance' . . . It was admitted in the argument that the application now made to us is without a precedent and this is of much weight against it . . . The fact that no such application was ever before made in any case indicates the general judgment of the profession that no such application should be entertained."

I may mention incidentally that there is in the last sentence quoted a hint of the conception mentioned by Justice Frankfurter in his recent judgment in which he speaks of the "expert feel of lawyers". In his judgment in the case of *M'Culloch v. Maryland* (10), Chief Justice Marshall deals with the boundaries between the functions of the legislative authority and the judicial authority, and we may say, following him, that were we to accede to the request of the petitioners in this case, we would exceed the limits of judicial authority and trespass upon the preserves of the political and executive authorities. In the language of Chief Justice Marshall, "this court disclaims all pretensions to such a power. ' '

The question brought before us is one affecting the executive and political powers of the President, and is beyond the scope of judicial authority.

We accordingly dismiss the petition for want of jurisdiction.

Petition for order nisi refused.

Judgment given on July 20, 1951.