

Imperial College Union

COURT DETERMINATION RE SUMMER 2007 CONSTITUTIONAL REVIEW (NO. 01/08)

A note by the President

Background

The Union Court has authority over all matters of constitutional interpretation and is the only body in the Union bar the Trustee Board that can overrule the President on matters of how our governing documents are interpreted.

Below is the full determination of the Union Court with regards to the questions raised at the last meeting of Council concerning the integrity of the 2007 Governance Review and my subsequent interpretation that the manner in which it was passed **was** constitutional. For those of you who are less interested, a summary of the deliberations is available at the bottom of this document. This paper is just for Council's information as I appreciate that some of you might have been somewhat bemused during discussions at the last meeting.

Court determination in full

Panel consisting of:
Lara West (Chair),
Rob Park, and
Sebastian Tallents.

5th February 2008

Lara West:

1. I have read the opinion of Sebastian Tallents and am in full agreement with it.

Sebastian Tallents:

Facts

2. In the 2006/7 academic year, the Union reviewed its systems of Governance in order to conform with current best practice and requirements of UK charity law (particularly the new Charities Act 2006) and the Education Act 1994. The end result of this was a proposed new governance structure, including the creation of a trustee board, and a change of the Constitution to implement these new arrangements.
3. Amending the Constitution, under the Constitution then in effect, required the following procedure to be undertaken:

“1. This Constitution may be amended by resolution of the Council, passed by a two-thirds majority at two successive meetings, not less than fifteen and not more than forty College days apart.

2. The Regulations may be amended by resolution of the Council, passed by two successive meetings, not less than fifteen and not more than forty College days apart, with the second reading passed by a two-thirds majority.

...

4. The Disciplinary Procedure, Finance Regulations, Court, Memorandum of Understanding, any new Regulation and any part of a Regulation affecting the membership of or voting rights upon the Council, or composition, titles or job descriptions of the Sabbatical Officers require for amendment the approval of the Imperial College Council. Other regulatory amendments made shall be deposited with the Clerk to the Imperial College Council.

....

6. The Court shall provide its opinion on the constitutional propriety, efficacy and fairness of a proposed constitutional or regulatory amendment to the Council before the second reading or referendum of the same. The Court may, at its discretion, provide an opinion upon the same to the Clerk to the Imperial College Council.”

4. A motion to Amend the Constitution was tabled for a first reading at the 9th meeting of Council in May 2007 and was passed by the Council (First Reading), and was tabled

again for a second reading, as required under the procedures of the Constitution then in effect, at the 10th meeting of Council on the 11th June 2007, and was again passed (Second Reading).

5. Between the first and the second reading, amendments were made to the proposed new Constitution. Not all of these were clearly highlighted in the motion.
6. After the second reading, the Constitution was again modified after negotiation with College, and then passed by College Council on 13th July 2007.
7. In the 21st January 2008 meeting of Council, a motion was tabled to re-pass the Amended Constitution under the rules of the pre-May 2007 Constitution. The two notes tabled in support of the motion, asserted that the Amendment to the Constitution in 2007 had not been carried out in compliance with the requirements then in effect, and that the Amendments must therefore be passed again, under the requirements of the pre-May 2007 Constitution, for the Amendments to come into effect. (this would have been the first reading, as it was more than 40 College Days from the reading in June of 2007) So this constitution would still have required a second reading.
8. In particular, it was asserted that changes in the proposed Amendments between the first and second reading effectively meant that the proposal passed by the 10th meeting of Council had in fact only been read once, not twice, as required.
9. In particular, the rules under which the Constitution can be Amended were changed between the First Reading and the Second Reading, such that Constitutional Amendments would in future only require one reading by Council.
10. Furthermore, the paper asserted these changes had not been tracked, and it was therefore unlikely that Council Members were even aware of these changes.
11. Therefore, as the Amendments in 2007 had not been carried out in the manner required by the Constitution then in effect, they should be considered to have fallen, and the Union should be operating under the pre-May 2007 Constitution.
12. This motion was rejected by the Council.
13. The President issued a preliminary interpretation of the Constitution that
 - “1. All changes that were passed by College Council in July on the basis of the document passed at the second reading.
 2. For the sections of the constitution that are deregulated (ie do not require the approval of College Council) the current version is the sections voted through at the second reading”and requested the Court to rule on the Constitutionality of the Governance Review.
14. A further complaint has been made in support of the view that the Amendments were not correctly passed at the Second Reading, suggesting that the Council did not receive the required opinion of the Court on the Constitutional Amendments prior to the second reading, as required, and that this also means that the second reading can not be considered to have passed.

Court's jurisdiction

15. The Court's jurisdiction in this matter is reasonably clear. Both pre-May 2007 and the Constitution passed by College Council state that the matter of interpretation of the Constitution, its regulations and any reserved matter, policy, rule, act or omission made under it is under the ultimate jurisdiction of the Court.
 - “5.The Court interprets this Constitution, its Regulations and any reserved matter, policy, rule, act or omission made under it.”
16. Regulation 2, I, 45 permits the Court to issue orders declaring the meaning of any policy, rule, act or omission and the consequences of that declaration.
17. Regulation 2, I, 45 permits the Court to Quash or Suspend any policy, rule, act or omission, and any part thereof, found to be unconstitutional or unlawful.
18. In this case, the Court has been asked to review the Constitutionality of Governance review. The particular complaints made relate to whether the Amendments to the

Constitution, passed at the first and second readings (May and June 2007) were themselves made in a Constitutional fashion. Thus, the facts will be judged against the requirements of the pre-May 2007 version of the Constitution.

19. The Court will rule on the meaning of the pre-May 2007 Constitution, regarding the issue of first and second readings and the constitutionality of amending a Motion to Amend the Constitution.
20. The Court will rule on the specific incidents in the May and June 2007 Council meetings, and whether they meet the requirements specified by the Pre-May 2007 Constitution.
21. The Court will rule on which version of the Constitution (Pre-May 2007 or the one most recently passed by College Council) is currently in effect.

Due Process

22. As noted earlier, the pre-May 2007 states that it must be Amended in the following manner:
 - “1. This Constitution may be amended by resolution of the Council, passed by a two-thirds majority at two successive meetings, not less than fifteen and not more than forty College days apart.
 2. The Regulations may be amended by resolution of the Council, passed by two successive meetings, not less than fifteen and not more than forty College days apart, with the second reading passed by a two-thirds majority.
 - ...
 4. The Disciplinary Procedure, Finance Regulations, Court, Memorandum of Understanding, any new Regulation and any part of a Regulation affecting the membership of or voting rights upon the Council, or composition, titles or job descriptions of the Sabbatical Officers require for amendment the approval of the Imperial College Council. Other regulatory amendments made shall be deposited with the Clerk to the Imperial College Council.
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 6. The Court shall provide its opinion on the constitutional propriety, efficacy and fairness of a proposed constitutional or regulatory amendment to the Council before the second reading or referendum of the same. The Court may, at its discretion, provide an opinion upon the same to the Clerk to the Imperial College Council.”
23. The Amendment to the Constitution takes the form of a motion resolved by Council. The only restriction upon Council amending motions before it (under the standing orders for Council in regulation 4 of the pre-May 2007 Regulations) is that reports may not be amended. It seems obvious then that such a motion to Amend the Constitution may itself be amended.
24. The pre-May 2007 Constitution requires that any Amendment be passed at two separate meetings.
25. A proposed set of Amendments, or a final Constitution, that is finally passed at a first reading, having been drafted hastily either through being amended during the reading itself, or through bad drafting of the proposal, will often have typographical or grammatical errors. It has long been the practice that the version tabled at the second reading will have been edited to remove these errors.
26. The Court however must consider the situation where the version tabled at the second reading has been edited in a material, or substantive way, and whether such amendments to the Motion to Amend the Constitution can be considered fresh Amendments, and thus require two readings.
27. In determining this issue, the Court has given regard to the intention of the Constitution, the practical details the interpretation would entail, and the past precedent set by Council.
28. The purpose of the two readings is clearly to give Council members time to reflect and consider the wide ranging issues that might be brought up by an Amendment. Debate might focus on a narrow set of points, and other important but less obvious

consequences might not be considered. Furthermore, it is often the case that many parts of the Constitution are changed at the same time, and this might require a great deal of information to be assimilated and a great many possibilities considered by Council before members could commit to a decision.

29. One would therefore expect that in all circumstances, amendments will be made to the Motion Amending the Constitution at the second reading, as for many members of Council it will be the first time they will have had input into the motion proposing Amendment of the Constitution.
30. One might imagine a scenario where during the first reading of an Amendment, a particular Amendment might be proposed to deal with an issue of which Council Members were in agreement that change was needed, but in disagreement as to the precise remedy required. Council might at that point decide to appoint a working group to decide on the Amendment required, and report back to the next meeting of Council. In such a case, there would not necessarily be any particular benefit for Council members being forced to consider the amendment proposed by the working group to the motion to Amend the Constitution for another great interval of time.
31. Indeed, if we are to consider the impact of considering any substantive change to the meaning of the Motion to Amend the Constitution as a fresh Amendment to the Constitution, then it becomes clear that the minimum number of readings required to pass the Constitution will be at least three.
32. It seems obvious that the requirement for two readings is to give Council members time to consider and reflect on changes, not to delay Amendment of the Constitution until such time as members' considerations and reflections produce no new thoughts of any value or relevance, if that is indeed possible.
33. Any amendments made at the second reading to the Motion to Amend the Constitution might be so novel that Council members could not reasonably have considered them in the interval period. In that case, Council members have a number of procedural motions available to them: they can vote for the motion in parts, passing some points of the motion as a second reading and rejecting others, later considering them in a separate motion as a first reading. They can refuse to hear the motion, deferring a second reading of the entire document to a later date. Alternatively, they can reject the entire motion.
34. Therefore, there seems to be little benefit in insisting that any item or amendment to the motion to Amend the Constitution must be voted on in parts, each as a separate motion to Amend the Constitution in and of itself, and that such an interpretation would make it a very lengthy and complex procedure to change the Constitution.
35. With regard to precedent, it has long been the case that major and substantive amendments to the motion to Amend the Constitution have been tabled and accepted at the second reading, one example being the decision to allow two year Sabbatical Officers.

The May and June 2007 readings of the Constitutional Amendments arising out of the 2006/2007 Governance Review

36. Throughout 2006/2007 a major consultation was undertaken of Union Governance, and the results of this consultation presented to the Council as a proposed new constitution, and Council was asked to pass a motion Amending the Constitution in the May and June meetings of 2007.
37. Between the two readings, changes were made to the document. As discussed in the previous section, it is not unconstitutional in and of itself to amend a motion to Amend the Constitution, indeed it is expected, as a natural consequences of the thoughts and reflections of Council members in the interval between the two readings.
38. In this case however, major changes were made between the Constitution tabled at the first meeting, and the second meeting, including deletions (in particular, the requirement that Amendments to the Constitution be read twice) to which Council's attention was not drawn verbally, in a note, or through marks or comments in the document tabled at Council.

39. It is a requirement that documents be made available to Council members with sufficient notice prior to the meeting so that Council members may attend the meeting having read and considered the motions before they are considered in Council.
40. It has commonly been practice that it is the discretion of the Council Chair to accept motions and papers that have not been properly submitted. Furthermore, should the Council Chair accept such papers and motions, Council can itself move by a procedural motion to refuse to hear any paper or motion, and if Council members had been unable to read the document in question.
41. It has been raised to the Court that comparison between two such large documents as those tabled at the May and June meetings is a long and arduous procedure. However, Council members do not need to compare the two documents. As discussed earlier, they are being asked to vote on a motion to Amend the Constitution, which may itself be amended between the meetings. All that is required for Council members to make an informed vote is to be aware of the provisions in the final, amended motion.
42. As discussed earlier, a motion to Amend the Constitution can, and frequently does, consist of many individual changes, but can nevertheless be considered a single motion. The particular motion submitted to Council was the result of a wide ranging review of Union Governance, and it stands to reason that many areas might be covered. It is obvious that Council members should be aware that changes and amendments could be made in all areas of the document.
43. Though it is obviously good practice that any amendments to a motion be clearly marked and presented in such cases, the fact that changes were not in this case highlighted, though included in the final document that Council was asked to vote on, is neither unconstitutional nor sufficient grounds to suggest that Council members were effectively incapable of exercising their duty to read and consider the papers placed before them.
44. We must assume that Council members understand their powers and duties, and exercise them in good faith. It is not in the Court's jurisdiction in this case to decide on the competence of Council members. It is clear that Council was aware they were voting on a package of Amendments. The minutes make it clear that a single vote was taken on the proposed document, and not that each Amendment to a clause, or section, in the pre-May 2007 document was taken in parts.
45. As Council members are aware of their duties and responsibilities, and many options are available for Council, should they feel insufficiently informed as to the motions content or its effect, to consider the motion in other ways, to refuse to hear the paper, or to vote it down, there are we must assume that the document was passed knowingly and intentionally.
46. The provisions for Amending the Constitution, under the pre-May 2007 Constitution, make the following requirement:

"6. The Court shall provide its opinion on the constitutional propriety, efficacy and fairness of a proposed constitutional or regulatory amendment to the Council before the second reading or referendum of the same. The Court may, at its discretion, provide an opinion upon the same to the Clerk to the Imperial College Council."
47. The Court was informed of the proposed changes, and considered them at length. An opinion was formed that there was nothing of any importance within the remit of the Court to which it objected. A verbal opinion to that effect was delivered by the Court Chair to the President who tabled the motion to Amend the Constitution to Council. The minutes do not record whether this was presented to the Council, however, neither is there any record that any member of Council objected to passing the motion due to lack of this opinion.
48. The Court's opinion, is provided for the benefit of Council members. It is not binding. Were it negative, it would certainly not be sufficient to block the passing of the motion to Amend the Constitution if Council wished to pass it in any case. As such it is unclear that there are any grounds to rule the passing of the motion to Amend the Constitution unconstitutional even if it were shown that Court's Opinion had been withheld from Council in this instance, in light of the fact that the Court's opinion lacked any objection to the changes, and so would not have had any impact on the thinking of Council members.

Rob Park:

49. I agree with Sebastian Tallents.
50. I would add that it is that absolute duty of the Council and its members to satisfy themselves that actions transacted by them or in their name are constitutional in the first instance.
51. Within a reasonable time, the Members of the Union or indeed members of the Council or the Council itself (or a representative: such as the Executive Committee) may query or formally challenge transactions of business. I would hold that "reasonable time" would be, in the instance of decisions of the Council, the next scheduled ordinary meeting of the Council.
52. It must be stressed that it is that a duty of the trustees under charity law (and company law) that an organisation (incorporated or otherwise) must ensure that the organisation (the Union in this instance) follows its own rules: its Constitution. These are requirements of the Trustees Acts (notably 1912 & 2000), as well as principles enshrined in the Companies Acts 1985-1989
53. It must also be stressed that the Education Act 1994 simply allows that College to be a regulatory body which shall ensure the union is democratic, accountable for its finances and has a written constitution.
54. I hold that the Union Council should enact an agreed procedure for considering Amendments to the Constitution in the future which accord with the custom of the Council and should, in future, not feel that a working party or procedural order be impractical. Changes to the Constitution should be considered with the most scrutiny and transparency.
55. I hold that the Trustee Board, must operate at arms length using the Governance Review's convention of a helicopter pilot's view on the business of the Council, yet advising not directing the Council on future Constitutional Amendments. The Trustees are represented on the Council: including the President and the Chair of Council.

ORDERS:

1. It is declared that there are no grounds to consider that the Amendments to the Constitution passed by the 11th June 2007 meeting of Council are unconstitutional.
2. It is declared that the version of the constitution of the Union in force is the one most recently passed by College Council at its meeting on the 13th July 2007.
3. It is declared that the version of the regulations now delegated to the Union to amend without reference to the College is the one passed at the 11th June 2007 meeting of the Union Council.

All orders were agreed unanimously.