

PROCEEDINGS UNDER ARTICLES 16(4) AND 39(3) REFERRALS BY THE PRESIDENT

Application of Part 3

3.1 This Part deals with Referrals by the President, under Articles 16(4) and 39(3) of the Constitution, of Bills and Regulations that the President considers are inconsistent with the Constitution.

[3.1.1] Constitutional framework Article 16 (Power to Make Laws) provides:

(1) *Parliament may make laws for the peace, order and good government of Vanuatu.*

(2) *Parliament shall make laws by passing bills introduced either by one or more members or by the Prime Minister or a Minister.*

(3) *When a bill has been passed by Parliament it shall be presented to the President of the Republic who shall assent to it within 2 weeks.*

(4) *If the President considers that the bill is inconsistent with a provision of the Constitution he shall refer it to the Supreme Court for its opinion. The bill shall not be promulgated if the Supreme Court considers it inconsistent with a provision of the Constitution.*

Article 39 (Executive Power) provides:

(1) *The executive power of the people of the Republic of Vanuatu is vested in the Prime Minister and Council of Ministers and shall be exercised as provided by the Constitution or a law.*

(2) *The Prime Minister shall keep the President of the Republic fully informed concerning the general conduct of the government of the Republic.*

(3) *The President of the Republic may refer to the Supreme Court any regulation which he considers to be inconsistent with the Constitution.*

[3.1.2] Meaning and effect of “peace, order and good government” These words do not limit the power of the Parliament and therefore do not provide any basis for inconsistency between a Bill and the Constitution: *President v Speaker* [2009] VUSC 35; Const Cas 1 of 2009.

[3.1.3] From Bill to Act A Bill which is passed by Parliament continues to be called a Bill until it receives Presidential assent whereupon it becomes an Act: s.5(2), *Acts of Parliament Act* [Cap 116]. A Bill which has not yet been passed by Parliament is not a Bill to which art.16(4) refers and is not subject to Referral: *In re the President's Referral; President of the Republic of Vanuatu v Speaker of Parliament* [2000] VUSC 43; CC 51 of 2000. If the President does not exercise the power of Referral and the Bill becomes an Act, that does not foreclose subsequent challenge to the validity of the Act in other ways, it is merely that Referral may save a citizen this trouble later: *In re the Constitution; Attorney General v Timakata* [1993] VUCA 2; [1980-1994] Van LR 679. See further art.2 and s.9, *Interpretation Act* [Cap 132].

[3.1.4] Amendment of the Constitution A difficult question raised by the wording of art.16(4) is whether it is intended to apply also to amendments to the *Constitution* itself. Provision for general amendment is made in art.85 which makes it clear that an amendment is also made by the passage of a Bill, the only difference being a two-thirds majority necessary for passage. In relation to certain matters provided by art.86 there is the additional requirement of a national referendum. Is it possible for an amendment of the *Constitution* to be disallowed by Referral? There would appear to be two broad possibilities. In the first, the amendment is inconsistent with some other provision therein, as in *Vohor v Attorney General* [2004] VUCA 22; CAC 24 of 2004 (when s.9, *Interpretation* [Cap 132] was applied and the amendment declared unconstitutional). In the second, the amendment is inconsistent with the basic structure or essential features of the Constitution, for example, because the amendments were inconsistent with democratic principles. The latter doctrine has been developed by the Supreme Court of India but has received at best a fairly lukewarm response elsewhere: See *Golak Nath v State of Punjab* AIR 1967 SC 1643. The fact that key provisions of the *Constitution* are selectively protected by the additional requirements of art.86 probably militates against this doctrine.

[3.1.5] Meaning of “provision” Dicta from several decisions of the Supreme Court suggest a narrow reading of the meaning of “provision” in art.16(4). In *In re the President's Referral, President of the Republic of Vanuatu v Speaker of Parliament* [2000] VUSC 43; CC 51 of 2000 it was said:

It is fundamentally important to understand that the duty of the Court is to control the constitutional validity of a bill or a provision of a bill in the light of an express provision of the Constitution and not otherwise.

In *Virelala v Ombudsman* [1997] VUSC 35; CC 4 of 1997 the Chief Justice left the door (only slightly) ajar in relation to implied “provisions”

I must say that there is a role for implication in constitutional interpretation. But, this role is a limited one, and the only implications, which could be made were those that must be necessarily implied from the actual terms of the instrument [Constitution].

Therefore, in my judgment, I am of the opinion that the Court is not free to limit the language of a legislative power contained in the Constitution or the Court is not free to invent implied prohibitions upon the exercise of Legislative power.

Accordingly, in *President v Speaker* [2009] VUSC 35; Const Cas 1 of 2009, the Chief Justice declined to accept that there was an implied obligation to consult before a Bill was passed.

In *President v Speaker* [2008] VUSC 77; Const Cas6 of 2008 the Chief Justice concluded that the preamble was not a provision within the meaning of art.16(4) such as could give rise to any relevant inconsistency.

- [3.1.6] Meaning of “regulation” The Constitution does not contain any definition of “Regulation” which is but one type of delegated legislation described collectively as “statutory orders” by ss.10(2) and 12, *Interpretation* [Cap 132]. It is difficult to describe with precision what might amount to a “Regulation” within the meaning of the article. On the one hand, it seems incongruous that a power of referral should have been given in respect of one form of delegated legislation but not in relation to others. This might prompt an expansive reading of “Regulations” to include all forms of delegated legislation. On the other hand, it is inescapable that to use the expression “delegated legislation” (or to list all the types of delegated legislation) would have been an exceedingly easy matter for the drafters. Furthermore, there are traces of a distinction (albeit a rather informal one) between “regulations” and other forms of delegated legislation. The term “regulation” is usually invoked for delegated legislation of general application to everyone or to all members of a particular class: *A-G for Alberta Huggard Assets Ltd* [1953] AC 420 at 447. By contrast, “rules” usually contain procedural formalities and “orders” are of more limited application than either rules or regulations. The title of the instrument in question may not be a reliable guide and there is likely to be a significant and growing body of instruments containing multiple characteristics.
- [3.1.7] Alternative methods of invalidating laws The mechanism provided by art.16(4) is not the only method by which the court may be required to consider the validity of a law by reason of alleged inconsistency. A party seeking to invalidate a law may commence a constitutional petition under art.53(1) or may seek a declaration in general litigation. See for example *Rarua v Electoral Commission* [1999] VUCA 13; CAC 7 of 1999, cf *Groupe Nairobi v Vanuatu* [2009] VUCA 35; CAC 11 of 2009.

Starting Proceedings

3.2 (1) A proceeding under Article 16(4) or 39(3) is started by the President filing a Referral in the office of the Supreme Court anywhere in Vanuatu.

- [3.2.1] Manner in which President informed of Bill The President becomes informed of the passage of a Bill by the provision of an authenticated copy by the Clerk of Parliament in accordance with s.4(2)(d), *Acts of Parliament Act* [Cap 116]. Though there is no time limit expressed in the *Rules*, art.16(3) of the *Constitution* provides that the President shall assent within two weeks or shall commence a Referral.
- [3.2.2] Model of the *Conseil Constitutionnel* The former Chief Justice speculated in *In re the Constitution, Timakata v Attorney-General* [1992] VUSC 9; [1980-1994] Van LR 691 that the constitutional arrangement whereby the court might be called upon to consider the validity of a Bill might be influenced by the French model of the *Conseil Constitutionnel*. The Conseil, however, only has the power to challenge a law before it is promulgated and there is no power in the French courts otherwise to challenge laws made by Parliament: See generally D. Tallon, “The Constitution and the Courts in France” (1979) 27 Am J Comp L 567. That is not the position in Vanuatu.

- [3.2.3] Parliamentary consideration of issue There is no formal Parliamentary procedure specifically for determination of constitutional questions which might, and frequently do, arise. Advice on such issues may have been given or available from several sources but is not always taken or sought. Interpretation of the *Constitution* has been said to be a matter for the court, not for Parliament: *In re the Constitution; Korman v Natapei* [1997] VUSC 46; CC 168 of 1997.
- [3.2.4] Manner in which President informed of Regulation The President becomes informed of the passage of a Regulation by its publication in the Gazette in accordance with s.13, *Interpretation Act* [Cap 132]. The absence of a time limit means that Regulations may be referred at any time, even, presumably, after they have been revoked.
- [3.2.5] See CPR [2.3.1] for the location of offices.

(2) A Referral must be in Form 5.

What a Referral must contain

3.3 A Referral must set out:

- (a) the name of the Bill or Regulation and the provisions that are being referred to the Court; and**

[3.3.1] Short title It is conventional to refer to the short title of the Bill in accordance with s.2(3), *Acts of Parliament Act* [Cap 116].

- (b) the Articles of the Constitution with which the President considers those provisions are inconsistent; and**

[3.3.2] See further [3.1.3], [3.1.4].

- (c) a statement of the reasons why the President considers those provisions to be inconsistent with the Constitution; and**

- (d) a statement whether the President considers those provisions of the Bill or Regulation are severable; and**

- (e) if the President considers the provisions are severable, which provisions of the Bill or Regulation may remain.**

Parties to a proceeding started by a Referral

3.4 The parties to a proceeding started by a Referral are:

- (a) the President; and.**

[3.4.1] Description of the President The President should be referred to as the "Referral Authority": *In re the President's Referral; President of the Republic of Vanuatu v Speaker of Parliament* [2000] VUSC 43; CC 51 of 2000.

- (b) as the respondent:**

- (i) for a Referral under Article 16(4), the Speaker of Parliament; and**

- (ii) for a Referral under Article 39(3), the person or body that made the Regulation.**

[3.4.2] Origin of para.(b) Paragraph (b) appears to modify and subsume what was said in *In re the President's Referral; President of the Republic of Vanuatu v Speaker of Parliament* [2000] VUSC 43; CC 51 of 2000.

Filing

3.5 (1) A Referral is filed by lodging 4 copies of the Referral with the Court.

(2) After the Referral is filed and before returning sealed copies to the President, the Court must:

[3.5.1] See *CPR* r.18.5 as to sealing.

(a) fix a date for the first Conference in the matter; and

(b) write this date on the Referral.

(3) The Conference date must be between 14 and 21 days after the filing date.

Service

3.6 (1) A Referral must be served on the Attorney-General within 7 days after the filing date.

(2) The Court may by order reduce or extend this period, either on application by a party or on its own initiative.

(3) A sworn statement, in Form 2, setting out details of the time and manner of service of the Referral must be filed before the President can take any further action in the proceeding.

Conference

3.7 (1) At the first Conference, the Court may:

(a) order that another person be served and may be legally represented; and

[3.7.1] General observations See further rr.2.4(3) and 2.8(d). It is difficult to envisage circumstances under which this would be necessary in a Referral. Elsewhere in the Commonwealth courts may sometimes grant leave to a limited class of interested persons to appear and make submissions.

(b) recommend to the Attorney-General that he or she act under section 22 of the State Law Office Act (No. 4 of 1998) to appoint an independent lawyer for a person, if the Court considers this is necessary in the interests of justice; and

[3.7.2] General observations Further to para.(a), it is difficult to envisage circumstances under which this would be necessary in a Referral or generally appropriate. Strictly speaking, there is in fact no such power of appointment in the Act; subs.(2) merely permits the Attorney General to allow the Government to seek private legal representation and subs.(3) permits the "engagement"

of a private practitioner to work "on behalf of the Office." In the case of such an engagement, the private lawyer works for the State Law Office and could not go beyond the remit provided by s.6, ie. to represent the Government.

- (c) fix a date for another Conference, if one is necessary; and**
- (d) fix a hearing date; and**
- (e) make orders about:**
 - (i) filing and serving written submissions and lists of authorities to be relied on; and**
 - (ii) any other matter necessary to assist in managing the hearing of the Referral.**
 - (iii) for a Referral under Article 39(3), the person or body that made the Regulation.**

Hearing

3.8 (1) The hearing of the Referral must take place as soon as practicable, and in open court.

[3.8.1] See further *CPR* r.12.2.

(2) However, the Court may order the public to be excluded from a specific part of the hearing in exceptional circumstances if it is necessary to do so in the interests of the defence, safety, public order, public welfare or public health of Vanuatu.

(3) The hearing is to be conducted in the following order:

- (a) the President's counsel makes an address opening his or her case and states the reasons why the Bill or Regulation has been referred to the Court; and**
- (b) the respondent and anyone entitled to legal representation make an address opening their case and state their arguments; and**
- (c) the President's counsel replies.**

[3.8.2] *Reception of evidence* It should be noted that, unlike corresponding hearing rules in Parts 2, 4 and 5, no provision is made here for the reception of evidence. The scope for evidence does seem very narrow, however, it is possible that certain legislative and extrinsic material might be relevant. The evidence of legal experts is unlikely to be admissible.

Judgment

3.9 (1) After the hearing the Court must give judgment, as set out in this Rule.

(2) The judgment must be announced in open court.

[3.9.1] See further *CPR* r.12.2.

(3) The judgment must:

- (a) set out the Court's opinion; and**
- (b) state the Court's reasons for reaching its opinion.**

[3.9.2] Meaning of "opinion" See further *CPR* r.13.1(1). The reference to "judgment" is slightly misleading and superfluous as the Court's mandate under art.16(4) is only to provide its "opinion". Article 39(3) does not explicitly limit the Court to the provision of an opinion, however it would be anomalous if the provision were to be read otherwise. The reference to "opinion" in art.16(4) probably derives from the French influence suggested by the former Chief Justice in *In re the Constitution, Timakata v Attorney-General* [1992] VUSC 9; [1980-1994] Van LR 691 – the *Conseil Constitutionnel* provides strong, but not binding, decisions on the validity of legislation. In France, the executive is bound by general principle of law to withdraw illegal measures consequent upon a decision of the *Conseil* against validity: J. Bell, *French Constitutional Law*, Clarendon, Oxford, 1992 at 33, n.56. In Vanuatu, the consequences of an opinion of invalidity are similarly automatic from art.16(4). This probably explains why there is no provision for enforcement in this part. It is suggested that the Court's opinion should be expressed accordingly.

(4) The opinion must state:

- (a) whether or not the provisions of the Bill or Regulation are constitutional; and**
- (b) if the provisions are unconstitutional, whether or not they can be severed; and**
- (c) if they can be severed, to what extent any remaining provisions of the Bill or Regulation are consistent with the Constitution after severance.**

[3.9.3] Extent of additional consideration This paragraph seems, contrary to expectation, to require the court to consider whether every other part of the Bill or Regulation is consistent with the Constitution. In any event, the question whether the court may advise the President to assent to the remainder of the Bill after excising the offending parts was left open in *In re the Constitution; Attorney-General v Timakata* [1993] VUCA 2; [1980-1994] Van LR 679 and probably cannot be answered by rules of procedure.

(5) Except as set out in subrule (6), the Court must ensure that copies of the judgment and reasons are available to the public.

[3.9.4] Meaning of "judgment" As explained in [3.9.2], the reference to "judgment" and "reasons" are apt to mislead – the Court's mandate is to provide an "opinion" – no more and no less.

(6) However, the Court may withhold from the public a part of the reasons for its decision in exceptional circumstances:

[3.9.5] Meaning of "reasons for decision" As discussed in [3.9.2] and [3.9.4], the reference to "decision" and "reasons" generate some confusion about the Court's mandate.

- (a) out of respect for the rights and freedoms of a party or another person; or**
- (b) because it is necessary to do so in the interests of the defence, safety, public order, public welfare or public health of Vanuatu.**

Costs

3.10 When the Court gives its judgment, or as soon as practicable after giving judgment, the Court must decide the question of costs.

[3.10.1] See further *CPR* Part 15.

[3.10.2] Usual costs order It is difficult to find a common thread among the costs orders. If a Bill or Regulation is set aside, the Government will usually be ordered to pay the costs: *In re the Constitution*; *Attorney-General v Timakata* [1993] VUCA 2; [1980] Van LR 679; *In re the President's Referral*; *President of the Republic of Vanuatu v Speaker of Parliament* [2000] VUSC 43; CC 51 of 2000. When the Bill or Regulation is upheld, costs may be borne by the President: *In re the President's Referral*; *President of the Republic of Vanuatu v Speaker of Parliament* [2000] VUSC 43; CC 51 of 2000; *Contra: President v Speaker* [2009] VUSC 35; Const Cas 1 of 2009; *President v Speaker* [2008] VUSC 77; Const Cas 6 of 2008.

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