PROCEEDINGS UNDER ARTICLES 6 AND 53(1) INFRINGEMENT OF RIGHTS AND REDRESS

Application of Part 2

2.1 This Part deals with Constitutional Applications, under Articles 6 and 53(1) of the Constitution, about the infringement of individuals' rights and the redress of infringements of provisions of the Constitution.

[2.1.1] Constitutional framework Article 6 (Enforcement of Fundamental Rights) provides:

(1) Anyone who considers that any of the rights guaranteed to him by the Constitution has been, is being or is likely to be infringed may, independently of any other possible legal remedy, apply to the Supreme Court to enforce that right.

(2) The Supreme Court may make such orders, issue such writs and give such directions, including the payment of compensation, as it considers appropriate to enforce the right.

Article 53 (Application to Supreme Court Regarding Infringements of Constitution) provides:

(1) Anyone who considers that a provision of the Constitution has been infringed in relation to him may, without prejudice to any other legal remedy available to him, apply to the Supreme Court for redress.

(2) The Supreme Court has jurisdiction to determine the matter and to make such order as it considers appropriate to enforce the provisions of the Constitution.

(3) When a question concerning the interpretation of the Constitution arises before a subordinate court, and the court considers that the question concerns a fundamental point of law, the court shall submit the question to the Supreme Court for its determination.

The brief statement of what arts.6 and 53(1) are "about" is surplusage and implies a slightly narrower view of the provisions than they may in fact bear: See for example *Vanuatu Copra and Cocoa Exporters Ltd v Republic of Vanuatu* [2006] VUSC 74; Const Cas 2 of 2006 (as to Constitutional rights of corporations under art.6). Of course, the rule is not an interpretive aid to the *Constitution*.

[2.1.2] Duplication of proceedings permitted The provision in art.6(1) that the remedy is "independent" of other remedies and in art.53(1) that the remedy is "without prejudice" to other remedies have been interpreted to permit multiple, even overlapping proceedings: *Naling v Public Prosecutor* [1983] VUCA 1; [1980-1994] Van LR 61; *In re the Constitution; Timakata v Attorney General* [1992] VUSC 9; [1980-1994] Van LR 691 ("co-existent, parallel and independent, of any other legal remedy."); *Tatwin v Attorney General* [1995] VUSC 5; CAC 25 of 1995; *Benard v Vanuatu* [2007] VUSC 68; Const Cas 1 of 2007 at [8]. Where the general law offers adequate relief there is some conflict in the authorities which is difficult to reconcile. On the one hand, judges have refused to strike out applications which are effectively duplications of civil proceedings: *Willie v Public Service Commission* [1993] VUSC 4; [1980-1994] Van LR 634; *Benard v Vanuatu* [2007] VUSC 68; Const Cas 1 of 2007 at [8]. On the other hand, the Court of Appeal has cautioned that a constitutional application should not become simply an alternative means of obtaining justice where under the general law good and sufficient processes are available: *Attorney-General v Timakata* [1993] VUCA 2; [1980-1994] Van LR 679; *Dinh van Than v. The Minister of Finance* [1997] VUCA 6; CAC 2 of 1997; *Vanuatu v Bohn* [2008] VUCA 6; CAC 3 of 2008. See also [2.3.1].

[2.1.3] Available remedies Article 6 speaks of "enforcement" of rights and permits "such orders, issue such writs and give such directions, including the payment of compensation" as the courts thinks appropriate to "enforce" the right. Art. 53(1) refers to applying to the court for "redress" and art.53(2) expressly grants jurisdiction to determine the matter and to make such order as it considers appropriate to enforce the provisions of the Constitution. The range of available remedies is potentially very wide and efforts to circumscribe it, such as by reference to traditional forms of remedy, have been resisted: *Attorney General v Jimmy* [1996] VUCA 1; CAC 7 of 1996. On the other hand, regard may be had to common law rules: *Willie v Public Service Commission* [1993] VUSC 4; [1980-1994] Van LR 634 (availability of damages for acts *ultra vires* denied by analogy with general law). Once there is a determination of breach then the court will determine the most appropriate way, whether financial or otherwise, for the breach to be remedied: *Vanuatu v Picchi* [2001] VUCA 6; CAC 4 of 2000; *Vanuatu v Carcasses* [2009] VUCA 34; CAC 9 of 2009.

[2.1.4] Relationship between arts.6 and 53(1) Articles 6 and 53(1) may overlap but are otherwise independent of each other in that art.53(1) provides a remedy for any kind of infringement, not just those relating to art.6: *In re the Constitution; Korman v Natapei* [1997] VUSC 46; CC 168 of 1997. Accordingly, the procedure provided by this Part ought to be adopted in all allegations of infringement not otherwise provided for in the *Rules*.

[2.1.5] Relationship to parliamentary proceedings There is said to be a "sensitive" interface between the courts and parliament, however the court will enquire into an alleged breach of the constitution, even if the breach is a matter of parliamentary practice and procedure: *Vanuatu v Carcasses* [2009] VUCA 34; CAC 9 of 2009.

Starting Proceedings

CPR r2.2, 2.3
EPR r2.2(1)

2.2 (1) A proceeding under Article 6 or 53(1) is started by filing a Constitutional Application in the office of the Supreme Court anywhere in Vanuatu.

[2.2.1] See CPR [2.3.1] for the location of offices.

(2) A Constitutional Application filed by the person seeking redress must as far as possible be in Form 1, but is valid no matter how informally made. A Constitutional Application filed by a legal practitioner must be in Form 1.

[2.2.2] Extent of permitted informality The extent of permitted informality would seem to be very great (see for example the dicta of Muria J in *In re the Constitution; Malifa v Attorney-General* [1999] VUSC 43; CC 66 of 1999: " …if they should come by the hundreds or thousands, then let them come.") unless filed by a "legal practitioner", a term which is not defined and stands in contrast, perhaps unintentionally, to the use of the defined word "lawyer" in the *Civil Procedure Rules*. Of course, that does not prevent the court from moulding an informal or otherwise defective petition: *Vanuatu v Picchi* [2001] VUCA 6; CAC 4 of 2000 ("It should be in proper form and entituled in such a way which makes it clear that it is a constitutional petition"). A general law claim which is in substance a Constitutional Application should be struck out: *Tasale v Vanuatu* [2009] VUSC 33; CC162 of 2008.

(3) In a case of extreme urgency a Constitutional Application may be made orally, as long as it is put into writing, in accordance with Form 1, as soon as possible.

[2.2.3] Meaning of "extreme urgency" There is no definition of "extreme urgency", a term sometimes seen used in connection with *ex parte* applications for injunctions: See for example *Bates v Lord Hailsham* [1972] 1 WLR 1373; *LTE Scientific Ltd v Thomas* [2005] EWCA Civ 1177 at [9]. Mere urgency should not suffice, though perhaps a merely urgent oral application, made personally, might be saved by subr.(2).

What a Constitutional Application must contain

2.3 (1) A written Constitutional Application must set out:

(a) the rights that have been infringed, are being infringed or provisions for which redress is sought; and

[2.3.1] Reality The Court of Appeal in *Picchi v Attorney-General* [2001] VUCA 12; CAC 20 of 2001 warned that such allegations must be "based on reality and not on some theoretical or assumed scenario". The court approved of *Ferguson v Attorney-General of Trinidad and Tobago* [2001] UKPC 3 where the Privy Council said at [14]: "Counsel submitted that it follows as a matter of legal logic from the fact of the breach of the common law duty of disclosure that the appellant was deprived of his liberty otherwise than by "due process of law" and deprived of "the protection of the law" contrary to section 4(a) and (b) of the Constitution; and that he was deprived of his right to "a fair hearing in accordance with the principles of fundamental justice for the determination of his rights and obligations," contrary to 5(2)(e). Their Lordships are unable to accept this proposition. It can readily be accepted that the constitutional guarantees of due process, protection of the law, and a fair hearing are of generous width: See *Minister of Home Affairs v*

Fisher [1980] AC 319, at 328H, *per* Lord Wilberforce. They are in principle capable of covering unfairness in the treatment of an accused at a preliminary enquiry. On the other hand, their Lordships are satisfied that the question whether there has been a breach of constitutional guarantees in respect of due process, protection of the law, and a fair hearing, must be approached in the light of the proceedings considered as a whole… the issue whether there has been a breach under any of these guarantees must be judged on a realistic assessment of the proceedings considered as a whole. This view does not undermine those guarantees. On the contrary, the cause of human rights is served by concentrating on matters of substance and approaching with scepticism technicalities and causally irrelevant breaches."

(b) the Article of the Constitution that confers those rights or sets out those provisions; and

(c) the person or body that infringed those rights or provisions; and

(d) the way those rights or provisions have been infringed; and

[2.3.2] Striking out applications An application which fails to disclose an infringement may be struck out in the inherent jurisdiction of the court: *Benard v Vanuatu* [2007] VUSC 68; Const Cas 1 of 2007 at [3], [9] – [12]; *President v Speaker* [2009] VUSC 35; Const Cas 1 of 2009; *Bule v Esau* [2009] VUSC 115; Const Cas 5 of 2009. See further r.2.8(a).

(e) the facts on which the application is based; and

[2.3.3] Brevity It is suggested that, like a statement of the case under the *Civil Procedure Rules*, the facts should be stated as briefly as possible. A fuller exposition of the facts ought to be contained in the sworn statement described in subr.(2)(a).

(f) the remedies applied for by the applicant to enforce those rights or seek redress.

[2.3.4] Availability and choice of remedies See further [2.1.3].

(2) The application must have with it:

(a) a sworn statement by the applicant in support of the Application, setting out details of the evidence the applicant relies on; and

(b) any other sworn statements that support the Application.

[2.3.5] Prima facie case It is suggested that the sworn statements filed with the application establish at least a *prima facie* case. Further sworn statements may, of course, be filed later.

[2.3.6] Admissibility See further *CPR* Part 11 and [2.10.2].

(3) An oral application:

(a) must state the matters listed in subrule 2.3(1); and

(b) must be sworn to by the applicant.

[2.3.7] Content of oral application It is difficult to see how an oral application can be made to "state" the required matters or to be "sworn to" unless the applicant gives *viva voce* evidence. It might be thought that these are the subsequent requirements, however subr.(4) would seem to eliminate that possibility. It is suggested that the only conclusion is that an oral application cannot be made purely orally and that these are the *de minimis* documentary requirements.

(4) When an oral application is put into writing it must also include:

(a) any orders made by the Court on the Application; and

[2.3.8] General observations This would seem to be useful only if the oral application was *ex parte*, as seems always likely from the requirement of extreme urgency in r.2.2(3). It may be that this paragraph is intended to circumvent any delay in the generation of sealed orders by the court. It is suggested that the court should nevertheless consider more comprehensive orders as to what material should be served on the other parties and when, with a view to dealing with as many matters as possible at the next return date.

(b) if any part of the hearing has been held, a statement of what was said at the hearing.

[2.3.9] General observations The paragraph does not explain whether it is intended to refer to "what was said at the hearing" by the applicant (in giving *viva voce* evidence) or "what was said at the hearing" by everybody, in lieu of transcript. The latter possibility seems a little curious, however the former could easily have been put more precisely if no more was intended.

(5) A sworn statement must be in Form 2.

Parties to proceedings started by a Constitutional Application

2.4 (1) The parties to proceedings started by a Constitutional Application are:

(a) the applicant; and

(b) the Republic of Vanuatu, as the respondent.

[2.4.1] History The former counterpart to this rule, s.218 of the *Criminal Procedure Code* [Cap 136], referred to "all those parties whose actions are complained of." By implication, this allowed for the possibility that non-State actors such as private individuals could infringe the Constitutional rights of other individuals. The Court of Appeal determined, however, that the opening words of art.5(1) of the *Constitution* ("The Republic of Vanuatu recognises…"), precluded the creation of private rights: *Francois v Ozols* [1998] VUCA 5; CC 155 of 1996; see also *Attorney-General v Timakata* [1993] VUCA 2; (1993) 2 Van LR 679 at 682. Accordingly, Coventry J in *In re the Constitution, Picchi v Attorney-General* [2001] VUSC 106; CC 113 of 1997 considered the reference to "other parties" in s.218 was otiose. The Court of Appeal agreed: *Picchi v Attorney-General* [2001] VUCA 12; CAC 20 of 2001.

[2.4.2] Whether other parties can be joined The rule leaves open the question whether other parties may be joined, according to their interest.

(2) A witness may at any time apply to the Court to be legally represented.

(3) The Court may at any time order that a person may be legally represented.

[2.4.3] Relevant "person" Presumably the "person" contemplated by this subrule is in fact the "witness" contemplated by subr.(2) or a party whose interests may be affected.

Filing

2.5 (1) A Constitutional Application is filed by lodging 4 copies of the Application and sworn statement with the Court.

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

[2.5.1] 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 Application.

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

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

Service

2.6 (1) A Constitutional Application must be served on the Attorney-General on behalf of the respondent to the proceedings within 7 days after the date of filing the application.

[2.6.1] See *CPR* Part 5 as to service generally.

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

(3) The applicant must file a sworn statement setting out details of the time and manner of service of the Application before the applicant takes any further action in the proceeding.

Duty of court to enquire into Constitutional Application

2.7 The court is to enquire into the matters raised by the Constitutional Application.

[2.7.1] History The former s.218(6) of the *Criminal Procedure Code* [Cap 132] was slightly different to this rule in that the former provided that the court should so enquire "at the hearing". Nevertheless, in *In re the Constitution, Picchi v Attorney-General* [2001] VUSC 106; CC 113 of 1997 Coventry J considered this "special and original jurisdiction" in light of a submission by counsel that the "enquiry" was a separate process from the hearing and was "inquisitorial" in nature - and therefore the court should take upon itself the task of obtaining production of documents and the attendance of witnesses. Although the court was less than explicit and declined to limit the power of the court to act in other ways to obtain production, it is clear from the order that the Attorney-General produce documents that the court did not accept the above submission *per se.*

[2.7.2] Extent of duty to enquire The extent of this new rule-based duty has the potential for controversy and its precise scope is uncertain. It is an essential requirement of procedural fairness that judicial officers be impartial and be seen to be impartial: *Metropolitan Properties Co (FCG) Ltd v Lannon* [1969] 1 QB 577 at 599. There may be a fine line between conducting an enquiry under this rule and becoming an advocate so as to give the impression of bias. In Canada, for example, such proceedings are strictly adversarial in nature and the court will decide the case only upon the issues framed by the parties, even where the facts suggest alternative formulations: R Sharpe & K Roach, *The Charter of Rights and Freedoms* (3rd ed.), Irwin, Toronto, 2005 at 105-6. A very different course is taken in Vanuatu. In *Republic of Vanuatu v Bohn* [2008] VUCA 6; CAC 3 of 2008 the Court of Appeal reflected on the assistance given by the primary judge to frame the claimant's application. The court approved of such activity as "vital" to case management. The court also noted that in the 21st Century (in Vanuatu) the common law adversarial system and the continental inquisitorial system were not separate systems, but rather, occupied points along a continuum. The Court of Appeal declined further to elaborate on the extent of the duty to enquire except to say that it did not consider dictionary definitions of "enquire" (and its difference to "inquire") to be helpful.

[2.7.3] Unrepresented litigants The duty to enquire into applications by unrepresented persons may involve deeper enquiry and extends to assisting the unrepresented litigant to frame the case:

Republic of Vanuatu v Bohn [2008] VUCA 6; CAC 3 of 2008.

[2.7.4] No default judgment The duty to enquire precludes the possibility of obtaining default judgments on Constitutional Applications: *Vanuatu v Picchi* [2001] VUCA 22: CAC 14 of 2000.

EPR r2.9

Conference

2.8 At the first Conference the court may:

(a) deal with any application to strike out the Constitutional Application; and

[2.8.1] Striking out applications A Constitutional Application may be struck out in the inherent jurisdiction of the court: *Benard v Vanuatu* [2007] VUSC 68; Const Cas 1 of 2007 at [3], [9] – [12]. For examples see *Malas v Vanuatu* [2007] VUSC 2; Const Cas 2 of 2005; *Tonge v Vanuatu* [2007] VUSC 5; Const Cas 5 of 2006.

(b) order the respondent to file a response; and

(c) issue a summons under Rule 2.9; and

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

[2.8.2] General observations It is doubtful whether the court could properly compel any person to be represented. This paragraph is probably intended to be mutually supportive of subr.2.4(3).

(e) decide if the Constitutional Application needs to be served on anyone else, and state how it is to be served; and

[2.8.3] Other persons on whom an application might be served In *In re the Constitution, Picchi v Attorney-General* [2001] VUSC 106; CC 113 of 1997 Coventry J suggested that any person whose conduct is complained of in a petition should be made aware of that fact. The Court of Appeal agreed, adding that the former s.218 of the *Criminal Procedure Code* [Cap 132] contemplated the involvement of those whose actions are complained of: *Picchi v Attorney-General* [2001] VUCA 12; CAC 20 of 2001. These comments probably continue to apply to the slightly different regime under the *Rules*. In general, it is suggested that the principle described by the majority in *Rarua v Electoral Commission* [1999] VUCA 13; CAC 7 of 1999 is also instructive: "A fundamental rule of procedure in the Supreme Court is that a person whose rights in respect of the subject matter of the action will be directly affected by any order which may be made in the action must be joined as a party".

(f) fix a date for another Conference, if one is necessary, or fix a hearing date; and

(g) make orders about:

(i) filing and serving a response; and

(ii) filing and serving sworn statements by the parties, their witnesses and anyone else; and

(iii) disclosure of information and documents, in accordance with Part 8 of the Civil Procedure Rules; and

(iv) filing and serving written submissions and lists of authorities to be relied on; and

(v) giving notice to witnesses to attend the hearing; and

(vi) any other matter necessary to assist in furthering the enquiry into the application.

(2) A response:

(a) must not deny the applicant's claims generally but must deal with each paragraph of the Constitutional Application; and

[2.8.4] See further *CPR* r.4.5(3).

(b) must be in Form 3.

Summons to disclose documents and information, produce documents and objects, etc

2.9 (1) The court may at any time order that:

(a) a summons be issued requiring a person to attend court to give evidence and produce documents or objects; and

(b) a person allow the Court to inspect an object and visit a place.

(2) The order may be made:

(a) at the request of a party; or

(b) at the request of a person entitled to legal representation; or

(c) on the Court's initiative.

(3) A summons must be in Form 4.

Hearing

2.10 (1) The hearing of a Constitutional Application must be in open court.

[2.10.1] 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) Evidence in chief is to be given by sworn statement unless the Court orders otherwise.

[2.10.2] Admissibility Every issue must be proved by proper and admissible evidence: *Picchi v Attorney-General* [2001] VUCA 12; CAC 20 of 2001 (referring to "the most rank and irresponsible hearsay"). See further *CPR* r.11.3.

(4) The hearing is to be conducted as follows, unless the Court orders otherwise:

(a) the applicant makes an address opening his or her case and, if evidence is to be given orally, brings evidence in support of his or her case;

(b) the respondent and anyone entitled to be legally represented cross-examine the applicant's witnesses;

(c) the applicant re-examines his or her witnesses;

(d) the respondent and anyone entitled to be legally represented make an address opening their case and, if evidence is to be given orally, bring evidence in support of their case;

(e) the applicant cross-examines the respondent's witnesses;

(f) the respondent and anyone entitled to be legally represented re-examine their witnesses;

(g) the applicant makes a closing address;

(h) the respondent and anyone entitled to be legally represented make their closing addresses.

(5) At the hearing the Court may:

(a) ask questions of the witnesses; and

(b) call witnesses on its own initiative; and

(c) inspect an object and visit a place; and

(d) take any other step necessary to further the enquiry into the Constitutional Application and help the Court make a decision on the Application.

[2.10.3] Scope of para.(d) Paragraph (d) may permit the court to call in an applicant and obtain information which may cure any deficiencies of form: *Rarua v Electoral Commission* [1999] VUCA 13; CAC 7 of 1999. This may be desirable when the applicant is unrepresented: *Benard v Vanuatu* [2007] VUSC 68; Const Cas 1 of 2007 at [5]. The further scope of the paragraph is uncertain: See further [2.7.2].

Judgment

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

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

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

(3) The Court must state its reasons for making its decision.

[2.11.2] See further *CPR* r.13.1(1).

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

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

(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.

Enforcement and costs

2.12 (1) When the Court gives its judgment, or as soon as practicable after giving judgment, the Court:

(a) may make an enforcement order; and

[2.12.1] See further *CPR* Part 14 and subs.(3), below.

(b) must decide the question of costs.

[2.12.2] See further *CPR* Part 15.

(2) An enforcement order must set out how and when the Court's decision is to be enforced.

(3) Part 14 of the Civil Procedure Code applies to the enforcement order.

[2.12.3] This should be a reference to the *Civil Procedure Rules*.

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