

**IN THE SUPREME COURT
OF THE REPUBLIC OF VANUATU**
(Other Jurisdiction)

**Constitutional
Case No. 19/971 SC/CNST**

**IN THE MATTER OF: THE CONSTITUTION OF THE REPUBLIC OF
VANUATU**

AND:

**IN THE MATTER OF: A BILL FOR THE CONSTITUTION (SEVENTH)
(AMENDMENT) NO.1 OF 2019**

**BETWEEN: THE PRESIDENT PASTOR MOSES
TALLIS, President of the Republic of
Vanuatu**

Applicant

**AND: ESMON SAIMON – SPEAKER OF
PARLIAMENT**

Respondent

Coram: *Chief Justice Vincent Lunabek*

Counsel: *Mr. Garry Blake for the Appellant
Mr. Kent Ture Tai for the Respondent*

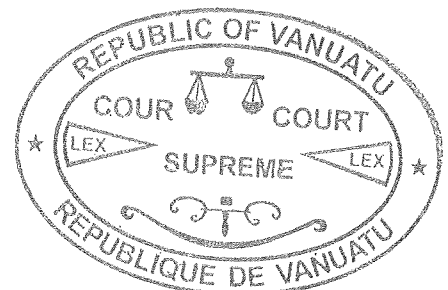
Date of Hearing: *Wednesday 15th May 2019*

Date of Judgment: *Friday 17th May 2019*

JUDGMENT

Introduction:

1. By constitutional referral filed 3 May 2019, His Excellency Pastor Obed Moses Tallis, the President of the Republic of Vanuatu, refers the bill for the Constitution (Seventh) (Amendment) No.1 of 2019 (the "Bill") to the Supreme Court pursuant to Article 16 (4) of the Constitution because he considers that assenting to the Bill would be inconsistent with Article 86 of the Constitution of Vanuatu.



2. A first conference hearing is conducted on Monday 6 May 2019. The Constitutional Referral has a foundation which requires substantive hearing from all parties in order to provide a judgment on the issue of the constitutional validity of the said Constitution (Seventh) (Amendment) No.1 of 2019 – the Bill.
3. The Court requires the Attorney General to file a response to the application and both Counsel file respective submissions. The Constitutional Referral is heard on Wednesday 15th May 2019 at 11.00am o'clock.

Grounds for the Constitutional Referral

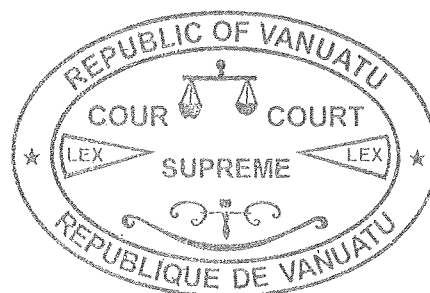
4. Based on the certification issued by the Respondent pursuant to s.13 (1) of the Acts of Parliament Act [CAP 116], and in the absence of the support of a national referendum, the Applicant considers the Bill presented to him for assent to be inconsistent with the Constitution on the following grounds:-

- i) the bill provides for the insertion of a new Article 46A in the Constitution to provide as follows:-

"46.A Appointment and Removal of Parliamentary Secretaries

1. *The Prime Minister may appoint Parliamentary Secretaries from amongst the Members of Parliament.*
2. *The number of Parliamentary Secretaries must not exceed two-thirds of the number of Ministers.*
3. *The Prime Minister is to assign responsibilities for the conduct of Government to the Parliamentary Secretaries.*
4. *The Prime Minister may remove the Parliamentary Secretaries from office."*

- ii) The Bill purports to amend the Constitution regarding the Parliamentary system by increasing the number of person with responsibility for the conduct of Government from a maximum of 13 Ministers, the Prime Minister and up to a further 8 Parliamentary Secretaries; and



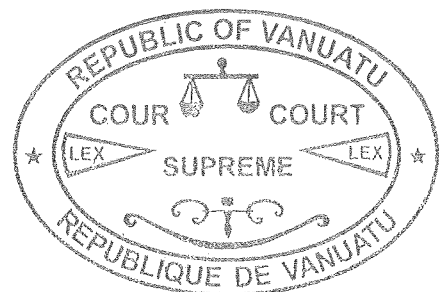
- iii) That to amend the Constitution regarding the Parliamentary system without the support of a national referendum is inconsistent with the provision of Article 86 of the Constitution.

Response to Constitutional referral

5. The Respondent Speaker of Parliament files a response to the application on 8 May 2019. The Respondent says that the Bill does not require a national referendum as it does not affect the parliamentary system accorded under Article 86 of the Constitution.
6. The Respondent says that by the Bill, it added a new Article 46A to the Constitution and vested the discretionary power on the Prime Minister to appoint Parliamentary Secretaries from amongst the members of Parliament.
7. It says that the new Article 46A made it a discretionary requirement for the Prime Minister under the exercise of the executive branch of the Government to appoint Parliamentary Secretaries.
8. It says that the position of the Parliamentary Secretaries under the new Article 46A is dissimilar to that of a Minister and it cannot be added nor seen as an increase in the number of Ministers as required under Article 40 (2) of the Constitution.
9. It says the Bill is consistent with the provisions of the Constitution and the Applicant is not entitled to the relief sought in the application.
10. The Clerk of Parliament, Mr. Raymond Kalpeau Manuake, filed a sworn statement on 8 May 2019 in support of the Respondent.

Issue

11. The critical issue on this Referral is whether the Constitution (Seventh) (Amendment) Act No.1 of 2019 (the "Bill") is inconsistent with Article 86 of the Constitution

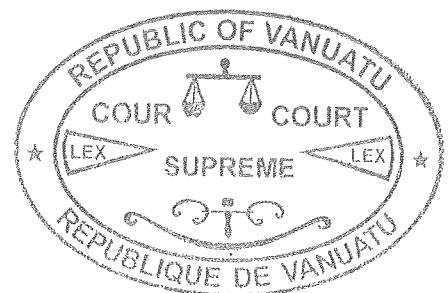


Brief Background

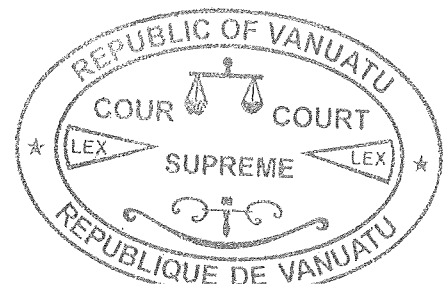
12. On 29th March 2019, Parliament met in its special sitting to discuss the Bill for the Constitution (Seventh) (Amendment) No.1 of 2019 and passed the Bill with 41 members voted for and 7 members voted against.
13. On 5 April 2019, by letter to the Referral Authority (Applicant), the Clerk of Parliament presented the bill for assent.
14. On 17th April 2019, by letter the Referral Authority requested a certification of the Bill pursuant to section 13 of the Acts of Parliament Act [CAP 116].
15. On 17 April 2019, by a certification Note, the Respondent provided its response to the letter from the Referral Authority.
16. On 26th April 2019, the Referral Authority filed this Constitutional Referral, seeking the opinion of the Supreme Court on the constitutional validity of the Constitution (Seventh) (Amendment) No.1 of 2019 (the "Bill") pursuant to Article 16 (4) of the Constitution because he considers that assenting to the Bill would be inconsistent with Article 86 of the Constitution of Vanuatu.

Submissions by both Counsel

17. Before turning to the submissions, the Referral Authority (Applicant) notes the following:
 - i) That the Referral the subject of the proceedings relates to a bill for the Constitution (Seventh) (Amendment) Act No.1 of 2019 (the "Bill") which has been passed by Parliament and was submitted to the President for assent;
 - ii) That the Constitution makes express provisions in chapter 14 for Parliament to amend the Constitution and lays out the process to be followed to give effect to any amendment.



- iii) That in terms of the constitutionality of an amendment the key consideration is compliance with the process laid down in chapter 14.
 - iv) That Article 85 requires a special sitting of Parliament at which at least three quarters of the members are present to consider the bill and for it to be passed, it requires not less than two thirds of all the members of Parliament to vote in favour of it, which would mean no less than 35 votes in favour.
 - v) That in this case, however, Article 86 requires that an amendment of a provision of the Constitution regarding relevantly “the parliamentary system”, must before it can “come into effect”, be supported in a national referendum.
 - vi) That given the language of Article 16 (4), a bill which is absent the requisite support of a national referendum in order for it to come into effect, would be inconsistent with a provision of the Constitution, namely Article 86.
 - vii) That to purport to assent to and enact legislation which does not satisfy the requirements of Article 86 would be inconsistent with Article 86 of the Constitution.
 - viii) That it is for those reasons that the Bill has been referred to the Supreme Court for its opinion.
18. Mr. Blake submitted on behalf of the Referral Authority that the Bill comprises an amendment to the Constitution regarding the parliamentary system, thereby activating Article 86. The key consideration is whether the amendment the subject of the bill is an amendment to the Constitution “regarding the parliamentary system.” If, it is, Mr. Blake submitted then clearly, in the absence of the support of a national Referendum, the Bill is inconsistent with Article 86 for the reasons he has set out above. Mr. Blake referred to the following cases in support of his submissions: **Natapei –v- Wells [2013] VUSC 43** where the Court observed there



that in relation to Article 43 in chapter 7. The Executive, when describing the backbone of the Parliamentary democratic system:-

"It is common ground that Vanuatu has adopted a Parliamentary Democratic system of Government. The system can effectively operate only on the basis that Parliament exercises its control over the executive branch of the Government. If the Parliamentary control over the government is ousted or removed from the Parliament, the system of Parliamentary Democracy can no longer operate and the system will cease to be a Parliamentary System of Government."

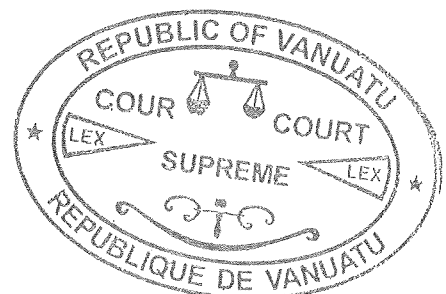
19. In those cases, it is said the Court considers the nature of the parliamentary system of government establishment by the Constitution and which applied in Vanuatu. It is also noted that it is inherent in the statements in those cases that the Parliament plays a supervisory role in respect to executive or the government. In **Vohor –v- Attorney [2004] VUCA 22**, the Court of Appeal stated in its findings:

"We agree with the submission of the Attorney General that the parliamentary system was the one adopted by the Republic of Vanuatu on Independence day and that system must include all processes of electing Members of Parliament right up to the appointment of government ministries. The Members of Parliament elect the Prime Minister who then appoints the Ministers."

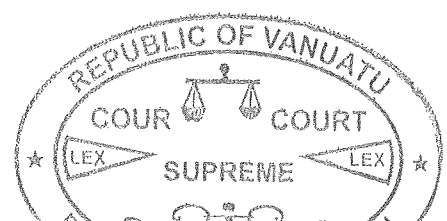
20. Mr. Blake refers then to chapter 7 of the Constitution dealing with the Executive. He says that there are a number of references to the conduct of government by the executive. An example is that the Prime Minister is required to keep the President of the Republic fully informed "concerning the general conduct of the government of the Republic."
21. Further in Article 42 (2), the Prime Minister shall assign responsibilities "for the conduct of the government to the Ministers." The number of Ministers is restricted to a quarter of the number of members of Parliament (i.e. 25%) with 52 members there can be no more than 13 Ministers.
22. Mr. Blake says that the new Article 46A introduced by the Bill provides in Article 46A (3) that "*the Prime Minister is to assign responsibilities for the conduct of*

government to the Parliamentary Secretaries.” He further says that “what can be seen is that in Article 42, the parliamentary system provides for the appointment by the parliament of the Prime Minister, and the appointment by the Prime Minister in turn of up to 13 Ministers “for the Conduct of the Government.”

23. He added that the doctrine of ‘separation of powers’ has been recognized as being reflected in the Constitution and in the parliamentary system operating in Vanuatu. The parliament is a check on the functions and role of the Executive. The makeup of the executive was clearly set out in Chapter 7 as we have described it. That is the structure of the parliamentary system under the Constitution. He submitted that the Bill purports to change the structure of the parliamentary system by changing the makeup of the executive which is an integral component of the parliamentary system.
24. The Bill, he submitted, has the effect of increasing the number of persons with responsibility for the “conduct of government” by adding up to 8 parliamentary secretaries, being two thirds of the maximum numbers of Ministers, thereby increasing the numbers of persons responsible for the conduct of the government from the Prime Minister and 12 Ministers to the Prime Minister, 12 Ministers and 8 Parliamentary Secretaries.
25. Under the parliamentary system provided for in the Constitution, out of 51 members of parliament, excluding the speaker, the size of the executive was limited to enable parliament to properly act as a check on the executive. Previously the executive comprised 14 out of 51 votes on the floor, or 27.4%. By adding another 8 parliamentary secretaries increases the numbers to 22 out of 51 or 43%. In short 4 more votes from the floor and the executive controls the parliament. The scales are now firmly weighted in favour of the executive, which was not the balance envisaged when the Constitution was proclaimed. To achieve that significant change in the parliamentary system must, he submitted, require a national referendum.

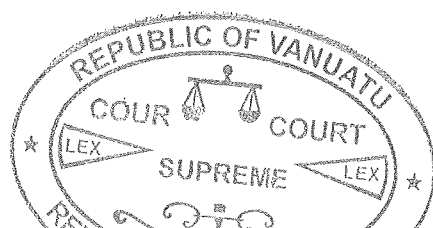


26. In that context, having regard to provisions of Article 86, and given the fundamental amendment to the operation of Chapter 7 involving the placement of the conduct of government in the hands of an additional 8 Parliamentary Secretaries, he submitted the Bill comprises an amendment to the Constitution which could be said to be “regarding the Parliamentary System.”
27. If that submission is accepted by the Supreme Court, then it follows that the Bill in its present form without the support of a national referendum is ‘inconsistent’ with Article 86 of the Constitution.
28. The Solicitor General, Mr. Frederick Gilu, on behalf of the Respondent Speaker, submitted in response to the following effect:-
29. He notes and submits that the construing of the meaning of the Parliamentary system has been dealt with in the case of **Vohor –v- Attorney General [2004] VUCA 22; Civil Appeal Case 24 of 2004 (10 December 2004)**. In that case of **Vohor –v- Attorney General [2004] VUCA 22; Civil Appeal Case 24 of 2004 (10 December 2004)**, at page 18 of its judgment, the Court of Appeal said:
- “.....the parliamentary system was the one adopted by the Republic of Vanuatu on Independence day and that system must include all the processes of electing Members of Parliament right up to the appointment of government ministers...”*
30. He submits that although the facts of that case are distinctive to this present case, the principle in that case is relevant. In that case, the Court of Appeal determined the meaning of “*Parliamentary system*” on an account of an amendment to the Constitution that relates to the Vacation of Seats and the motion of no confidence in the Prime Minister.
31. In this present case, the Court is asked to consider whether the new provisions of Article 46A as outlined in the Bill, affects the Parliamentary system which if it does, would render a national referendum under Article 86 of the Constitution.
32. He then refers to the provisions of the new Bill and submits that by the Bill, in effect, it purports to provide a discretionary power to the Prime Minister to appoint



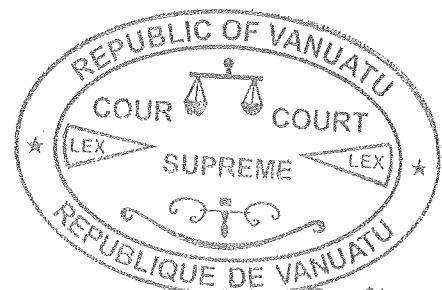
Parliamentary Secretaries from amongst the Members of Parliament, to carry out functions that may be assigned to them by the Prime Minister.

33. Mr. Gilu submits that it is necessary to construe the meaning and the composition of the executive under Chapter 7 of the Constitution. In order to do that, Articles 39 to 46 of the Constitution is of relevance.
34. He says that by Article 39 of the Constitution, it clearly stated that the executive power of the people of the Republic of Vanuatu is vested in the Prime Minister and Council of Ministers and is to be exercised as provided by the Constitution or a law. By Articles 40 to 46, it establishes the Council of Ministers and its composition and provided for the appointment of the Prime Minister, the appointment of the Ministers and their removal, it provided also for the requirement of collective responsibilities of the Ministers to Parliament and the votes of no confidence in the Prime Minister.
35. He submits therefore that the executive consists of the Prime Minister and the Council of Ministers and it involves all the processes as outlined under Articles 39 to 46 which are connected with the Prime Minister and the Ministers and/or the Council of Ministers.
36. The Respondent submits that by the Bill, it created or established the source of power to appoint Parliamentary Secretaries and/or the position of Parliamentary Secretaries AND in that source it does not vet the position of Parliamentary Secretaries to be part of the executive as defined under sub-Article 39(1) of the Constitution. That is, the Parliamentary Secretaries are not Ministers neither they involved in the exercise of the executive power as entrusted by sub-Article 39(1) of the Constitution. He therefore submit that the Bill does not affect nor change the makeup of the executive so as to change the structure of the parliamentary system.
37. He further submits that new provisions of Article 46A was intended and inserted on purpose by Parliament, giving discretionary power to the Prime Minister as the head of the executive branch of the government to exercise his/her executive



function's and roles under sub-Article 39(1) of the Constitution, and under the new Article 46A to appoint Parliamentary Secretaries from amongst the members of Parliament. Hence, it cannot be construed to have an effect of adding OR increasing the number of Ministers from a maximum of 13 Ministers and the Prime Minister and up to a further 8 Parliamentary Secretaries. The Parliamentary Secretaries are neither Ministers nor making it a requirement for them (Parliamentary secretaries) to have collective responsibilities to Parliament. Such as exercise does not impede on the Parliamentary system nor restricts the Parliamentary secretaries to exercise their Constitutional rights and/or Parliamentary roles and duties to and in Parliament (e.g. the purported Article 46A does not restrict the Parliamentary secretaries in exercising their rights in any votes of no confidence in the Prime Minister).

38. He says the Respondent concurs with the findings of the Court of Appeal in **Vohor –v- Attorney General [2004] VUCA**, in holding that the parliamentary system must be one that was adopted by the Republic of Vanuatu on Independence day and that the system must include all the processes of electing Members of Parliament right up to the appointment of government Ministers. Thus, the Bill does not in effect, and to and/or increase the number of Ministers from a maximum of 13 Ministers and the Prime Minister make up to a further 8 Parliamentary secretaries. The Bill does not affect the makeup of the executive – thus; it does not affect the structure of the parliamentary system.
39. Accordingly, and based upon the submissions made above and the case authority of **Vohor v Attorney General [2004] VUCA 22**, contended that the new Article 46A of the Constitution does not affect the parliamentary system, thus – it does require for a national referendum under Article 86.
40. He finally submits that the Referral Authority is not entitled to the relief sought and/or to any other relief and submits that it is entitled to costs.
41. Mr. Gilu makes and alternative submission to the effect that if the Supreme Court is of the opinion that the Bill affects or comes into contact with or touches the



parliamentary system as was submitted by the Referral Authority, the Respondent submits that such finding should not affect the exercise of passing the Bill by Parliament. Only that the Bill need a national exercise of passing the Bill by Parliament. Only the Bill need a national referendum before presenting it to the Referral Authority for his assent. He says this position is supported by Article 86 of the Constitution.

42. I take this opportunity to thank both Counsel for their helpful submissions and assistance in this case.

Court Considerations

Law

43. Following are the relevant provisions of the Constitution and the Constitution (Seventh) (Amendment) No.1 of 2019 (the "Bill") which is the subject of the constitutional challenge in this referral.

CHAPTER 1 – THE STATE AND SOVEREIGNTY

1. *Republic of Vanuatu*

The Republic of Vanuatu is a sovereign democratic state.

2. *Constitution supreme law*

The Constitution is the supreme law of the Republic of Vanuatu.

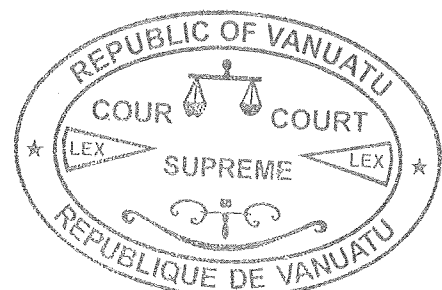
3.

4. *National sovereignty, the electoral franchise...*

(1) National sovereignty belongs to the people of Vanuatu which they exercise through their elected representatives.

CHAPTER 4 – PARLIAMENT

15. *Parliament*



The legislature shall consist of a single chamber which shall be known as Parliament.

16. *Power to make laws*

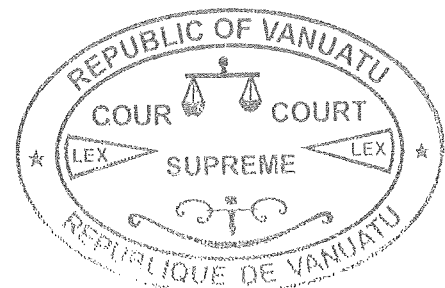
- (1) *Parliament may make laws for the peace, order and good government of Vanuatu.*
- (2) *Parliament shall make laws by passing bills introduced either by one or more members or by the Prime Minister or a Minister.*
- (3) ***When a bill has been passed by Parliament it shall be presented to the President 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.***

17. *Election of members of Parliament*

- (1) *Parliament shall consist of members elected on the basis of universal franchise through an electoral system which includes an element of proportional representation so as to ensure fair representation of different political groups and opinions.*
- (2)
- (3) *The franchise is universal, equal and secret...*

28. *Life of Parliament*

- (1) *Parliament, unless sooner dissolved under paragraph (2) or (3), shall continue for 4 years from the date of its election.*
- (2) *Parliament may at any time decide, by resolution supported by the votes of an absolute majority of the members at a special sitting when at least three-fourths of the members are present, to dissolve Parliament. At least 1 week's notice of such a motion shall be given to the Speaker before the debate and the vote on it.*



- (3) *The President of the Republic may, on the advice of the Council of Ministers, dissolve Parliament.*
- (4) *General elections shall be held not earlier than 30 days and not later than 60 days after any dissolution.*
- (5) *There shall be no dissolution of Parliament within 12 months of the general elections following a dissolution under sub article (2) or (3).*

CHAPTER 6 – HEAD OF STATE

33. *President of the Republic*

The head of the Republic shall be known as the President and shall symbolise the unity of the nation.

CHAPTER 7 – THE EXECUTIVE

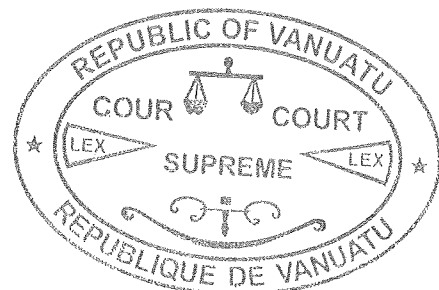
39. *Executive power*

- (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.***

40. *Council of Ministers*

- (1) *There shall be a Council of Ministers which shall consist of the Prime Minister and other Ministers.*
- (2) *The number of Ministers, including the Prime Minister, shall not exceed a quarter of the number of members of Parliament.*

41. *Election of Prime Minister*



The Prime Minister shall be elected by Parliament from among its members by secret ballot in accordance with the rules in Schedule 2.

42. Appointment and removal of other Ministers

- (1) The Prime Minister shall appoint the other Ministers from among the members of Parliament and may designate one of them as Deputy Prime Minister.*
- (2) The Prime Minister shall assign responsibilities for the conduct of government to the Ministers.*
- (3) The Prime Minister may remove the Ministers from office.*

43. Collective responsibility of Ministers and votes of no confidence

- (1) The Council of Ministers shall be collectively responsible to Parliament.*
- (2) Parliament may pass a motion of no confidence in the Prime Minister. At least 1 week's notice of such a motion shall be given to the Speaker and the motion must be signed by one-sixth of the members of Parliament. If it is supported by an absolute majority of the members of Parliament, the Prime Minister and other Ministers shall cease to hold office forthwith but shall continue to exercise their functions until a new Prime Minister is elected.*

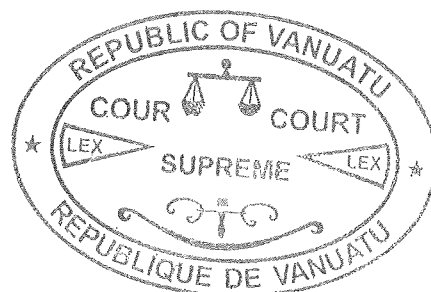
44. Termination of office of Ministers

The Council of Ministers shall cease to hold office whenever the Prime Minister resigns or dies but shall continue to exercise their functions until a new Prime Minister is elected. In the case of the death of the Prime Minister, the Deputy Prime Minister, or if there is no Deputy Prime Minister a Minister appointed by the President of the Republic, shall act as Prime Minister until a new Prime Minister is elected.

45. Other times when a Minister ceases to hold office

A Minister, including the Prime Minister, shall also cease to hold office –

- (a) when, after a general election, Parliament meets to elect a new Prime Minister;*
- (b) if he ceases to be a member of Parliament for any reason other than a dissolution of Parliament; or*



(c) if he is elected as President of the Republic or as Speaker of Parliament.

46. *Ministers to remain Members of Parliament*

Members of Parliament who are appointed Ministers shall retain their membership of Parliament.

[Article 46A of the Constitution (Seventh) (Amendment) No.1 of 2019 (the “Bill”) provides:

“46.A Appointment and Removal of Parliamentary Secretaries

- 1. The Prime Minister may appoint Parliamentary Secretaries from amongst the Members of Parliament.**
- 2. The number of Parliamentary Secretaries must not exceed two-thirds of the number of Ministers.**
- 3. The Prime Minister is to assign responsibilities for the conduct of Government to the Parliamentary Secretaries.**
- 4. The Prime Minister may remove the Parliamentary Secretaries from office.”]**

CHAPTER 8 – JUSTICE

47. *The Judiciary*

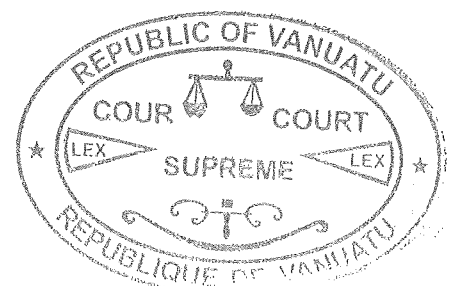
(1) *The administration of justice is vested in the judiciary, who are subject only to the Constitution and the law. The function of the judiciary is to resolve proceedings according to law. If there is no rule of law applicable to a matter before it, a court shall determine the matter according to substantial justice and whenever possible in conformity with custom.*

....

CHAPTER 14 – AMENDMENT OF THE CONSTITUTION

84. *Bills for amendment of Constitution*

A bill for an amendment of the Constitution may be introduced either by the Prime Minister or any other member of Parliament.



85. Procedure for passing Constitutional amendments

A bill for an amendment of the Constitution shall not come into effect unless it is supported by the votes of no less than two-thirds of all the members of Parliament at a special sitting of Parliament at which three-quarters of the members are present. If there is no such quorum at the first sitting, Parliament may meet and make a decision by the same majority a week later even if only two-thirds of the members are present.

86. Amendments requiring support of referendums

A bill for an amendment of a provision of the Constitution regarding the status of Bislama, English and French, the electoral system, or the parliamentary system, passed by Parliament under Article 85, shall not come into effect unless it has been supported in a national referendum.

44. The relevant legislative provisions are set out below.

A. Acts of Parliament [CAP. 116]

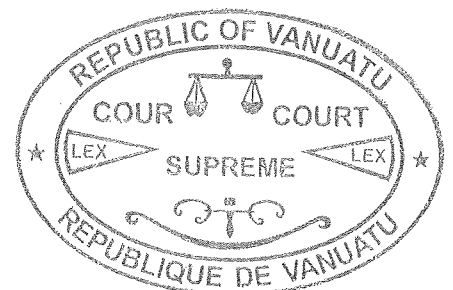
The Assent

1. (1) *The President shall show that he assents to a Bill by signing on each copy prepared in accordance with section 4 a statement to that effect in the form set out in Schedule 3;*

(2) A Bill shall become an Act of Parliament on the signing by the President of the assent on the first of the copies.

Publication

8. *Every Act shall be published as soon as practicable after the President's assent with –*
- (a) the omission of the statements contained in the original copies by virtue of the provisions of sections 4 and 5 of this Act;*
 - (b) a statement of the date on which the President's assent was signified, and the date of commencement contained in the margin thereof.*



Commencement

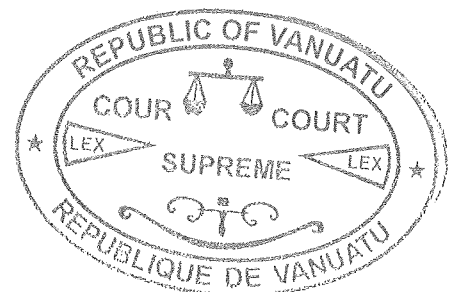
10. (1) Subject to the provisions of this section, commencement of an Act shall be such date as is provided in or under the Act, or where no date is so provided, the date of its publication as notified in the Gazette;
- (2) Every Act of Parliament shall come into force immediately on the expiration of the date next preceding its commencement;
- (3) A provision in an Act regulating the coming into force of an Act or any part thereof shall have effect notwithstanding that the part of the Act containing the provision has not come into operation;
- (4) Where an Act is made with retrospective effect the commencement of the Act shall be the date from which it is given or considered to be given such effect;
- (5) The provisions of subsection (4) shall not apply to an Act until there is notification in the Gazette as to the date of its publication and until date is specified the Act shall be without effect.

Certification of Special Votes and Referendums

13. (1) Where the Constitution requires that a Bill is passed by Parliament after being supported by a special majority with a special quorum present or with such requirements and supported by a national referendum the Speaker, or the Deputy Speaker if the Speaker is absent or otherwise unable to act shall, before the Bill is presented to the President for his assent, certify in whatever form he considers appropriate that the Bill was passed after having been so supported and with such special quorum or with those requirements and the support of a national referendum.
- (2) A copy of the certificate given under subsection (1) signed by the Speaker or the Deputy Speaker, as the case may be, shall be prima facie evidence of the facts stated therein.

B. INTERPRETATION ACT [CAP. 132]

Acts Subordinate to the Constitution



9. (1) *Every Act shall be read and construed subject to the Constitution and where any provision of an Act conflicts with a provision of the Constitution the latter provision shall prevail;*

(2) *Where a provision in an Act conflicts with a provision in the Constitution the Act shall nevertheless be valid to the extent that it is not in conflict with the Constitution.*

Application of Law

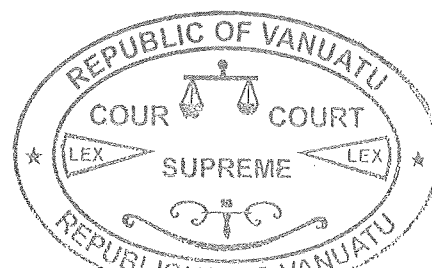
45. It is common ground that on 29th March 2019, Parliament met in its special to discuss the Bill for the Constitution (Seventh) (Amendment) No.1 of 2019 and passed the Bill with 41 members voted for and 7 against.

46. It is also common ground that on 5 April 2019, the Respondent presented the bill to the Referral Authority (President) for assent.

47. On 26th April 2019, the Referral Authority filed this Referral to the Supreme Court seeking the opinion of the Supreme Court on the constitutional validity of the Constitution (Seventh) (Amendment) No.1 of 2019 (the "Bill") pursuant to Article 16(4) of the Constitution because the President considers that assenting to the Bill would be inconsistent with Article 86 of the Constitution.

48. The role and exercise of the constitutional duty of the President under Article 16(4) of the Constitution have been commented upon by the Court. **In *Timakata v. Attorney General* [1992] VULawRp 9; [1980-1984] Van LR 575 (1 November 1992)** the Court stated:

Laws are made by passing bills (Article 16(2)). When a bill is passed by Parliament it shall be presented to the President of the Republic who shall assent to it within 2 weeks (Article 16(3)) save that "if the President considers the bill is inconsistent with a provision of the Constitution he shall refer it to the Supreme Court (note the President has no discretion if he considers a bill inconsistent with the constitution) for its opinion". The bill shall not be promulgated if the Supreme Court considers it inconsistent with a provision of the Constitution. Therefore in those circumstances it cannot become a law. In that respect, the Constitution of Vanuatu is unique.



In Re the President's Referral, **President of the Republic of Vanuatu v. Speaker of Parliament [2000] VUSC 43; Civil Case 051 of 2000 (11 August 2000)** the Court stated:

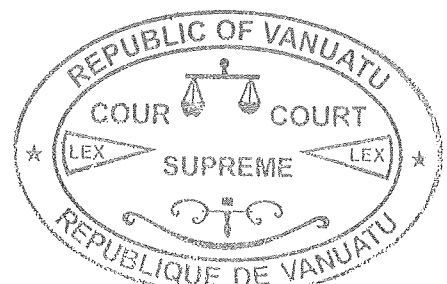
It is to be noted further that under Article 16(4) of the Constitution, if the President considers that a Bill is inconsistent with a provision of the Constitution, and once the President is so satisfied, then, he has no discretion, he must refer the Bill to the Supreme Court for its opinion. By doing so, the President should not be concerned that some people would interpret the exercise of that duty as an interference by the President in the affairs of the Government of the day and Parliament.

If that is the case, then, the President would fail in the exercise of his constitutional duty.

As per the Constitution, which is the supreme law of Vanuatu (Article 2), the President of the Republic is not only the symbol of unity of the nation but he has also the duty to protect the Constitution itself. Articles 16(4) and 39(3) of the Constitution provide the means of that protection: that of the presidential reference of a proposed Act of Parliament (Bill) under Article 16(4) and that of the Presidential reference of a regulation under Article 39(3) to the Supreme Court for the control of their constitutional validity.

The President constitutes and represents, therefore, the institutional check and balancing element between the function of Executive Government and the function of Legislative Government in the law-making process, so that Bills (and/or Regulations) are made in conformity with the Constitution of the Republic.

49. In addition to the above, the constitutional referral pursuant to Article 16 (4) is made by the President as the Referral Authority in the public interest so that Bills passed by Parliament went through the constitutional control for their validity before they are promulgated.
50. The Constitution (Seventh) (Amendment) Act No.1 of 2019 (the "Bill") provides for the insertion of a new Article 46A in the Constitution to provide as follows:



"46.A Appointment and Removal of Parliamentary Secretaries

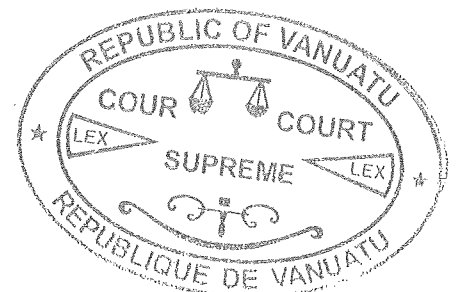
- 1. The Prime Minister may appoint Parliamentary Secretaries from amongst the Members of Parliament.*
- 2. The number of Parliamentary Secretaries must not exceed two-thirds of the number of Ministers.*
- 3. The Prime Minister is to assign responsibilities for the conduct of Government to the Parliamentary Secretaries.*
- 4. The Prime Minister may remove the Parliamentary Secretaries from office."*

51. The language of the new Article 46A, is clear. The Prime Minister will appoint Parliamentary Secretaries from amongst the Members of Parliament. The Prime Minister is to assign responsibilities for the conduct of government to the Parliamentary Secretaries. The Prime Minister will also remove the Parliamentary Secretaries from office. In comparison with the appointment and removal of the Ministers, Article 42 provides that:

- 1) The Prime Minister shall appoint the other Ministers from among the Members of Parliament.*
- 2) The Prime Minister shall assign responsibilities for the conduct of government to the Ministers.*
- 3) The Prime Minister may remove the Ministers from office.*

52. The language of the New Article 46A of the Bill and that of Article 42 are not so dissimilar.

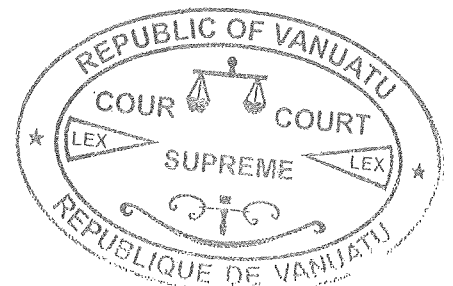
53. A Parliamentary Secretary is not appointed a Minister of the State, however, he or she will hold the rank and status akin to a Minister of state by his or her appointment and removal and is assigned responsibilities for the conduct of government like a Minister of State.



54. The key consideration is whether the amendment the subject of the bill is an amendment to the Constitution regarding the parliamentary system.
55. Both Counsel refer to the judgment of the Court of Appeal in **Vohor –v- Attorney General [2004] VUCA 22; Civil Appeal Case of 2004 (10 December 2004)** where the Court of Appeal considering an amendment of the Constitution regarding the parliamentary system, stated:

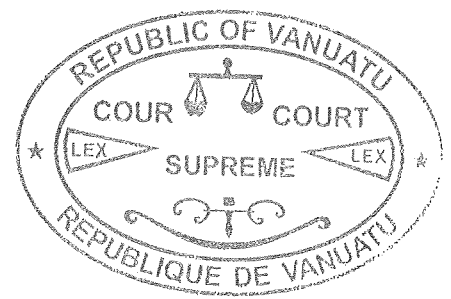
We agree with the submission of the Attorney General that the parliamentary system was the one adopted by the Republic of Vanuatu on Independence day and that system must include all the processes of electing Members of Parliament right up to the appointment of government ministers. The Members of Parliament elect the Prime Minister who then appoints the Ministers.

56. There is much debate before the Court on whether the Constitution (Seventh) (Amendment) No.1 of 2019 (the “Bill”) is an amendment of a provision of the Constitution regarding the parliamentary system, and if it is, it will activate Article 86 of the Constitution as submitted by Mr. Blake on behalf of the Referral Authority (President). In the present case, I am of the opinion that the said Bill is an amendment to the Constitution regarding the parliamentary system which requires a national referendum. There is no such national referendum in relation to the Bill. The facts of certification of such a bill do not disclose any.
57. Mr. Blake was right in his submission to the effect that absent a national referendum as provided in Article 86, the Constitution (Seventh) (Amendment) No.1 of 2019 (the “Bill”) inserting the new Article 46A relating to the appointment and removal of Parliamentary Secretaries and the assignment of responsibilities of the conduct of government to Parliamentary Secretaries, is inconsistent and in breach of Article 86 of the Constitution which is the Supreme law of the Republic (Article 2).
58. I agree and accept that the judgment of the Court of Appeal in **Vohor –v- Attorney General [2004] VUCA 22** is relevant for this case. The ratio decidendi of the judgment of the Court of Appeal in the Vohor case supports the findings that:



“.....that (parliamentary) system must include all the processes of electing Members of Parliament right up to the appointment of government Ministers and (as intended in the Bill under consideration in this referral) the appointment of Parliamentary Secretaries. The Members of Parliament elect the Prime Minister who then appoints the Ministers and the Parliamentary Secretaries (as intended by the Bill).

59. But I think the matter of the Bill goes further than that. I accept the submissions of Mr. Blake that the Bill purports to amend the Constitution regarding the Parliamentary systems by increasing the number of person with responsibility for the conduct of government from a maximum of 13 Ministers, the Prime Minister and up to further 8 Parliamentary Secretaries, being two thirds of the maximum numbers of Ministers, thereby increasing the numbers of persons responsible for the conduct of the government from the Prime Minister and 12 Ministers to the Prime Minister, 12 Ministers and 8 Parliamentary Secretaries.
60. I note and accept that the doctrine of “separation of powers” has been recognised as being reflected in the Constitution and in the parliamentary system operating in Vanuatu. It is also common ground that the parliament is a check on the functions and role of the Executive. [See **Natapei –v- Wells [2013] VUSC 43**]. Further the makeup of the Executive was clearly set out in chapter 7 of the Constitution: that is the structure of the parliamentary system under the Constitution. In the present case, I agree with the submissions of Mr. Blake that the Bill purports to change the structure of the parliamentary system by changing the makeup of the executive which is an integral component of the parliamentary system. I am of the opinion that to achieve that significant change in the parliamentary system a national referendum is required as provided for in Article 86 of the Constitution.
61. There is no evidence of national referendum set out in the certification to the Referral Authority (President) by the Respondent Speaker. I am of the view that Article 46A is inconsistent with Article 42 of the Constitution in its full effect and unless a national referendum is held under Article 86, appointing Parliamentary



Secretaries of the rank and status akin to a cabinet Minister will be contrary to Article 42 of the Constitution in its effect.

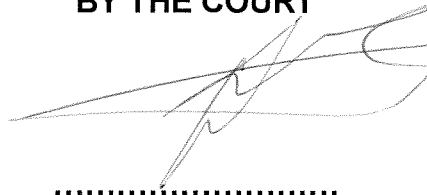
Conclusion

62. I reach the conclusion that the Bill as presented to the President for his assent is inconsistent with Articles 86 and 42 of the Constitution and should not be assented to by the President in the absence of a national referendum result meeting the requirements of Article 86 of the Constitution.

63. There is no order as to costs.

DATED at Port Vila this 17th day of May, 2019

BY THE COURT



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Vincent Lunabek
Chief Justice

