CONSTITUTIONAL RIGHTS AND THEIR ENFORCEMENT IN PAPUA NEW GUINEA

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CONSTITUTIONAL RIGHTS AND THEIR ENFORCEMENT IN PAPUA NEW GUINEA

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Chapter I

INTRODUCTION

When it attained Independence on 16 September 1975 Papua New Guinea adopted its own written constitution.[1] Contained in the Constitution are guarantees of certain basic rights and freedoms such as the freedom of expression and the right to privacy.[2] The great majority of these rights and freedoms are qualified in that they may be regulated or restricted by the legislature.[3] The Constitution itself provides the means for their enforcement in the superior courts, namely the National Court of Justice and the final court of appeal the Supreme Court of Justice.[4]

Although the Constitution of Papua New Guinea is often referred to as 'homegrown'[5] its provisions, particularly those dealing with human rights and freedoms, are similar to those which may be found in the constitutions of many other newly independent countries. As the Privy Council has observed there is 'a family of constitutions ... which embody a Bill of Rights or Charter of Fundamental Rights and

Freedoms drafted on the model of the European Convention on Human Rights'.[6] The family includes the constitutions of Nigeria, Trinidad and Tobago, Cyprus, Bermuda and many other nations which were formally British dependencies.[7]

If the Constitution of Papua New Guinea is not a member of the family it is no less than a first cousin. It follows what the Privy Council has called the 'Westminster model'[8] in its relative sophistication and inclusion of entrenched fundamental rights and freedoms.[9] But despite the resemblance to the constitutions of so many other new nations the tendency of the Papua New Guinea courts, at least in more recent cases, has been to interpret the Constitution of Papua New Guinea with little or no reference to foreign decisions.[10]

The purpose of this paper is to examine various aspects of constitutional rights and freedoms in Papua New Guinea. First it is intended to look broadly at the qualified rights and freedoms protected by the Constitution of Papua New Guinea and to examine the cases in which the courts have been required to adjudicate upon the legislature's attempts to regulate or restrict those rights or freedoms. In the course of examining the Papua New Guinea cases reference will be made to comparable decisions from other jurisdictions.

Secondly it is intended to examine two major aspects of the

Constitution which, nearly fifteen years after Independence, are still to be resolved by the courts. One is the relationship between the rights and freedoms guaranteed under the Constitution and Papua New Guinea's body of pre-Independence legislation. The other issue is section 41 which is a provision unique to the Papua New Guinea Constitution and purports to give the courts the power in certain circumstances to declare any act 'done under a valid law' unlawful.

Thirdly it is intended to look at how constitutional rights and freedoms may be enforced in the Papua New Guinea courts. This involves an examination of the more important cases in which the courts have explored the relationship between the rights provisions and the enforcement provisions of the Constitution.

Chapter II

QUALIFIED RIGHTS AND FREEDOMS

Division 3 of the Constitution of Papua New Guinea establishes basic rights and freedoms in the nature of a bill of rights and is divided into four subdivisions. Subdivision A is introductory; Subdivision B establishes fundamental rights and freedoms ; Subdivision C establishes qualified rights and freedoms; and Subdivision D provides for the enforcement of constitutional rights and freedoms.[1]

The legislature has no power to alter the fundamental rights and freedoms in Subdivision B.[2] But the overwhelming majority of constitutional rights and freedoms are the qualified rights found in Subdivision C.[3] These rights are not absolute in that generally they may be regulated or restricted by the legislature in order to give affect to a greater need, for example, the public welfare. If the legislature attempts to restrict a qualified right or freedom the court may be called upon to determine if, in

fact, public welfare or some other overriding consideration justifies the restriction. Such a restriction will only be allowed if it is 'necessary' and 'reasonably justifiable in a democratic society'.

The constitutional provision by which most[4] qualified rights and freedoms may be restricted is section 38(1) which provides as follows:

> For the purposes of this Subdivision, a law that complies with the requirements of this section is a law that is made and certified in accordance with Subsection (2), and that -
>
> (a) regulates or restricts the exercise of a right or freedom referred to in this Subdivision to the extent that the regulation or restriction is necessary -
>
> (i) taking account of the National Goals and Directive Principles and the Basic Social Obligations, for the purpose of giving effect to the public interest in -
>
> (a) defence; or
> (b) public safety; or
> (c) public order; or
> (d) public welfare; or
> (e) public health (including animal and plant health) or;
> (f) the protection of children and persons under disability (whether legal or practical); or
> (g) the development of under-privileged or less advanced groups or areas; or
>
> (ii) in order to protect the exercise of the rights and freedoms of others; or
>
> (b) makes reasonable provision for cases where the exercise of one such right may conflict with the exercise of another,
>
> to the extent that the law is reasonably justifiable in a democratic society having proper respect for the rights and dignity of mankind.

Pursuant to section 38(2) for the purposes of subsection (1) a law must be expressed to be a law 'that is made for that purpose'; must specify the right or freedom it regulates or restricts; and 'be made and certified by the Speaker in his certificate under Section 110 to have been made, by an absolute majority'. Section 38 (3) provides that the burden of showing that a law is a law that complies with the requirements of subsection (1) is on the party relying on its validity.[5] Section 39(3) provides that in determining what is reasonably justifiable the material the court may have regard to includes the European Convention for the Protection of Human Rights and Fundamental Freedoms and the Protocols thereto and the law and judicial decisions and opinions in other countries.

Section 38 has been considered by the Supreme Court on two occasions. The section was first considered by the Supreme Court in NTN Pty Limited v. The State.[6] The applicants had entered into a contract with the State to establish a commercial television station and were ready to commence operations when the National Parliament passed the Television (Prohibition and Control) Act 1986 which prohibited television broadcasts for approximately eighteen months. The applicants sought a declaration that the Act was invalid in breach of section 46 of the Constitution (freedom of expression) and that it had not been passed in accordance with section 38.

The Supreme Court was unanimous in holding that the Act infringed the freedom of expression guaranteed by section 46 which expressly includes freedom of the press and other mass communications media. The court also found that the Act did not comply with section 38 on the narrow basis that it did not satisfy the technical requirements of subsection 38 (2). It was held that to comply with section 38(2) an act must clearly specify which of the allowable purposes it is sought to achieve. Barnett J. (with whom Amet and Woods JJ. agreed) said that for very good reasons section 38 of the Constitution provides that a law which is intended to regulate or restrict a constitutional right or freedom must follow certain prescribed formalities. Kapi D.C.J. (with whom Kidu C.J. agreed) also said that the law was invalid because of the failure to express the 'purpose' for which it was made.

However the court was divided on whether the Act complied with the substantive provisions of Constitution section 38. The majority (Barnett, Amet and Woods JJ.) held that but for the technical non-compliance with section 38 (2) the Act would have been valid. They held that the State had satisfied the "high standard of proof" which it bore namely, to establish that the challenged legislation (a) regulated or restricted the freedom of expression and did no more than that; (b) was necessary for the purpose of giving affect to the public interest (in this case in public welfare); and (c) did not regulate or restrict the freedom beyond the

extent that the law was 'reasonably justifiable in a democratic society having proper respect for the rights and dignity of mankind'.

Barnett J. (for the majority) rejected the submission that a restrictive law should be disallowed unless it was 'absolutely necessary'. He said to insist that a regulation or restriction must be 'absolutely necessary' would make the State's task of protecting public welfare impossibly difficult -

> Whether a restriction is necessary should be considered with a due sense of proportion, balancing the nature and duration of the regulation or restriction against the urgency and desirability of the public welfare sought to be promoted or protected.

Barnett J. also considered that on the evidence before the court a ban on television broadcasts for eighteen months was necessary to achieve the desired purpose of public welfare and that the restriction was reasonably justifiable in a democratic society. He rejected the submission that the test is a subjective one and that the court should take into account that the government enacted the legislation just as the applicants were about to commence broadcasting in accordance with their contract with the State. His Honour said:

> The question for this Court is whether the Act itself, as enacted by the National Parliament, is reasonably justifiable in a democratic society in today's circumstances.

The other two members of the court considered that the Act failed to comply with the substantive provisions of Constitution section 38. Kapi D.C.J. (with whom Kidu C.J. agreed) emphasized the significance of the burden of proof placed on the State. As to the term 'necessary' in section 38 Kapi D.C.J. thought this meant 'reasonably necessary' and that this implied that constitutional rights or freedoms should not be regulated or restricted if there is another way of effectively protecting the public interest. His Honour concluded that on the facts the legislation was not 'necessary' under section 38 of the Constitution and therefore void and of no effect.

Kapi D.C.J. also considered whether the Act was reasonably justifiable in a democratic society. His approach was to look at the effect of the Act upon the applicants and the circumstances in which it was passed. He found there was 'an element of unfairness and injustice' and that overall the legislation was not reasonably justifiable in a democratic society.

The other occasion on which section 38 of the Constitution was considered was in Supreme Court Reference No. 1 of 1986[7] involving a challenge to the Vagrancy Act.[8] The Act provided for the arrest without a warrant of any person found in a town and reasonably suspected of having no or insufficient lawful means of support. Failure to establish to the satisfaction of a magistrate lawful means of support

meant that a person was liable to be excluded from the town for up to six months. Disobedience to an exclusion order was a punishable offence attracting a maximum of six months imprisonment. One of the questions for the Supreme Court was whether the Vagrancy Act complied with section 38 of the Constitution whereby the freedom of movement guaranteed to all citizens by section 52 of the Constitution may be regulated or restricted.

As in the NTN case[9] section 38 attracted both technical and substantive arguments. The technical argument was that the Vagrancy Act had not been certified in the Speaker's certificate under section 110 of the Constitution as having been passed by an absolute majority in the National Parliament. The majority of the court[10] held that this failure by the Speaker did not render the Vagrancy Act unconstitutional. Section 38(2), in this respect, was held not to be mandatory. Barnett J. said:

> The substantive constitutional requirement set out in section 38(2)(c) is that the law must be made by an absolute majority of the Parliament. The requirement for certification is merely to assist in proving that fact should it ever be disputed. In the absence of proper certification, enactment by absolute majority could be readily proved by other means.[11]

In respect of the broader requirements the majority[12] held that the Vagrancy Act did not comply with section 38 of the Constitution. It was observed that the 'exclusion order' under the Act could be applied to law-abiding and peaceful persons who, through no fault of their own, could not show

that they had sufficient lawful means of support. Barnett J said:

> I find that the State, which called no evidence on these matters, has failed to discharge the burden of proving that section 3 of the Vagrancy Act is necessary for the purpose of giving effect to the public interest in public order or public welfare. Nor has it discharged the burden of proving that it is reasonably justifiable in a democratic society having proper respect for the rights and dignity of mankind.[13]

Therefore in each of the two cases concerned with section 38 of the Constitution the relevant legislation has been held invalid. In the NTN case the Supreme Court insisted on strict compliance with the requirement under section 38(2) that the purpose of the legislation be stated. There is good reason to say that the Supreme Court in Supreme Court Reference No. 1 of 1986[15] should have taken a similar strict approach in respect of the requirements of the Speaker's Certificate, particularly in view of section 134 of the Constitution. Section 134 provides that the procedure of Parliament is 'non-justiciable' and that 'a certificate by the Speaker under section 110 is conclusive as to the matters required to be set out in it.'[16]

The point is made in the Privy Council decision in Bribery Commissioner v. Ranasinghe.[17] The question arose whether an amendment to the Constitution of Ceylon had been made in compliance with the special legislative procedures laid down by section 29(4) of the Constitution which provided for a

Speaker's certificate showing that the bill had been passed by the requisite majority of Parliament. The Ceylon Constitution contained a provision similar to section 134 of the Constitution of Papua New Guinea stating that the certificate of the Speaker shall be conclusive for all purposes and shall not be questioned in any court of law. The Board said:

> If the presence of the certificate is conclusive in favour of such a majority, there is force in the argument that its absence is conclusive against such a majority. Moreover, where an Act involves a conflict with the Constitution the certificate is a necessary part of the Act-making process and its existence must be made apparent.[18]

Furthermore the Privy Council thought that when the Constitution lays down that the Speaker's certificate shall be conclusive for all purposes and shall not be questioned in any court of law, the intention was as follows:

> That courts of law shall look at the certificate but shall look no further. The courts therefore have a duty to look for the certificate in order to ascertain whether the Constitution has been validly amended.[19]

The same reasoning as the Privy Council employed in relation to the Ceylon Constitution may be applied with equal force to the requirement of section 38 of the Constitution of Papua New Guinea in respect of the Speaker's certificate under section 110.

In respect of its substantive provisions, section 38 requires a law to be both 'necessary' and 'reasonably justifiable in a democratic society'. This is a variation,

at least in wording, from the European Convention which requires that permissable restrictions on human rights and freedoms be 'necessary in a democratic society'.

Different but similar wording is found in the various 'Westminster model' constitutions. For example under the Cyprian Constitution a law which restricts a guaranteed right or freedom must be 'necessary' or, in some cases, 'absolutely necessary', but the phrase 'in a democratic society' is absent. The Constitution of Sierra Leone uses the phrase 'reasonably justifiable in a democratic society' but also refers to the requirement of 'special circumstances'.[20] Under the Constitution of St Christopher, Nevis and Anguilla freedom of expression may be restricted by a law reasonably required in the interest of public order 'except so far as that provision ... is shown not to be reasonably justifiable in a democratic society'.[21]

In the few cases in which the Privy Council has been required to consider whether a law is 'reasonably justifiable in a democratic society' no detailed examination of that phrase seems to have been attempted. Similarly there appears to have been no attempt to compare words such 'reasonably justifiable' as they appear in one constitution with corresponding words in any other constitution. This is not surprising given that the Privy Council has consistently held that 'a constitutional instrument is "sui

generis", calling for principles of interpretation of its own, suitable to its character'.[22]

de Smith, however, has compared the different terms and argues that what is 'necessary' and what is 'reasonably justifiable' may be different in a particular situation.[23] He claims that 'reasonably justifiable' offers appreciably less scope for judicial review than does the term 'necessary'. Grove on the other hand suggests that the differences may be 'differences without distinctions'.[24] He says 'it does not appear arguable that a restriction on individual liberty, which is not "necessary" could be "reasonably justifiable in a democratic society"'.[34]

Whether these differences in wording have any impact in a practical sense is debatable, if the cases are any guide. In NTN Pty. Limited v. The State[26] Barnett J. drew a distinction between the term 'necessary' which appears in section 38 of the Constitution of Papua New Guinea and 'absolutely necessary'. Speaking for the majority he upheld the challenged law as 'necessary'. Kapi D.C.J. on the other hand interpreted 'necessary' to mean 'reasonably necessary', which tends to suggest a more lenient test. Yet Kapi D.C.J. held that the same law failed this test and would have struck it down.

Several cases under the Nigerian Constitution provide further evidence that in this context the particular words

of the constitution are of less significance than some commentators might suggest. In Cheranci v. Cheranci[27] the High Court of the Northern Region of Nigeria was required to decide whether a law passed by the Northern Region Legislature was 'reasonably justifiable in a democratic society.' The court considered that a restriction upon a fundamental human right must, before it may be considered justifiable, be 'necessary' in the interest which it purports to protect and must not be excessive and out of proportion to the object which it is sought to achieve.[28] Thus the court itself introduced a requirement that the law be 'necessary'.[29]

The best approach is probably that which the Privy Council appears to have adopted. The Privy Council seems to have resisted any temptation in the various cases to elaborate upon the meaning of terms such as 'reasonably justifiable in a democratic society'.[30] It is note worthy that neither the courts nor the commentators have attempted any definition of the words 'democratic society'.[31]

Chapter III

PRE-INDEPENDENCE LEGISLATION

Nearly fifteen years after Independence it has still not been decided how the constitutional provisions guaranteeing various rights and freedoms relate to Papua New Guinea's pre-Independence legislation.

Immediately prior to Independence on 16 September 1975 all legislation and subordinate legislation in Papua New Guinea was repealed by the Laws Repeal Act 1975 enacted by Papua New Guinea's pre-Independence House of Assembly. By force of section 20 (3) and Schedule 2.6 of the Constitution, which came into effect on 16 September 1975, those pre-Independence laws were adopted as Acts of the Parliament of the Independent State of Papua New Guinea.

Under Schedule 2.6 of the Constitution pre-Independence legislation was brought into force in the following terms:

> Subject to any Constitutional Law, all pre-Independence laws are, by virtue of this section, adopted as Acts of the Parliament, or subordinate legislative enactments under such Acts, as the case may be, and apply to the extent to which they applied, or purported to apply, immediately before the

repeal referred to in subsection (1)(a), or immediately before Independence Day, as the case may be.

By definition 'Constitutional Law' includes the Constitution itself.[1] There are a number of adopted pre-Independence Acts which are in apparent conflict with the rights and freedoms guaranteed under the Constitution. However the debate has tended to centre on the Defamation Act.[2] The Defamation Act was originally enacted as the Defamation Ordinance 1962 by the Legislative Council for the Territory of Papua and New Guinea.[3] It was virtually identical to the New South Wales Defamation Act 1958 which itself had been modelled on the Queensland codification. Under the Papua New Guinea Defamation Act it is an actionable wrong to publish defamatory matter (as defined) unless the publication is protected or justified or excused by law.[4]

The Act is in apparent conflict with section 46(1) of the Constitution of Papua New Guinea which guarantees freedom of expression. Section 46(1) is in the following terms:-

> Every person has the right to freedom of expression and to publication, except to the extent that the exercise of that right is regulated or restricted by a law -
> (a) that imposes reasonable restrictions on public office-holders;
> (b) that imposes restrictions on non-citizens; or
> (c) that complies with section 38 (general qualifications on qualified rights).

The Defamation Act purports to be of general application and therefore does not fall into categories (a) or (b) of

section 46(1). Nor does it fall into category (c) because to comply with section 38 of the Constitution certain criteria must be satisfied. The law must be passed by an absolute majority of the Parliament and certified accordingly by the Speaker[5]; the law must be expressed to be a law which does restrict a guaranteed right or freedom; it must specify the right or freedom which it purports to restrict or modify; and it must specify the purpose for which it is made.[6]

The question is whether the pre-Independence Defamation Act was excluded from adoption under Schedule 2.6 because it infringed the freedom of expression.[7] The principal texts suggest that the Defamation Act has not been adopted as part of the law of Papua New Guinea. Goldring says this:

> In Papua New Guinea, the language of s.46 of the Constitution is much wider than that of the U.S. Constitution, and the better view, it is suggested, is that there is no law of defamation unless and until the parliament passes a law which complies with s.38 to protect the reputation of individuals.[9]

A similar view is expressed by Brunton and Colquhoun-Kerr:

> In our opinion s. 38(2) is best read as expressing the intention that the rights guaranteed under the Constitution in Subdivision C can be restricted only by the deliberate act of an absolute majority of the members of the post-Independence Parliament.[10]

If the Defamation Act is unconstitutional then, as Goldring says, Papua New Guinea has no defamation law. Papua New

Guinea common law (or 'underlying law' as it is referred to in Constitution Schedule 2.2) does not fill the gap. It too fails to meet the requirements of a law passed in accordance with section 38 of the Constitution.

Indeed every law which infringes the guaranteed freedom of expression and does not comply with the section 38 would be invalid. There are some obvious examples. The law of sedition as it appeared in the pre-Independence Criminal Code would have been a casualty as would the provisions of the Code dealing with obscene publications.[11] Similarly the common law action on the case for injurious falsehood[12] would form no part of the underlying law of Papua New Guinea.

Of course the impact of a decision that section 38 extends to pre-Independence laws would not be limited to those laws which contravened the guaranteed freedom of expression. All pre-Independence laws which infringed upon those constitutional rights or freedoms which may only be restricted or regulated by a law complying with section 38 would have no force or effect. The rights or freedoms which may be restricted or regulated by section 38 include the freedom from forced labour[13], freedom from abitrary search and entry[14], freedom of conscience thought and religion[15], freedom of assembly and association[16], freedom of employment[17], the right to privacy[18], freedom of information[19], and freedom of movement[20]. A vast

range of laws would be held unconsitutional, not because they were not 'necessary' or 'reasonably justifiable in a democratic society', but because they had not in fact been enacted under section 38 of the Constitution.

Other newly independent countries which have adopted 'Westminster model' constitutions containing entrenched human rights have also had to deal with the effect of their constitutions on pre-existing laws. Some of these constitutions expressly deal with the issue. For instance section 26(8) of the Constitution of Jamaica provides as follows in respect of the human rights provisions contained in Chapter 3:

> Nothing contained in the law in force immediately before the appointed day [when the Constitution came into force] shall be held to be inconsistent with any of the provisions of this Chapter; and nothing done under the authority of any such law shall be held to be done in contravention of any of these provisions.

In Trinidad and Tobago section 3 of the Constitution reads as follows:

> Sections 1 and 2 [the human rights provisions] of this Constitution shall not apply in relation to any law that is in force in Trinidad and Tobago at the commencement of this Constitution.

However the Constitituion of Papua New Guinea does not expressly state whether or not the entrenched human rights provisions are intended to apply to pre-Independence laws.[21] Where this occurs in other 'Westminster model' constitutions the consistent approach of the Privy Council

is to imply that the human rights provisions have prospective force only.[22] Indeed, the Privy Council seems to say that express declarations that pre-existing laws are unaffected by constitutional guarantees are merely confirmatory of a situation which would otherwise be implied.[23]

The reasoning is explained in two of the Privy Council cases. In Director of Public Prosecutions v. Nasralla[24] Lord Devlin, speaking for the Board, said:

> This chapter, as their Lordships have already noted, proceeds upon a presumption that the fundamental rights which it covers are already secured to the people of Jamaica by existing law. The laws in force are not to be subjected to scrutiny in order to see whether or not they conform to the precise terms of the protective provisions. The object of the provisions is to ensure that no future enactment shall ... derogate from the rights which at the coming into force of the Constitution the individual enjoyed.[25]

In Maharaj v. Attorney-General of Trinidad and Tobago (No 2)[26] Lord Hailsham of St. Marylebone said:

> The nature of these rights and freedoms and the purpose of their entrenchment has been discussed more than once in reported cases. The first point to observe is that they do not claim to be new. They already exist, and the purpose of their entrenchment is to protect them against encroachment ...
>
> In other words the entrenchment is designed to preserve and protect what already exists against encroachment, abrogation, abridgement or infringement. It is concerned with future abuses of authority, usually State authority by the legislature (see section 2), or the executive, though doubtless as Lord Diplock said it binds also the judiciary and inferior authority and presumably also individuals. Except in so far as it protects against future abuse, entrenchment does not purport to alter existing law.[27]

The approach of the Privy Council, as explained in these judgments, is appropriate to the interpretation and application of the Constitution of Papua New Guinea. It could not have been intended that when the Constitution came into effect it should create a huge void in the new nation's body of law.

Chapter IV

SECTION 41, PROSCRIBED ACTS

Section 41 is unique to the Constitution of Papua New Guinea.[1] It provides as follows:

41. Proscribed acts
(1) Notwithstanding anything to the contrary in any other provision of any law, any act that is done under a valid law but in the particular case -

(a) is harsh or oppressive; or

(b) is not warranted by, or is disproportionate to, the requirements of the particular circimstances or of the particular case; or

(c) is otherwise not, in the particular circumstances, reasonably justifiable in a democratic society having a proper regard for the rights and dignity of mankind,

is an unlawful act.

(2) The burden of showing that Subsection (1)(a),(b) or (c) applies in respect of an act is on the party alleging it, and may be discharged on the balance of probabilities.

(3) Nothing in this section affects the operation of any other law under which an act may be held to be unlawful or invalid.

The section raises a number of questions upon which there have been diverging opinions.[2] The questions include

whether the section has application to acts done under any valid law or only to acts done under a law restricting or regulating a qualified right or freedom; whether the section has application to laws concerned with fundamental rights and freedoms as well as to laws affecting qualified rights and freedoms[3]; whether section 41 creates a 'right' which may be enforced under the enforcement provisions of the Constitution; whether section 41 is available to impugn a judicial act by way of a de facto appeal; and whether the only acts which may be affected by section 41 are acts done in the exercise of a discretionary power.

Section 41 was first considered by the Supreme Court in Premdas v. The State [4]. The applicant, a foreign national, challenged the decisions of a Committee of Review and the Minister for Foreign Affairs and Trade confirming the revocation of his permit under the Migration Act to enter and remain in Papua New Guinea for the purpose of employment. The Supreme Court[5] was in agreement that neither the Committee nor the Minister had in the circumstances acted in a manner contrary to section 41.

Prentice C.J. was the only judge to give more than passing consideration to the question to which laws section 41 was intended to apply. His Honour concluded:

> I consider that, giving section 41 a fair and liberal meaning as the Court is instructed to do by Schedule 1.5 (2) of the Constitution, it should be regarded as of general application.

In Special Constitutional Reference No. 1 of 1984[7] the Supreme Court was asked to consider the validity of three acts passed by the National Parliament by which the courts were compelled to impose minimum custodial sentences for certain offences. The acts were challenged principally on the basis that they breached the guarantee under section 36(1) of the Constitution of freedom from inhuman treatment.

However, the Court invited the parties to argue whether, if the legislation was valid under section 36(1), the Court in a particular case could impose a lesser penalty pursuant to section 41 and section 57 (the latter being the principal provision for the enforcement of constitutional rights).[8]

Kidu C.J. thought that the answer to the court's question depended on what meaning was given to the word 'act' in section 41. He adopted Prentice C.J.'s approach of giving the section a fair and liberal meaning and held it was applicable to any law whatsoever. Kidu C.J. considered that the word 'act' included a judicial act but that section 41 only had application at all where the person or body exercising the power to act under a law had a discretion. Under the minimum penalties legislation no such discretion was granted to the court and therefore section 41 had no application.[9]

Kapi D.C.J. concluded that section 41 had an overriding

effect on any act done under any law including constitutional laws.[10] His Honour also considered that section 41 had application where a court imposed a sentence under the minimum penalties legislation. Where such a sentence was considered to be in breach of section 41 separate proceedings could be taken (in the Supreme Court) to have the sentence declared invalid, but the Court did not have power to impose a lesser penalty. Kapi D.C.J. considered that section 41 did not create a right or freedom which could be enforced under section 57 of the Constitution.[11]

Bredmeyer J. rejected the view taken by Prentice C.J. in the Premdas case that section 41 was of general application and said that that part of the decision was not binding on the Supreme Court as the exact scope of section 41 had not been fully argued.[12] He considered that section 41 was restricted to laws dealing with constitutional rights or freedoms and was further restricted to abuses or excessive use of discretionary powers. Bredmeyer J. held the section did have application to discretionary judgments of a court but did not apply in the particular case because when a judge sentenced a person to a minimum penalty term of imprisonment no discretion was involved.[13]

As to whether section 41 was a right for the purposes of enforcement under section 57 Bredmeyer J. disagreed with the decision of Kapi D.C.J. His Honour considered that, for

the purposes of section 57, section 41 was a 'right' and this was confirmed by the express mention of section 41 in section 58.[14]

Kaputin J. came to the view that section 41 applied to laws dealing with fundamental as well as to qualified rights or freedoms under the Constitution.[15] As to the general applications of section 41 he said 'section 41 provides a controlling mechanism and whatever way we look at it, no statutory laws can avoid it'.[16] This was later interpreted by the National Court in Raz v. Matane [17] to mean that Kaputin J. agreed with Kidu C.J. and Kapi D.C.J. that section 41 applied to any law. However on analysis it is not clear that Kaputin J. agreed that section 41 had any application beyond legislation dealing with qualified and fundamental rights and freedoms.[18]

Kaputin J. considered 'any act' within section 41 included a 'judicial act' including the passing of a mandatory penalty such as a minimum sentence which, although valid under the minimum penalty legislation, may offend against section 41 in a particular case. He also thought that the enforcement provisions of the Constitution could be called in aid, where a case fell within section 41, to allow the court to impose a lesser sentence.[19]

McDermott J. was the only judge of the Supreme Court to come to the view that the minimum penalties legislation offended

against freedom from inhuman treatment guaranteed by section 36 (1) of the Constitution. As to section 41 he considered that the provision applied to laws dealing with fundamental rights as well as to legislation affecting qualified rights but that it was not of general application.[20]

McDermott J. thought that to make any sense of the term 'act' in section 41 it must involve some discretion.[21] He thought that the real scope of section 41 was to supply a right of action, which may otherwise have been unavailable, to challenge certain administrative actions taken under a 'valid law' within the meaning he ascribed to that term.[22] He concluded that for Papua New Guinea some of the legislative rights available in Australia through the Administrative Appeals Tribunal were contained in section 41.[23] Without deciding expressly whether section 41 could apply to a judicial act McDermott J. observed that section 41 was not aimed at constitutionally restating the law on sentencing.[24]

The Supreme Court next considered section 41 in Raz v. Matane.[25] Relevantly the Court was asked to decide whether section 41 was enforceable under section 57 or under any other provision of the Constitution. Section 57 is the principal section providing for enforcement in the National and Supreme Courts of rights or freedoms arising under the Constitution.[26]

By a majority [27] the court concluded that section 41 did not confer a 'right or freedom' within the meaning of section 57 (1) and therefore was not enforceable under that section.

Kidu C.J., referring to the decision in the Minimum Penalties case[28], said that Kapi D.C.J.'s view that section 41 provides for a constitutional remedy means that it confers a right of a sort but not a right or freedom mentioned in section 57. He said that section 57 was included in the Constitution for the sole purpose of enforcement of the entrenched human rights and that section 41 did not provide for a human right.[29]

Kidu C.J. thought that section 23 (2) of the Constitution empowered the National Court to deal with a matter brought under section 41. Section 23 (2) provides relevantly:

> Where a provision of a Constitutional Law prohibits or restricts an act or imposes a duty, the National Court may, if it thinks it proper to do so make any order that it thinks proper for preventing or remedying a breach of the prohibition, restriction or duty...[31]

Kidu C.J. also considered that section 155 (4) of the Constitution enabled the National or Supreme Court to entertain an application under section 41.[32] Section 155(4) provides:

> Both the Supreme Court and the National Court have an inherent power to make, in such circumstances as seem to them proper, orders in the nature of prerogative writs and such other orders as are necessary to do justice in the

circumstances of a particular case.

Kapi D.C.J. said he remained of the opinion that section 41 did not confer a 'right or freedom' under section 57 and could not give rise to a claim for damages under section 58. He held that any person aggrieved by an act prohibited by section 41 could seek judicial remedy under the provision itself. He considered that the Supreme Court clearly had jurisdiction to enforce section 41.[33] In respect of the National Court Kapi D.C.J. considered that section 41 conferred a right which could be enforced or protected in that Court under section 155 (4). Kapi D.C.J. considered that the terms of section 41 were self executing as well as enforceable under section 155 (4). Section 41 was therefore not enforceable under Constitution section 23 (1).[34]

Amet J., dissenting, was of the opinion that section 41 could be enforced by proceedings under section 57. He therefore found no need to consider whether it was enforceable under any other provision of the Constitution.[35]

Section 41 of the Constitution last arose for consideration before the Supreme Court in The State v. Lohi Sisia[36]. The case involved an appeal from a decision of the National Court that a declaration in 1979 under the National Land Registration Act of certain land as 'national land' was

invalid on the grounds that it was harsh and oppressive under section 41 of the Constitution. The Supreme Court held that the respondent's delay in seeking a declaration was, in the circumstances, fatal to his case and upheld the appeal. At the same time the Supreme Court[37] expressed the view that the ambit of section 41 was settled in Special Constitutional Reference No. 1 of 1984.[38] Bredmeyer J. (with whom the other judges agreed) said:

> The ambit of s.41 was considered by the Supreme Court in SCR No 1 of 1984; Re Minimum Penalties Legislation [1984] P.N.G.L.R. 314. The majority, Kidu C.J., Kapi Dep. C.J. and Kaputin J., decided that the section applied to any act done under a valid law and is not limited to an act done under a law which restricts one of the constitutional rights. Thus the section applies to the Minister's declaration made in this case under a valid law, viz, s.88 of the National Land Registration Act. Section 41 received further consideration by the Supreme Court in SCR No 5 of 1985; Raz v. Matane [1985] P.N.G.L.R. 329. The majority, Kidu CJ and Kapi Dep CJ, in that case held that a breach of s. 41 cannot be enforced under s. 57 of the Constitution but can be enforced by an order under s. 23 or s. 155(4) of the Constitution.[39]

Bredmeyer J. went on to say that section 23(2) of the Constitution allows the court to fine, imprison or order compensation for the breach of a prohibition, restriction or duty imposed by the Constitution.[40] He said that section 41 provided further grounds for challenging official actions, in addition to the ordinary public or administrative law grounds of breach of the rules of natural justice, and ultra vires.[41] But just as unreasonable delay may be a bar to an order in the nature of a prerogative writ, so too, a declaration under section 155(4) or an order under section 23(2) of the Constitution may not

be available if the applicant has been guilty of unreasonable delay.[42]

Through these four cases the Supreme Court has therefore attempted to elaborate upon section 41 of the Constitution. However the attempts have resulted in different and sometimes confusing views of the meaning and scope of that section. The most important question is whether every law is subject to section 41. The National Court in Raz v Matane[43] and the Supreme Court in The State v. Lohia Sisia[44] read Kaputin J.'s decision in Supreme Court Reference No. 1 of 1984[45] to be in accordance with that of the Chief Justice and the Deputy Chief Justice in forming a majority opinion that section 41 may apply to an act done under any valid law.

However these decisions have subsequently been analysed by Hinchliffe J. in the National Court in Tarere v. Australia and New Zealand Banking Group (PNG) Ltd. [46] In that case the plaintiffs sought declarations that the actions of the defendant as mortgagee in possession in selling various properties belonging to the plaintiffs contravened section 41. The plaintiffs argued that section 41 had general application to all laws and called in aid the decision of the 'majority' in Supreme Court Reference No. 1 of 1984.[47] Hinchliffe J. concluded that Kaputin J. in that case had not in fact adopted the wider view held by Kidu C.J. and Kapi D.C.J. in declaring that section 41 applied to acts taken

under any valid law but that 'at its highest the judgment of Kaputin J. ... is equivocal'.[48] Hinchliffe J. said that the cases which purported to adopt the decision of the 'majority' on this point failed to analyse Kaputin J.'s judgment and that, in the circumstances, he did not feel bound to follow such decisions. Hinchliffe J. concluded that the question is still undecided.[49] He thought the decision of Bredmeyer J. in Supreme Court Reference No. 1 of 1984 [50], was the better view and that section 41 did not apply in respect of all laws, but only to laws concerned with consitutional rights.[51]

Another important issue is whether section 41 may be applied to judicial 'acts' under a valid law. In Supreme Court Reference No. 1 of 1984 [52] the majority decided that section 41 extends to judicial acts where the court is exercising a discretionary power under a law to which section 41 applied.[53] The exercise of a judicial discretion in certain circumstances is therefore open to challenge not only by way of appeal but by separate proceedings for infringement of section 41 of the Constitution.

This is a unique development in that it runs counter to the consistent approach of the Privy Council in respect of other 'Westminster model' constitutions. The Privy Council's approach is that entrenched constitutional rights have only very limited application to judicial decisions. In Maharaj

v. Attorney-General of Trinidad and Tobago No.2[54] Lord Diplock said:

> No human right or fundamental freedom recognised by Chapter 1 of the Constitution [of Trinidad and Tobago] is contravened by a judgment or order that is wrong and liable to be set aside on appeal for an error of fact or substantive law, even where the error has resulted in a person serving a sentence of imprisonment. The remedy for errors of these kinds is to appeal to a higher court. Where there is no higher court to appeal to then none can say that there was error. The fundamental human right is not to a legal system that is infallible but to one that is fair.[55]

The point was made again by Lord Diplock in Chokolingo v. Attorney-General of Trinidad and Tobago.[56] In that case the appellant had applied for a declaration that his committal for contempt of court in breach of the rules of natural justice was constitutionally void because it contravened his right not to be deprived of his liberty except by due process of law. The application had been brought not by way of appeal from the committal order but by way of application under the Constitution of Trinidad and Tobago. The Privy Council dismissed the appellant's appeal holding that it would be irrational and subvert the rule of law if the appellant were to be allowed to make the application under the Constitution because that would amount to the appellant having parallel and collateral remedies with respect to the same matter, namely a direct appeal and an application under the Constitution, which could lead to conflicting decisions.[57]

However the very same irrational result is possible if a

judicial decision is challenged under section 41 of the Constitution of Papua New Guinea. Such a result appears even more likely when it is considered that an appeal is generally limited to errors of law. A challenge under section 41, on the other hand, requires the court to consider the merits of the 'act' which is being brought into question and to determine, for example, whether that act 'in the particular case' was 'harsh or oppressive'. An appeal from a judgment could therefore be dismissed on the grounds that it involved no error of law but a collateral application under section 41 could lead to a ruling that the very same judgment constituted 'an unlawful act'.

Another point, which emerges from the Minimum Penalties[58] case, is that section 41 only applies to the exercise of a discretionary power. However there is nothing in section 41 itself which dictates this narrow construction of its scope. It is incorrect to say, as some of the members of the court did, that no other interpretation makes sense.[59] Not every harsh or oppressive act of an administrative nature necessarily involves the exercise of a discretion.[60] However the Supreme Court's interpretation of section 41 would exclude all administrative action of a 'purely mechanical' nature from its provisions.

Finally, the decisions of the Supreme Court concerning the manner of enforcing the 'right' created by section 41 are not entirely satisfactory. In The State v. Lohia Sisia[61]

the court observed that Raz v Matane[62] had held that section 41 could be enforced by an order under section 23 of the Constitution. However section 23 by its terms seems inappropriate.[63] Section 23 is concerned with sanctions for the breach of a constitutional law which 'prohibits or restricts an act, or imposes a duty'. Section 41 arguably does none of these. It empowers the court in certain circumstancs to deem a lawful act, in a particular case, to be unlawful.[64]

Furthermore section 23 goes on to provide that the National Court may as a sanction for a breach of a constitutional law impose a sentence of imprisonment for a period not exceeding ten years or a fine not exceeding K10,000. The court in The State v. Lohia Sisia[65] seemed to consider that these sanctions were available in respect of an act which was deemed unlawful under section 41 of the Constitution.[66] However, until the court's pronouncement, such an act would by definition have been lawful. Section 37(2) of the Constitution provides that nobody may be convicted of an offence that is not defined by a written law. Section 37(7) provides that no person shall be convicted of an offence on account of any act that did not at the time when it took place constitute an offence. Presumably the court would characterise a finding under section 23, followed by a fine or imprisonment, as a conviction for an offence.[67] In view of these provisions it seems most unlikely that the criminal sanctions of section 23 are available in respect of

an act deemed unlawful by the court under section 41.

At this stage the following tentative conclusions can be drawn from the cases concerning section 41:

1. An 'act' to which section 41 may apply must be done in the exercise of a discretionary power under a 'valid law', although it seems an 'act' may include an omission to act.[68]

2. The term 'valid law' in section 41 includes a law affecting a qualified or fundamental right or freedom.[69]

3. In The State v. Lohia Sisia[70] the Supreme Court accepted that the term 'valid law' extended to laws generally. However if Hinchliffe J. in Tarere v. Australia and New Zealand Banking Group (PNG) Ltd.[71] is correct the question remains undecided by the Supreme Court.

4. Section 41 extends to a judicial 'act' involving the exercise of a discretion pursuant to a 'valid law'.[72]

5. Section 41 cannot be enforced under section 57 of the Constitution and may not be the subject of an order, for example for damages, under section 58.[73]

6. The 'right' created by section 41 may be enforced under sections 155(4) and 23(2) of the Constitution[74] and

possibly under section 41 itself.[75]

7. On an application involving section 41 the court may review a particular 'act' on its merits to decide whether it is harsh or oppressive or otherwise contravenes the section.[76]

8. The right granted by section 41 is in addition to any other legal rights and may not be excluded or overridden by a privative clause which might otherwise protect an action from judicial review.[77]

9. An application alleging an infringement of section 41 may be refused if the applicant has been guilty of unreasonable delay.[78]

Chapter V

ENFORCEMENT PROVISIONS

The means of enforcing the constitutional rights and freedoms are granted by the Constitution of Papua New Guinea itself. This accords with the 'Westminster model' constitutions of many of Britain's former colonial dependencies.[1]

The principal enforcement provision of the Constitution is section 57 which provides as follows:

57. Enforcement of guaranteed rights and freedoms.

(1) A right or freedom referred to in this Division shall be protected by, and is enforceable in, the Supreme Court or the National Court or any other court prescribed for the purpose by an Act of the Parliament, either on its own initiative or on application by any person who has an interest in its protection and enforcement, or in the case of a person who is, in the opinion of the court, unable fully and freely to exercise his rights under this section by a person acting on his behalf, whether or not by his authority.

(2) For the purposes of this section -

(a) the Law Officers of Papua New Guinea; and

(b) any other persons prescribed for the purpose by an Act of the Parliament; and

(c) any other persons with an interest (whether personal or not) in the maintenance of the principles commonly known as the Rule of Law such that, in the opinion of the court concerned, they ought to be allowed to appear and be heard on the matter in question,

have an interest in the protection and enforcement of the rights and freedoms referred to in this Division, but this subsection does not limit the persons or classes of persons who have such an interest.

(3) A court that has jurisdiction under subsection (1) may make all such orders and declarations as are necessary or appropriate for the purposes of this section, and may make an order or declaration in relation to a statute at any time after it is made (whether or not it is in force).

(4) Any court, tribunal or authority may, on its own initiative or at the request of a person referred to in subsection (1), adjourn, or otherwise delay a decision in, any proceedings before it in order to allow a question concerning the effect or application of this Division to be determined in accordance with subsection (1).

(5) Relief under this section is not limited to cases of actual or imminent infringement of the guaranteed rights and freedoms, but may, if the court thinks it proper to do so, be given in cases in which there is a reasonable probability of infringement, or in which an action that a person reasonably desires to take is inhibited by the likelihood of, or a reasonable fear of, an infringement.

(6) The jurisdiction and powers of the courts under this section are in addition to, and not in derogation of, their jurisdiction and powers under any other provision of this Constitution.

Section 58 of the Constitution provides that persons whose rights or freedoms under Division 3 are infringed may recover compensation and, if the court thinks it proper, exemplary damages. Under section 58(4) where the infringement was committed by a governmental body damages may be awarded against both a person and against the

governmental body to which such person was responsible.

There are now numerous cases in which individuals (including corporations)[2] have sought and obtained enforcement of their constitutional rights under sections 57 and in some cases damages under section 58. The circumstances of course have been varied. In Komidese v. Kuabaal (Commissioner of Correctional Services) [3] section 57 was used to declare void a directive which infringed the guaranteed right in section 37(20) that an offender under the criminal law shall not be transferred from an area away from that in which his relatives reside except for security or other good cause. In Masive v. Okuk[4] the Supreme Court held that because section 50 of the Constitution guarantees citizens the right to stand for election, meaning a 'genuine' election, the National Court had jurisdiction under section 57 to entertain an application to have a candidate in the National Elections, before the commencement of the polling, declared ineligible.[5] In Supreme Court Reference No. 54 of 1988[6] section 57 was invoked to enforce the freedoms of association and of choice of employment guaranteed by sections 47 and 48 of the Constitution on the application of a lawyer who objected to statutory requirements such as mandatory membership of the Papua New Guinea Law Society.

An application under section 57 may be made in the National Court or the Supreme Court. It will ordinarily be made in

the National Court.[7] The enforcement provisions prevail against any exclusion clause.[8]

However the cases in which section 57 of the Constitution arises for consideration are not by any means limited to proceedings commenced by applications under that provision or section 58. The first reported case in which those provisions were considered was commenced as a criminal prosecution.[9] It was argued that because an alleged confession to the police was extracted in circumstances contravening the right to protection of the law[10] the confession was inadmissable. On reference to the Supreme Court Frost C.J. said:

> A Court that has jurisdiction under s.57 is given the plenary power to make all such orders and declarations as are necessary and appropriate for the purposes of the section (subs.(3)), and further ancillary powers are added in subsections (4) and (5). That power must include the making of an order or declaration that a statement made by an accused person following non-compliance with s.42(2) [dealing with the rights of a person who is detained or arrested] be excluded from evidence, which is the most effective form of relief for any accused person. The jurisdiction and powers of the Courts under s.57, it is expressly provided, are in addition to, and not in derogation of, their jurisdiction and powers under any other provision of the Constitution (subs.(6)), which include of course the jurisdiction to award compensation under s.58. As that section is also expressed to be in addition to and not in derogation of s.57, (s.58(1)), the result presumably is that each section is to be given an independent operation. Whilst the requirement that the right or freedom shall be protected by the Court in s.57(1) would by its mandatory terms seem to be paramount, under s.58 there is an additional and independent entitlement, conferred upon a person whose rights or freedoms declared or protected by Div.3 are infringed, to reasonable damages, and if the Court thinks proper exemplary damages (s.58(2)).
>
> However, in the case of non-compliance with the Constitution, s. 42(2), it may be thought inadequate for a

Court to admit the accused's statement, and simply allow action to be taken under any other provision. In the ordinary case of a breach of s.42(2), particularly of sub-paragraphs (b) and (c), the Court may well feel bound to adopt the analogy of relief by way of restitutio in integrum, or restoration of the accused to the position as if s.42(2) had been complied with, taking into account the real possibility that the accused would have exercised his right to silence, and thus exclude the admission under s.57. There is no reason why such an order should not be made in the course of a criminal proceeding before the National Court.[11]

Almost as a matter of course the courts now resort to section 57 of the Constitution to ensure an accused's constitutional rights are protected in a criminal trial. The guiding principles were expounded by Kapi D.C.J. in John Alex v. Martin Golu[12] as follows:

(a) The remedy under s.57 is quite separate and independent of the common law discretion of rejection of evidence which is obtained illegally;

(b) the power given under s.57 is discretionary and may be exercised in appropriate cases;

(c) the power is wide enough to extend to prohibiting evidence which may be obtained in breach of a fundamental right or freedom;

(d) the power extends further than the discretion to reject evidence on the trial;

(e) orders can be made at any time after a breach of a fundamental right.[13]

In The State v. Popo[14] Amet J. used section 57 of the Constitution to reject police evidence obtained on a search and seizure without a warrant. He said:

Although s.57 of the Constitution was not argued I have addressed it as it is an inherent dispositive power vested in this court to exercise, I consider, in my own discretion, if I consider the circumstances warrant my exercise of it to protect fundamental rights ... The court has an inherent

power under s.57 of the Constitution to exercise its discretion of its own volition even if not argued, at any time.[15]

However the use of section 57 by the court of its own initiative has not been confined to cases in which the court has been solely concerned with protecting the constitutional rights and freedoms of an accused. The case of University of Papua New Guinea v. Ume More [16] involved the use of sections 57 and 58 by the court of its own initiative against the defendants to civil litigation.

The University had applied to the National Court for injunctive relief against striking students who had barricaded the campus and disrupted lectures. The court held that their conduct violated the constitutional rights and freedoms of other students and lecturers at the University and of the public.[17]. Noting that the orders a judge may make of his own motion under section 57 'may be quite creative'[18] Bredmeyer J. made orders barring certain of the defendants from the townships of Port Moresby or Lae for three months; ordered the government to pay for and send them to their home Provinces; and in the meantime remanded such defendants in custody at Bomana Corrective Institution for a period not exceeding five days.[19]

On appeal[20] the Supreme Court observed that the proceedings had been of a civil nature and that the defendants themselves had been deprived of their

constitutional rights, namely their right to protection of the law under section 37. The court considered that the following procedure should be adopted in respect of enforcement proceedings under the Constitution: (1) A specific allegation should be formulated, in writing if possible, identifying the right or freedom allegedly infringed and referring to the maximum penalty if the allegation should be proved; (2) A specific date, time and place for hearing the matter should be set; (3) At the time of hearing the allegation should be put to the defendant in the language which he best understands. He should also be given some idea of what penalty he is facing and be asked whether he admits or denies the allegation; (4) In the event of a denial the evidence in support of the allegation should be adduced in logical sequence and such evidence should be subject to cross-examination by the defendant or his legal representative; (5) At the conclusion of the case in support of the allegation the court should decide whether or not there is sufficient evidence to call upon the defendant to elect whether or not he intends to answer the allegation and if there is insufficient evidence the court should dismiss the claim forthwith; (6) At the conclusion of all the evidence the court should decide the issues, bearing in mind that the onus of proof rests on the accuser and the degree of proof should be of a high probability the standard of proof should be beyond reasonable doubt.[21]

The last mentioned case leads to the question whether the courts themselves are answerable under the enforcement provisions of the Constitution of Papua New Guinea for a breach of a constitutional right or freedom. The issue has arisen in the Privy Council in the context of the principal enforcement provision in the Constitution of Trinidad and Tobago. In Maharaj v. Attorney-General of Trinidad and Tobago (No.2)[22] a judge of the High Court of Trinidad and Tobago had made an order committing the appellant, a barrister, to prison for seven days for contempt of court. An appeal against the committal order was allowed on the ground that the appellant had been denied natural justice. The appellant in separate proceedings invoked the original jurisdiction of the High Court under the Constitution seeking redress for an alleged contravention of his right not to be deprived of his liberty except by due process of law. Lord Diplock, speaking for the Board, observed:

> Distasteful though the task may well appear to a fellow judge of equal rank, the Constitution places the responsibility for undertaking the enquiry fairly and squarely on the High Court.[23]

His Lordship went on to say:

> The order of Maharaj J. committing the appellant to prison was made by him in the exercise of the judicial powers of the state; the arrest and detention of the appellant pursuant to the judge's order was effected by the executive arm of the state. So if his detention amounted to a contravention of his rights under section 1(a), it was a contravention by the state against which he was entitled to protection.[24]

The Privy Council recognised that instead of, or even as well as, pursuing the ordinary course of appealing directly to an appellate court, a party to legal proceedings who alleges that his right to protection of the law has been infringed in the course of the determination of his case, resulting in his deprivation of liberty, could in theory seek collateral relief in an application under the Constitution.[25] However the Board observed that the courts have ample powers to prevent their process being misused in this way; for example, a stay of proceedings until an appeal against the judgment or order complained of had been determined.[26]

Giving the guaranteed right to protection of the law[27] and section 57 of the Constitution of Papua New Guinea a fair and liberal meaning there is no reason why enforcement proceedings against a court might not be taken in appropriate circumstances for infringement of a constitutional right. There is authority of the Supreme Court in Papua New Guinea for holding the State liable, at least in costs, for the mistakes of a judge.[28]

With respect to compensation under section 58 of the Constitution the Papua New Guinea courts have held that the principles to be applied follow the general law of damages.[29] In Amaiu v. Commissioner of Corrective Institutions [30] Bredmeyer J. awarded a prisoner whose constitutional rights had been infringed whilst in custody

(including lengthy solitary confinement) K4,574 compensation and a further K2,000 for exemplary damages.[31]

The only suggestion that the ordinary principles of assessing damages should not apply comes from Maharaj v. Attorney-General of Trinidad and Tobago (No. 2)[32]. In that case the Privy Council considered the measure of monetary compensation recoverable under the Constitution of Trinidad and Tobago for the contravention of the right not to be deprived of liberty otherwise than by due process of law. It was observed that the claim was not a claim in private law for damages for the tort of false imprisonment under which damages recoverable are at large, and could include damages for loss of reputation, but was a claim in public law for compensation for deprivation of liberty alone.[33] The Privy Council remitted the case to the High Court of Trinidad and Tobago for assessment of compensation.

In Jamakana v. Attorney-General[34] the High Court of Solomon Islands considered the appropriate award of damages under that country's constitution for infringement of the constitutional 'right to move freely throughout Solomon Islands'. Daly C.J. expressed difficulty in following the distinction made by the Privy Council between 'a claim in tort for false imprisonment under which the damages are at large' and 'a claim in public law for deprivation of liberty alone'.[35] The Chief Justice concluded that the measure of 'compensation' under the Solomon Islands Constitution

should exclude any award for exemplary damages but that the compensation was assessable 'at large' and should include an award for any aggravating features of the infringement.[36]

The other provisions of the Constitution of Papua New Guinea which provide specifically for the enforcement of constitutional rights and freedoms are sections 22 and 23. They provide as follows:

22. Enforcement of the Constitution.

The provisions of this Constitution that recognize rights of individuals (including corporations and associations) as well as those that confer powers or impose duties on public authorities, shall not be left without effect because of the lack of supporting, machinery or procedural laws, but the lack shall, as far as practicable, be supplied by the National Court in the light of the National Goals and Directive Principles, and by way of analogy from other laws, general principles of justice and generally-accepted doctrine.

23. Sanctions.

(1) Where any provision of a Constitutional Law prohibits or restricts an act, or imposes a duty, then unless a Constitutional Law or an Act of the Parliament provides for the enforcement of that provision the National Court may-

(a) impose a sentence of imprisonment for a period not exceeding 10 years or a fine not exceeding K10 000.00; or

(b) in the absence of any other equally effective remedy under the laws of Papua New Guinea, order the making of compensation by a person (including a governmental body) who is in default,

or both, for a breach of the prohibition, restriction or duty, and may make such further order in the circumstances as it thinks proper.

(2) Where a provision of a Constitutional Law prohibits or restricts an act or imposes a duty, the National Court may, if it thinks it proper to do so, make any order that it thinks proper for preventing or remedying a

breach of the prohibition, restriction or duty, and subsection (1) applies to a failure to comply with the order as if it were a breach of a provision of this Constitution.

(3) Where the National Court considers it proper to do so, it may include in an order under subsection (2) an anticipatory order under subsection (1).

Sections 22 and 23 have only limited application. They appear to have no part to play in the enforcement of the rights and freedoms contained in Division 3 of the Constitution. The issue was referred to but not decided by the Supreme Court in Reference No. 1 of 1977.[37] In that case Williams J. correctly categorised section 22 when he said 'section 22 appears to me to be concerned with a case in which the right conferred or the duty imposed may be completely hollow without some means to back it up'.[38] For example section 22 has been held to be available for the enforcement of the 'right' provided under section 41 of the Constitution.[39] But where a constitutional law provides for any other means of enforcement of a constitutional right or duty the better view is that sections 22 and 23 do not apply.[40]

It has been observed in respect of the 'Westminster model' constitutions that the enforcement provisions create a new remedy for the contravention of constitutional rights, whether there was already some existing remedy or not.[41] The enforcement provisions of the Constitution of Papua New Guinea do the same thing. The consistent approach of the

Papua New Guinea courts has been to ensure that constitutional rights and freedoms may be enforced pursuant to the Constitution itself.[42];

Chapter VI

CONCLUSION

A feature of the Constitution of Papua New Guinea is that nearly fifteen years after its commencement several major issues remain unresolved. A principal reason for this is that comparatively few constitutional cases have been litigated. For example there are only a few decisions dealing with either section 38 or section 41 of the Constitution. There is no decision at all on the application of the Constitution to pre-Independence legislation.

The two Supreme Court cases dealing with section 38 of the Constitution and the legislature's attempts to regulate or restrict qualified rights or freedoms underline the formidable power which the court has been granted. The court is empowered to strike down certain legislation as not having been, in the court's opinion, 'necessary' or 'reasonably justifiable in a democratic society' notwithstanding the enactment has been passed by an absolute

majority in the National Parliament. In each of the two decided cases the Supreme Court has held the relevant legislation invalid, once on technical grounds and in the second case on substantive grounds.

The decisions on section 41 of the Constitution call for some resolution of the law in that area. The scope and application of that provision are still to be decided. An optimistic view is that these matters will be determined when section 41 is next considered by the Supreme Court.

There are two observations to be made about the relationship of the Constitution to Papua New Guinea's pre-Independence legislation. The first is that a decision in this area is long overdue. Secondly, it is to be hoped that when the Supreme Court finally comes to resolve this issue it will carefully consider the wider ramifications of its decision.

By comparison the enforcement provisions of the Constitution have by now been extensively considered. The courts appear to be particularly alert to their powers under section 57 of the Constitution and have not hesitated to use those powers of their own initiative. In this area the judges have led the way. The law in respect of the enforcement of constitutional rights in Papua New Guinea is fairly settled.

It would probably assist the development of constitutional

law in Papua New Guinea if both lawyers and judges appreciated that many other new nations have constitutions containing similar provisions. That is not to say that the Papua New Guinea courts should slavishly follow foreign precedents. But in developing Papua New Guinea's constitutional law the courts have everything to gain from considering the decisions of other jurisdictions with similar constitutions.[1] Unfortunately the trend in Papua New Guinea's Supreme and National Courts, at least in respect of the Constitution, is to ignore decisions from other countries.

NOTES

Chapter I - Introduction

1. The full title is 'Constitution of the Independent State of Papua New Guinea', hereinafter 'Constitution of Papua New Guinea'.

2. Sections 46 and 49 respectively.

3. The Supreme Court has observed that only the right to life (section 35), freedom from cruel or inhuman treatment (section 36) and the right to protection of the law (section 37) are expressed in absolute terms: see Reference No. 1 of 1977 [1977] P.N.G.L.R. 362, 366. However even the rights to life and to protection of the law or subject to some qualification: see Donald Chalmers, 'Human Rights and What is Reasonably Justifiable in a Democratic Society' (1975) 3 Melanesian Law Journal 92.

4. The principle enforcement provision is section 57 for the text of which see below page 40.

5. Compare The State v. Mogo Wonom [1975] P.N.G.L.R. 311, 315-1616 per Frost C.J.

6. Riley v. Attorney-General of Jamaica [1982] 3 All E.R. 469, 474 per Lord Scarman and Lord Brightman.

7. For a more exhaustive list see Professor Enid Campbell, 'Papua New Guinea Government: Consideration of a Bill of Rights' in L.K. Young, (ed.), Constitutional Development in Papua New Guinea (1971) 69.

8. Hinds v. The Queen [1977] A.C. 195, 233; see also Maharaj v. Attorney-General of Trinidad (No.2) [1979] A.C. 385, 402. It has been less reverently referred to as 'the British export model': N.K.F. O'Neill, 'Human Rights in Pacific Island Constitutions' in Peter Jack (ed.), Pacific Constitutions (1982) 307.

9. In the Constitution of Papua New Guinea the reference is to 'Fundamental Rights and Freedoms' but the titles vary e.g. in the Constitution of Malaysia, 'Fundamental Liberties'; in Cyprus, 'Fundamental Rights and Liberties'.

10. For exceptions see Supreme Court Constitutional Reference No. 1 of 1977 [1977] P.N.G.L.R. 362 per Frost C.J.; S.C.R. NO. 1A of 1981 [1982] P.N.G.L.R. 122 per Kearney D.C.J.; S.C.R. No. 2 of 1982 [1982] P.N.G.L.R. 214 per Kearney D.C.J. and Kapi J.; and Special Constitutional

Reference No. 1 of 1984 [1984] P.N.G.L.R. especially per Kapi D.C.J.

Chapter II - Qualified Rights and Freedoms

1. The principle enforcement provision in Subdivision D is section 57, for which see below page 40.

2. See Reference No. 1 of 1977 [1977] P.N.G.L.R. 362, 366.

3. Freedom from forced labour (s.43); freedom from arbitrary search and entry (s.44); freedom of conscience, thought and religion (s.45); freedom of expression (s.46); freedom of assembly and association (s.47); freedom of employment (s.48); right to privacy (s.49); freedom of information (s.51); and freedom of movement (s.52).

4. Some of the rights provisions have additional qualifications, e.g. freedom of employment under section 48 does not prohibit reasonable provision 'for requiring membership of an industrial organization for any purpose'.

5. The 'Westminster model' constitutions which expressly mention the burden of proof generally place it upon the party challenging the law, e.g. Trinidad and Tobago, Nigeria, Jamaica and St. Christopher, Nevis and Anguilla.

6. Unreported, 30 December 1986.

7. [1988] P.N.G.L.R. 1.

8. Chapter No. 268.

9. Unreported, 30 December 1986.

10. Barnett J. with whom Kidu C.J., Amet and Cory JJ. agreed, Woods J. dissenting.

11. [1988] P.N.G.L.R. 1, 17.

12. Woods J. not deciding.

13. [1988] P.N.G.L.R. 1, 19.

14. Unreported, 30 December 1986.

15. [1988] P.N.G.L.R. 1.

16. Based on section 134 the Supreme Court in Moplo v. The Speaker [1977] P.N.G.L.R. 420 refused to rule on the proceedings of Parliament involving the election of a Speaker.

17. [1965] A.C. 172.

18. Id. 195.

19. Ibid. Compare Akar v. Attorney-General of Sierra Leone [1970] A.C. 853.

20. See Akar v. Attorney General of Sierra Leone [1970] A.C. 853, 395. Compare the Maltese (Constitution) Order in Council 1961 referred to in Olivier v. Buttigieg [1967] 1 A.C. 115.

21. Francis v. Chief of Police [1973] A.C. 761.

22. Minister of Home Affairs v. Fisher [1980] A.C. 319, 325; see also Riley v. Attorney-General of Jamaica [1982] 3 All E.R. 469, 474; Thornhill Robinson v. Attorney-General of Trinidad and Tobago [1981] A.C. 61; Attorney-General of Gambia v. Momodore Jobe [1984] 3 W.L.R. 174, 183.

23. S.A. de Smith, 'Fundamental Rights in the New Commonwealth - II' (1961) 10 I.C.L.Q. 215. de Smith also suggests the requirement that a law be 'reasonable', in the Indian Constitution, confers a greater scope of review upon the judiciary than does 'reasonably justifiable in a democratic society'.

24. David Lavan Grove, 'The "Sentinels" of Liberty? The Nigerian Judiciary and Fundamental Rights' [1963] J.A.L. 152.

25. Ibid.

26. Unreported, 30 December 1986.

27. [1960] N.R.N.L.R. 24.

28. Id. 29.

29. See also Olawoyin v. Attorney-General of the Northern Region [1961] 1 All N.L.R. 269; D.P.P. v. Obi [1961] 1 All N.L.R. 182.

30. For example Olivier v. Buttigieg [1967] 1 A.C. 115; Akar v. Attorney-General of Sierra Leone [1970] A.C. 853.

31. There is no generally accepted definition of 'democracy': see Graham Maddox, Australian Democracy in Theory and Practice, (1985) 26-7.

Chapter III - Pre-Independence Legislation

1. Constitution Schedule 1.2.(1).

2. Chapter No. 293.

3. Laws of the Territory of Papua and New Guinea 1962 (Annotated) 164.

4. Section 5.

5. The latter requirement is not mandatory: S.C.R. No. 1 of 1986 [1988] P.N.G.L.R. 1.

6. NTN Pty. Limited v. The State (Unreported, 30 December 1986).

7. In Cory v. Byth (No.1) [1976] P.N.G.L.R. 274, 279 Raine J. described the argument as ''vexatious' and 'possibly trivial''; in Hetura Paz Development v. Niugini Nius Pty. Ltd. [1982] P.N.G.L.R. 250, 254 Kapi D.C.J. described it as an 'interesting issue'.

8. John Goldring, The Constitution of Papua New Guinea (1978), Brian Brunton and Duncan Colquhuon-Kerr, The Annotated Constitution of Papua New Guinea (1984).

9. Goldring, 236.

10. Brunton and Colquhuon-Kerr, 142, also page 173. See also H.A. Amankwah and A.J. Regan 'The Influence of the Constitution and the Supreme Court of the United States on the Constitution and Law of Papua New Guinea', Law Tok, December 1989, 11.

11. But compare Kidu C.J. in The State v. Kosi (Unreported, National Court, 1981) referred to in Brunton and Colquhuon-Kerr, 142 and 173.

12. Radcliffe v. Evans [1892] 2 Q.B. 524, 527.

13. Section 43.

14. Section 44.

15. Section 45.

16. Section 47.

17. Section 48.

18. Section 49.

19. Section 51.

20. Section 52.

21. Section 10 which provides that 'all written laws' shall be read and construed subject to the Constitution has been held a mere rule of construction: Rakatani Peter v. South Pacific Brewery Ltd. [1976] P.N.G.L.R. 537. A similar

provision appears in s. 103 of the Constitution of St. Christopher, Nevis and Anguilla: see Attorney-General of St. Christopher, Nevis and Anguilla v. Reynolds [1980] A.C. 637. Compare s.2 of the Canadian Bill of Rights which has been held to render prior inconsistent federal laws 'inoperative': R. v. Drybones (1969) 9 D.L.R. 3d, 473.

22. See Director of Public Prosecutions v. Nasralla [1967] 2 A.C. 238; Hinds v. The Queen [1977] A.C. 195; Riley v. Attorney-General of Jamaica [1982] 3 All E.R. 469; de Freitas v. Benny [1976] A.C. 239; Maharaj v. Attorney-General of Trinidad and Tobago (No.2) [1979] A.C. 385.

23. Director of Public Prosecutions v. Nasralla [1967] 2 A.C. 238, 248. See Clarke v. Karika [1985] LRC (Const) 732.

24. [1967] 2 A.C. 238.

25. Id. 247-8.

26. [1979] A.C. 385.

27. Id. 402-3.

Chapter IV - Section 41, Proscribed Acts

1. Per Prentice C.J. in Premdas v. The State [1979] P.N.G.L.R. 329, 343; also Bredmeyer J. in Special Constitutional Reference No. 1 of 1984 [1984] P.N.G.L.R. 314, 339.

2. The section has been considered by the Supreme Court on four occasions: Premdas v. The State [1979] P.N.G.L.R. 329; Special Constitutional Reference No. 1 of 1984 [1984] P.N.G.L.R. 314; Raz v. Matane [1985] P.N.G.L.R. 329; and The State v. Lohia Sisia [1987] P.N.G.L.R. 102.

3. In certain circumstances legislation may affect a fundamental right or freedom e.g. section 37, the protection of the law, may be qualified in an emergency.

4. [1979] P.N.G.L.R. 329.

5. Prentice C.J., Raine D.C.J., Saldahna, Wilson and Andrew JJ.

6. [1979] P.N.G.L.R. 329, 344.

7. [1984] P.N.G.L.R. 314; Kidu C.J., Kapi D.C.J., Bredmeyer, Kaputin and McDermott JJ.

8. See below page 40.

9. [1984] P.N.G.L.R. 314,322.

10. Id. 331.

11. Id. 333.

12. [1984] P.N.G.L.R. 314, 342. Generally the Supreme Court will only depart from its own previous decisions in exceptional circumstances: Derbyshire v. Tongia [1984] P.N.G.L.R. 148, 150-1; Re Opai Kunagel Amin (unreported Supreme Court 231, 6 August 1982); Reading v. Motor Vehicles Insurance (PNG) Trust [1988] P.N.G.L.R. 236.

13. [1984] P.N.G.L.R. 314, 343.

14. Id. 344. Bredmeyer J. thereby adhered to his own earlier decision in the National Court in Jireuto v. The State [1984] P.N.G.L.R. 174.

15. [1984] P.N.G.L.R. 314, 350.

16. Id. 351.

17. [1986] P.N.G.L.R., 38, 50 per McDermott A.J.

18. See below page 33.

19. [1984] P.N.G.L.R. 314, 352.

20. Id. 362.

21. Id. 363.

22. Ibid.

23. Ibid.

24. Id. 364.

25. [1985] P.N.G.L.R. 329.

26. See below page 40.

27. Kidu C.J. and Kapi D.C.J., Amet J. dissenting.

28. [1984] P.N.G.L.R. 314.

29. [1985] P.N.G.L.R. 329, 331.

30. Id. 332-3.

31. For the full text of section 23 see below page 50.

32. [1985] P.N.G.L.R. 329, 333.

33. [1985] P.N.G.L.R. 329, 333.

33. Id. 338-9.

34. Ibid.

35. Id. 339.

36. [1987] P.N.G.L.R. 102.

37. Bredmeyer, Cory and Barnett JJ.

38. [1984] P.N.G.L.R. 314.

39. [1987] P.N.G.L.R. 102, 111.

40. Id. 112.

41. Ibid.

42. Ibid.

43. [1986] P.N.G.L.R. 38, 50 per McDermott A.J.

44. [1987] P.N.G.L.R. 102, 111.

45. [1984] P.N.G.L.R. 314.

46. [1988] P.N.G.L.R. 201.

47. [1984] P.N.G.L.R. 314.

48. [1988] P.N.G.L.R. 201, 204.

49. Ibid.

50. [1984] P.N.G.L.R. 314, 342.

51. [1988] P.N.G.L.R. 201, 204.

52. [1984] P.N.G.L.R. 314.

53. Kaputin J. would not have limited the jurisdiction to discretionary decisions.

54. [1979] A.C. 385.

55. Id. 395.

56. [1981] 1 All E.R. 244.

57. Id. 248-9.

58. [1984] P.N.G.L.R. 314.

59. e.g. McDermott J. at 363. At the same time his Honour made the point that under Schedule 1.2.(1) of the Constitution 'act' is defined to include an omission or failure to act.

60. Compare Lamb v. Moss (1983) 49 A.L.R. 533; Harris v. Australian Broadcasting Corporation (1983) 50 A.L.R. 551, 557-8; see also S.D. Hotop, Principles of Australian Administrative Law, 6th ed. pp. 328-333.

61. [1987] P.N.G.L.R. 102, 111.

62. [1985] P.N.G.L.R. 329, 332 and 333 per Kapi D.C.J.

63. See below page 50.

64. Kidu C.J. in Raz v. Matane [1985] P.N.G.L.R. 329, 332 overcame the point by giving section 23 'a fair and liberal interpretation'.

65. [1987] P.N.G.L.R. 102.

66. Id. 112.

67. Compare Public Employees Association of Papua New Guinea v. Public Service Commission [1983] P.N.G.L.R. 206 holding that public service disciplinary offences were not criminal in nature.

68. S.C.R. No. 1 of 1984 [1984] P.N.G.L.R. 314; Raz v. Matane [1986] P.N.G.L.R. 38; followed by the National Court in Goplan v. Uni Transport Pty. Ltd. [1986] P.N.G.L.R. 101.

69. S.C.R. No. 1 of 1984 [1984] P.N.G.L.R. 314.

70. [1987] P.N.G.L.R. 102.

71. [1988] P.N.G.L.R. 20.

72. S.C.R. No. 1 of 1984 [1984] P.N.G.L.R. 314.

73. Raz v. Matane [1985] P.N.G.L.R. 329; followed by the National Court in Application by Tom Ireeuw [1985] P.N.G.L.R. 430, 437.

74. Raz v. Matane [1985] P.N.G.L.R. 329; The State v. Lohia Sisia [1987] P.N.G.L.R. 102.

75. Raz v. Matane [1985] P.N.G.L.R. 329, 333 per Kapi D.C.J., holding that enforcement under s.41 is only available in the Supreme Court.

76. S.C.R. No. 1 of 1984 [1984] P.N.G.L.R. 329 particularly per McDermott J.

77. There is no apparent restriction on joining an application under s.41 with an application for judicial review.

78. The State v. Lohia Sisia [1987] P.N.G.L.R. 102.

Chapter V - Enforcement Provisions

1. See for example the Malta (Constitution) Order in Council 1961 referred to in Olivier v. Buttigieg [1967] A.C. 115.

2. Constitution section 34 provides that the provisions of Division 3 apply in relation to corporations and associations in the same way as they apply in relation to individuals except where, or to the extent, that the contrary intention appears in the Constitution.

3. [1985] P.N.G.L.R. 212. See also Amaiu v. Commissioner of Corrective Institutions [1983] P.N.G.L.R. 87 in which the National Court ordered a division of Bomana Corrective Institution be closed following violations of prisoners' constitutional rights.

4. [1985] P.N.G.L.R. 263.

5. Id. 267 per Kidu C.J., 271 per Pratt and Bredmeyer JJ. and 276 per Amet J. Followed by Kapi D.C.J. in Malapu v. The Electoral Commission [1987] P.N.G.L.R. 128.

6. Unreported, Supreme Court, 4 August 1989.

7. Ready Mixed Concrete v. The State [1981] P.N.G.L.R. 396, 408; The State v. Painke (No. 2) [1977] P.N.G.L.R. 344. 141.

8. Premdas v. The State [1979] P.N.G.L.R. 329, 337.

9. Reference No. 1 of 1977 [1977] P.N.G.L.R. 362.

10. Constitution section 37.

11. [1977] P.N.G.L.R. 362, 367-8.

12. [1983] P.N.G.L.R. 117.

13. Id. 120. Followed in The State v. Evertius and Kundi [1985] P.N.G.L.R. 109 in which Pratt J. at page 113 observed that the development of the law in this area has led to a divergence from the English common law on search warrants and illegal police conduct.

14. [1987] P.N.G.L.R. 286.

15. Id. 291.

16. [1985] P.N.G.L.R. 48.

17. Unlike some of the 'Westminster model' constitutions the Constitution of Papua New Guinea expressly states, in section 34, that the guaranteed rights and freedoms apply as between individuals as well as between governmental bodies and individuals. Compare the Constitution of Belize, considered in Alonzo v. Development Finance Corporation [1985] L.R.C. (Const) 359. See also Lord Diplock's remarks on this point in Maharaj v. Attorney-General of Trinidad and Tobago (No.2) [1979] A.C. 385.

18. [1985] P.N.G.L.R. 48,56.

19. Id. 57-8.

20. Ume More v University of Papua New Guinea [1985] P.N.G.L.R. 401.

21. Id. 410-1 and 420.

22. [1979] A.C. 385.

23. Id. 394.

24. Id. 397.

25. Id. 400.

26. Ibid.

27. Section 37.

28. The Government of Papua New Guinea v. Barker [1979] P.N.G.L.R. 53, on the ground (amongst others) that 'the judiciary is an arm of the National Government' per Greville-Smith J. at page 120.

29. Re Heni Pauta and Kenneth Susuve [1982] P.N.G.L.R. 7.

30. [1983] P.N.G.L.R. 87.

31. A total of approximately $Aus9,000.

32. [1979] A.C. 385.

33. Id. 400 The Constitution of Trinidad and Tobago does not expressly allow exemplary or punitive damages: compare section 58 of the Constitution of Papua New Guinea.

34. [1985] LRC (Const) 569.

35. Id. 574.

36. Id. 577 See also Attorney-General of St. Christopher, Nevis and Anguilla v. Reynolds [1980] 2 W.L.R. 177.

37. [1977] P.N.G.L.R. 362, 368, 378-9 and 381-2.

38. Id. 382.

39. See Raz v. Matane [1985] P.N.G.L.R. 329, 332 per Kidu C.J.

40. Compare Amet J. in Masive v. Okuk [1985] P.N.G.L.R. 263, 277.

41. Maharaj v. Attorney General of Trinidad and Tobago (No. 2) [1979] A.C. 385, 396;compare Olivier v. Buttigieg [1967] 1 A.C. 115.

42. See for example Raz v Matane [1985] P.N.G.L.R. 329.

Chapter VI - Conclusion

1. Compare David Lavan Grove,'The "Sentinels" of Liberty? The Nigerian Judiciary and Fundamental Rights' [1963] J.A.L. 152

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