CHRONICLE OF THE MONTHS OF POLITICAL AND CONSTITUTIONAL CRISIS IN VANUATU, 2014, 2015.

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INTRODUCTION

Uncommon as it is for a person to submit more than one paper for publication in the same journal, the extraordinary events that unfolded during the latter part of 2015 in Vanuatu, cannot be let pass into history without some recording in this Journal. What happened in the months of October, November and December 2015 was completely unprecedented in the history of the country, and it was not just one event of constitutional and legal significance that was unprecedented, but a whole series of events of constitutional and legal significance which followed in a remarkable succession of events.

The purpose of this article is to record those events while they are fresh in the memory. It may be that others may wish to add critiques and comments about those events, but that can be done at leisure at a later stage. The purpose of this is to provide a chronicle of those events - what would have been described by Gilbert and Sullivan as "a plain, unvarnished narrative."

THE BACKGROUND

Vanuatu attained independence in 1980, and adopted a written Constitution which provides for a democratically elected unicameral Parliament. Although Parliament has a lifetime of 4 years, there have been frequent shiftings of political allegiance, accompanied by motions of no confidence in current Prime Ministers, and so quite frequent changes of Governments. According to article 21 of the Constitution, "Parliament shall meet twice a year in ordinary session, [but]… may meet in extraordinary session at the request of the majority of its members, the Speaker or the Prime Minister."

In May 2014, the then Prime Minister, Hon. Moana Carcasses Kalosil [hereafter referred to as Carcasses], who was the first naturalized citizen in the history of Vanuatu to be elected to the position of Prime Minister, was defeated by a motion of no confidence, and Hon. Joe Natuman was elected Prime Minister. Early in June 2014, the Prime Minister terminated the ministerial portfolios of two ministers, Hon. Sato Kilman, because as Minister of Foreign Affairs he had not

followed the policy of Government, especially as regards West Papua, and Hon. Alfred Carlot, because he would not agree to replace Hon. Kilman as Minister of Foreign Affairs. The dismissed Ministers determined to join with Carcasses and his supporters to overturn the Prime

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Minister, and, since Parliament was not then sitting, on 29 August 2014 a letter was delivered to the office of the Speaker, signed by Carcasses and other members of Parliament, requesting that an extraordinary session of Parliament be convened, and also enclosing a motion of no confidence in the Prime Minister.

This request was not accepted by the Speaker, because 3 of the members of Parliament whose signatures appeared on the document when it was filed, told the Speaker that they had not signed the request for an extraordinary session. The refusal of the Speaker to accept the request was confirmed as correct by the Supreme Court on 8 September 2014:

> As both the *Korman* and *Vanuaroroa* judgments make clear, where the Speaker has information which casts doubt on the authenticity of one of more signatures (if their falsity would reduce the number below a majority), he is not only entitled but has a Constitutional *duty* to inquire into complaints. That is simply because he has no power or ability to convene Parliament unless he has a valid request from a majority of MPs…… He namely wrote to Government MPs seeking confirmation of the validity of their signatures, and in response he received compelling information from the three MPs that their signatures had been improperly and fraudulently used. Once he received that information he had no choice but to decline the request because it had not come from a true majority. ….. For these reasons I am satisfied that the application must be dismissed." *Carcasses v Boedoro* [2014] VUSC 113; Constitutional Case 08 of 2014 (8 September 2014; Harrop J.)

Accordingly, Parliament did not meet in September 2014 for the extraordinary session that had been requested, but on 24 October 2014 a summons was sent out by the Speaker for Parliament to meet in the second ordinary session of 2014 on 18 November 2014.

THE BRIBERY ALLEGATIONS

Before Parliament met, towards the end of October 2014, rumours started to circulate among political circles in Port Vila about large sums of money being offered by Carcasses, to other members of Parliament in an attempt to persuade them to support a bid by Carcasses to overturn the Government of the Prime Minister, Hon Joe Natuman, who, as mentioned earlier, had displaced Carcasses as Prime Minister in May 2014. It was said that a large amount of money from an overseas bank located in Port Vila had been made available to Carcasses, who was making it available to any members of Parliament in return for their support. These rumours were soon brought to the attention of the Prime Minister, Hon Joe Natuman, who made a complaint to the police to enable the allegations to be officially investigated.

THE SUSPENSION FROM PARLIAMENT

Before the police completed their investigations into the Prime Minister's complaint against Carcasses and the other members of Parliament, the Prime Minister and his supporters in

Parliament, on 21 November 2014, filed a motion with the office of the Speaker of Parliament that Carcasses and 15 other members of Parliament be disciplined and suspended from Parliament until the conclusion of the first Ordinary Session of Parliament in 2015. On the same day, 21 November 2014, another motion was filed with the office of the Speaker of Parliament: a motion signed by Carcasses and 16 other members of Parliament of no confidence against Hon Joe Natuman as Prime Minister.

On 25 November 2014, the first motion to be debated was the motion by the Prime Minister and Hon Ham Lini, calling for the suspension of Carcasses and 15 other named members of Parliament, on the ground that Carcasses had transferred the sum of VT1,000,000 into the bank account of each of the other members of Parliament in breach of the Leadership Code and of the Penal Code and thereby brought Parliament into disrepute. This motion was debated and was passed. Accordingly, Carcasses and the 15 other named members of Parliament were suspended from Parliament until the conclusion of the first Ordinary Session of Parliament in 2015. The motion of no confidence in the Prime Minister, Hon Joe Natuman, filed by Caracasses and his supporters, was not debated or passed.

THE OVERTURN OF THE SUSPENSIONS BY THE SUPREME COURT

Carcasses and his supporters applied to the Supreme Court claiming that their constitutional rights had been infringed in that the legislature had purported to hold them to be guilty of criminal offences, when under the separation of powers provided by the Constitution of Vanuatu, this was a power which could be exercised only by the courts. This argument was accepted by the Supreme Court which held, in its judgment on 2 December 2014 that the motion to suspend Carcasses and 15 other members of Parliament was unconstitutional and void. Saksak J. concluded his judgement as follows:

> [32] In the present case the petitioners were not before a Court of law, rather they were before Parliament without charges and any evidence substantiating the allegations made against them. Parliament's concern about protecting its integrity is legitimate in all respects. But unless police investigations are allowed to proceed unhindered and the complaints are brought before the Public Prosecutor to lay charges and have the petitioners answer those charges in a court of law, and are subsequently found guilty and convicted, there could be no cause for discipline against them in the way Parliament resolved on 25 November 2014….[33]. Accordingly I am satisfied the resolution to suspend the petitioners by the respondents on 25 November 2014 had breached the petitioners' constitutional rights under the various Articles of the Constitution specified in their petition. Accordingly I enter judgment in favour of the petitioners.": *Carcasses v Boedoro* [2014] VUSC 155; Constitutional Case 10 of 2014 (2 December 2014; Saksak J.).

Accordingly Carcasses and the 15 supporters who had been suspended from Parliament were now free to return to Parliament.

TRIAL AND CONVICTIONS FOR BREACHES OF PENAL CODE

As mentioned earlier, a complaint to the Police had been lodged by the Prime Minister, Hon Joe Natuman, in 2014 about the transactions between Carcasses and some 15 other members of Parliament which were alleged to be bribery. Police investigations were started but were interrupted for a period while the country recovered from Cyclone Pam, which struck on 13 March 2015, and the proceedings were further complicated by the absence of a substantive public prosecutor until 1 August 2015, due to delays in the process of appointment.

Eventually charges were filed by the acting public prosecutor charging Carcasses and 15 other members of Parliament with offences of bribery in breach of the Penal Code Act, and also with breaches of the Leadership Code Act, and the defendants appeared before the Magistrate's Court on 21 July 2015 for a preliminary enquiry by the Senior Magistrate. In his decision on 7 August 2015, the Senior Magistrate held that there was sufficient evidence to support the charges against the defendants of breaches of the Penal Code Act, and committed all the defendants to the Supreme Court for trial on those charges. The Senior Magistrate did not however, accept the charges for breaches of the Leadership Code Act, apparently because he believed that they should have been based upon a report from the Attorney General, and did not commit the defendants for trial on those charges.

On 2 September 2015, all but 1 of the 16 charged members of Parliament, entered pleas of not guilty in the Supreme Court to the charges for breaches of the Penal Code Act relating to bribery, and the trial of the 15 who had pleaded not guilty began before Justice Mary Sey on 7 September 2015, and continued for 8 days until 17 September 2015. During the trial, 14 of the 15 defendants chose to remain silent and declined to give evidence. On 9 October 2015, the Court reached its verdict, and held that Carcasses was guilty of 18 counts of offering a bribe, and that 13 of the defendants were guilty of accepting a bribe, in breach of s73 (1) and (2) of the Penal Code, while 1 of the defendants was not guilty of accepting a bribe: *Public Prosecutor v Kalosil - Judgment as to verdict* [2015] VUSC 135; Criminal Case 73 of 2015 (9 October 2015; Sey J.)

The sentencing of Carcasses, the 13 members of Parliament who had been found guilty, and the 1 defendant who had pleaded guilty (Hon. Willlie Jimmy Tapanagarua), followed on 22 October 2015. Carcasses was sentenced to 4 years imprisonment, Hon.Tony Nari was sentenced to 3 ½ years, and the remainder to 3 years, except for the defendant who had pleaded guilty (Hon Willie Jimmy Tapangararua) and was sentenced to 20 months imprisonment, suspended during good behaviour: *Public Prosecutor v Kalosil - Sentence* [2015] VUSC 149; Criminal Case 73 of 2015 (22 October 2015; Sey J.)

The defendants appealed to the Court of Appeal in respect of the convictions and also the sentences. The appeal was heard, 12-13 November 2015, and the Court gave its decision on 20 November 2015, upholding in their entirety, both the convictions and the sentences. The Court emphasized the seriousness of the offence of bribery, and confirmed that the sentences were in

the acceptable range, indicating, however, that Carcasses may well have deserved a heavier sentence:

> [102] In our view all these starting points were in the range, and that of Mr Kalosil right at the bottom of the available range. It must be repeated that bribery is a serious crime. The bribing of Members of Parliament strikes at the heart of democracy and good government, debasing the decision-making processes of Vanuatu's Parliament so that it is not reliable, predictable, or fair. Worse, a practice of bribes weakens the trust of the public in government, and damages the rule of law.
> [103] In Mr Kalosil's case he lead a bribery scheme that involved large sums of money, and corrupted one the most solemn functions of Parliament, the selection of a leader. Given his high position, multiple offending, and the amount of money involved, a starting point of six or seven years could have been justified. He is fortunate there was no cross-appeal: *Kalosil v Public Prosecutor* [2015] VUCA 43; Criminal Appeal Case 12 of 2015 (20 November 2015; Lunabek CJ, von Doussa, Asher, Harrop JJA).

THE PURPORTED PARDON OF THE CONVICTED MEMBERS OF PARLIAMENT

The decision of the Supreme Court convicting Carcasses and 14 other members of Parliament was announced on Friday, 9 October 2015. At that time one of the other 14 members of Parliament, who was convicted, was Hon Marcellino Pipite, who was the Speaker of Parliament, and he was at the time acting President, because the President was out of the country from 7-11 October 2015, attending a USP Graduation in Cook Islands in his capacity as Chancellor of the University of the South Pacific. Article 37 of the Constitution provides that "whenever … the President is overseas or incapacitated, the Speaker of Parliament shall perform the functions of the President," and, article 38 provides, "The President may pardon, commute or reduce a sentence imposed on a person convicted of an offence."

On the day after the conviction of Carcasses and the 14 members of Parliament, ie Saturday 10 October 2015, 10 of the convicted members, but not including Carcasses, Hon. Kalsakau and Hon. Vohor, met in the office of one of the convicted members, Hon. Nari, to discuss what should be done to improve their situation. There was some conversation about appeal, but the conversation turned away from appeal, and turned in the direction of a pardon, which it was thought Hon. Pipite, as acting President, could grant for all convicted members, including himself. It was agreed that a pardon was the best end to their troubles, and later in the day the acting President held a press conference where he signed and read out an instrument of pardon for all the convicted members of Parliament, including himself, but excluding Hon. Willy Jimmy, who had pleaded guilty, and this instrument was published in the *Gazette*.

After the President returned to the country the following day, he held a press conference on Monday, 12 October 2015, where he denounced the pardon, as dishonouring the office of

President, and stated that he was considering his options as to appropriate action. On 16 October 2015, the President issued an order revoking the pardon. Proceedings were launched by the Opposition bloc for a judicial review of the pardon by the acting President, and proceedings were also issued by the convicted members of Parliament for judicial review of the revocation of the pardon by the President. These two opposing proceedings were joined and heard by the Supreme Court, which held, on 20 October 2015, that the pardon was unconstitutional and invalid, and that the revocation of the pardon was valid: *Natuman v President of the Republic of Vanuatu; Vohor v President of the Republic of Vanuatu* [2015] VUSC 148; Constitutional Case 6 & 7 of 2015 (21 October 2015, Saksak J).

This decision was appealed to the Court of Appeal, and on 20 November 2015, the Court of Appeal dismissed the appeal, holding that the pardon issued by the Hon. Pipite on Saturday, 10 October 2015, was contrary to article 66 of the Leadership Code Act, and was also subject to judicial review, because it was based upon considerations that should not have been taken into account and also because it was patently unreasonable in the *Wednesbury* sense: *Kalosil v Public Prosecutor* [2015] VUCA 43; Criminal Appeal Case 12 of 2015 (20 November 2015;Lunabek CJ, von Doussa, Asher, Fatiaki, Harrop, Chetwynd JJA).

THE TRANSITORY SUSPENSION AND REPLACEMENT OF THE OMBUDSMAN

On the same Saturday, 10 October 2015, that the Speaker, Hon Marcellino Pipite, who was acting President, issued a pardon for himself and all other convicted members of Parliament, except Hon Willie Jimmy, the acting President also sought to suspend the Ombudsman, Mr Kalkot Mataskelekele.

It was reported on Tuesday 13 October 2015, that the acting President had on Saturday, 10 October 2015, sent a letter to the Ombudsman informing him that he was suspended without salary as from that day, and that he was replaced by the lawyer Wilson Iauma: "Ombudsman Suspended," *Vanuatu Daily Post*, 13 October 2015. p.1. The grounds for the suspension were stated to be that the Ombudsman had failed to make a proper enquiry and report into the conduct of the convicted members of Parliament, as found by the judgment of Fatiaki J on 8 October 2015 – see later BREACHES OF THE LEADERSHIP CODE – PROCEDURAL TANGLES. The Ombudsman was reported as saying that "he considered his suspension as unlawful ... He confirmed that he had written to the Head of State regarding the matter and it is now up to the president to decide whether or not his suspension was lawful.": "Ombudsman confirm suspension letter." *Vanuatu Daily Post*, 13 October 2015, p.3.

No formal order of suspension of the Ombudsman was published in the *Gazette* by the acting President, and no formal instrument was published by the President upon his return. Nor was there any further mention reported in the media about the purported suspension of the Ombudsman and his replacement by Wilson Iauma. It appears that the President and the

Ombudsman treated the purported suspension as of no effect, and not worthy of any further public comment, and Wilson Iauma's purported appointment as Ombudsman sank from the public and official consciousness.

THE ATTEMPTED CHIEFLY INTERVENTION

A somewhat similar fate awaited an attempt by some chiefs from northern islands to intervene, and arrange some kind of reconciliation ceremony. On Saturday, 31 October 2015, a delegation of about a dozen chiefs from northern islands, in which lay the constituencies of many of the convicted members of Parliament, arrived in Port Vila, together with a large collection of pigs and mats. They stated that they wished to meet with the Head of State, to have a customary conciliation with him. The *Vanuatu Daily Post*, 3 November 2015, pp1-2, reported: "Reconciliation Bid….The primary [purpose of the] visit of the chiefs to Port Vila, they say, is because the Government is the government of the chiefs, and when some of the chief's children who are leaders of the country are affected and the country is affected, it is the chiefs' duty to ensure something right is done to put things right again for the good of the country and the people. The chiefs state that at the same time, they are mindful for and have the respect for the existing laws and rules of the country."

The chiefs' visit was received, courteously, but coolly, by the President of the Malvatumauri National Council of Chiefs, who is reported in *Vanuatu Daily Post*, 3 November 2015, p1, as follows: "In response to their request to assist in facilitating meetings with the prime minister, the leaders of the opposition and the Head of State, the Malvatumauri President, Chief Senimao Tirsupe, said there is [a] time for everything, and, as such, things must happen at their appropriate time." Rather more blunt was the reaction of the former Prime Minister Hon Joe Natuman, who was reported to have said: "…the traditional respect for chiefs stays in its place, but their arrival in the Capital last weekend was 'at a wrong time at the wrong place.'": *Vanuatu Daily Post*, 4 November 2011, p 1.

The Head of State did not personally receive the visiting chiefs, but sent them a written letter in which he stated that "custom ceremonies and other normal practices to bring back normalcy in any situation …have to be performed at their time and right place … and that he has an obligation to safeguard and uphold the Constitution at all times … [and] that he cannot accept any reconciliation ceremony now until the Appeal Case is heard by the Appeal Court …":*Vanuatu Daily Post*, 5 November 2015,p3. It was reported that "The chiefs … expressed their gratitude to the Head of State. They also expressed their respect for the Head of State's position as a symbol of peace, unity and upholder of the Constitution." *ibid*. Importantly, it was further reported that: "They are calling on their people in Port Vila and throughout Vanuatu to remain calm, respect the law and order and allow the legal and customary processes to take their course." *ibid*.

On Thursday, 5 November 2015 a farewell function was held at the Malvatumauri National Council of Chiefs, when the chiefs left their 15 pigs and most of the mats and kava in the care of the Malvatumauri. The President of the Malvatumauri, Chief Seni Mao Tirsupe was reported to have "urged the visiting chiefs to 'walk in peace' and to return home to ensure their people in the islands remain in peace at all times ... I accept and take on the responsibility of your concerns in relation to your visit … And I will ensure when, where and how to respond to your concerns [sic]will take place at the right time, place and in the customary and traditional manner " "Response to concerns must happen at the right place, time: Chief Tirsupe," *Vanuatu Daily Post*, 10 November 2015, p2. Who had organised and paid for this visit of the chiefs, and their attempt to intervene, was never publicly stated. It was later reported in the media that their expenses had been paid for by the Board of Directors of the Northern Islands Stevedoring Company Ltd, NISCOL, and it was rumoured that their trip was organised by the brother of one of the convicted members of Parliament, but there was no official or public confirmation of this.

BREACHES OF THE LEADERSHIP CODE ACT - PROCEDURAL TANGLES

When, in July 2015, the Public Prosecutor filed charges against Carcasses and 16 defendants for breach of s73 of the Penal Code, he also included charges of breaches of sections 21 and 23 of the Leadership Code Act, which prohibit a leader from accepting a loan from a non-recognised financial institution, and also prohibit a leader from offering or accepting a bribe. When the charges were considered at the preliminary enquiry before the Magistrate's Court, that Court ruled that the charges of breaches of the Penal Code Act were in order, but not the charges under the Leadership Code Act, and so the Magistrate's Court committed the defendants for trial in the Supreme Court for breaches of the Penal Code Act, but did not commit the defendants to the Supreme Court for trial for breaches of the Leadership Code Act: "this Court Rules that the charges laid against the accused persons under the Leadership Code Act will not be considered in this matter. The prosecution is, however, at liberty to recharge the Accused persons under the Leadership Code Act but must first ensure that the requirements and the processes outlined in sections 34 to 38 of the LC Act are followed." (page 3 at paragraph 2 of the Decision on Preliminary Inquiry Submissions, quoted at para 10 of the judgment of Sey J. in *Public Prosecutor v Kalosil* [2015] VUSC 111; Criminal Case 73 of 2015 (27 August 2015).

The Magistrate's Court seemed to be indicating that the Public Prosecutor could only prosecute for breaches of the Leadership Code Act if sections 34 to 38 of the Leadership Code Act have been complied with. Sections 34 to 38 of the Leadership Code Act authorise the Ombudsman to investigate the conduct of a leader (other than the President) and send a report on that conduct to the Public Prosecutor, and also to the Commissioner of Police if he considers that the complaint "involves criminal misconduct." In May 2015, the Ombudsman, acting upon a complaint which had been made to him, had investigated the conduct of Carcasses and 18 members of Parliament, and on 13 May 2015 produced a report upon that conduct, a copy of which was sent to the Public

Prosecutor, but apparently this was not relied upon by the prosecution when it filed the charges under the Leadership Code Act in July 2015.

In response to the decision of the Magistrate's Court on 17 August 2015, the Public Prosecutor filed fresh charges in the Supreme Court for breaches of the Leadership Code Act against Carcasses, the same 15 members of Parliament and Thomas Bayer. These charges were challenged by the defendants, on the ground that the Public Prosecutor had no power to charge the defendants in the Supreme Court, when they had not been committed to the Supreme Court by the Magistrate's Court after a preliminary enquiry. On 27 August 2015, the Supreme Court held that the Public Prosecutor had power under section 9 of the Public Prosecutor Act to commence criminal proceedings in the Supreme Court for breaches of sections 21 and 23 of the Leadership Code Act, even when the Magistrate's Court had not committed the defendants for trial in the Supreme Court : *Public Prosecutor v Kalosil* [2015] VUSC 111; Criminal Case 73 of 2015 (27 August 2015; Sey J.).

The defendants promptly reacted against Sey J's decision of 27 August 2015. On 1 September 2015, the defendants filed an appeal against her decision, and the following day, 2 September 2015, they applied to Sey J. for a deferral or postponement of the date for the trial, pending the hearing of the appeal. This application for deferral was dismissed on 2 September 2015 by Sey J. on the ground that leave should have been obtained before the application for appeal was made, and had not been obtained, and that the proper practice is that any dissatisfaction against an interlocutory ruling, such as the dismissal of the application for leave, should be saved until after the trial, and be included in the grounds of appeal against the decision of the court at the end of the trial: *Public Prosecutor v Kalosil* [2015] VUSC 121; Criminal Case 73 of 2015 (2 September 2015; Sey J.)

On 9 September 2015, some of the defendants returned to the attack against the prosecution for breaches of the Leadership Code Act, and filed a constitutional application claiming that their constitutional rights had been interfered with, because section 21 of the Leadership Code Act was contrary to their rights under article 5 of the Constitution, and because the Supreme Court had relied upon a special report which had been prepared by the Ombudsman under section 34 of the Leadership Code Act, which was critical of the conduct of the defendants, but the Ombudsman had failed to provide the defendants with an opportunity to refute or explain the criticisms, as required by section 21 of the Ombudsman Act. This application was dealt with by Fatiaki J., and on 8 October 2015, ie the day before Sey J. was scheduled to pronounce the verdict upon the trial of the defendants for breaches of the Penal Code Act and for breaches of the Leadership Code Act, Fatiaki J. ruled that the special report of the Ombudsman which had been submitted to the Ombudsman and used by the Public Prosecutor as the basis for his charges under the Leadership Code Act was null and void for non-compliance with the procedures required by the Act which stipulated that the Ombudsman must not make a report that is adverse to a leader without giving the leader an opportunity to comment on the subject of the enquiry:

Nari v Republic of Vanuatu [2015] VUSC 132; Constitutional Application 05 of 2015 (8 October 2015; Fatiaki J.).

When on the following day, 9 October 2015, the Supreme Court sat to announce the decision about the guilt of Carcasses and the other defendants, Sey J. decided that, although the judgment of Fatiaki J. was not binding on her, because Fatiaki J. was a judge of the same court as Sey J., nevertheless, to be on the safe side, the charges for breaches of the Leadership Code Act would be disregarded: " … Fatiaki J.'s judgment is not binding on me since both Courts exercise concurrent, co-ordinate and equal jurisdiction. Nonetheless, *ex abundanti cautela*, i.e. out of the abundance of caution, this Court will refrain from dealing with the charges laid under the Leadership Code Act [CAP 240]." Accordingly, the Supreme Court decided that the defendants would be tried only for breaches of the Penal Code Act, and the charges for breaches of the Leadership Code Act, were adjourned : *Public Prosecutor v Kalosil - Judgment as to verdict* [2015] VUSC 135 (Sey J.).

The danger of adjourning the charges under the Leadership Code Act to be determined at another trial was that subsequent proceedings could be argued to be in breach of the rule against double jeopardy, which is protected by article 5(2) (h) of the Constitution. When the Court of Appeal heard the appeals against convictions and sentences for breaches of the Penal Code Act, it stated in the judgment it delivered on 22 October 2015, that the judgment of Fatiaki J. on 8 October 2015 was incorrect inasmuch as it had held that a report from an Ombudsman was necessary before the Public Prosecutor could lay charges for breaches of the Leadership Code Act:

> In our respectful view Fatiaki J should not have made a substantive determination of breach in the case management hearing that was before him. Further, it is our preliminary view that he was in error in treating the Ombudsman's enquiry as a prerequisite to the laying of a charge under the Leadership Code Act. The prosecutor may initiate a prosecution for a breach of the Code under s 19 even if there has not been such an enquiry, or if there has been an enquiry and it is defective. The Ombudsman section of the Act does not inhibit the powers of a prosecutor to prosecute, although in the event of a report it places obligations on the prosecution." *Kalosil v Public Prosecutor* [2015] VUCA 43; Criminal Appeal Case 12 of 2015 (20 November 2015; Lunabek CJ, von Doussa, Asher, Harrop JJ.A).

The Court then, at the request of the Public Prosecutor, dismissed the charges in respect of the Leadership Code Act.

BREACHES OF THE LEADERSHIP CODE – THE SUBSTANTIVE DECISION

The Leadership Code Act is unusual in that it provides that a breach of certain sections of another Act, ie the Penal Code Act, is automatically a breach of the Leadership Code Act, so that a leader who is convicted of certain prescribed offences under the Penal Code Act is liable to punishment under the Leadership Code Act, as well as punishment under Penal Code Act. This is

provided by section 27 of the Leadership Code Act which reads as follows: "Section 27 (1) A leader who is convicted by a court of an offence under the Penal Code [Cap. 135] … as listed in subsection (2) is:(a) in breach of this Code; and (b) liable to be dealt with in accordance with sections 41 and 42 in addition to any other punishment that may be imposed under any other Act." Section 41 of the Leadership Code Act provides for a person who is guilty of an offence under the Leadership Code Act to be liable to an order dismissing him from office, and section 42 of the Act provides that where the leader is dismissed from office under section 41 the leader is disqualified from standing for election as, or being appointed as, a leader of any kind for a period of 10 years from the date of the conviction.

On 2 December 2015, the Public Prosecutor, taking his lead from the comments of the Court of Appeal referred to above - see BREACHES OF THE LEADERSHIP CODE-PROCEDURAL TANGLES - applied to the Supreme Court to invoke section 27 of the Leadership Code Act, and punish the convicted defendants in accordance with sections 41 and 42 of that Act. This application was heard on 7 December 2015, and the Supreme Court held that Carcasses and the other 14 defendants were all in breach of the Leadership Code Act, and made an oral order dismissing all the Defendants from office and disqualifying them from standing for election or being appointed as a leader of any kind for a period of 10 years. Also the Court made an oral order that the defendants had ceased to be leaders, and that, pursuant to s.43 of the Leadership Code Act, any entitlement to payments or allowances in connection with being leaders ceased on dismissal. The Court added that if any payments or allowances had been paid to the defendants, as reports in the press seemed to suggest, they were to be repaid forthwith. These oral orders were confirmed in a written judgment issued on 14 December 2015: *Public Prosecutor v Kalosil* [2015] VUSC 173; Criminal Case 762 of 2015 (7 December 2015, Chetwynd J.).

THE PRESIDENTIAL DISSOLUTION OF PARLIAMENT

On 15 October 2015, ie after Carcasses and the 14 other members of Parliament had been found guilty on 9 October 2015, but before their sentences had been announced on 22 October 2015, the Prime Minister (Hon Sato Kilman) met with the Council of Ministers, and they determined to advise the Head of State to dissolve Parliament. This advice was conveyed to the President on 16 October 2015, but the President did not act upon it immediately, waiting to see whether the Government, which had lost 4 Ministers and 14 members, and the Opposition, could agree to a way forward that would provide the country with a Government that had a majority.

Eventually, when no agreement had been reached by the political parties, the President, on Tuesday, 24 November 2015, made an order dissolving Parliament, and some days later the Electoral Commission announced that general elections for Parliament would be held on Friday, 22 January 2016.

This order was challenged by the former Opposition bloc in Parliament, which filed an urgent constitutional application on 1 December 2015 for the Supreme Court to examine the order and hold it to be unconstitutional and void. This application was heard shortly thereafter, and on 16 December 2015, the Supreme Court dismissed the application and held that the Presidential order was made following the advice of the Council of Ministers, and the fact that four of those Ministers had been convicted of bribery, but not yet sentenced, did not invalidate that advice: *Vanuaroroa v President of the Republic of Vanuatu* [2015] VUSC 175; Constitutional Case 822 of 2015 (16 December 2015; Aru J.).The Opposition bloc stated that they would not appeal at that time because of the need to concentrate on the forthcoming general election, but they reserved their right to appeal at a later stage: "Former Opposition group accepts Court decision," *Vanuatu Daily Post*, 19 December 2015, p 3.

UNFINISHED BUSINESS

As at 31 December 2015, when this article is required to be published, there were two prosecutions arising out of the earlier events that have not been completed, and also amendments to the laws which have not been formulated:

(1) CONSPIRACY TO PERVERT THE COURSE OF JUSTICE
After it became known that 11 of the convicted members of Parliament had met with their lawyers on Saturday, 10 October 2015, and decided that one of their number, who was the acting President, would issue a pardon for the benefit of all the convicted members of Parliament, including himself, but excluding Hon Willie Jimmy, who had pleaded guilty, criminal proceedings were commenced against the 11 members of Parliament and their 4 lawyers for conspiracy to pervert the course of justice.

It was reported on 14 October 2015 that a complaint had been made to the Police by the former Prime Minister, Hon Joe Natuman, and that a police investigation team had been set up to investigate this complaint: *Vanuatu Daily Post,* 14 October 2015, p1.

Later it was reported that 3 of the lawyers, ie Robin Kapapa, Gregory Tekau, and Eric Molbaleh, had agreed to testify for the prosecution, and had been granted immunity, leaving only the fourth lawyer present at that meeting, Wilson Iauma, to face prosecution, and that the preliminary enquiry was to be held on Tuesday, 22 December 2015: "Conspiracy Case against former MPs deferred," *The Vanuatu Independent*, 19 December 2015, p2. On 22 December 2015 a preliminary enquiry was held by the Magistrate's Court, when 42 witness statements and 3 exhibits were submitted before Senior Magistrate, Moses Peter, who reserved until 8 January 2016 his decision as to whether the defendants should be committed to the Supreme Court for trial on charges of conspiracy to pervert the course of justice, contrary to section 79(a) of the Penal Code: "Conspiracy PI", *Vanuatu Daily Post,* 23 December 2015, pp 1,3. The decision of

the Senior Magistrate, which was finally announced on 13 January 2016, was that there was a case for all the defendants to answer before the Supreme Court, and a hearing of the Supreme Court was scheduled for 2 February 2016: "Conspiracy case admitted to Supreme Court," *Vanuatu Daily* Post, 14 January 2016, p1."

(2) COMPLICITY TO BRIBERY

When rumours started to circulate in Port Vila in late October 2014 about the disbursement of large amounts of money by Carcasses to members of Parliament, the source of the money was traced to a company called Pacific International Trust Company, usually referred to as PITCO, the manager of which was a prominent financier and businessman in Port Vila, Mr Thomas Bayer.

It appeared from the evidence that was given later in the trial of Carcasses and the other 14 members of Parliament, that on 21 October 2014 a Mr Fong Man Kelvin of Hong Kong transferred USD500,000 into the Westpac bank in Port Vila for the account of PITCO. This was converted into VT48,896,092, and placed in PITCO's vatu account at Westpac. On 28 October 2014, the manager of PITCO, Mr Thomas Bayer drew a cheque of VT35,000,000 from this account in favour of Carcasses who held an account at ANZ Bank, and it was from this account that all the payments were made by Carcasses to the other 14 members of Parliament: "The Money Trail", *Vanuatu Daily Post*, 9 September 2015, p1.

Accordingly, when the prosecution for bribery was launched in the Supreme Court against Carcasses and the 15 other members of Parliament, Bayer was joined as the seventeenth defendant, and was charged with complicity to bribery contrary to section 30 Penal Code Act [Cap 135] and section 23 and 30 (1) (a) of the Leadership Code Act [CAP 240], and with complicity to corruption and bribery contrary to section 30 and 73 (2) of the Leadership Code Act [CAP] 240.

Prior to the trial of the defendants in the Supreme Court, the Court ruled that the trial of Bayer was to be separated from the trial of the other defendants: *Public Prosecutor v Kalosil - Ruling on Separate Trials* [2015] VUSC 120; Criminal Case 73 of 2015 (2 September 2015; Sey J.). As at 31 December 2015, no arrangements for the trial of Thomas Bayer had been reported.

(3) RECOVERY OF THE BRIBE MONEY

As mentioned earlier, on 14 December 2015, the Supreme Court issued a written judgment which confirmed oral orders made earlier which not only dismissed all the convicted defendants from office and disqualified them from standing for election or being appointed as a leader of any kind for a period of 10 years, but also directed that any entitlement to payments or allowances in connection with the defendants being leaders ceased on their dismissal (i.e. on 9th October 2015), and directed that if any payments or allowances had been paid to the defendants, as reports in the press seemed to suggest, they were to be repaid forthwith: *Public Prosecutor v Kalosil* [2015] VUSC 173; Criminal Case 762 of 2015 (7 December 2015, Chetwynd J.).

Nothing was said by the Supreme Court about the bribe money paid by Carcasses to the defendants, ie the VT1,000,000 that each of the convicted members of Parliament had been paid by Carcasses in late October 2014. In late December 2015, a news item on a local radio station reported that lawyers of Carcasses were writing to the recipients of the money paid by Carcasses as bribes for the return of the money. The Proceeds of Crime Act 2002 authorises the Attorney-General to apply to the Supreme Court for an order for the recovery of proceeds of crime. As at 31 December 2015, no public statement has been made by the Attorney-General as to whether such application will be made.

(3) RECOVERY OF THE GRATUITY PAYMENTS MADE TO THE CONVICTED MEMBERS OF PARLIAMENT

After the President made the order dissolving Parliament on 24 November 2015, the Finance Department paid a gratuity of VT 4,452, 023 to each member of Parliament, including to the 14 members of Parliament who had been convicted of perjury. The Supreme Court referred to these when it issued its written decision on 7 December 2015 regarding the proceedings issued under the Leadership Code Act. Chetwynd J said: "Also I confirm the order that the Defendants have ceased to be leaders and pursuant to s. 43 of the LCA, any entitlement to payments or allowances in connection with them being a leader ceased on dismissal (i.e. on 9th October 2015). It would appear from press reports that payments and allowances may have already been disbursed. If that is the case then such disbursement was premature to say the very least. Whoever was responsible should take steps to recover payments. In any event the Defendants are ordered that if any payments or allowances have been paid to them they are to repay them forthwith." On 14 January 2016 it was reported that the gratuity payments had been paid to the convicted Members of Parliament, but had still not been recovered : "Former jailed MPs did not refund gratuity payments: Finance….Daily Post understands the former 14 MPs received a gratuity of VT 4,452,023 each, just days after the Head of State dissolved the parliament. The source from Finance also confirmed that Finance is currently negotiating with the Banks concerned on this matter." *Vanuatu Daily Post*, 14 January 2016, p1.

(4) AMENDMENTS TO THE LAWS

When the President addressed the nation on Monday, 12 October 2015, to express his great sorrow at what had happened in his absence, he concluded his address with the following remarks: "I am appealing to the Government of today and tomorrow, for Vanuatu to take a critical look with a view to amending the laws involved after what has happened. Our country is developing and if we do not amend our laws to keep up with the changes then we stand the risk of becoming victims of our own laws." : "Head of State says no one is above the law," *Vanuatu Daily Post*, 13 October 2015, p5.

Some informal discussions followed these remarks, but as at the publication of this Chronicle on 31 December 2015, no proposals for amendments of laws have been made officially announced.

There are three laws in particular upon which the spotlight has fallen as a result of the above events, where some change would seem to be warranted:

(a) Speaker to act for President. As mentioned earlier, article 37 of the Constitution provides that "Whenever there is a vacancy in the office of the President of the Republic or the President is overseas or is incapacitated, the Speaker of Parliament shall perform the functions of the Constitution under this Constitution or any other law." In the light of the events that have been chronicled in this paper, there has been some informal discussion as to whether it would be better that a non-politician acted for the President of the Republic, when the President is incapacitated or absent. In countries following the British colonial tradition it is quite common for the Chief Justice to be appointed to act for the Governor-General, when the latter is incapacitated or absent, and section 88 of the Constitution of Fiji contains such a provision. In Vanuatu, with its strong tradition of separation between the judiciary and the executive and legislative branches of government, such a provision would probably not be acceptable. More acceptable may be that the President of the Malvatumauri National Council of Chiefs act for the President of the Republic, in the absence or incapacity of the latter. More discussions presumably will need to be held about this.

(b) Revocation of an instrument. The Constitution does not expressly say that an instrument made under constitutional powers may be revoked or amended. Nor is there any such provision in the Interpretation Act with regard to instruments made under statutory powers. When the President returned and discovered the pardon that had been issued by the Speaker, there was some uncertainty as to whether this pardon could be revoked. Any such uncertainties were brushed aside by the Supreme Court in *Natuman v President of the Republic of Vanuatu; Vohor v President of the Republic of Vanuatu* [2015] VUSC 148; Constitutional Case 6 & 7 of 2015 (21 October 2015, Saksak J). They were dismissed with even less discussion by the Court of Appeal in *Vohor v President of the Republic of Vanuatu* [2015] VUCA 40; Civil Appeal Case 40 of 2015 (20 November 2015). Nevertheless it would be possible to avoid any uncertainty in the future by inserting a provision in the Constitution similar to the following provision which appears in section 163 (11) of the Constitution of Fiji: "A power conferred by this Constitution to make, grant or issue any instrument (including a proclamation, order, regulation or rule) or to give any direction, includes the power, exercisable in the like manner, to repeal, rescind, revoke, amend or vary the instrument or direction."

(c) Exercise of the power of pardon without consultation Article 38 of the Constitution provides that: "The President may pardon, commute or reduce a sentence imposed on a person convicted of an offence," but does not require the President to seek any information or advice or conduct any consultation with anyone before making a decision about whether to exercise the power to pardon, commute or reduce a sentence. The Article does add that "Parliament may provide for a committee to advise the President in the exercise of this

function," but this is not obligatory, and Parliament has rarely, if ever, established such a committee.

The Courts have had to consider exercises of the power of pardon by earlier Presidents in cases such as *Attorney-General v President of the Republic of Vanuatu* [1994] VUSC 2; Civil Case 124 of 1994 (1 January 1994); *Sope Maautamate v Speaker of Parliament* [2003] VUCA 5; Civil Appeal Case 04 of 2003 (9 May 2003); *Sope v Republic of Vanuatu* [2004] VUCA 20; Civil Appeal Case 15 of 2004 (5 November 2004). Are there principles that can be distilled from these cases which can be made available through legislation to assist Presidents of the future in the exercise of the power of pardon?

(d) Language of the Constitution The acting President issued the pardon for himself and his convicted colleagues very shortly after the convictions were announced by the Supreme Court on 9 October 2015, and well before they were sentenced to 3-4 years' imprisonment. From the English version of the Constitution, which was consistently relied upon by the courts which were considering the challenge against the purported pardon by the acting President, it is reasonably clear that the power of pardon that is granted by article 38 of the Constitution is separate from the power to commute and reduce sentences, and so a person can be pardoned before he or she is sentenced.
But the Bislama version of the Constitution seems to indicate that the power of pardon is to be exercised in respect of a person who is in prison, ie has been sentenced to imprisonment: "36**.** Presiden blong Ripablik bambae i save sore long man we kot i putum hem long kalabus, i save letem i gofri. Mo i save jenisim panis blong hem, mo i save katem taem blong kalabus blong hem i kam sotfala." [The President of the Republic may show mercy for a person who has been imprisoned by a court, and may order that person to be released. Also he can change the punishment of such person, and reduce the time in prison.]
The French version of article 38, on the other hand, is more neutral:
38. Droit de grâce et de réduction des peines Le Président de la République dispose du droit de grâce et du droit de commuer ou de réduire les peines infligées à tout condamné. Le Parlement peut instituer une commission chargée de conseiller le Président de la République dans l'exercice de cette fonction. [Article 38. The President of the Republic has the power of mercy and the power to commute or reduce punishments imposed on all who have been convicted. Parliament may set up a commission charged to advise the President of the Republic in the exercise of this function.]

Article 3 (1) of the Constitution of Vanuatu states that there are there are three official languages of Vanuatu: "The official languages are Bislama, English and French." The Constitution has been translated into each of the three official languages. But there is no provision in the Constitution of Vanuatu or in the Interpretation Act as to which language version of the Constitution is to take priority.

So there is the question of whether the Constitution of Vanuatu should be amended to contain a provision to make clear which of the three possible language versions, is to prevail. This is an issue which is discussed at much greater length in another contribution to this edition of the Journal, so nothing more will be said here, except to note that section 3 (4) of the Constitution of Fiji contains a provision in relation to the three dominant languages in Fiji : "If there is an apparent difference between the meaning of the English version of a provision of this Constitution and its meaning in the iTaukei and Hindi versions, the English version prevails." This could provide a guide for an amendment to the Constitution of Vanuatu.

CONCLUSION

The purpose of this Chronicle has been to record, while the memory is still fresh, and while written records are readily accessible, a period of the legal history of Vanuatu which must be one of the most remarkable and extraordinary in the life of the country. The events in the 1970's which led up to the great day of Independence on 30 July 1980 must surely be the most important events in the recorded history of the country, but the events which culminated in the months of October- December 2015, are, at least from a constitutional, legal and political perspective, very remarkable and worthy of recording. They are not yet completed, and it will remain for the next Journal in 2016 to record what remains as unfinished business from 2015.

There are also critiques and commentaries and philosophical evaluations and reflections, which, with the benefit of a longer period of time for contemplation and writing, and with the luxury of hindsight, could be made with regard to the events of this period, and could, perhaps, be published in a later edition of this Journal. One could ask, for example, as to how much the various legal proceedings that have been chronicled, cost to the State and to the litigants? One could ask as to what extent the image of the legal profession has been benefitted by, or been damaged by, the involvement of lawyers in these political events. One could also ask as to how much these events, which were centred in the capital, Port Vila, were known to, and understood and evaluated by, people in the rural areas of the islands that make up the majority of the population of the country of Vanuatu. All of these await a future edition of this Journal.