SC1057

PAPUA NEW GUINEA
[IN THE SUPREME COURT OF JUSTICE]

SC REF NO. 11 of 2008

SPECIAL REFERENCE PURSUANT TO CONSTITUTION, SECTION 19.

IN THE MATTER OF THE ORGANIC LAW ON THE INTEGRITY OF POLITICAL PARTIES AND CANDIDATES

REFERENCE BY THE PROVINCIAL EXECUTIVE COUNCIL OF THE FLY RIVER PROVINCIAL GOVERNMENT OF WESTERN PROVINCE.
-Referrer -

AND:
THE REGISTRAR OF POLITICAL PARTIES
- First Intervener-

AND:
THE INTERGRITY OF POLITICAL PARTIES COMMISSION
-Second Intervener-

AND:
DR ALLAN MARAT, MP, ATTORNEY GENERAL
-Third Intervener-

AND:
THE HON. JEFFREY NAPE, MP; SPEAKER OF THE NATIONAL PARLIAMENT
-Fourth Intervener-

AND:
THE NATIONAL PARLIAMENT
-Fifth Intervener-

AND:
THE HON. FRANCIS AWESA, MP

- Sixth Intervener-

AND:
THE HON. BART PHILEMON, MP
- Seventh Intervener-

Waigani: Injia, CJ; Salika Dep.CJ; Sakora J; Kirriwom J & Gavara-Nanu J.

2010: 7th July

CONSTITUTIONAL LAW - Validity of an Organic Law - Whether certain provisions of the Organic Law on Integrity of Political Parties and Candidates are inconsistent with certain provisions of the Constitution.

CONSTITUTIONAL LAW – Validity of amendments to certain provisions of the Constitution made to authorize the enactment of an Organic Law - Whether certain amendments of the Constitution are inconsistent with the basic structure of the Constitution.

Facts:

The Executive of the Fly River Provincial Government filed a special Reference under s 19 of the *Constitution* seeking the Supreme Court's opinion on the interpretation and application of various provisions of the *Constitution* and the *Organic Law on the Integrity of Political Parties and Candidates (OLIPPAC).*

Held:

1. General questions - Question 6 & 17:

   (1) Except to the extent that s 50 (1)(e) (qualified right) of the *Constitution* is affected by amendments made to ss12, 111, 127 and 130 of the *Constitution,* those amendments are authorized by the *Constitution*.

   (2) To the extent that those amendments of the *Constitution* restrict and prohibit the exercise of the right given to Members of Parliament by s 50 (1) (e) of the *Constitution*, they are inconsistent with the existing qualification under s 50 (2) and are therefore of no force and effect.

(3) Except to the extent that *OLIPPAC* provisions, the subject of this reference restrict the exercise of s 50 right, *OLIPPAC* complies with the formal requirements of s12, s127 and s130A of the *Constitution*.

2. Specific questions:

- Question 7: Yes. *OLIPPAC*, s 57 is unconstitutional.
- Question 8: Yes. *OLIPPAC*, s 58 is unconstitutional.
- Question 9: Yes. *OLIPPAC*, s 59 is unconstitutional.
- Question 10: Yes. *OLIPPAC*, s 60 is unconstitutional.
- Question 11: Yes. *OLIPPAC*, s 61 is unconstitutional.
- Question 12: Yes. *OLIPPAC*, s 69 is unconstitutional.
- Question 13: Yes. *OLIPPAC*, s 70 is unconstitutional.
- Question 14: Yes. *OLIPPAC*, s 72 is unconstitutional.
- Question 15: Yes. *OLIPPAC*, s 73 (1)(b) is unconstitutional.
- Question 16: Yes. *OLIPPAC*, s 81 is unconstitutional.

3. The answers given to questions 6 to 17 also affect other provisions of the *Constitution* and *OLIPPAC* that are not mentioned in the Reference but are directly related to those provisions. The effect of the answers given to the questions in the Reference is that those provisions are also rendered invalid. Those provisions are as follows:

- *Constitution*, ss12 (4) and 114, only to the extent that they authorise an *Organic Law* to restrict and prohibit the exercise of a Member of Parliament's right under s 50 (1)(e) of the *Constitution*.

- *OLIPPAC*, ss 65, 66, 67, 70 (3), 72 (2) and 73 (1) (a) & (2)

Cases Cited:
Papua New Guinea Cases

Enforcement of Rights Pursuant to Constitution, s 57 Application of Karingu [1988-89] PNGLR 276
Haiveta v Wingti (No 1) [1994] PNGLR 160
Iambakey Okuk v Gerald Sidney Fallscheer [1980] PNGLR 274
Isidore Kaseng v Rabbie Namaliu (No. 1) [1995] PNGLR 481

Kila Wari v Gabriel Ramoi and Another [1986] PNGLR 112
Kuberi Epi v Tony Farapo (1983) SC 247
Madaha Resena and Others v The State (Re Fisherman's Island) [1991] PNGLR 174
SCOS No 2 of 2003; Re Election of Governor-General (No 1) [1995] PNGLR 481
SCR No. 1 of 1976; Rakatani Peter v South Pacific Brewery Ltd. [1976] PNGLR 537
SCR No. 1 of 1992: Re Constitutional Amendment No. 15 – Elections and Organic Law on National Elections (Amendment No 1) 1991 [1992] PNGLR 73
SCR No. 2 of 1981; Re Electoral Boundaries [1981] PNGLR 518
SCR No. 2 of 1982 Re Organic Law on National Elections (Amendment) Act of 1981 [1982] PNGLR 214
SCR No. 2 of 1985; Kevin Masive v Iambakey Okuk & Johhannes Kenderop [1985] PNGLR 263
SCR No. 2 of 1995; Reference by the Western Highlands Provincial Executive (1995) SC 486
SCR No. 3 of 1986 Reference by Simbu Provincial Executive [1987] PNGLR 151
SCR No. 3 of 2006; Fly River Provincial Executive (2007) SC 917
SCR No 4 of 1981; Re Petition of MT Somare [1981] PNGLR 265
SCR No. 4 of 1985; Omaro Garo v The Police [1985] PNGLR 320
SCR No. 4 of 1987 Special Reference by Central Provincial Government v NCDIC [1987] PNGLR 249
SC Rev. No. 5 of 1987 Re Central Bank Regulations [1987] PNGLR 433
*Southern Highlands Provincial Government v Sir Michael Somare and the National Executive Council (*2007) SC859
State v John Mogo Wonom [1975] PNGLR 311
The Chief Collector of Taxes v Blaisius Dilon [1990] PNGLR 414.
The Ship "Federal Huron" v OK Tedi Mining Ltd. [1986] PNGLR 5
The State v NTN Pty Ltd. and NBN Ltd. [1992] PNGLR 1

Overseas cases

Aldred Case (1987 - 9) VP 1695-8; PP 498 (1989)
Butadroka v Attorney General of Fiji (1990) FJHC 55
Edwards v AG Canada [1930] AC 124
Hunter v Southam [1984] 2 SCR 145
IC Golaknath v State of Punjap AIR 1967 SC 1643
Keshavanada Bharati v State of Kerala AIR 1973 SC 146
McGrath Case (1913) VP 151; (1914- 17) VP 181
Polyukhovich v The Commonwealth (199) 172 CLR 501

Reg. v Foster; Ex parte Eastern and Australian Steamships Co. Ltd. [1959] HCA 10; (1959) CLR 256
Sabaroche v Speaker of the House of Assembly & Anor [1999] I CHRL 79
Saijan Singh v State of Rajasthan (1965) 1 SCR 933
Shankiari Prasad v Union of India (1952) SCR 89
Tuckey Case (1987) VP 1985-87 1467-8

PNG Statutes and subordinate legislation referred to:

Constitution of the Independent State of Papua New Guinea
Constitutional Amendment No. 26
Organic Law on the Integrity of the Political Parties and Candidates 2003
Organic Law on the Duties and Responsibilities of Leadership
Organic Law on National and Local-Level Government Elections
Associations Incorporations Act (Ch.142)
Criminal Code Act, (Ch.No. 262)
Parliamentary Powers and Privileges Act (Chapter 24).
Standing Orders of the National Parliament(Ch. No. 1).

PNG Books, articles, and reports referred to:

Final Report of the Constitutional Planning Committee 1974

Overseas statutes, sub-ordinate legislations and Conventions referred to:

Commonwealth (Latimer House) Principles on the Three Branches of Government (1988)
International Bill of Human Rights (1988)
International Convention on Civil and Political Rights (1966)
Standing Orders of the Commonwealth Parliament, Australia
The Standing Orders of the House of Commons in the United Kingdom
US Congress House Rule No. 3

Overseas Books, articles and reports referred to:

Erskine May's *Treatise on The Law, Privileges, Proceedings and Usage of Parliament*, 18th ed. Butterworths, London, (1971)
Joel Asher, *Australian Protocol and Procedures*, (2nd ed), Angus & Robertson, Melbourne, (1988)

J. R. *Odgers Australian Senate Practice* (4th ed), Australian Government Publishing Service, Canberra (1972)
P.S. Pachauri, *The Law of Parliamentary Privilege in UK and India*, Oceana Publications, New Delhi (1970)
Sir Barnet Cocks, *Erkine May's Parliamentary Practices* (18th ed.), Butterworths, London (1971)
Sir Ivor Jennings, *Parliament,* (2nd ed) Cambridge University Press, London (1969)
Wikipedia Encyclopedia.
Y.P Ghai & J.P.W.B Mac Auslan, *Public Law and Political Change in Kenya. A Study of the Legal Framework of Governments from Colonial Times to the Present*, Oxford University Press, London (1970)

Counsel:

L Henao, for the Referrer
A Jerewai, for the First and Second Interveners
C Mende, for the Third and Fourth Interveners
L Kandi, for the Fifth Intervener
D Lora, for Sixth Intervener
P Donigi, for the Seventh Intervener

7th July, 2010

1. **BY THE COURT:** This is a Reference by the Executive of the Fly River Provincial Government, an authority entitled to bring this Reference under s19(3)(eb) of the *Constitution.* The reference seeks an opinion on questions relating to interpretation or application of various provisions of the *Constitution* and various provisions of the *Organic Law on the Integrity of the Political Parties and Candidates 2003* (hereinafter abbreviated *OLIPPAC*).

2. The initial Reference was filed by the Referrer but the Seventh Intervener raised additional questions which were adopted by the Referrer. The Amended Reference which is before us include those additional questions.

3. The *Constitution* establishes a system of government modeled under the British Westminster system of government. Political parties play a key role in the election of members of the Parliament (MPs). Integrity and stability of the political party system and integrity of the electoral process is essential for good governance.

A system of political party provides the political platform for democratic elections under a universal and equal suffrage vote and periodic elections and formation of the executive government in the Parliament. Parliament also enacts laws for the peace, order and good government and makes other important policy decisions.

4. At the time of Independence in 1975, *Constitution,* Part VI*,* Div. 2, Subdivision H (Integrity of Political Parties and Candidates) (ss 127 – 130) provided a general framework for securing the integrity of political parties, their candidates and elected MPs. Subdivision H authorised an *Organic Law* to make provision for limited aspects of matters relating to the protection of elections and the prevention of candidates from being improperly influenced by foreign influences. Subdivision H authorised an *Organic Law* to make provision for, amongst others, registration of political parties and their candidates for election, to disclose to the Ombudsman Commission (OC) the party's income and assets, limiting the amount of contribution in campaign funds to political parties and candidates and to prohibit non-citizen from becoming members of political parties and contributing to the fund. Parliament did not enact an *Organic Law* specifically to provide for those matters. Those matters were instead provided for in the *Organic Law on the Electoral Commission* and the *Organic Law on the Ombudsman Commission.* Those provisions however were inadequate in dealing with the activities of political parties and their candidates in elections and after elections. The political party system was very much fluid and political instability was rife, particularly during the formation of the government after the general elections and votes of no confidence in the Prime Minister or a Minister when MPs switched support for their own political parties and supported other political parties. In order to bring about political stability, it was considered necessary to reform the law.

5. In 2000, by *Constitutional Amendment No. 26*, the Parliament amended *Constitution*, ss 12 (4), 111, 114, 127, 129 and 130 which authorised *OLIPPAC* to be enacted. Those amendments made provision for an *Organic Law* to provide for specific matters relating to the activities of registered political parties and their members as well as the conduct of MPs who were not members of any registered political party in relation to important matters before the Parliament.

6. In 2000, with overwhelming support of MPs on both sides of the floor, the Parliament enacted the *Organic Law on the Integrity of Political Parties and Candidates* which governed the general elections in 2002. In 2003, again with overwhelming support of MPs on both sides of the floor, the Parliament repealed that *Organic Law* and enacted current *OLIPPAC*: see *OLIPPAC*, s 9. The new

Constitutional laws have been implemented without any question raised as to their inconsistency with the *Constitution* until this constitutional Reference was filed in 2008.

7. The main question in this Reference is whether the *OLIPPAC* provisions set out in the Schedule to the Reference (ss 57, 58, 59, 60, 61, 69, 70 (1) & (2), 72 (1)(a) & (1)(b), 72 (1) (b)(ii), 73 (1)(b), 73 (1)(b)(ii) and 81) are in conflict with or fail to comply with *Constitution*, ss 27, 38, 44, 45, 46, 47, 49, 50, 52, 53, 55, 56, 99, 100, 101, 103, 104, 109, 111,115, 127, 129, 130A, 142, 145 and/or ss 209 – 216 (inclusive). Counsel representing the Referrer and various Intervenors made submissions on the case for the affirmative and the negative respectively.

8. The Court's opinion is also sought on whether the amendments to *Constitution*, ss127, 129 and 130 are in conflict with *Constitution*, 99, 100, 101, 103, 104, 109, 111, and 115. Counsel made full arguments on those questions.

9. The Reference is characterized by multiple questions and sub-questions within those questions which we consider to be very general, repetitive, and duplicitous. It has taken a great deal of our time to sorting out how we should identify the main and pertinent issues or points in the Reference and consider them. In the end we have settled on addressing the issues under four main parts as follows:

I. Preliminary matters.

- Nature of the Court's jurisdiction under *Constitution*, s 19.
- Sphere of authority specified under *Constitution*, s 19 (3) to bring a reference on matters outside its sphere of authority or responsibility.
- Locus standi and new questions
- Statement of the Reference questions.
- Onus of proof.
- Questions of fact.

II. Threshold issues: Questions 6 & 17 of the Reference:

- Whether the Parliament has the power to alter the basic structure of the *Constitution.*

- Whether *OLIPPAC* and/or the specific provisions in question in the Reference are authorized by the *Constitution.*

III. Membership of and Resignation from registered political parties.
IV. Performance of duties of Members of Parliament.
V. Privileges and immunities of Parliament and its Members.

I. Preliminary matters

(1) Nature of jurisdiction under Constitution, s 19:

10. We commence our deliberations by setting out and expounding on some of the principles that have been developed in previous cases by this Court in relation to *Constitution*, s 19 that we consider to be relevant to the case at hand.

11. Section 19 of the *Constitution* is in the following terms:

> ***19. Special references to the Supreme Court.***
>
> *(1) Subject to Subsection (4), the Supreme Court shall, on application by an authority referred to in Subsection (3), give its opinion on any question relating to the interpretation or application of any provision of a Constitutional Law, including (but without limiting the generality of that expression) any question as to the validity of a law or proposed law.*
>
> *(2) An opinion given under Subsection (1) has the same binding effect as any other decision of the Supreme Court.*
>
> *(3) The following authorities only are entitled to make application under Subsection (1):—*
>
> *(a) the Parliament; and*
> *(b) the Head of State, acting with, and in accordance with, the advice of the National Executive Council; and*
> *(c) the Law Officers of Papua New Guinea; and*
> *(d) the Law Reform Commission; and*
> *(e) the Ombudsman Commission; and*
> *(ea) a Provincial Assembly or a Local-level Government; and*
> *(eb) a provincial executive; and*
> *(ec) a body established by a Constitutional Law or an Act of the Parliament specifically for the settlement of disputes*

between the National Government and Provincial Governments or Local-level Governments, or between Provincial Governments, or between Provincial Governments and Local-level Governments, or Local-level Governments; and

(f) the Speaker, in accordance with Section 137(3) (Acts of Indemnity).

(4) Subject to any Act of the Parliament, the Rules of Court of the Supreme Court may make provision in respect of matters relating to the jurisdiction of the Supreme Court under this section, and in particular as to—

(a) the form and contents of questions to be decided by the Court; and
(b) the provision of counsel adequate to enable full argument before the Court of any question; and
(c) cases and circumstances in which the Court may decline to give an opinion.

(5) In this section, "proposed law" means a law that has been formally placed before the relevant law-making body." (underlining is ours)

12. Section 19 is a special jurisdiction given to the Supreme Court to decide Constitutional questions: *SCR No. 1 of 1992: Re Constitutional Amendment No. 15 – Elections and Organic Law on National Elections (Amendment No 1) 1991; Special Reference by the Ombudsman Commission under s 19 of the Constitution* [1992] PNGLR 73; *SCR No 4 of 1981; Re Petition of MT Somare* [1981] PNGLR 265, (*Somare* case). The Supreme Court has exclusive jurisdiction to give its opinion on any question relating to the interpretation and application of a Constitutional Law.

13. The jurisdiction is exercised *"on application"* by an authority specified in Subsection (3). In practice, an application is brought in the form of a Constitutional Reference that must be duly signed by the authority referred to in Subsection (3): see *Constitution*, s 19 (4)*; Supreme Court Rules*, O 4 r 1 (e), Form 3. Also see *SCR No 3 of 2006*; *Reference by Fly River Provincial Executive* (2007) SC 817, SCR No 4 of 1987; *Special Reference by the Central Provincial Government v NCDIC* [1987] PNGLR 249.

14. Subsection (3) specifies the authorities that can bring a special Reference under s 19. If any other person intends to bring a special reference under s 19, that person must fulfill the requirements on *locus standi* set out by this Court in the *Somare* case**.** Also see *SC OS No. 2 of 2003; Re Election of Governor–General* (No 1) (2003) SC721; *Isidore Kaseng v Rabbie Namaliu* (No. 1) [1995] PNGLR 481.

15. The referring authority must state the specific *question* that the Court is required to express an opinion on. The question must be stated in the reference in the appropriate manner. As a matter of good practice, reference questions should be stated in a clear and concise manner with sufficient particularity by reference to specific sections or parts of sections of a Constitutional law that the law or proposed law is said to be in conflict with. Constitutional questions should not be framed in a general, ambiguous, convoluted and duplicitous manner. Statement of reference questions in this manner makes the Court's task difficult in identifying the precise question to be answered and leads counsel into *"an ambitious goose chase in a jungle of provisions"*, so to speak, that results in the waste of the Court's time. It is in the Court's discretion to strike out such questions or decline to answer the question as offending O 4 r 16 of the *Supreme Court Rules* 1987.

16. The *question* must involve interpretation and application of a constitutional law. It is these that *"are brought to bear upon the issue raised in the Reference*": *SCR No. 2 of 1981; Re Electoral Boundaries* [1981] PNGLR 518, at 523.

17. In a Reference that raises question as to the validity of a law or proposed law, the question is determined by reference to a superior Constitutional law: see *Constitution*, ss 10 and 11. The *Constitution* is the supreme law against which all other laws including an *Organic Law* are measured. It may also express an opinion on the consistency law or proposed law of the *Constitution* as measures against another provision of the *Constitution*: see *SCR No. 1 of 1992: Re Constitutional Amendment No. 15 – Elections and Organic Law on National Elections (Amendment No 1) 1991; Special Reference by the Ombudsman Commission under s 19 of the Constitution* [1992] PNGLR 73.

18. The Court must give or decline to give its opinion on the question. The Court may decline to give an opinion if in its opinion the question is trivial, vexatious, hypothetical or unlikely to have any immediate relevance to the circumstances of Papua New Guinea: *Constitution*, s 19 (4); *Supreme Court Rules,* O 4, r 16;

19. Where the Court gives its opinion, the opinion is binding. In effect, it is equivalent of a declaration or declaratory order: *Constitution*, s 19 (2); *SCR No. 4 of 1981* [1981] PNGLR 265 at p 276.

(2) <u>*Statement of questions in this Reference:*</u>

20. Some of the questions in this Reference are general and lack specificity or particularity. For instance, Question 7.2 states:

> *" Does it (s 57) negate a Member of Parliament's responsibilities of office as specifically enshrined in Section 27 of the Constitution?"*

21. Section 27 of the *Constitution* contains various duties and responsibilities of leaders. Which one does this question relate to?

22. Some of the questions are loaded with multiple questions. For instance, Question 8.3 states:

> *"Does Section 58 contravene a Member of Parliament's qualified rights to Freedom of Conscience [Section 45;], Freedom of Expression [Section 46] and Freedom of Assembly and Association [Section 47]?"*

23. Question 8.4 states:

> ' If so, does the Organic Law comply with Section 38 of the *Constitution* ?"

24. Does this question refer to the whole of the *Organic Law* or just s 38? Section 38 of the *Constitution* has various distinct requirements, both formal and substantive? Which requirement does this question relate to?

25. On the face of the main Reference question stated in the Amended Reference, specific sections of *OLIPPAC* are challenged. However in the body of the questions posed in the Reference, there are general questions which question the validity of the entire *OLIPPAC* and the validity of amendments to the *Constitution* itself. Also, a Constitutional question which was raised in Court during argument was not raised in the Reference.

26. It is this style and standard of drafting of Reference questions that attracted opposition from counsel for the First, Second and Third Interveners. Counsel for the First and Second Interveners moved before us a motion disputing the

competency of some of the Reference questions. The Attorney- General also filed a separate Constitutional Reference (SC Ref No. 2 of 2009) in the course of submissions, seeking the Court' s opinion on the competency of the new questions raised at the hearing. After hearing arguments on the competency issues, we proceeded to hear full arguments on the merits of those new questions and indicated we would address those matters in our judgment.

27. We have already expressed our view that questions should not be stated in this manner. We intend to apply those observations to the questions before us.

(3) Section 19 (3) – Sphere of authority or responsibility.

28. Mr Jerewai submitted that an authority specified in s 19 (3) should restrict the questions in the reference to matters that concern its own sphere of authority or responsibility. In this case, the matters raised in the Reference do not concern the Fly River Provincial Government. They relate to the functions of the National Government, and the Court should decline jurisdiction to deal with the Reference.

29. We are of the view that the standing conferred on the specified authorities to bring a special Reference under s 19 is widely expressed to allow any of those specified authorities to bring a Reference that concerns interpretation and application of the *Constitution* to any law or proposed law. The authorities specified in Subsection (3) are Constitutional officers or institutions of the State that, by the very nature of the functions given to them by law, have a legitimate interest in the protection of the *Constitution* and they are vested with wide power to bring Constitutional questions in respect of any law or proposed law in Papua New Guinea for determination by the Supreme Court. For this reason, we reject Mr Jerewai's contention.

(4) Locus standi & new questions:

30. In the Course of his submissions, Mr Donigi of counsel for the Seventh Intervener introduced a new Constitutional question as to the interpretation and application of *Constitution*, s12 (4). He submits s12 (4) is in conflict with ss 99, 100 and 115 of the *Constitution* and therefore, it is unconstitutional and invalid. He concedes that his client lacks standing to bring a Reference. However, when general questions of validity of a constitutional law are in issue in a reference under s 19, the Court in considering those questions has the discretion to consider other related provisions of the *Constitution* which have a bearing on the provisions

in question and voice its opinion. Section 12 (4) is an integral part of the amendments made to ss 127 and 130 of the *Constitution* in order to authorize *OLIPPAC* and it is necessary for this Court to consider s 12 (4).

31. Counsel for the negative case submits that the Seventh Intervener is not a prescribed authority under s 19 (3).

32. It is obvious to us that the Seventh Intervener lacks standing to bring a reference under s19. It follows that he has no standing to introduce a new Reference question at the hearing of this Reference. Further he has not brought the additional Reference question in the manner done by The Hon. Michael T Somare in the *Somare* case.

33. However, in discharging its Constitutional function under s 19, the Court has discretion to have regard to all relevant Constitutional provisions that have a bearing on issues raised in the Reference, even if that provision is not mentioned in the Reference. The Court may express an opinion on the interpretation to be accorded to a Constitutional provision, although not specifically mentioned in the Reference, if that provision is relevant to the other provisions in question in the Reference.

34. We are of the view that s 12 (4) is part of the amendments made to the *Constitution* to authorise *OLIPPAC*. Section 12 (4) is interwoven with amendments to s 127, s 130A and the *OLIPPAC* provisions in question in this Reference. For those reasons, we intend to consider s 12 (4).

35. It has come to our attention that s 114 of the *Constitution* was also amended to authorize *OLIPPAC*. Although s 114 is not mentioned in the Reference, we intend to consider this provision.

36. We are also of the view that in a case where questions are raised in a Reference relating to specific provisions of a law or proposed law, and the interpretation to be given by the Court directly affects other provisions of the law or proposed law that is not part of the Reference, it is within the general power of the Court given by s 19 to give its opinion on the constitutionality or otherwise of those other provisions. In the present Reference, those provisions are *OLIPPAC*, ss 65, 66 & 67.

(5) Onus of proof:

37. There are several decisions of this Court which deal with onus of proof in constitutional cases. We set out some of the principles established in those cases which are applicable to this case.

38. We start with the principle of supremacy of the Parliament. Subject only to the constitutional laws, Parliament has *"unlimited powers of law-making"*: s 99(1). There is a presumption as to the validity of laws made by the Parliament: *SCR No 4 of 1985*; *Omaro Garo v The Police* [1985] PNGLR 320*; SC Rev No 5 of 1987;ReThe Central Banking (Foreign Exchange and Gold Regulation) Chapter No. 138)* [1987] PNGLR 433; *SCR No. 2 of 1982 Re Organic Law on National Elections (Amendment) Act of 1981* [1982] PNGLR 214 at 228; cf. *The State v NTN Pty Ltd and NBN Ltd* [1992] PNGLR 1 at 16.

39. In a case where a law or proposed law is challenged as infringing a protected constitutional right, *Constitution*, s 38 (3) places the onus of proving the validity of the law on the party relying on its validity. However the onus of proof placed by s38 (3) does not shift the initial burden on the Referrer to establish a prima facie case of infringement. We adopt the statement of Kapi J (as he then was) in *SCR No. 2 of 1982* (supra), at p. 238:

> *It would be sufficient for the party who alleges that a law is unconstitutional merely to prove that his right is infringed. He is only required to show a prima facie case. Where this is shown, then the onus is on the party who relies on the validity of the law to prove that it is within the limitation provided by the Constitution.*

40. This statement was approved and applied in *The State v NTN* (supra) and *Southern Highlands Provincial Government v Sir Michael Somare and the National Executive Council* (2007) SC 854.

41. In proving its case, the Referrer must establish a *prima facie* case that the law or proposed law is in conflict or inconsistent with a provision of a constitutional law. This may be accomplished by simply demonstrating, on the face of the construction of the law or proposed law and the constitutional law that is affected, without recourse to extraneous materials. This may involve use of aids to Constitutional interpretation prescribed by *Constitution*, s 24 and the range of material set out in *Constitution,* s 39(3), of which the Court would normally take judicial notice. The circumstances of some cases may require hypothetical facts or

a Statement of Agreed Facts. In other cases, it may require proof of facts by evidence.

42. The onus then shifts to the party relying on the validity of the law or proposed law to show that the law is necessary. Ordinarily, that party is the State or an instrumentality of the State. In a case where the factual circumstances were relied on, those circumstances must be provided. As to the nature of the evidence to be proven, see *SCR No. 2 of 1982; State v NTN (supra) and Southern Highlands Provincial Government v Sir Michael Somare and National Executive Council (supra).*

43. Counsel for the affirmative submitted that the Referrer had shown or demonstrated a *prima facie* case that the amendments of the *Constitution* are in conflict with other provisions of the *Constitution*, and also that the *OLIPPAC* provisions in question are inconsistent with the constitutional provisions relied upon. And further, that the Interveners who supported the case for the negative had failed to disprove the case for the affirmative. Consequently, the Court is urged to find that the amendments of the *Constitution* are in conflict with those other provisions of the *Constitution* and therefore invalid. Further, the *OLIPPAC* provisions in question are inconsistent with the *Constitution* and therefore invalid.

44. Counsel for the negative submit they have discharged the burden by showing that the laws were validly made by the Parliament.

45. We deal with these submissions in our consideration of the specific questions in the Reference.

(6) *Questions of fact:*

46. The reception of evidence and the Court's task of making findings of fact in a constitutional case is not without difficulty. We adopt the approach enunciated by Kearney Dep. CJ in *SCR No. 2 of 1982* (supra), at p. 227 – 228:

> *The guiding approach to the reception of such materials should, I think, be along the lines expressed by Dixon C.J. in Commonwealth Freighters Pty Ltd v. Sneddon (1959) 102 C.L.R 280 at p.292:*
>
> > *"if a criterion of constitutional validity consists in matter of fact, the fact must be ascertained by the court*

as best it can, when the court is called upon to pronounce validity."

If evidence is relevant to that task it should be admitted, and the ways in which this is done should not be strictly limited. As Frankfurter J., dissenting, said in Zorach v. Clauson (1952) 343 U.S. 306 at p. 322; 96 L. Ed. 954 at p. 966:

"When constitutional issues turn on facts, it is a strange procedure indeed not to permit the facts to be established."

47. We also adopt the statement of Kidu CJ in *The State v NTN (supra)* at p. 5 as follows:

Where this issue arises, the burden of showing that the legislation complies with s 38 of the Constitution is on the party relying on its validity. This is clear from the terms of s 38 (3) of the Constitution. However, it is not sufficient for a party impugning the legislation to simply make an allegation that his right is affected by legislation. He must demonstrate that there is a prima facie case that the right is affected. In this regard, I adopt what I stated in SCR No 2 of 1982; Re Organic Law On National Elections (Amendment) Act 1981 [1982] PNGLR 214. The nature of evidence required to establish a prima facie case depends on the manner in which the fundamental right is said to be affected by the legislation.

48. In the present case, there is before us a Statement of Agreed Facts which sets out the general factual background of the case.

49. There is also before us three affidavits filed on behalf of the Referror. The Hon. Sir Mekere Morauta (Leader of the Opposition), The Hon. Bart Philemon (Deputy Leader of the Opposition) and The Hon. Bob Danaya (Governor of Western Province) have each deposed to affidavits. The affidavits contain statements of the noble and good intentions behind the constitutional enactments, but decry the practical realities of the application of the new laws to the detriment of MPs and the people of PNG. They say the laws are working against the interest of the MPs and the people of PNG in that the laws are preventing MPs from freely exercising their freedom to choose to belong to a political party of their choice and freely debate on and vote on important issues in the Parliament. As a result, the

new laws have entrenched a particular political party in power and a government that has become a dictatorship and lost the confidence of the people.

50. We consider the allegations against the government and key figures in the government contained in the affidavits to be irrelevant and prejudicial to the issues before us. Some of the statement border on scandalous allegations against the government and key figures in the government. These are not the sort of matters that s 39 (1) speaks of, when it says:

> *(1). The question, whether a law or act is reasonably justifiable in a democratic society having a proper regard for the rights and dignity of mankind**, is to be determined in the light of the circumstances obtaining at the time when the decision on the question is made.**"* (our emphasis).

51. What is required is evidence of factual circumstances existing at the time the law was made. We accept the evidence in the affidavits which show the unsettling political situation in the country and the reasons which prompted enactment of *OLIPPAC*. We have captured the essence of the acceptable parts of that evidence in the introductory part of our judgment. We will advert to other evidence later in our judgment.

52. Apart from those facts, we are satisfied from the nature of the questions posed in the Reference that those questions can be determined on a construction of the constitutional provisions with recourse to aids to constitutional interpretation (s24) and other extrinsic materials by judicial notice (s 39) without recourse to factual circumstances.

II. THRESHOLD ISSUES (QUESTIONS 6 & 17)

53. Questions 6 and 17 raise threshold issues as to whether *OLIPPAC* complies with the requirements of *Constitution*, ss 12, 111, 114, 127, 129 and 130A. We agree with counsel for the Referrer and those Interveners supporting the Referrer that if these submissions are accepted, *OLIPPAC* provisions the subject of the reference and consequently the whole of *OLPPAC* would be declared unconstitutional. In such a case it would become necessary for us to consider the specific *OLIPPAC* provisions. It is for this reason that we consider questions 6 and 17 together at the outset.

54. Question 6 is in the following terms:

> *" 6. <u>General Questions:</u>*
>
> *6.1 Are the sections listed in the Schedule authorized by the purposes of Subdivision H as set out in Section 127 of the Constitution?*
>
> *6.2 Are the sections listed in the Schedule directed to achieving the stated purpose for Subdivision H?*
>
> *6.3 To be valid, must the Organic Law made pursuant to the head of power in Section 127 or Section 130A of the Constitution be properly characterized as being for the purpose of achieving the purposes expressed in Section 127?*
>
> *6.4 Do the sections of the Organic Law listed in the Schedule undermine the principle of representative government established by Sections 99 – 101 of the Constitution? Are they therefore invalid as being inconsistent with these provisions?*
>
> *6.5 Does Section 127 or Section 130A of the Constitution authorize an Organic Law to abrogate or restrict the right of a Member of Parliament otherwise guaranteed by the Constitution?*
>
> *6.6 Is Section 81 of the Organic law inconsistent with Sections 129(1(c) and 130(1)(b) of the Constitution.*

55. Question 17 states as follows:

> *17. Constitution Sections 127 and 130A:*
>
> *17.1. Is Section 127(c), (d) and (e) in conflict with:*
>
> *(a) the principle of separation of powers contained in Section 99 of the Constitution [See General Question 6.4]; or*
>
> *(b) the powers, privileges and immunities of members of parliament provided for in Section 115 of the Constitution?*

17.2. Is Section 130A(a), (b), (c) and (f) of the Constitution in conflict with:

(a) the principle of separation of powers contained in Section 99 of the Constitution [See General Question 6.4]; or

(b) the powers, privileges and immunities of members of parliament provided for in Section 115 of the Constitution?

17.3 If the answer to either one or both of the questions above are in the positive, then are Sections 127(c), (d) and (e) and 130A(a), (b), (c) and (f) invalid and ineffective?"

56. The amendment of *Constitution*, ss12, 111, 127, 129 and 130 were made to authorize *OLIPPAC* to restrict certain qualified rights under the *Constitution*, Subdivision III. 3 C (qualified rights).

57. One other important amendment made to the *Constitution* in 2006 which is not mentioned in the Reference questions, is s114. This amendment was to provide for an *Organic Law* made under Subdivision H to restrict the rights of MPs to vote in respect of certain matters in the Parliament.

58. Two threshold issues arise for determination. First, whether amendments to *Constitution*, ss12, 111,114,127, 129, and 130 are consistent with existing provisions of the *Constitution* which impose qualifications or limitations on the MPs' exercise of their rights. Second is whether *OLIPPAC* complies with these provisions of the *Constitution*. We deal with both issues, together.

59. We reproduce the amendments hereunder.

60. *Constitution*, s 12 was amended by inserting a new Subsection (4). The amended s 12 now reads (with the new provision in underlining)***:***

12. Organic Laws

(1) Subject to Subsection (4), for the purposes of this Constitution, an Organic Law is a law made by the Parliament that is—
(a) for or in respect of a matter provision for which by way of an Organic Law is authorized by this Constitution; and
(b) not inconsistent with this Constitution; and

(c) expressed to be an Organic Law.

(2) An Organic Law may be altered only by another Organic Law, or by an alteration to this Constitution.

(3) Nothing in this section prevents an Organic Law from—

(a) making any provision that might be made by an Act of the Parliament; or

(b) requiring any provision to be made by an Act of the Parliament that might otherwise be so made, but any such provision may be altered by the same majority that is required for any other Act of the Parliament.

(4) Where this Constitution authorizes an Organic Law to make provision for any matter, the Organic Law may—

(a) make full provision for all aspects of that matter notwithstanding that all such aspects have not been expressly referred to in the provision authorizing the Organic Law except where this Constitution expressly limits the aspects of that matter for which provision may be made in an Organic Law; and

(b) may impose conditions, restrictions or modifications in respect of that matter or any aspect of it, except where this Constitution expressly states that conditions, restrictions or modifications shall not be imposed in respect of that matter.

61. *Constitution*, Subdivision H *(*ss127- 130) was amended in various areas. The heading of Subdivision H which previously read *"Protection of Elections from Outside Influences"* was amended by adding *"and Strengthening of Political Parties"*.

62. Section 127 was repealed and replaced with a new s 127. The repealed s127 provided:

127 Purpose of Subdivision H.

The purpose of this Subdivision is to protect elections and to prevent candidates from being, or appearing to be or to have been, improperly or unduly influenced by outside (especially foreign) or hidden influences, and an Organic Law may make provision, in addition to the provisions expressly referred to in this Subdivision, for achieving that purpose.

63. The new s127 reads (with the new provision in underlining):

> ***127. Purposes of Subdivision H.***
>
> *The purposes of this Subdivision are—*
> *(a) to protect elections and to prevent candidates from being, or appearing to*
> *be or to have been, improperly influenced by outside (especially foreign) or hidden influences; and*
> *(b) to permit the funding of registered political parties; and*
> *(c) to restrict a member of the Parliament in certain circumstances from resigning or withdrawing from or failing to support a political party of which he is a member; and*
> *(d) to provide that in certain circumstances a member of the Parliament who—*
> *(i) resigns or withdraws from the political party of which he is a member; or*
> *(ii) fails to support the political party of which he is a member; or*
> *(iii) is a member of a political party whose registration is cancelled, is guilty of misconduct in office; and*
> *(e) to restrict in certain circumstances the voting rights of a member of the Parliament, and an Organic Law may make provision, in addition to the provisions expressly referred to in this Subdivision, for achieving those purposes.*

64. Section 128 was retained. It reads:

> ***128. "Registered political party".***
>
> *In this Subdivision, "registered political party" means a political party or organization registered under an Organic Law made for the purpose of Section 129(1)(a) (integrity of political parties).*

65. Section 129 (1)(a) was amended by replacing *"the Electoral Commission"* with *"an appropriate body established by an Organic Law"*. Also Subsection (1) was amended by inserting new paragraphs (g) and (h). The amended s 129 states:

129. Integrity of political parties.

(1) An Organic Law shall make provision—

(a) requiring any political party or organization having political aims and desiring to nominate a candidate for election to the Parliament, or to publicly support such a candidate as representing its views, to register with an appropriate body established by an Organic Law such reasonable particulars as are prescribed by Organic Law; and

(b) requiring any such party or organization to disclose to the Ombudsman Commission or some other authority prescribed by the law in such manner, at such times and with such details as are prescribed in or under the law—

(i) its assets and income, and their sources; and

(ii) its expenditure on or connected with an election or the support of a candidate; and

(c) prohibiting non-citizens from membership of, and from contributing to the funds of, any such party or organization; and

(d) defining the corporations and organizations that are to be regarded as non-citizens for the purposes of a provision made for the purposes of paragraph (c); and

(e) limiting the amount of contributions that such a party or organization may receive from any source or sources; and

(f) requiring persons who have made, or may have made, contributions to any such party or organization to give to the Ombudsman Commission, or some other authority, details of any such contribution; and

(g) authorizing the funding of registered political parties from the National Budget and establishing a body to manage and distribute the funds in accordance with established procedures; and

(h) authorizing the payment in certain circumstances of a percentage of electoral expenses incurred by a female candidate in an election.

(2) Where another authority is prescribed by the law under Subsection (1)(b), that authority—

(a) shall be composed of a person or persons who are declared under paragraph (i) of the definition of "constitutional office-holder" in Section 221 (definitions) to be a constitutional office-holder; and

(b) is not subject to direction or control by any person or authority.

(3) An Organic Law made for the purposes of Subsection (1) may provide that the value of any assistance given otherwise than in cash shall be taken into account as expenditure or contributions for any purpose of that subsection or of that law.

66. Section 130 was amended by inserting a new s 130A. Section 130 states (new provision is underlined):

***130. Integrity of candidates**.*

(1) An Organic Law shall make provision—

(a) requiring a candidate or former candidate for election to the Parliament to disclose to the Ombudsman Commission or some other authority prescribed by the law, in such manner, at such times and with such details as are prescribed by or under the law—

(i) any assistance (financial or other) received by him in respect of his candidature, and its source; and

(ii) the amount or value of his electoral expenses; and

(b) prohibiting a candidate or former candidate for election to the Parliament from accepting from a non-citizen assistance (financial or other) in respect of his candidature; and

(c) defining the corporations and organizations that are to be regarded as non-citizens for the purposes of a provision made for the purposes of paragraph (b); and

(d) regulating or restricting the amount or kind of such assistance that may be
received from any source other than a registered political party; and

(e) prohibiting a candidate for election to the Parliament from holding himself out as representing any party or organization other than a registered political party that has publicly adopted him as its candidate.

(2) Where another authority is prescribed by the law under Subsection (1)(b), that authority—

(a) shall be composed of a person or persons who are declared under paragraph (i) of the definition of "constitutional office-holder" in Section 221 (definitions) to be a constitutional office-holder; and

(b) is not subject to direction or control by any person or authority.

(3) An Organic Law made for the purposes of Subsection (1) may make provision for further defining what are to be regarded as assistance and electoral expenses for any purpose of that subsection or of that law, and in particular may provide that—

(a) the value of hospitality (including meals, accommodation and transport) of a kind and to a degree recognized by custom in the country shall not be taken into account as assistance; and

(b) the personal expenses of a candidate shall not be taken into account as electoral expenses.

(4) In this section—

"electoral expenses", in relation to a candidate, means expenses incurred (whether before, during or after an election to the Parliament, including expenses incurred before the issue of the writ for election) by him or on his behalf on account of or in respect of the election; "personal expenses", in relation to a candidate, means any reasonable costs incurred by him personally for travel and for living away from his home for the purposes of the election.

130A. <u>Provisions relating to political parties</u>.

An Organic Law made for the purposes of this Subdivision may—

(a) restrict a member of the Parliament from resigning or withdrawing from a political party of which he is a member; and

(b) restrict a member of the Parliament from failing to support, in certain circumstances, a political party of which he is a member; and

(c) provide that, in certain circumstances, a member of Parliament who—

(i) resigns or withdraws from the political party of which he is a member; or

(ii) fails to support the political party of which he is a member; or

(iii) is a member of a political party whose registration is cancelled, is guilty of misconduct in office; and

(d) permit a member of the Parliament who at the time of his election to the Parliament was not a member of a registered political party to join a registered political party; and

(f) authorize the Head of State to invite a registered political party to form the Government in certain circumstances; and

(g) restrict a member of the Parliament in certain circumstances, from exercising his voting rights in the Parliament.

67. Section 111 reads:

111. Right to introduce bills, etc.

(1) Subject to Section 210 (executive initiative) and to an Organic Law made for the purposes of Subdivision VI.2.H (Protection of Elections from Outside or Hidden Influence and Strengthening of Political Parties), any member of the Parliament is entitled to introduce into the Parliament, in accordance with, and subject to any

reasonable restrictions contained in, the Standing Orders of the Parliament, a petition, question, bill, resolution or motion.
(2) The petition, question, bill, resolution or motion shall be dealt with as provided by the Standing Orders of the Parliament.
(3) The Standing Orders of the Parliament may make provision for priority to be given to Government business at certain times or in certain circumstances.

68. Section 114 reads:

***114. Voting in the Parliament**.*

(1) Subject to Subsection (5) and except as otherwise provided by a Constitutional Law or the Standing Orders of the Parliament, all questions before a meeting of the Parliament shall be decided in accordance with the majority of votes of the members present and voting.

(2) Subject to Subsection (5), the member presiding does not have a deliberative vote except—
(a) on a motion of no confidence in the Prime Minister, the Ministry or a Minister, in accordance with an Organic Law referred to in Section 145 (motions of no confidence); or
(b) on any question which requires an affirmative vote greater than a simple majority.
(3) Subject to Subsection (5), except in a case where he has voted under Subsection (2), in the event of an equality of votes on a question, the member presiding has a casting vote, but if he fails to use it the motion shall be deemed to be withdrawn.
(4) The Standing Orders of the Parliament shall make provision for the manner in which a vote is to be taken and recorded.
(5) An Organic Law made for the purposes of Subdivision VI.2.H (Protection of Elections from Outside or Hidden Influence and Strengthening of Political Parties) may restrict the voting rights of a member of the Parliament in certain circumstances.

69. It is clear to us that *OLIPPAC* is a comprehensive Code that covers all aspects of matters relating to political parties in Papua New Guinea (PNG). The Preamble to *OLIPPAC* states that *OLIPPAC* is an *Organic Law* that is made for the purpose of implementing Subdivision VI.H *(Protection of Elections from Outside*

or Hidden Influences) of the *Constitution* and for related purposes. Section 1 states that *OLIPPAC* is a law made in compliance with the requirements of s 38. In so far as the activities of MPs are regulated or restricted by *OLIPPAC*, s 1 specifies the qualified rights affected as *Constitution*, ss. 44, 45, 46, 47, 49, 50, 52, 53, 55 and 56 and also ss142 and 145. Section 1 (3) says that the qualified rights in s 47 and s 50 are restrictive rights and the *"provisions of Section 127 of the Constitution shall be given liberal construction in its meaning and intent"*.

70. Questions 6 & 17 relate to *OLIPPAC*, ss 57 - 73 which are interwoven. In order to avoid repetition, we set out in full the *OLIPPAC* provisions affected by this reference.

71. Division 2 (ss 57 – 61) relates to an MP's resignation of membership of a registered political party. It is in the following terms:

> *Division 2.—Resignation from a Registered Political Party.*
>
> ***57. Grounds for and effect of resignation from a registered political party.***
>
> *(1) A Member who is a member of a registered political party may resign from that registered political party—*
> *(a) where, in accordance with Section 105(1)(a) (general elections) of the Constitution, a general election falls to be held within the period of three months before the fifth anniversary of the day fixed for the return of the writs for the previous general election—within a period of 30 days before the commencement of the three month period; and*
> *(b) where a general election falls to be held in any circumstances other than those referred to in Paragraph (a)—within 14 days following the date of issue of the writs for the general election,*
> *and the provisions of this Part relating to a Member who resigns from a registered political party shall not apply in respect of a Member who resigns under this subsection.*
> *(2) The following are permissible grounds for resignation by a Member from a registered political party of which he is a member:—*
> *(a) that—*
> *(i) the party; or*
> *(ii) an executive officer of the party,*

has committed a serious breach of the constitution of the political party; or
(b) that the political party has been adjudged insolvent under any applicable law.
(3) A Member who resigns from a registered political party other than under Subsection (1), but is unable to establish that the grounds specified under Subsection (2) existed in relation to his resignation, is guilty of misconduct in office.
(4) A Member who resigns from a registered political party other than under Subsection (1) or on grounds other than those specified under Subsection (2) is guilty of misconduct in office.
(5) For the purposes of Subsection (2), "a serious breach of the constitution" means a breach of the constitution of the registered political party that would be likely to bring the integrity and reputation of the Member into disrepute.

58. Member may resign from registered political party.

(1) A Member who is a member of a registered political party may resign from the party by submitting his resignation in writing to the president of the party.
(2) A resignation under Subsection (1) shall specify the grounds for the resignation.
(3) In any investigation under this Division into the resignation of a Member or in any subsequent inquiry under Part V of the Organic Law on the Duties and Responsibilities of Leadership into the resignation, the burden of proof that the grounds for resignation were permissible grounds under Section 57(2) rests with the Member.

59. Procedures following resignation of a member from a registered political party.

(1) On receipt of a resignation under Section 58, the president of the registered political party shall, within 30 days of the date of receipt by him of the resignation, give notification and a copy of the resignation to—
(a) the Speaker; and
(b) the Registrar.
(2) On receipt of a notification under Subsection (1)(b), the Registrar shall refer the resignation to the Ombudsman Commission.

(3) A Member shall not withdraw his resignation after it has been referred to the Ombudsman Commission under Subsection (2).
(4) On receipt of a referral under Subsection (2), the Ombudsman Commission shall investigate whether the resignation was made on grounds specified under Section 57(2) or whether it is satisfied that the Member is guilty of misconduct in office under Section 57(3).

60. Further provision.

(1) Where, following investigation under Section 59(4), the Ombudsman Commission is satisfied that a Member is guilty of misconduct in office under Section 59(3), the matter shall proceed in accordance with Part V of the Organic Law on the Duties and Responsibilities of Leadership.
(2) Where, following investigation under Section 59(4), the Ombudsman Commission is satisfied that a Member is not guilty of misconduct in office under Section 59(3), it shall so advise—
(a) the Member; and
(b) the Speaker; and
(c) the Registrar,
and the Member shall retain his office as a Member of the Parliament and may—
(d) join another registered political party; or
(e) remain independent from any political party.
(3) Where, as a result of the procedure under Part V of the Organic Law on the Duties and Responsibilities of Leadership no recommendation is made for the dismissal from office of a Member the Member shall retain his office as a Member of the Parliament and may—
(a) join another registered political party; or
(b) remain independent from any political party.

61. Status of member during investigation, etc.

For the period commencing on the date on which the Registrar refers the resignation of a Member to the Ombudsman Commission under Section 59(2) and ending on—
(a) the date of any advice given by the Ombudsman under Section 60(2); or

(b) where the matter proceeds in accordance with Section 59(1), the date of final resolution of the matter in accordance with Part V of the Organic Law on the Duties and Responsibilities of Leadership, the Member remains a member of the registered political party from which he seeks to resign and the provisions of Section 65 apply to him as a member of that party.

72. Division 3 (s 62) relates to expulsion of an MP from a registered political party. It is in the following terms:

Division 3.—Expulsion from a Registered Political Party.

62. Expulsion from registered political party.

(1) A registered political party may, in accordance with its constitution, expel from the party a member of the party (including a member who is a Member of the Parliament) on grounds specified in the constitution of the party.
(2) A Member expelled from a party under Subsection (1) may—
(a) join another registered political party; or
(b) remain independent from any political party.

73. Division 4 (ss 63 – 64) relates to invitation from the Head of State to the political party with the highest number of elected MPs to form the government. It is in the following terms:

Division 4.—Invitation to form Government.

63. Invitation to form government.

(1) Subject to Subsection (2), on the date of the return of the writs in a general election, the Electoral Commission shall advise the Head of State of the registered political party which has endorsed the greatest number of candidates declared elected in the election, and the Head of State, acting with, and in accordance with, the advice of the Electoral Commission, shall invite that registered political party to form the Government in accordance with this section.
(2) Where two or more registered political parties have endorsed an equal number (being the greatest number) of candidates declared elected in the election, the Electoral Commission shall so advise the

Head of State, and the Head of State, acting with, and in accordance with, the advice of Electoral Commission, shall invite the registered political party with the highest votes declared in the election to form the Government.

(3) An invitation under Subsection (1) or invitations under Subsection (2) shall be—

(a) conveyed to the public officer of the registered political party or registered political parties, as the case may be; and

(b) notified to the Clerk of Parliament; and

(c) published in the National Gazette.

(4) At the first meeting of the Parliament following a general election, being a meeting at which the Prime Minister is to be elected, the registered political party to whom the invitation has been made may nominate a candidate for election of the Prime Minister.

(5) Where—

(a) a candidate is nominated under Subsection (4)(a)—the Parliament shall vote as to whether that candidate is to be elected Prime Minister; or

(b) a candidate is or candidates are nominated under Subsection (4)(b),

the Parliament shall vote as to whether that candidate, or any of those candidates, is to be elected Prime Minister.

(6) Where—

(a) the candidate nominated under Subsection (4)(a)); or

(b) a candidate nominated under Subsection (4)(b),

receives a simple majority of the votes in the election of Prime Minister, the Speaker shall advise the Head of State that the candidate has been elected Prime Minister by the Parliament.

(7) Where—

(a) a registered political party to whom an invitation has been made under Subsection (1) or (2) declines or fails to nominate a candidate under Subsection (4); or

(b) a nominated candidate under Subsection (4) fails to receive a simple majority of the votes in the election under Subsection (5),

the Parliament shall otherwise elect a Prime Minister in accordance with Standing Orders of the Parliament.

(8) In an election of a Prime Minister under Subsection (7)—

(a) a registered political party, who declined to nominate a candidate under Subsection (4), may nominate a candidate; and

(b) a nominated candidate, who failed to receive a simple majority of votes in an election under Subsection (5), may be nominated.

64. Office of opposition and election of Opposition Leader.

(1) There shall be established an Office of the Opposition which is made up of Members of Parliament not in government.
(2) The Members shall elect in a democratic manner one of their numbers to be the Leader of Opposition who shall in turn then appoint one of the Members to be the Deputy Leader.
(3) Funds shall be provided in each year from the Consolidated Revenue Fund for the maintenance and expenses of the Office of the Opposition.

74. Division 5 (ss 65 – 73) relates to MPs' defection from a political party and restrictions on voting. It is in the following terms:

Division 5.—Defection from Political Party and Voting Restriction.

65. Defection from or voting against a registered political party.

(1) A Member of the Parliament, who was an endorsed candidate of a registered political party at the election at which he was elected to the Parliament, shall, during the term of the Parliament for which he was elected—
(a) not withdraw or resign from that registered political party except in accordance with Division 2; and
(b) subject to Section 60(2)(d) or (3)(a), not join another registered political party; and
(c) subject to Subsection (2), vote only in accordance with a resolution of that registered political party as determined by the members of that registered political party who are Members of the Parliament in the following only:—
(i) a motion of no-confidence brought against the Prime Minister, the Ministry or a Minister under Section 145 (motions of no confidence) of the Constitution; and
(ii) a vote for the election of a Prime Minister under Section 142 (The Prime Minister) of the Constitution; and
(iii) a vote for the approval of the National Budget; and
(iv) a vote to enact, amend or repeal a Constitutional Law.

(2) A Member of the Parliament who is a member of a registered political party may abstain from voting in cases referred to in Subsection (1)(c).

66. Vote contrary to provisions of Section 65(1)(c) not to be counted.

The vote of a Member of the Parliament contrary to the provisions of Section 65(1)(c) shall not be counted.

67. Deemed resignation from office.

Where a member of the Parliament contravenes Section 65(1)—
(a) he is deemed to have resigned from the registered political party of which he was a member; and
(b) the Speaker shall give notification of the matter to the Registrar; and
(c) the Registrar shall refer the matter to the Ombudsman Commission; and
(d) the matter shall proceed under Sections 59(4), 60 and 61 as if the resignation were a resignation under Section 58.

68. Other penalties for contravention of Section 65.

A Member of the Parliament who contravenes Section 65, but to whom Section 60 applies—
(a) shall refund to the registered political party all campaign and other expenses received from the registered political party in supporting him at the election; and
(b) shall not be appointed as a Prime Minister, Minister, Vice-Minister or Chairman or Deputy Chairman of a Committee of the Parliament for the remainder of the life of the Parliament.

69. Member elected without endorsement.

(1) Subject to Subsection (2), a Member of the Parliament elected without endorsement by a registered political party shall not join a registered political party during the life of the Parliament to which he was elected without endorsement.

(2) A Member of the Parliament elected at a general election without endorsement by a registered political party may join a registered political party at any time after the return of the writs and before the first election by the Parliament of a Speaker following the date of the return of the writs in that general election provided that that registered political party had endorsed candidates at that general election.

(3) A Member of the Parliament—

(a) elected without endorsement by a registered political party; or

(b) whose resignation from a registered political party has been found—

(i) by the Ombudsman Commission, following investigation; or

(ii) after the procedure in accordance with Part V of the Organic Law on the Duties and Responsibilities of Leadership, not to amount to misconduct in office; or

(c) who otherwise, in accordance with this Law, becomes an independent Member,

and who does not subsequently join a registered political party shall remain as an independent Member for rest the of the term of the Parliament, but in the case of—

(d) a motion of no-confidence in the Prime Minister, the Ministry or a Minister—the provisions of Section 70 shall apply; and

(e) the election of a Prime Minister (other than the election of the Prime Minister immediately following a general election)—the provisions of Section 71 shall apply; and

(f) a vote on the approval of the National Budget—the provisions of Section 72 shall apply; and

(g) a vote on the enactment, amendment or repeal of a Constitutional Law—the provisions of Section 73 shall apply.

70. Voting in the case of a motion of no confidence or in the election of a Prime Minister following resignation where the member resigning is nominated for election.

(1) A Member of the Parliament—

(a) who was not a member of a registered political party at the time of the election of a Prime Minister; and

(b) who voted for the Member elected Prime Minister in the election; and

(c) to whom Subsection (2) does not apply,

shall not vote—
(d) for a motion of no confidence in—
(i) that Prime Minister; or
(ii) the Ministry headed by that Prime Minister; or
(iii) a Minister appointed on the advice of that Prime Minister; or
(e) against the Member elected Prime Minister referred to in Paragraph (b), in an election of Prime Minister, following the resignation of the Prime Minister referred to in Paragraph (b), where the Prime Minister referred to in Paragraph (b) is nominated.
(2) A Member of the Parliament, who—
(a) was not a member of a registered political party at the time of the election of a Prime Minister; and
(b) voted for the Member elected Prime Minister in that election; and
(c) subsequently, and at least six months before, a motion of no confidence in—
(i) that Prime Minister; or
(ii) the Ministry headed by that Prime Minister; or
(iii) a Minister appointed on the advice of that Prime Minister, joined a registered political party,
shall vote in that motion of no confidence in accordance with the requirements of a member of that registered political party under Section 65.
(3) A Member of the Parliament who—
(a) was not a member of a registered political party at the time of the election of a Prime Minister; and
(b) did not vote for the Member elected Prime Minister in that election; and
(c) has not subsequently joined a registered political party at least six months prior to a motion of no confidence in—
(i) that Prime Minister; or
(ii) the Ministry headed by that Prime Minister; or
(iii) a Minister appointed on the advice of that Prime Minister, shall not vote against the motion of no confidence.

71. Voting in the election of a Prime Minister following resignation of a Prime Minister and in the event of other vacancies in the office of Prime Minister.

Where—

(a) a Prime Minister has resigned and has not been nominated in the election of the next Prime Minister; or
(b) there is otherwise a vacancy in the office of Prime Minister,
a Member of the Parliament who is not a member of a registered political party may vote for any nominee in the election of the next Prime Minister.

72. Voting on the National budget.

(1) In any vote taken to approve a National Budget—
(a) a Member of the Parliament who is a member of a registered political party shall vote in accordance with a resolution as determined by the members of the party who are Members of the Parliament; and
(b) a Member of the Parliament—
(i) who is not a member of a registered political party; and
(ii) who voted, in the election for Prime Minister, for the Prime Minister whose Government is proposing the National Budget,
shall vote for the National Budget; and
(c) a Member of the Parliament—
(i) who is not a member of a registered political party; and
(ii) who did not vote, in the election for Prime Minister, for the Prime Minister whose Government is proposing the National Budget,
may vote for or against the National Budget.
(2) The vote of a Member of the Parliament—
(a) to whom Subsection (1)(a) applies, who does not vote in accordance with Subsection (1)(a); and
(b) to whom Subsection (1)(b) applies, who does not vote in accordance with Subsection (1)(b),
shall not be counted.
(3) In the event of any question arising as to whether or not a vote taken in the Parliament constitutes a vote to approve a National Budget, the decision of the Speaker on the matter shall be final.

73. Voting on a Constitutional Law.

(1) In any vote taken to enact, amend or repeal a Constitutional Law—
(a) a Member of the Parliament who is a member of a registered political party shall vote in accordance with a resolution as

determined by the members of the party who are Members of the Parliament; and
(b) a Member of the Parliament—
(i) who is not a member of a registered political party; and
(ii) who voted, in the election for Prime Minister, for the Prime Minister whose Government is proposing the enactment, amendment or repeal, shall vote for the enactment, amendment or repeal; and
(c) a Member of the Parliament—
(i) who is not a member of a registered political party; and
(ii) who did not vote, in the election for Prime Minister, for the Prime Minister whose Government is proposing the enactment, amendment or repeal,
may vote for or against the enactment, amendment or repeal.
(2) The vote of a Member of Parliament –
(a) to whom Subsection (1)(a) applies, who does not vote in accordance with Subsection (1)(a); and
(b) to whom subsection (1)(b) applies, who does not vote in accordance with Subsection (1)(b),
shall not be counted

Whether the Parliament has the power to alter the basic structure of the Constitution:

75. This question raises threshold issues as to whether *Constitution*, ss 12 (4), 127 (c), (d) and (e); and130 A (a), (b), (c) and (f); are consistent with *Constitution* s 99 and s115. It is in this context that Mr Donigi made his submissions on *"the basic structure of the Constitution"* doctrine.

76. The main issue is whether the Parliament has the authority to alter the basic structure of the *Constitution* by imposing further qualifications on its exercise of the legislative powers which have the effect of abrogating or restricting protected rights and powers and privileges of the Parliament and MPs under s115.

Arguments for the affirmative

77. Mr Donigi's principal argument is that Parliament's power to enact laws given by s 99 though unlimited, is, as stated in s 99 (2)(a), subject to the *Constitution*. The *Constitution* limits Parliament's law-making power. The expression "subject to Constitutional Laws" in s 99 (2)(a) includes the basic

constitutional structure as determined and enacted at the time of Independence in 1975. Parliament cannot alter or amend the *Constitution* so as to alter that "basic structure".

78. Two main contentions are advanced. Firstly, the *Constitution* declares certain rights of citizens and prescribes provisions for qualifying those rights by a law that regulates or restricts the exercise of those rights. Parliament cannot alter that structure by a subsequent amendment to the *Constitution* which imposes further qualifications that abrogate, abridge, annul, limit or substitute those qualified rights. The amendments to *Constitution* ss12, 127 and130 precisely do that and they offend against the *basic structure doctrine*. Secondly, the *Constitution* establishes a government structure in which the exercise of the legislative power is vested in the Parliament and its Members. The exercise of that power is protected by s115. The exercise of those freedoms is absolute. He urged this Court in the exercise of its supervisory jurisdiction to invalidate those constitutional amendments.

79. Counsel cited the early works of Aristotle and Dicey on the philosophical and ideological underpinnings of democratic governments. He refers to the works of various acknowledged writers on constitutionalism and constitutional democracies of modern times such as South African constitutional lawyer Ziyad Motala and American writers Jon Roland and Keith Whittington. He refers to the Indian situation by relying on *IC Golaknath v State of Punjap* AIR 1967 SC 1643; *Shankiari Prasad v Union of India* (1952) SCR 89, *Saijan Singh v State of Rajasthan* (1965) 1 SCR 933. A case in point he submits is *Keshavanada Bharati v State of Kerala* AIR 1973 SC 1461 in which the Supreme Court of India struck down amendments to the Indian Constitution as altering its' basic structure.

80. Counsel further submits the Parliament's power to make laws under s 109 is not subject to any report and recommendations of the General Constitutional Commission to amend the *Constitution*. The Commission set up in 1997 produced a report to the Parliament to amend the *Constitution* which the Parliament relied upon to justify these amendments. However, the report is not before this Court.

81. Counsel submits that *Constitution* ss13, 14, 15, 16 and 17 which provide for alterations to the *Constitution* and *Organic Laws* are procedural only, they do not vest power in the Parliament to alter the basic structure of the *Constitution*.

82. Mr Donigi's second argument is that, the *Constitution* establishes a government structure in which the exercise of the legislative power is vested in the

Parliament. The exercise of that power is protected by s 115. The exercise of those powers, privileges and immunities is absolute and they cannot be abrogated, abridged, annulled, limited or substituted by a subsequent law. The enjoyment of those powers and privileges is also absolute. He submits that the *Constitution* is crafted in such a manner so as to restrict the State from interfering with the rights of the citizens. Any amendments to the *Constitution* should augment and expound on existing constitutional provisions. He relied on *Edwards v AG Canada* [1930] AC 124 per Lord Sankey at p. 136 and *Hunter v Southam* [1984] 2 SCR 145 per Dickson J at p 155. The amendments to the *Constitution* and the corresponding *OLIPPAC* provisions are incongruous with the general tenor and structure of the *Constitution*, they chip away the fabric of the *Constitution* and this should not be allowed by the Court in this country. The events in Fiji is adopted as an example of what could happen if the Parliament were allowed to abrogate the basic structure of the *Constitution*. In support of this contention, he also cites the works of English writer Wesley Hohfield as regards the powers, privileges and immunities of the parliament and Members.

83. The amendments to the *Constitution* and *OILPPAC* abrogate or restrict the MPs' exercise of these powers, privileges and immunities. Thus he argues that they offend against the *basic structure doctrine*.

Arguments for the Negative

84. In response to the first part of Mr Donigi's submission, counsel arguing for the negative submits that the arguments cannot be sustained for two reasons. First s12 is a definition provision and not procedural. Secondly ss13, 14 and 15 give Parliament wide powers to amend or alter the *Constitution* and the *Organic Laws*: Schedule 1.2 (1) of the *Constitution*. The Court should adopt the plain or literal meaning of words or expressions used in the constitutional amendments: *Kuberi Epi v Tony Farapo* (1983) SC 247.

85. Sections 99, 100 and 109 relate to Parliament's law - making powers. They submit that these powers were properly exercised in this instance.

86. Under the structure of government and distribution of powers between the three arms of government, the legislative power is vested in the parliament and it has unlimited law-making powers. However, the exercise of its legislative power is always subject to the *Constitution*. The exercise of the legislative power to amend or alter the *Constitution* is not made subject to any foreign doctrine such as the "basic structure" doctrine. The *Constitution* is intended to be construed in

accordance with the principles and the use of certain materials as aids to interpretation provided in the *Constitution*.

87. Counsel for the negative emphasises on the autochthonous nature of the *Constitution* and submit that the Court need not look elsewhere for principles and materials to interpret the *Constitution*.

88. Counsel urged the Court to be cognizant of the CPC report, and urged the Court to steer away from matters concerning the political process.

89. The power under s 19 is to interpret the constitutional provision in question without invalidating the provision.

90. It is submitted that by virtue of s109 (3) as to whether a law is not for the peace and good governance of PNG under s 109 (3) is non-justiciable. They relied on *Reg. v Foster; Ex parte Eastern and Australian Steamships Co. Ltd.* [1959] HCA 10; (1959) CLR 256, per Windeyer J at 308; *Polyukhovich v The Commonwealth* (199) 172 CLR 501 per Deane J at p. 9-13.

91. It is submitted that the political nature of the matters which were addressed by the Parliament through the amendments of the *Constitution* and *OLIPPAC* are matters within the Parliament's law making power and are matters that only Parliament should be allowed to address. The Court should avoid construing the provisions in question in such a way that interferes with Parliament's law-making powers on matters of political nature.

92. It is further submitted that the Court's interpretive function is one of interpretation and application of a constitutional law, it does not extend to "legislating" by judicial act.

93. In response to the second part of the submission by Mr. Donigi, it was submitted that the powers, privileges and immunities of MPs are not guaranteed rights and therefore not subject to the qualification provisions of qualified rights. It is within Parliament's authority to alter the *Constitution* to limit the exercise of powers, privileges and immunities given by s 115.

Determination of issues to the basic structure doctrine

94. We consider those arguments as follows. Firstly, whether a constitutional law is inconsistent with the basic structure of government as set out in *Constitution*, s 99 (2) is non-justiciable by virtue of s 99 (3).

95. Secondly, it is our opinion that the constitutional amendments are consistent with other provisions of the *Constitution*, except to the extent that those amendments restrict or prohibit the exercise of the right under s 50 (1)(e).

96. Section 50 (2) provides for a law to qualify the exercise of s 50 right, by way of *regulation*, only. Schedule 1.20 of the *Constitution* is relevant to s 50 (2) and it provides:

> ***"Sch.1.20. Regulation of acts, etc.***
>
> *A provision of a Constitutional Law that provides for the regulation of an act or thing does not extend to prohibition, whether in law or in effect. (our underlining).*

97. It is trite law that whilst it is permissible for a law to regulate the exercise of the right under s50, it should not restrict or prohibit the exercise of that right. In our view, to the extent that *Constitution*, ss 12 (4), 111, 114, 127 and 130A permit *OLIPPAC* to impose restrictions and prohibitions on exercise of the right under s 50 (1)(e), those amendments are inconsistent with the existing qualification in s 50 (2) that only provides for the "regulation" of the exercise of that right. This finding renders ineffective the application of the amendments to ss 12, 111, 114, 127 and 130A, to the extent that they authorize *OILPPAC* to restrict or prohibit the exercise of a s 50 right.

98. In interpreting and applying s 50 (2) of the *OLIPPAC* , we adopt the approach enunciated by this Court in *SCR No. 2 of 1982* (supra) at p. 228, 234, 238, 239-240; and in *SCR No. 1 of 1992*(supra) at pages, 77 and 82. We quote from the judgment of Kapi J (as he then was) in *SCR No. 2 of 1982,* which appears at p. 239 – 240:

> *I consider that the right and the reasonable opportunity to exercise the right given under s 50 (1) are to be read together with s 52 (2). Reading both provisions together in this way, one comes to the conclusion that the reasonable opportunity to exercise the right given by s 50 (1) may be regulated by a law under s 50 (2). In other words the right under s 50 (1) cannot be in isolation as though it is absolute*

> *in itself. It is subject to regulation by a law under s 50 (2). Where a law regulates the exercise of this right as in the K1,000 amendment, the only standard which this law must satisfy is that it is a law which is "reasonably justifiable for the purpose in a democratic society that has regard for the rights and dignity of mankind". In addition, the law must not go outside the limitation, namely to regulate and do nothing more.*

99. The distinction between regulation, restriction and prohibition have been discussed by this Court in its previous decisions: *SCR No. 2 of 1982* (supra), *The State v NTN* (supra), In particular, the words have been considered in cases involving exercise of the right under s 50: *SCR No. 2 of 1982,* (supra); *SCR No 1 of 1992; Re Constitutional Amendment No 15—Elections and Organic Law on National Elections (Amendment No 1) Law 1991; Special Reference by the Ombudsman Commission under s19 of the Constitution* [1992] PNGLR 73. We adopt what this court said in those cases that whilst it is permissible for a law to regulate or restrict the exercise of a qualified right as authorized by the qualification provision in the provision creating that right, the law cannot *restrict* or *prohibit* the exercise of a qualified right that only makes provision for *regulation*. Kearney, Dep. CJ makes this important distinction in *SCR NO. 2 of 1982* (supra), in the following terms:

> *In the ordinary use of language, "regulate" does not include "prohibit"; see e.g. A.-G. for Ontario v. A.-G. for the Dominion [1896] A.C. 348 at p. 363, per Lord Watson. And the Constitution, Sch. 1.20, makes it clear that a law passed under the Constitution, s. 50 (2), cannot, under the guise of regulating, in law or in effect prohibit the exercise of the s. 50 (1) rights. But I think that regulating the exercise of a right will very frequently involve the imposition of some degree of restriction on its exercise. A law passed for the purposes of any of ss. 44-49, 51 and 52 can I think, go further in the way of imposing restrictions than can a regulating law under s. 50 (2). The difference between regulating and restricting is one of degree, not of kind, and I think the distinction is this: that the power to restrict in those provisions can extend to prohibition, while the power to regulate in s. 50 (2) cannot.*

100. In our view, the correct approach to interpreting the *Constitution* is to adopt the approach that the *Constitution* itself provides. Our *Constitution* is homegrown or autochthonous and it provides the principles and materials as aids to

interpretation which this Court should adopt and apply. Therefore in our opinion there is no constitutional basis for the Court to adopt legal doctrines of constitutional interpretation developed elsewhere.

101. This Court has acknowledged the autochthonous nature of our *Constitution* in numerous decisions: *State v John Mongo Wonom* [1975] PNGLR 311; *SCR No 1 of 1976; Rakatani Peter v South Pacific Brewery Ltd* [1976] PNGLR 537; *Iambakey Okuk v Gerald Sidney Fallscheer* [1980] PNGLR 274; SCR No. 2 of 1985, *SCR No 2 of 1985;Kevin Masive v Iambakey Okuk & Kevin Kenderop* [1985] PNGLR 263; *The Ship "Federal Huron v OK Tedi Mining Ltd* [1986] PNGLR 5, *Kila Wari v Gabriel Ramoi* a*nd Another* [1986] PNGLR 112, *The Chief Collector of Taxes v Blaisius Dilon* [1990] PNGLR 414; *Madaha Resena v The State (Re Fisherman's Island)* [1991] PNGLR 174; *SCR No. 2 of 1995 Reference by Western Highlands Provincial Executive* (1995) SC 486; *SCR No. 3 of 1986 Reference by Simbu Provincial Executive* [1987] PNGLR 151.

102. Our *Constitution* has unique and dynamic features. The *Constitution* is a complete code of law that is comprehensive and exhaustive on every aspect of good governance. The sheer volume in content bears testimony to this fact. Comparing our *Constitution* with the Constitution of modern constitutional democracies around the world, ours stands out as perhaps the most voluminous and comprehensive. For instance, the Constitution of the United States of America which has only 7 articles and undergone 27 amendments in its over 207 year history comprises 17 pages only. Our *Constitution* has over 270 substantive provisions with four Schedules and which could cover over 200 pages. In addition to that are various *Organic Laws* which are also Constitutional Laws.

103. Our *Constitution* has other unique characteristics. The *Constitution* itself provides the principles of interpretation and the sources of aids to interpretation. Unless expressly provided for in the *Constitution*, recourse to doctrines of constitutional interpretation and materials developed or used elsewhere as aids, should be discouraged. It is of course useful for the Court to be assisted in interpreting provisions of constitutional laws, to have access information and materials from countries with constitutional systems similar to ours and more often than not, the Court may in an appropriate case require counsel to provide them.

104. The *Constitution* mandates this Court to construe the *Constitution* in a fair and liberal manner, to think expansively and to be dynamic and where necessary, to use judicial ingenuity. The body of law developed in this way would then form a part of the home grown jurisprudence.

105. We appreciate that the *Constitution,* though law, is a document derived from a political process and that many of its components contain political statements.

106. John Goldring in his book *The Constitution of Papua New Guinea* makes this pertinent observation at page 29:

> *"Thus political, rather than legal, considerations led to the desire for a home-grown constitution. The document is to some extent unusual as a constitution in that it contains a full statement of " National Goals and Directive Principles": a general statement of policy, which under s.25 of the Constitution is to provide a guide not only to the implementation of policy, but also to the interpretation of the Constitution and other laws. The political statements were statements which were, and which should be seen as, proceedings from the people themselves. In itself, it is not unusual for a constitution to contain a statement of political aims (Duhacek 1973). What is unusual about the Papua New Guinea Constitution is the degree of detail with which the political aims are set out and also the fact that to some extent, at least, those political aims are made enforceable. Thus the need for a constitution which drew its authority from the will of the people of the country, rather than from the legal machinery of the former metropolitan power".*

107. It is therefore difficult for Judges to be totally divorced from considering socio-political considerations which permeate the *Constitution*. The CPC considered this difficulty but counseled against judges withdrawing from taking into account political considerations in appropriate cases. The CPC stated in Chapter 8, paragraphs 5 -6, as follows:

> *5. The Courts do not, however exist in a vacuum. Like other institutions of government of a country, they are caught up in political reality, and often their decisions have political consequences.*
>
> *6. In carrying out their judicial role, judges… must take full account of society in which they live; they must be attuned to the wishes of the society and to that extent must be politically conscious (although not party politically conscious.*

108. In the past, this Court has been conscious of the potential risk of politicization of the Court in deciding politically charged cases and taken great care in staying within the limits of law and reason. That has always been the approach of this Court and this will continue that path. For this reason, we find no merit in the submissions made by counsel for the negative on this point and dismiss those arguments.

109. We consider the philosophical and ideological underpinnings of democratic governments and constitutional democracies embodied in the *basic structure doctrine* developed by Courts in other countries to be inapplicable to the interpretation of our *Constitution*. The principles of constitutional interpretation and materials to be used as to interpreting the *Constitution* are those found in *Constitution* s 24 and Schedule 2. Then there is already ample case law developed by this Court on constitutional interpretation that complement the principles of interpretation contained in the *Constitution*. Neither the *Constitution* nor the cases advance any doctrine of constitutional interpretation founded on some foreign political theories and ideologies embodied in the *basic structure doctrine*, that the *Constitution* or any of its provisions, should be measured against to test their validity.

110. The structure of the *Constitution* is conceptual only and of itself does not impose any limits on the exercise of power. Where any questions arise as to the interpretation and application of a Constitutional law, such questions must be determined against prescribed limits on those powers. Questions raised in this reference on the 2006 amendments to the *Constitution* and enactment of *OLIPPAC* provisions bring into play the limits on government powers prescribed by the *Constitution*. They are justiciable and we will consider the questions.

111. It is within the Parliament's authority to alter the structure of the *Constitution*. Since its adoption, the *Constitution* has undergone several structural changes. An example is *Constitutional Amendment No. 1* enacted in 1975 which introduced a system of provincial governments. In 1995, the *Constitution* was further altered to vary the structure of provincial governments.

112. These amendments to the *Constitution* were made by the Parliament in the performance of its law-making power. In enacting those provisions, the *Constitution* was altered, as provided for in ss14 to17. Subject to the *Constitution*, and provided the formal requirements prescribed by ss14 to17 are complied with, the Parliament has wide power to alter the structure of the *Constitution*. This is clear from the broad definition of the word "alter" in Sch. 1.2 (1), which reads:

" ' alter', in relation to any provision of this Constitution or any other law, includes repeal (with or without re-enactment or the making of other provision), amend, modify, suspend (or remove a suspension) or add words or effect of the provision."

Whether specific provisions of OLIPPAC raised in the Reference are authorized by the Constitution

113. OLIPPAC contains eight (8) parts, as follows:

- *Part I: Preliminary (ss 1 & 2)*
- *Part II: Integrity of Political Parties Commission (ss 3 – 23)*
- *Part III: Political Parties Generally (ss 24 – 28)*
- *Part IV: Registration of Political Parties (ss 29 – 52)*
- *Part V: Strengthening of Political Parties (ss 53 – 74)*
- *Part VI: Funding of Political Parties (ss 75 – 87)*
- *Part VII: Financial Returns (ss 88 - 90)*
- *Part VIII: Miscellaneous (ss 91 – 97)*

114. The questions in the reference relates to various provisions under Part V, as follows:

- s 57 : *Resignation from a Registered Political Party.*
- s 58: *Member may resign from registered political party.*
- s 59: *Procedures following resignation of a member from a registered political party.*
- s 60. *Further provision.*
- s 61. *Status of member during investigation, etc.*
- s 69. *Member elected without endorsement.*
- s 70. *Voting in the case of a motion of no confidence or in the election of a Prime Minister following resignation where the member resigning is nominated for election.*
- *s* 72. *Voting on the National budget.*
- s 73. *Voting on a Constitutional Law.*
- s 81. *Contributions from non-citizens*

115. The formal and mandatory requirements for enacting an *Organic Law* are as prescribed by *Constitution*, s12. That is an *Organic Law* must be made in respect of a matter that is expressly authorized by the *Constitution*; the *Organic Law* must not be inconsistent with the *Constitution* and that the *Organic Law* is expressed to be an *Organic Law*. It is obvious from the Preamble to *OLIPPAC* that *OLIPPAC* is an *Organic Law* that is authorized to be made under Subdivision H, to provide for aspects of any matter relating to the integrity and strengthening of political parties in PNG. It is also obvious that the sections of *OLIPPAC* in question in this Reference were made for the purpose of achieving the purposes under s 127.

116. It is obvious from ss12 (4), 111, 114, 127, and 130A that they authorise an *Organic Law* to impose additional qualifications by way of "restrictions" on the rights of MPs to perform the duties of the office, but those restrictions must not be inconsistent with the *Constitution.* With the exception of restrictions and prohibitions on the exercise of rights under s 50 (1)(e), we are of the opinion that *OLIPPAC* meets the formal requirements of those Sections.

III. MEMBERSHIP OF AND RESIGNATION FROM REGISTERED POLITICAL PARTIES (QUESTIONS 7 to 15), *Constitution*, s 47; *OLIPPAC*, ss 57, 58, 59, 60, 61, 65, 66 & 67

117. The specific questions are stated in questions 7 to 17 of the Reference. Apart from questions16 and 17 which we consider separately, questions 7 to 15 relate to *OLIPPAC*, ss 57 to 73 which we consider to be interwoven, we consider them together.

118. In order to avoid repetition, we reproduce questions 7 to 15 hereunder.

119. Question 7 reads:

> **7. *Section 57 of the Organic Law:***
>
> *7.1 Does Section 57 contravene a Member of Parliament's privileges guaranteed by Section 115 of the Constitution?*

7.2 Does it negate a Member of Parliament's responsibilities of office as specifically enshrined in Section 27 of the Constitution?

7.3. Does Section 57 contravene a Member of Parliament's qualified rights to Freedom of Conscience [Section 45]; Freedom of Expression [Section 46] and Freedom of Assembly & Association [Section 47]?

7.4. If so, does the Organic Law comply with Section 38 of the Constitution?

7.5. Is Section 57 prohibitory and not regulatory as envisaged by Section 50 of the Constitution?

7.6. Is Section 57 contrary to Section 55 of the Constitution as it effectively amounts to discrimination against the people which are represented by the Member of Parliament based on their tribe, place of origin and political opinion?

7.7. Is Section 57 contrary to the powers, privileges and immunities of a member of parliament created by Sections 99, 100, 101, 103, 104, 109, 111, 115, 142, 145 and 209 – 216 (inclusive)? [See Question 6.4]

7.8. *If Section 57 is of no force and effect, then should Sections 58 and 59 of the Organic Law be also of no force and effect?*

120. Question 8 reads:

Section 58 of the Organic Law:

8.1. Does Section 58 contravene a Member of Parliament's privileges guaranteed by Section 115 of the Constitution?

8.2. Does it negate a Member of Parliament's responsibilities of office as specifically enshrined in Section 27 of the Constitution?

8.3 Does Section 58 contravene a Member of Parliament's qualified rights to Freedom of Conscience [Section 45]; Freedom of

Expression [Section 46], and Freedom of Assembly & Association [Section 47]?

8.4 *If so, does the Organic Law comply with Section 38 of the Constitution?*

121. Question 9 reads:

9. Section 59 of the Organic Law:

9.1 Does Section 59 contravene a Member of Parliament's privileges guaranteed by Section 115 of the Constitution?

9.2 Does it negate a Member of Parliament's responsibilities of office as specifically enshrined in Section 27 of the Constitution?

9.3 Does Section 59 contravene a Member of Parliament's qualified rights to Freedom of Conscience [Section 45; Freedom of Expression [Section 46] and Freedom of Assembly & Association [Section 47]?

9.4 If so, does the Organic Law comply with Section 38 of the Constitution?

122. Question 10 reads:

Section 60 of the Organic Law:

10.1 Does Section 60 contravene a Member of Parliament's privileges guaranteed by Section 115 of the Constitution?

10.2 Does it negate a Member of Parliament's responsibilities of office as specifically enshrined in Section 27 of the Constitution?

10.3 Does Section 60 contravene a Member of Parliament's qualified rights to Freedom of Conscience [Section 45]; Freedom of Expression [Section 46] and Freedom of Assembly & Association [Section 47]?

10.4 If so, does the Organic Law comply with Section 38 of the Constitution?

123. Question 11 reads:

Section 61 of the Organic Law:

11.1 Does Section 61 contravene a Member of Parliament's privileges guaranteed by Section 115 of the Constitution?

11.2 Does it negate a Member of Parliament's responsibilities of office as specifically enshrined in Section 27 of the Constitution?

11.3 Does Section 61 contravene a Member of Parliament's qualified rights to Freedom of Conscience [Section 45]; Freedom of Expression [Section 46] and Freedom of Assembly & Association [Section 47]?

11.4 *If so, does the Organic Law comply with Section 38 of the Constitution*?

124. Question 12 reads:

12. Section 69 of the Organic Law:

12.1 Does Section 69 contravene a Member of Parliament's privileges guaranteed by Section 115 of the Constitution?

12.2 Does it negate a Member of Parliament's responsibilities of office as specifically enshrined in Section 27 of the Constitution?

12.3 Does Section 69 contravene a Member of Parliament's qualified rights to Freedom of Conscience [Section 45; Freedom of Expression [Section 46] and Freedom of Assembly & Association [Section 47]?

12.4 If so, does the Organic Law comply with Section 38 of the Constitution?

125. Question 13 reads:

> *13. **Section 70(1) and (2) of the Organic Law:***
>
> *13.1 Does Section 70(1) and (2) contravene a Member of Parliament's privileges guaranteed by Section 115 of the Constitution?*
>
> *13.2 Does it negate a Member of Parliament's responsibilities of office as specifically enshrined in Section 27 of the Constitution?*
>
> *13.3 Does Section 70(1) and (2) contravene a Member of Parliament's qualified rights to Freedom of Conscience [Section 45]; Freedom of Expression [Section 46] and Freedom of Assembly & Association [Section 47]?*
>
> *13.4 If so, does the Organic Law comply with Section 38 of the Constitution?*
>
> *13.5 Does Section 70(1) terminate or prohibit the exercise of the powers, privileges, and immunities of a member of parliament created by Sections 99, 100, 101, 103, 104, 109, 111, 115, 142, 145 and 209 – 216 (inclusive) and therefore of no force and effect? [See Question 13.1]*
>
> *13.6 Is Section 70(1) prohibitory and not regulatory as envisaged by Section 50 of the Constitution?*
>
> *13.7. Is Section 70(1) contrary to Section 55 of the Constitution as it effectively amounts to discrimination against the people which are represented by the Member of Parliament based on their tribe, place of origin and political opinion?*

126. Question 14 reads:

> ***14. Section 72(1)(a) and 1(b)(ii) of the Organic Law:***
>
> *14.1 Does Section 72(1)(a) and 1(b) contravene a Member of Parliament's privileges guaranteed by Section 115 of the Constitution?*

14.2 Does it negate a Member of Parliament's responsibilities of office as specifically enshrined in Section 27 of the Constitution?

14.3. Does Section 72(1)(a) and (b) contravene a Member of Parliament's qualified rights to Freedom of Conscience [Section 45]; Freedom of Expression [Section 46] and Freedom of Assembly & Association [Section 47]?

14.4. If so, does the Organic Law comply with Section 38 of the Constitution?

14.5. Does Section 72(1)(b)(ii) terminate or prohibit the exercise of the powers, privileges and immunities of a member of Parliament created by Sections 99, 100, 101, 103, 104, 109, 111, 115, 142, 145 and 209 – 216 (inclusive) and therefore of no force and effect? [See Question 14.1]

14.6. Is Section 72(1) (b)(ii) contrary to Section 47 of the Constitution?[See Question 14.3]

14.7. Is Section 72(1)(b)(ii) prohibitory and not regulatory as envisaged by Section 50 of the Constitution?

14.8. Is Section 72(1)(b)(ii) contrary to Section 55 of the Constitution as it effectively amounts to discrimination against the people which are represented by the Member of Parliament based on their tribe, place of origin or political opinion?

127. Question 15 reads:

15. Section 73(1)(b)(ii) of the Organic Law:

15.1 Does Section 73(1)(b) contravene a Member of Parliament's privileges guaranteed by Section 115 of the Constitution?

15.2. Does it negate a Member of Parliament's responsibilities of office as specifically enshrined in Section 27 of the Constitution?

15.3. Does Section 73(1)(b) contravene a Member of Parliament's qualified rights to Freedom of Conscience [Section 45]; Freedom of Expression [Section 46] and Freedom of Assembly & Association [Section 47]?

15.4. If so, does the Organic Law comply with Section 38 of the Constitution?

15.5. Does Section 73(1)(b)(ii) terminate or prohibit the exercise of the powers, privileges, and immunities of a member of parliament created by Sections 99, 100, 101, 103, 104, 109, 111, 115, 142, 145 and 209 – 216 (inclusive) and therefore of no force and effect? [See Question 14.1]

15.6. Is Section 73(1)(b)(ii) contrary to Section 47 of the Constitution?[See Question 14.3]

15.7. Is Section 73(1)(b)(ii) prohibitory and not regulatory as envisaged by Section 50 of the Constitution?

15.8. Is Section 73(1)(b)(ii) contrary to Section 55 of the Constitution as it effectively amounts to discrimination against the people which are represented by the Member of Parliament based on their tribe, place of origin and political opinion?

128. Questions 7, 8, 9, 10 and 11 relate to *OLIPPAC*, ss 57, 58, 59, 60 & 61. *OLIPPAC*, ss 65, 66 and 67 are related to s 61. They deal with MPs' membership and resignation from registered political parties. Those provisions are interwoven and we consider them together.

129. We consider that *OLIPPAC*, ss 57 - 61, 65, 66 and 67 relate directly to the qualified rights given by s 47 of the *Constitution*. It is for this reason that we consider s 47 first.

130. Section 47 gives every citizen the right to freedom of peaceful assembly and association and to form or belong, to or not to belong to, political parties. Section 47 provides:

> ***47. Freedom of assembly and association***.
>
> *Every person has the right peacefully to assemble and associate and to form or belong to, or not to belong to, political parties**, industrial organizations or other associations, except to the extent that the exercise of that right is regulated or restricted by a law—***
> *(a) that makes reasonable provision in respect of the registration of all or any associations; or*
> *(b) that imposes reasonable restrictions on public office-holders; or*
> *(c) that imposes restrictions on non-citizens; or*
> *(d) that complies with Section 38 (general qualifications on qualified rights).* (our underlining).

Overview of OLIPPAC, ss 57, 58, 59, 60, 61, 65, 66 & 67

131. The main focus of *OLIPPAC*, Part V (ss 53 – 74) is that it is intended, as the Constitutional amendments themselves expressly state, to *restrict* MPs from withdrawing support for the respective registered political parties of which they are members, particularly when voting on important matters before the Parliament. *OLIPPAC* specifies four (4) important matters in which a vote is required. They are as follows:

- A *Motion of No Confidence* in the Prime Minister (or a Ministry headed by the Prime Minister or a Minister appointed by the Prime Minister) (s 70)
- Election of a Prime Minister (other than the election of the Prime Minister immediately following a general election) (s 71)
- A vote on the approval of the National Budget (s 72)
- A vote for the enactment of a Constitutional Law (s 73)

132. We begin our discussions with *OLIPPAC*, s 24 which sets the basic framework for membership of political parties. The Section provides:

24. Membership of political parties.

(1) Subject to Subsection (2), a political party shall not restrict membership of the party on the basis of sex, race, religion or place of origin.

(2) A non-citizen shall not be a member of a political party.

(3) A person shall not be a member of more than one political party at the same time.

(4) Subject to Subsection (7), a person is not a member of a political party unless all fees, dues or other payments due by him to the political party in accordance with the constitution of that political party have been paid within the time and in the manner required by that constitution.

(5) Subject to Subsection (6), membership of a political party shall be ordinary membership and a political party shall not grant dual membership, associate membership or any other form of membership of the political party.

(6) A political party may, in accordance with the constitution of that political party, accord special privileges, such as life membership of the party, to certain members of the party.

(7) A member of a registered political party who is a Member of the Parliament and who has not paid, within the time and in the manner required by the constitution of that political party, all fees, dues or other payments due by him to the political party may be expelled from the political party if the constitution so provides, but if not so expelled remains as a member of that political party until—

(a) the end of the life of the Parliament during which the non- payment occurs; or

(b) his resignation from that political party; or

(c) his ceasing to be a Member of the Parliament according to law,

whichever first happens.

133. Section 24 recognizes the universal nature of political parties in democratic countries throughout the world as purely voluntary associations in which the rules made and adopted by the political party itself govern all aspects of matters relating to political parties.

134. Section 57 sets out the grounds of resignation from a registered political party of which an MP is a member. A member who was elected on his party's endorsement is expected to remain a member of the party during the term of the Parliament (where the word "his" or "he" appears in the part of this judgment that addresses the main issues, it is intended to be read as inclusive of a female party member or female MP). However the member may resign from a party in two (2) situations. First, the member may, for any reason, resign within 30 days before commencement of the three month period before the fifth anniversary of the day fixed for the return of the writs for the previous general election; or in any other case where a general election is due within 14 days following the issue of the writs. A member who resigns under those situations is not subject to the restrictions imposed under the provisions of Division 2.

135. The second situation is where a resignation occurs at any other time during the term of the Parliament. The Member may resign only on the two (2) grounds which are specified in Subsection (2). That is, the party or an executive officer of the party has committed a serious breach of the party's constitution or, that the political party has been adjudged insolvent. A member who resigns on other grounds is guilty of misconduct in office and is liable to be investigated and prosecuted under the Leadership Code. Subsections (3) and (4) create offences of misconduct in office. In other words a member is prohibited from freely resigning from his political party on grounds other than those prescribed under Subsection (2).

136. The procedure for resignation is set out in s 58. Subsection (1) states that a Member who wishes to resign from a party may do so by submitting his resignation to the president of the party in writing. Subsection (2) requires a Member to state his reasons or grounds for resigning from the party. Subsection (3) states that in any investigation into the resignation of a Member from a party by the Ombudsman Commission (*"OC"*) under Part V of the *Organic Law on the Duties and Responsibilities of Leadership* (*"OLDRL"*), the onus is on the Member to establish and satisfy the permissible grounds for his resignation . The onus is on the member to justify the grounds of his resignation, in writing to the President of the party, the Registrar of Political Parties, and the OC. In effect, a member's resignation from his party on any ground including those specified under s 57 (2) will trigger scrutiny and investigation by the OC. Section 58 is therefore prohibitory of a member's right to resign from a party.

137. Section 59 states that the president of the party shall within 30 days of the date of the receipt of the Member's letter of resignation give a written notice to both the Speaker of Parliament and the Registrar of the Member's resignation together with a copy of the Member's letter of resignation.

138. Subsection (2) states that on receipt of a notification under Subsection (1) (b), the Registrar shall refer the Member's resignation to the OC.

139. Subsection (3) prohibits the Member from withdrawing his resignation after his resignation is referred to the OC under Subsection (2).

140. Subsection (4) states that on receipt of a referral by the Registrar of the Member's resignation from a party, the OC shall investigate whether the resignation satisfies the permissible grounds under s 57 (2) or whether the OC is satisfied that the Member is guilty of misconduct in office under s 57 (3) and (4). It is noted that there is no time limit fixed for conducting the investigations.

141. Section 60 (1) states that where following an investigation by the OC under s 59 (4), the Member is found guilty of misconduct in office, the process of referral under *Part V* of the *OLDRL* is to be invoked.

142. But if the Member is found not guilty of misconduct in office by the OC, Subsection (2) provides that the OC shall advise the Member, the Speaker and the Registrar accordingly, in which case, the Member shall retain his office as a Member of Parliament and would be at liberty to join another party or remain independent from any political party.

143. Also, if a Member is found guilty of misconduct in office by a leadership tribunal after being investigated under the process set out in Part V of the *OLDRL*, but no recommendation is made for the Member to be dismissed from office, the Member may join another party or remain independent.

144. Section 61 relates to the status of a Member who is under investigation by the OC under s 59 (2) (i.e. referral of the resignation of the Member from a party by the Registrar to the OC), up to when the Member is found not guilty by the OC under s. 60 (2) or up to the date of the resolution of the matter in accordance with *Part V* of the *OLDRL*.

145. Section 61 (b) provides that the Member will remain a member of the party from which he had sought to resign and do all things that are required of him under s. 65 as a member of that party, in the Parliament in exercising his voting rights.

146. Section 66 nullifies a Member's vote in contravention of s 65.

147. Section 67 provides that where a Member contravenes s 65(1), he is deemed to have resigned from the party in which case the Speaker shall notify the Registrar and the Registrar shall refer the matter to the OC and the matter proceeds under ss 59 (4), 60 and 61 as if the resignation were under s 58.

Submissions

148. Mr. Henao of counsel for the Referrer submits that ss 57, 58, 59, 60 and 61 of *OLIPPAC* are invalid because they are all inconsistent with important provisions of the *Constitution* in relation to the Members' qualified rights under ss 45, 46, 47, 50 and 55.

149. Mr. Jerewai of counsel for the First and Second Interveners, argued that ss 57, 58, 59, 60 and 61 of *OLIPPAC* are intended to be regulatory and restrictive but not prohibitory. It is a law passed in compliance with section 38 of the *Constitution* which is in the best interests of the country taking into account public welfare and public good by guaranteeing political stability in the government.

150. Mr Jerewai argued strongly that the Referrer's complaint in this Reference is not about any ambiguity in the words or phrases used in the sections of *OLIPPAC* and the *Constitution* but was one of proper interpretation and application of these provisions. In this context the intention of the Legislature must be given its 'literal' meaning'.

151. Given their correct and intended interpretation and application of the sections under the Reference, it is contended that, ss 57, 58, 59, 60 and 61 are only restrictive to the extent authorised by the *Constitution*, although in their operation they have the effect of being prohibitory when they are not, and therefore, are not unconstitutional.

152. While addressing specific sections of *OLIPPAC* on resignation, in their impact on the Members qualified rights under ss 45, 46 and 47, it is submitted that ss 57, 58 and 59 do not infringe ss45, 46 and 47 of the *Constitution* except restrict them in accordance with section 38 of the *Constitution*.

153. Counsel for the Third Intervener, the Attorney-General, submitted that Members' parliamentary privileges as observed and appreciated in countries like United Kingdom (UK) are not the same and have no application in PNG as parliamentary privilege is derived directly from the *Constitution*. But then the submission acknowledges that the *Parliamentary Powers and Privileges Act* (Ch. No. 24) expressly adopted all the privileges that the House of Commons of the UK Parliament had in 1901.

154. It is submitted that the *Organic Law* is necessary, taking into account the *National Goals and Directive Principles (NGDP)* and *Basic Social Obligations (BSO)* for purposes of giving effect to the public interest, public order and public welfare of the people of Papua New Guinea. Having regard to the period of instability in the government, this law is necessary and welfare of people is only advanced or enhanced when there is stability in the government. Until such time the country has yet to reach that stable environment, this is a relevant law that the country most needs.

155. Counsel for the Fourth and Fifth Interveners also mounted similar argument as the First, Second and Third Interveners, and submitted that a Member once made the original decision to become a member of a Registered Political Party, by exercising his free choice, he has "made his bed and must lie in it", no matter what. What happens inside and on the floor of Parliament while a Member is a member of a Registered Political Party is non-justiciable and must not be subject of scrutiny of the Court.

156. Both the Sixth and Seventh Interveners supported the Referrer.

Determination of issues

157. It is necessary for us to first have a clear understanding of the status of political parties and their role in the process of government in a constitutional democracy such as ours.

158. Political parties in PNG and in other democracies are purely voluntary associations. Not everyone is expected nor required to be involved in the formation of political parties. Not everyone is expected nor required to buy into the political visions, aspirations and ideologies advanced by political parties. It is all a matter of conscience and choice of an individual citizen, who are sufficiently sensitized and

concerned on political issues on good governance in the community that they join forces with other likeminded citizens to speak with a united voice and participate in the political affairs of the country. As we understand to be the situation in this country as is the situation in any democratic country, only a small portion of the population are involved in the formation and membership of political parties.

159. A political party, whether incorporated or not, represents an association of persons who share a common political ideology and policy platform. The party's affairs are conducted in accordance with the party's Constitution. The Constitution of the party spells out the political vision, aims and objectives of the party to which members are attracted to and voluntarily subscribe to. A person's right to hold political beliefs and to enjoy that right individually or in association with likeminded persons, ought not be restricted or prohibited in any democracy. This right, amongst other human rights, is recognised as an inherent and unalienable right under the *International Bill of Human Rights (1978)* and the *United Nations International Covenant on Civil and Political Rights (1966)*, both of which PNG has ratified.

160. *OLIPPAC* requires a political party that intends to nominate candidates in general elections to be registered with the Commission. Incorporation of a political party under the *Associations Incorporation Act* (Ch. 142) is a prerequisite for registration under *OLIPPAC*. Such registration of political parties under *OLIPPAC* in no way alters the voluntary nature of the political parties and their membership and activities.

161. Under *OLIPPAC*, a person, who is a member of the party, may voluntarily choose to be endorsed by a political party as a candidate or run as an independent. A candidate must not seek endorsement by more than one registered political party: see *OLIPPAC*, ss 53 – 56. The candidate runs and wins the election on his party's policies. Upon election, the elected MP continues to remain as a member of the party which endorsed his candidacy. It makes sense that the elected MP should not be allowed to freely exit from the party that has endorsed him for the election. However it is quite another thing for such an MP to be restricted or prohibited, directly or indirectly, from leaving the party at any time, for reasons and in circumstances as he sees fit.

162. *Constitution*, s 47 gives every person a right to form or belong to, or not to belong to, political parties, industrial organizations, or other associations, except where that right is regulated or restricted by a law for the purposes of which are as stipulated in s 47 (a) to (d).

163. *OLIPPAC*, s 57 restricts an MP's right to belong to and when and in what circumstances not to belong to the registered political party of which he is a member. By specifying the time in the term of the Parliament when a MP is free to resign and by specifying the grounds on which he may resign at any other time during the term of the Parliament, he is prohibited from resigning at any other time and for reasons other than those specified in s57. The MP's resignation becomes the subject of an investigation by the OC to establish if such an MP is guilty of misconduct in office.

164. Section 57 first of all prohibits an MP from resigning from his party for most of the term of the Parliament except where the MP resigns on given grounds. Even when the MP has resigned on those given grounds, his resignation is made subject to an investigation process that may result in charges of misconduct in office been brought against him under the Leadership Code. This to us seems to be a draconian law that may not be found in the laws of any modern constitutional democracy that we know of today. The draconian nature of this law which forced Members to act contrary to their own conscience was foreshadowed during debate on the Bill as per the extract from the Hansard when the Hon Philemon Embel MP was addressing the Parliament:

> *Basically, I agree with the Bill but many Members will lose their freedom of choice because they will be under the party. This will especially be so in the areas of motion of no confidence, voting of the Prime Minister and the passing of the Budget…..We do not want to see a situation where Members are forced to go with the party because that is the decision of the party. It will make Members become yes men and not leaders who use their conscience.*

165. Under s 57(2), a Member is given the right to resign from a party if the party or the executive officer of the party has committed a serious breach of the constitution of the party, or the party has been adjudged insolvent under any applicable law. These are the only grounds under which a Member would have a right to resign from a party. In our opinion, this is a clear prohibition on the Member from exercising his freedom of association under s 47. Even if these were regarded as a regulation or a restriction on the Member's right of association, it would still contravene s 47 because grounds under s 57 (2) under which such regulation or restriction would be based, do not fall within either *Constitution*, ss 38 (1) or 47 (a) to (d).

166. On the face of *OLIPPAC*, s 57, this provision is prohibitory of a MP's right under s 47 of the *Constitution*.

167. *OLIPPAC*, s 58 makes it mandatory for a MP to submit his resignation in writing, stating the grounds specified in s 57 (2), to the President of the party. It follows from our conclusion in respect of s 57 that s 58 is prohibitory of an MP's right under s 47 of the *Constitution*.

168. *OLIPPAC*, s 59 makes it obligatory of the OC to investigate an MP upon receipt of a copy of the resignation from the Registrar. An MP cannot withdraw his resignation after the resignation is referred to the OC and whilst it is investigating the resignation.

169. Section 59 does not specify a time frame for the OC's investigations. In elective public offices time is of essence and it is desirable that a law which requires an investigation during the elected leader's term of office should specify a time frame for conducting and completing the investigation. In the case of an MP investigated under s 59, he is kept in suspense as to the nature and period of the investigation whilst the MP's term runs. His freedom of conscience and his freedom of speech are adversely affected. He is compelled to remain expressed wish to leave the party.

170. It follows from the reasons already explained in the earlier discussion in respect of ss 57 and 58 that s 59 is prohibitory of an MP's right under s 47 of the *Constitution*.

171. Under s 60, an investigation is conducted which may or may not disclose a case of misconduct in office. If the investigation establishes a case of misconduct in office, no time frame is fixed for the matter to be proceeded under the *OLDRL.*

172. In this case, the combined effect of *OLIPPAC*, s 60 and ss 57 – 59, in our firm opinion, interfere with the Member's right to freedom of association, by compelling the Member to remain a member of the party from which he had by choice, decided to sever his association through resigning. Section 60 therefore contravenes s 47 of the *Constitution*; see *Enforcement of Rights Pursuant to Constitution s 57 Application by Karingu* [1988-89] PNGLR 276. In that case, the Supreme Court held that, insofar as s 9 of the *Lawyers' Act,* 1986*,* compelled all lawyers to join the Law Society, the section contravened s 47 of the *Constitution*. The Court also said s. 9 restricted the lawyers' freedom of association, the Law Society being "other association" for purposes of s 47 of the *Constitution.*

173. *OLIPPAC*, s 61 seeks to retain the Member in the party from which he has decided to resign, pending the outcome of investigations into his resignation. During that period of investigation the Member is required by ss 61, 65 and 66 of *OLLIPAC* to remain a member of the party and to support its position on vote on matters set out in s 65 (1)(c). If a Member contravenes s 65 (1)(c), he is deemed to have resigned from his party and those processes set out in s 67 come into play, culminating in the OC investigating and determining whether the Member is guilty of misconduct in office. In that sense, the Member's right to freedom to choose to belong to a political party of his choice after he has resigned from the party and the right to freedom of speech and debate according to his conscience, would be denied and he would not be free to debate issues and bills in the Parliament. The Member would also be denied his or her right to freedom of association, as he would be expected to remain a member of the party until the investigations over his resignation is completed: see *Enforcement of Rights Pursuant to Constitution, s57, Application by Karingu* (supra). In our view, if a Member decides to resign from a party because the party is engaged in corrupt deals or activities, or that the party is promoting policies and ideologies which are against the law and good governance and he feels that his responsibilities as a Member of Parliament may be affected by his continued association with the party, then the requirement that he continue to remain a member of the party would amount to an infringement of his rights under s 47 of the *Constitution*.

174. Section 61 is the sum effect on the MPs' position during the investigations that takes place over offences of misconduct in office under s 57 (3) and (4). The MP's resignation does not take effect until the investigation by the OC is completed and a finding either in his favour is made and conveyed to him, or a misconduct in office is established and the MP's case is processed and completed under the *OLDRL*.

175. When *OLIPPAC*, s 61 is given a fair and liberal meaning, it becomes clear that the section also prohibits the Member from exercising his right to association under s 47 of the *Constitution*.

176. The net effect of *OLIPPAC* ss 57, 58, 59, 60, 61, 65, 66 and 67 is as follows:

(1) The Member is prevented from leaving a voluntary association that he freely, by choice, joined. His membership of a political party is not in our view a position of leadership under the

Constitution, s 26(1), or his membership in a political party is not part of his responsibilities of office as a Member of Parliament.

(2) A Member's resignation from his political party is made to be an offence under the Leadership Code, when it is not.

(3) The investigation by the OC under the *OLIPPAC* does not come within Part III of *OLDRL*. If an investigation by the OC under *OLIPPAC* results in a finding of misconduct in office, it is prosecuted with under Part V of OLDRL. This means that the OC refers the matter to the Public Prosecutor for prosecution before a Leadership Tribunal, without giving the Member his right to be heard as envisaged by *OLDRL*.

(4) Whilst the OC investigates a resignation and makes a determination on misconduct in office, the Member is compelled to remain with the party that he has chosen to resign from. In the event of a finding of misconduct in office against the member by the OC, and the matter is referred to the Public Prosecutor under Part V of *OLDRL*, the Member is compelled to remain with the party that he has chosen to resign from, until the process under Part V of *OLDRL* is completed. The Member is compelled to await the outcome of those investigations for an indefinite period, and compelled to do those things against his will.

(5) In the end, the OC has no jurisdiction over matters that are clearly not leadership responsibilities.

177. The right under s 47 of the *Constitution* is of course a qualified right and it is necessary for us to consider the application of s 38 of the *Constitution*. Do ss 57 – 61 and 65 - 67 comply with the substantive requirements of s 38?

178. Section 38 of the *Constitution* is set out as follows:

38. General qualifications on qualified rights.

(1) 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 a proper respect for the rights and dignity of mankind.
(2) For the purposes of Subsection (1), a law must—
(a) be expressed to be a law that is made for that purpose; and
(b) specify the right or freedom that it regulates or restricts; and
(c) be made, and certified by the Speaker in his certificate under Section 110 (certification as to making of laws) to have been made, by an absolute majority.

(3) 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."

179. We accept the submissions for the negative that where a qualified right allows restriction on the exercise of a qualified right, restriction may amount to prohibition. There is ample case authority which establishes this principle. In our view however, such prohibition must be limited to facilitating a restriction imposed

on a qualified right. Such prohibition should not extend to a law whose primary purpose is to prohibit the exercise of that right.

180. The grounds upon which the right under s 47 may be regulated or restricted by a law are set out in s 38 (1) (a) and (b). For a law to be compliant with s 38, it must be a law that is passed to give effect to public interests in those matters enumerated from capital "A" to "G", taking account of NGDP in order to protect the exercise of the rights and freedoms of others, provided that the law passed is reasonably justifiable in a democratic society having a proper respect for the rights and dignity of mankind.

181. *OLIPPAC*, s.1 purports to comply with s 38 in the following manner:

> *(1) To the extent that the law regulates or restricts qualified rights (including s 47 right),the law takes into account the NGDP and BSO;*
> *(2) The law is necessary to give effect to the public interest in public order and public welfare; It is declared that the law is designed to place limitations on qualified rights to, to ensure that the enjoyment of those acknowledged rights by individuals do not prejudice the rights and freedoms of others or the legitimate national or public interest; and*
> *(3) To the extent that the law is reasonably justifiable in a democratic society having proper respect or regard for the right and dignity of mankind.*

182. Is *OLIPPAC* a law that is reasonably justifiable in a democratic society? This is a law that is directed at the conduct and behaviour of Members of Parliament. In an attempt to control their behaviour and conduct, *OLIPPAC* is the Parliament's answer to correcting human failures and shortcomings that only integral human development of the whole human person can correct and not through or by passing laws to deal with that human failure.

183. The question is whether the restrictions imposed by *OLIPPAC*, ss 57, 58, 59, 60, 61, 65, 66 and 67 are necessary for achieving the purposes set out in s 38 (1) of the *Constitution.* We are satisfied that those restrictions interfere with a Member's right given by *Constitution*, s. 47. The Referrer and those Interveners supporting the reference established a *prima facie* case by demonstrating on the face of those *OLIPPAC* provisions, that the Members' right under s 47 has been infringed. They established that the laws are not only restrictive but are in fact

primarily prohibitive. They have demonstrated to our satisfaction that the primary purpose of the restrictions imposed were prohibitory of the exercise of a Member's right under s 47, and therefore, they do not fall within the meaning of *restriction* as interpreted by this Court in previous cases.

184. The onus was on the State and those Interveners relying on the validity of those laws, to show that the restrictions or prohibitions were justified. We are not satisfied that they have discharged that burden.

185. We appreciate that the question whether the restrictions or prohibitions are necessary taking account of all those matters set out in s 38 (1) involve social and political considerations of which this Court is in no better position than the legislature to pass judgment on those matters and for good reasons. However as we have said already, the *Constitution* also gives this Court the power to pass ultimate judgment on those political matters that impact on protected rights and freedoms of citizens. We can appreciate the social and political circumstances which existed at the time the law was necessitated some form of control to discourage Members from switching political allegiances particularly at times when decisions on important matters were required to be made by the Parliament. There is no dispute that the Constitutional amendments and *OLIPPAC* was welcomed with open arms by Members from both sides of the Parliament when it was enacted.

186. We are, however, not persuaded by those Intervenors who argued that the restrictions and prohibitions are necessary for achieving those purposes set out in s38. By subjecting what is purely a voluntary system of political parties and their membership to a restrictive and prohibitive process of scrutiny and investigations by an agency of the State , though independent, into the resignation of Members who belong to registered political parties and compelling them to vote on important matters before the Parliament in a certain way, and if they do not wish to vote in that way, to abstain from voting; those restrictions and prohibitions have the potential to destroy the political party system, resulting in political instability and bad governance.

187. We are not satisfied that the restrictions or prohibitions of a s 47 right is the only way available to the government to bring about political stability. We acknowledge that the behaviour and conduct of many Members after they are elected to office particularly when voting on important matters in the Parliament are unacceptable. But such conduct can be corrected by the Parliament through information and education of Members and electors. This cannot be done

overnight by compulsion under law. If the electors were properly educated to be able to make informed decisions as to how they exercise their franchise, and if Members were properly informed on their responsibilities, that would allow persons with the necessary attributes of good leadership to be endorsed by political parties as candidates at general elections. And once elected, they would behave and conduct themselves appropriately in accordance with the wishes of the electors during the term of the Parliament to which they were elected. This would also instill a sense of discipline and responsibility amongst Members. They would understand the value and benefits that a multi-party system brings to the system of government. The end result is that the political party system and the system of government in our country would develop to become a real democracy that is comparable to other developed democracies.

188. We are also not persuaded that the restrictions or prohibitions imposed by all these provisions are justified in a democratic society having a proper regard to the right and dignity of mankind. We are not provided with any evidence or material by those Interveners arguing the negative case, in relation to the practice that exist in other democracies with a similar system of government where these types of restrictions and prohibitions exist under law. They have not produced any evidentiary material or any material of the type listed in s 39 (2) with which this Court would have been in order for us to appreciate the rationale for these type of restrictions or prohibitions. From what we understand to be the practice in other democracies, formation of political parties, membership, and activities of political parties are hardly the subject of government intervention through restrictions and prohibitions and threat of quasi-criminal investigation by a governmental agency. For a law to empower an investigative body of the State to investigate the voluntary activities of a political party with respect to membership and resignation of Members of Parliament poses a real threat to individual liberties and freedom to choose to form a political party or to belong to or not to belong to a political party and the survival of the political party system in any democracies. Those laws are in fact destructive to the survival of a multi-party system and a participatory system of democracy that underlies the system of government in Papua New Guinea under the *Constitution*.

189. For those reasons, we hold the view that *OLIPPAC*, ss 57, 58, 59, 60, 61, 65, 66 and 67 are inconsistent with s 47 of the *Constitution,* and are therefore unconstitutional.

190. Having reached the above conclusion, it is unnecessary for us to consider ss 27, 45, 46 and 55 of the *Constitution* on the issue of membership of and resignation from registered political parties.

IV. Performance of representative duties of Members of Parliament (QUESTIONS 7 – 15): *Constitution,* s 50, s 142, s 145, ss 209 – 216 (inclusive); *OLIPPAC*, ss 65, 66, 67, 70, 72 & 73.

191. *OLIPPAC*, Part V. Division 5 (ss 65 – 74) relate to Member's right to hold public office and to exercise his public functions.

192. Section 50 of the *Constitution*, particularly Subsection (1)(e) of that section, is the main qualified right affected by *OLIPPAC*, Division 5. For this reason we consider those *OLIPPAC* provisions as against s50.

193. Section 50 is in the following terms:

> ***50. Right to vote and stand for public office.***
>
> *(1) Subject to the express limitations imposed by this Constitution, every citizen who is of full capacity and has reached voting age, other than a person who—*
>
> *(a) is under sentence of death or imprisonment for a period of more than nine months; or*
> *(b) has been convicted, within the period of three years next preceding the first day of the polling period for the election concerned, of an offence relating to elections that is prescribed by an Organic Law or an Act of the Parliament for the purposes of this paragraph,*
> *has the right, and shall be given a reasonable opportunity—*
>
> *(c) to take part in the conduct of public affairs, either directly or through freely chosen representatives; and*
> *(d) to vote for, and to be elected to, elective public office at genuine, periodic, free elections; and*
> ***(e)** to hold public office and to exercise public functions.*
>
> ***(1)** The exercise of those rights may be regulated by a law that is reasonably justifiable for the purpose in a democratic society that has*

a proper regard for the rights and dignity of mankind.**"** (our underlining).

Overview of OLIPPAC, Div. 5 (ss 65 – 74)

194. *OLIPPAC*, s 65 (1) (c) (i) – (iv) relate to voting on Motions of No Confidence. It says a MP who was an endorsed candidate of a registered party at an election must, during the term of the Parliament to which he was elected, vote only in accordance with a resolution of the members of the parliamentary wing of the party, on a vote of no confidence in the Prime Minister, the Ministry or a Minister; a vote for the election of a Prime Minister after a general election; a vote for the approval of the National Budget and a vote to enact or repeal a Constitutional Law. Subsection (2) says such a Member may abstain from voting on those matters. Section 66 says a vote of a Member taken in contravention of s65 (1) (c) "shall not be counted". There is no question that ss 65 and 66 restrict or prohibit the exercise of a Member's right under s 50 (1) (e).

195. Section 67 says where a Member contravenes s 65 (1), he is deemed to have resigned from his party and the matter is referred to the OC for investigation. There is no question that s 67 restricts or prohibits a Member's right to exercise his public function under s 50 (1) (e).

196. Section 68 provides for other penalties for defaulting MPs.

197. Section 69 says that a Member who is elected without endorsement by a registered political party or a Member who resigned from his registered political party but has not been subsequently found to have committed misconduct in office and subsequently becomes an independent member, must remain an independent Member for the rest of the term of Parliament. However, the Member must vote in accordance with ss 70, 71, 72 and 73. There is no question that s 69 restricts and prohibits such a Member's right to exercise public function under s 50 (1) (e).

198. Section 70 relates to voting on Motions of no Confidence in the Prime Minister, a Ministry headed by the Prime Minister or a Minister appointed by the Prime Minister. Subsection (1) says an independent Member who voted for the Prime Minister after a general election, must not vote for a Motion of no Confidence in that Prime Minister (or Ministry headed by that Prime Minister or a Minister appointed by that Prime Minister). He is also required to vote for the same

Prime Minister that he voted for, after the general elections, if the same Prime Minister resigns and re-nominates for re-election.

199. Subsection (2) says an independent Member who voted for the Prime Minister after a general election subsequently joins a registered political party at least six (6) months before a Motion of no Confidence, that Prime Minister (a Ministry headed by the Prime Minister or a Minister appointed by the Prime Minister), he must vote in accordance with the resolution of the Parliamentary Wing of that political party.

200. Subsection (3) says an independent Member who did not vote for the Prime Minister after the general election, and remains independent for the life of the Parliament, must not vote against a Vote of no Confidence in that Prime Minister (a Ministry headed by the Prime Minister or a Minister appointed by the Prime Minister). Subsection (3) also says that an independent Member must join a registered political party at least six (6) months prior to such Motion of no Confidence, if he is to vote against the Motion, in which case, it seems to us, s 65 (1)(c)would also apply. That means the Member can only vote in accordance with the resolution of the parliamentary Wing of the registered political party, or abstain from voting.

201. There is no question that s 70 restricts and prohibits a Member's right to exercise his public function under s 50 (1)(e).

Constitution, s 50; OLIPPAC, ss 65, 66, 67, 68, 69, 70, 71, 72, 73

202. The right guaranteed by s 50 (1)(e) is for the purpose of performing one of the most fundamental of the Member's representative duties, as a legislator. Upon election to office, a Member has a right to hold that office for the duration of his term subject to those qualifications provided in s103 of the Constitution. Apart from its primary function as a legislator or law-maker, Parliament has many other important duties and functions. It is Parliament's function to elect the heads of the legislature (Speaker of Parliament), the executive (Head of State) and the executive government (Prime Minister), debates and vote on motions to pass a law and to vote on the proposed law is essential to the performance of its legislative function. Decisions on all questions before a meeting of the Parliament are decided by vote on a motion in accordance with s 114 of the *Constitution* and the *Standing Orders of the Parliament.* The *Constitution* gives every MP the right to introduce private member's bill for enactment by Parliament (s 111) or to debate and vote on a bill

for enactment introduced by the government. All those functions come under the Member's representative duties as a legislator.

203. In its Final Report, the CPC advocated a system of participatory democracy that it considered fitting for Papua New Guinea. In the CPC's Final Report, Chapter 6/1 states:

> *In the kind of participatory democracy we envisage for Papua New Guinea, with maximum emphasis on consultation and consensus, the national legislature must clearly play a central role. We believe that while the executive must be given every opportunity to provide strong leadership in reshaping our new nation to meet the needs and aspirations of our people, it is important also that the leadership does not become autocratic so that the legislature becomes a mere rubber stamp. If government is to be truly responsive to the people, it is vital that those whom the people elect to represent them should be able to contribute actively and effectively to the government of the nation. The legislature should not be seen as a rival to the executive arm, but rather as a full and constructive partner. It can help to ensure the overall effectiveness of government by keeping the executive accountable to the people. This is the approach that underlie our proposals. (our underlining)*

204. It is necessary to understand the role that political parties play in the Parliamentary system under the Westminster system of government because that is the system of government that this country has adopted. Section 3 (1) of the *Parliamentary Powers and Privileges Act* (Ch.24) indeed reminds us of the origin of the Parliamentary system of our government when it states:

> *The PART II.—BASIC POWERS, PRIVILEGES, ETC.*
> *3. Powers, privileges and immunities not elsewhere declared.*
> *(1) The powers (other than legislative powers), privileges and immunities of the Parliament and of the members and committees of the Parliament, to the extent that they are not declared by the provisions of this Act other than this section,* ***are the powers (other than legislative powers), privileges and immunities of the House of Commons of the Parliament of the United Kingdom, and of the members and committees of that House, respectively, at 1 January 1901.****"(our emphasis)*

205. Under the English Westminster system of parliamentary government, the proceedings of the Parliament are considered sacred and only those citizens who are chosen by the people in an election are participants in those proceedings.

206. Counsel did not refer us to any material on the situation in the United Kingdom and other countries which have adopted the Westminster system which would assist us in understanding the rationale for provisions such as those of *OLIPPAC* in question.

207. Our limited research shows none of the Commonwealth countries with a Westminster system of government have similar laws. We are also unable to locate any case law from any of those countries that support restrictions or prohibitions placed on a Member's performance of his representative duties and functions in Parliament.

208. It is widely accepted by convention, tradition and practice in the United Kingdom that an MP must have complete freedom to perform his legislative function on the floor of Parliament except where the MP of his own free choice abstains from participating in the proceedings or the Speaker removes him from the Chamber for disorderly conduct under the Standing Orders of the Parliament. If the Speaker removes the MP from the chamber, it is for a few hours and up to a few days only: see ss56, 58, 59 and 60 of *PNG Parliament Standing Orders*; *Australian Commonwealth Parliament House of Representatives Standing Orders,* Chapter 19 p 743; *McGrath Case* (1913) VP 151; (1914- 17) VP 181, *Tuckey Case* (1987) VP 1985-87 1467-8, *Aldred Case* (1987 - 9) VP 1695-8; PP 498 (1989). The exclusion of an MP for disorderly conduct under the Standing Orders of the Parliament is non-justiciable: *Butadroka v Attorney General of Fiji* (1990) FJHC 55. In the Dominican Republic, suspension of an MP for disorderly conduct is founded on constitutional law and the issue was held to be justiciable. The Court only had power to strictly apply the law: *Sabaroche v Speaker of the House of Assembly & Anor* [1999] I CHRL 79.

209. An MP's right to vote on a proposed law, is considered amongst the most fundamental of his elective and representative duties, and there is no authority to deny the performance of this duty under any circumstance. Similar practice exists in most Common wealth countries which have adopted the Westminster system of government including PNG.

210. The Parliamentary System of the United Kingdom is often described as the oldest and unarguably the best in the commonwealth and perhaps in the world. The success is attributed to a stable political party system. British Constitutional Lawyer and academic Sir Ivor Jennings in his book, *Parliament*, makes this pertinent observation at p. 7:

> *The British Government is one of the strongest, if not the strongest, in the world. It normally has at its command a stable parliamentary majority whose support is based on loyalty to the personnel and acceptance of the principles of the party from which the government is drawn, upon dislike of the alternative which could be drawn from the Opposition, and upon the big stick of dissolution which the government can, if need be, wield.*

211. The political party system in the United Kingdom has developed over many centuries and reached a stage where the allegiance and loyalty of party members and MPs is very strong. For a start, the common people have a fair idea of the role of political parties in the formation and running of government and are able to make an informed decision on candidates for election who contest the election under a particular political party. The elected MPs reciprocate by remaining loyal to the party. The party system is so strong that its influence on decisions made by the Parliament is largely known beforehand because the party instructs its MPs to vote in a certain way on important policy matters and enactment of laws. MPs, more often likely than not, follow their party's instructions in many important matters that come before Parliament. However in respect of some matters which involve personal conscience, the party allows members to vote freely. Examples of maters for free votes include the death penalty, abortion, religious and gay rights.

212. It is significant to note that the party's authority over its MPs in terms of issuing instructions on important matters before the Parliament stops at the Party caucus room. The party's activities and instructions do not extend to the activities of MPs inside the Parliament Chamber. In Parliament the MPs are completely free to decide how they should debate issues and vote.

213. It is not for anyone, not to mention political parties, to influence MPs on how they perform their law-making function in the Parliament Chamber.

214. The closest a party comes to influencing its MP is through the party *Whip,* who is also an MP. The *Whip* or to use the more antique English expression

"*Whipper – in*" is a party faithful appointed by the party to organize members of the party in the Parliament, to debate and vote on matters in accordance with the party's instructions. A Canadian writer once stated: *"What a good Adjutant is to a Regiment, a faithful Whip is to his Party":* See JR Odgers, *Australian Senate Practice,* at p. 236.

215. The *Whip's* duties include implementing strategy and tactics developed in consultation with the party leaders and includes organizing party speakers during debates on a particular bill, ensuring attendance of members in the Parliament Chamber or within ready call when a vote is taken or about to be taken. For historical origin of *Whip* in English parliamentary system, see Sir Ivor Jennings, *Parliament (*2nd ed) Cambridge University Press, London, (1969) at p 84-94. Also see J. R. *Odgers Australian Senate Practice* at p. 235; Erskine May's *Treatise on The Law, Privileges, Proceedings and Usage of Parliament* at p. 240. The *Whip's* duties do not extend to exerting undue or improper influences, issuing veiled threats, intimidation or bribery of a MP or by any means that are aimed at compelling a member of the party to debate and /vote in accordance with the party's instructions/resolutions: see P.S. Pachauri, *The Law of Parliamentary Privilege in UK and India*. His function is one of persuasion than undue pressure before debate or vote is taken and reproach after debate and vote. As Sir Ivor Jennings in his book at p. 88 states:

> *Moreover, a government, particularly… , is weakened in public opinion if its proposals cannot secure the support of its own members. Here again the velvet glove is more effective than the mailed fist. If a whip finds that a member dissents strongly, he promises to draw the Prime Minister's attention to the complaint, suggest that perhaps some modification may be agreed or some inquiry made to satisfy the member's point of view, which he recognizes to be one of great importance; and in the last resort he can always point out that the member could make his protest effective by abstaining from voting on the question. The mailed fist is seldom, if ever employed. The efficient whip, to change the metaphor, rides his horse with free rein, and uses his whip only to keep off the flies. Of one famous whip, the Master of Elibank, it was said, "Persuasion tips his tongue whee'er he talks.*

216. We would imagine that the party *Whip's* duties would not extend beyond the entrance to the Chamber of the House. Whatever the task of persuasion the *Whip* performs, should never occur in the Parliament chamber during the

proceedings of Parliament. His duties should not include exerting undue pressure, undue influence, abuse, force, threat, intimidation or bribery.

217. Sanctions against MPs who act contrary to party's instructions and policies are matters for the party leaders in the party room. In the free encyclopedia the *Wikipedia* published on the internet, the situation in the UK is succinctly stated in the following statement:

> *The outcome of most votes is largely known beforehand, since political parties normally instruct members on how to vote. A party normally entrusts some Members of Parliament, known as whips, with the task of ensuring that all party members vote as desired. Members of Parliament do not tend to vote against such instructions, since those who do so jeopardise promotion, or may be deselected as party candidates for future elections, Ministers, junior ministers and parliamentary private secretaries who vote against the whip's instructions usually resign. Thus the independence of Members of Parliament tends to be low, although "backbench rebellions" by members discontent with their party policies do occur. A member is also traditionally allowed some leeway if the interests of her/his constituency are adversely affected. In some circumstances, however, parties announce "free votes", allowing members to vote as they please. Votes relating to issues of conscience such as abortion and capital punishment are typically free votes.*

218. In the UK, MP's are not permitted to issue circulars to members asking them for their vote on a private member's bill, or to state whether they would vote for or against the bill. The practice has been condemned as proceedings *"contrary to the best usages and traditions of the House, and which would detract from its character"*: *Parliament Debates* ,(1888) 323, cf.1439 cited in Sir Barnett Cocks, *Erskine May's Parliamentary Practice*, Butterworths, London, (1971) at p. 398.

219. In the Unites States, the *US Congress House Rule 3* allows every Member to vote on each question put for vote on a legislation. In a publication of the Committee on Standards of Official Conduct, it is noted:

> *Voting on matters before the House is amongst the most fundamental of a Member's representational duties and historical precedent has taken the position that there is no authority to deprive a Member of the right to vote on the House floor. ...Certain matters go to the very*

heart of a Member's official responsibilities. Chief among them is voting on legislation. ... Thus, as a general matter, the decision on whether to refrain from voting on a particular matter rests with individual Members, rather than the Speaker or the Committee."

220. In the African continent, in democratic countries where the party system is very fluid and unpredictable due to Opposition MPs crossing the floor to join the ruling party or vise versa, some countries introduced disqualification provisions in their laws: see Y.P Ghai & J.P.W.B Mac Auslan, *Public Law and Political Change in Kenya. A Study of the Legal Framework of Governments from Colonial Times to the Present*, Oxford University Press, London (1970), at p. 320-326.

221. There is no provision in any Law, Standing Orders or convention which has come to our attention that compels a MP to debate and vote on an issue or proposed law before the Parliament or to invalidate a vote taken in contravention of the party's instructions.

222. It is obvious to us that under the Westminster system, an MP has complete freedom to engage in debate and to cast his vote. An MP's decision to vote on a proposed law is made in the Parliament free from any external influences or party-resolution made outside of the Parliament. An MP is also protected against undue influence by other MPs in the performance of his representative duties and in particular, in law-making. Nowhere in any literature and standing orders that we have had access to, is there a provision which compels an MP as to how he shall debate and vote on any matter before the parliament. Nowhere is there any such provision that invalidates a vote by an MP against his party's position.

223. The situation in Papua New Guinea is very much similar to that of the United Kingdom and other democratic countries that we have referred to. The position of the Whip as we understand is maintained and his or her role is very much the same as the Whip in the House of Commons in the United Kingdom.

224. In our view s 50 (1) (e) when read liberally provides for the right of a MP to be allowed reasonable opportunity to perform the function of the office to which he or she has been elected, the right to freely express himself or herself in the Parliament during debates on a bill for enactment that concerns the MP's electorate or the nation; and to have complete freedom in debates and to vote on a bill for enactment into law (s 114).

225. We consider that the restrictions and prohibitions imposed on MPs' performance of their representative duties in the Parliament under s 50 (1) (e) of the *Constitution,* by *OLIPPAC* ss 65, 66, 67, 69 (3), 70, 72 (1)(a) & (b) & (2); and 73 (1)(a) & (b) and (2) are unconstitutional for three reasons.

226. Firstly, these *OLIPPAC* provisions restrict and prohibit a Member's exercise of right under s 50 (1) (e). Section 50 (2) authorises a law to only regulate that right. We have already concurred that the enabling provisions of the *Constitution*, ss 12 (4), 111, 114, 127, 130A, to the extent that they authorise an *Organic Law* to restrict or prohibit an MP's exercise of right under s 50(1)(e), are inconsistent with s50(2) and therefore are of no force and effect.

227. Secondly, where a law restricts or prohibits the exercise of right under s 50, the law is invalid for this reason alone, in which case it is not necessary to consider the latter part of s 50 (2) : *SCR No. 2 of 1982*; *The State v NTN.* We are satisfied that the *OLIPPAC* provisions referred to are also unconstitutional for this reason.

228. Thirdly, we are satisfied that the referrer and those intervenors supporting the referror have succeeded in establishing a prima facie case of infringement of their s 50 (1) e) right and that the *OLIPPAC* provisions are not reasonably justifiable for the purpose for which they have been enacted, in a democratic society having proper regard for the rights and dignity of mankind. Those intervenors arguing the negative case have failed to discharge the burden placed on them to negate the case that has been established.

229. We have considered the importance of the unimpeded performance of MPs' representative duties in the Parliament to be of paramount and fundamental importance that goes beyond the reach of petty party politics which is played outside the chamber of the Parliament. We consider a MP's right to debate and to vote on a motion of no confidence on the Prime Minister, Ministry headed by the Prime Minister or a Minister appointed by the Prime Minister; a vote on the election of a Prime Minister; a vote on the National Budget; and a vote on the enactment of a Constitutional law; to be amongst the most fundamental of a MP's representative duties of which the MP has a right to be allowed to perform the functions of his office. It must be a real exercise of legislative power in the Parliament and not one that is pre-determined by decisions made and instructions issued outside of the Parliament chamber, whether that be in the Party boardroom or in the boardroom of the *Parliamentary Wing* of the party or elsewhere. It is also obvious from our discussions on the parliamentary system of democratic

governments under the Westminster system that a prohibition against a MP's exercise of or performance of his function as a legislator in the Parliament is unheard of in any democratic country. We are not persuaded that this law is one that is reasonably justifiable under any circumstances in any system of participatory government that is modeled under the Westminster system of democratic government or any constitutional democracies for that matter.

230. For the foregoing reasons and for the reasons we have given in relation to s 47 of the *Constitution*, we are of the view that OLIPPAC, ss 65, 66, 67, 69 (3), 70, 72 (1)(a) & (b) & (2); and s 73 (1)(a) & (b) and (2) are inconsistent with s 50 of the *Constitution* and therefore declared unconstitutional and invalid.

V. POWERS PRIVILEGES AND IMMUNITIES OF PARLIAMENT AND ITS MEMBERS (QUESTIONS 7 – 15): *CONSTITUTION*, s 115; *OLIPPAC*, ss 65, 66, 67, 70, 72, & 73

231. The law is found in *Constitution* s 115; *Parliamentary Powers and Privileges Act* (Chapter 24) and the *Standing Orders of the Parliament.*

232. Section 115 of the *Constitution* provides as follows:

> ***115. Parliamentary privileges, etc.***
>
> *(1)* ***The powers (other than legislative powers), privileges and immunities of the Parliament and of its members*** *and committees are as prescribed by or under this section and by any other provision of this Constitution.*
>
> *(2)* ***There shall be freedom of speech, debate and proceeding in the Parliament, and the exercise of those freedoms shall not be questioned in any court or in any proceedings whatever (otherwise than in proceedings in the Parliament or before a committee of the Parliament).***
>
> *(3) No member of the Parliament is subject to the jurisdiction of any court in respect of the exercise of his powers or the performance of his functions, duties or responsibilities as such, but this subsection does not affect the operation of Division III.2 (leadership code).*

(4) No member of the Parliament is liable to civil or criminal proceedings, arrest, imprisonment, fine, damages or compensation by reason of any matter or thing that he has brought by petition, question, bill, resolution, motion or otherwise, or has said before or submitted to the Parliament or a committee of the Parliament.

(5) No member of the Parliament or other person is liable to civil or criminal proceedings, arrest, imprisonment, fine, damages or compensation by reason of—
(a) an act done under the authority of the Parliament or under an order of the Parliament or a committee of the Parliament; or
(b) words spoken or used, or a document or writing made or produced, under an order or summons made or issued under the authority of the Parliament or a committee of the Parliament.

(6) Members of the Parliament are free from arrest for civil debt during meetings of the Parliament and during the period commencing three days before, and ending three days after, a meeting when they are travelling from their respective electorates to attend the meeting or are returning to their electorates from the meeting.

(7) No process issued by any court in the exercise of its civil jurisdiction shall be served or executed through the Speaker, an officer of the Parliament or a member of the Parliamentary Service, or within the precincts of the Parliament (as defined by or under an Act of the Parliament) while it is sitting.

(8) The powers conferred by Section 109 (general powers of law-making) extend to the making of laws—
(a) declaring further powers (other than legislative powers), privileges and immunities of the Parliament, and of its members and committees; and
(b) providing for the manner in which powers, privileges and immunities provided for by or under this section may be exercised or upheld.

(9) The powers and privileges conferred by or under this section do not and shall not include the power to impose or provide for the imposition of a fine, imprisonment, forfeiture of property or other penalty of a criminal nature, but this subsection does not prevent the

creation of offences for the purposes of this section that are triable within the National Judicial System." (emphasis is ours).

233. Section 2 of the *Parliamentary Powers and Privileges Act* (Ch. No. 24). says the Act does not limit the power or authority of the Speaker or the Parliament or a Committee of the Parliament under the Standing Orders or any other law, and its provisions are in addition to, and not in derogation of any such power or authority. Section 3 (1) is an interesting provision. It is in the following terms:

> *The PART II.—BASIC POWERS, PRIVILEGES, ETC.*
> *3. Powers, privileges and immunities not elsewhere declared.*
> *(1) The powers (other than legislative powers), privileges and immunities of the Parliament and of the members and committees of the Parliament, to the extent that they are not declared by the provisions of this Act other than this section,* ***are the powers (other than legislative powers), privileges and immunities of the House of Commons of the Parliament of the United Kingdom, and of the members and committees of that House, respectively, at 1 January 1901.****(our emphasis)*

234. The *Standing Orders of the Parliament* are made under *Constitution*, s133. That provision authorises the making of Standing orders and the rules and orders in respect of the order and conduct of the Parliament's business and its proceedings, including the proceedings of its committees.

Overview of Constitution, s 115

235. For purposes of this Reference the relevant provisions of s115 of the *Constitution* are subsections (2) to (7) inclusive. What is prescribed in subsection (2) is very critical to a Member's right as an elected leader to represent his electorate in the Parliament once in office. He must be free to express himself, take part in debates and proceedings. For exercising these freedoms he cannot be liable to face any civil action or criminal prosecution. In normal circumstances, those are his rights as Member of Parliament, representing his voters, for expressing his or their views on the floor of the Parliament. It is said that a Member of Parliament is the voters' mouth-piece.

236. At the time the *Constitution* was adopted, there were in existence an Ordinance and Standing Orders which protected parliamentary privileges and immunities. The CPC was conscious of the importance of parliamentary privileges

and immunities and that the *Constitution* expressly guarantees freedoms of speech, debate and proceedings. In Part I of its Final Report, Chapter 6, at paragraphs 55 – 56, the CPC stated:

> ***Privileges and immunities***
>
> *55. There is already an Ordinance dealing with privileges and immunities in respect of the House of Assembly and its members. Detailed provisions should remain in ordinary legislation, and we therefore propose that, subject to the Constitution, parliament should be authorized to determine these matters by law.*
>
> *56. We believe, however, that freedom of speech, debate and proceedings in the National Parliament is of such vital importance that it should be protected in the Constitution itself, and should not be questioned in any court or place outside parliament. In addition to this general recommendation, we propose a number of specific privileges and immunities which stem directly from it; these provide protection for the Speaker or any officer of parliament in respect of the exercise of powers relating to their office; protection of members in respect of any matters they bring before parliament (or any of its committees)by way of petition, motions or bills; and limited protection for members in respect of civil proceedings while parliament is meeting. We believe that these provisions are the minimum necessary to ensure that members are free to participate fully in the work of parliament, without fear or favour.*

237. Section 115 (1) affirms the importance of those privileges by stating that the *Constitution* is the source of those privileges.

238. Section 115 (2) gives a Member a right to free speech, including a right to debate issues raised in Parliament including bills introduced in the Parliament by Members.

239. And subsection (3) reiterates that unless a Member is charged with a leadership offence, a Member is not subject to the jurisdiction of any Court for exercising his powers or performing his duties, functions and responsibilities in Parliament.

240. Subsection (4) indemnifies a Member against civil or criminal prosecution in respect of anything said or done in the Parliament or a Committee of Parliament.

241. Subsection (5) provides immunity to a Member against civil action or criminal prosecution

242. Subsection (6) extends protection to members of Parliament from being arrested for civil debts during the Parliament session which includes three days before and three days after the end of the meeting.

243. Subsection (7) prohibits service of court documents in respect of any civil proceeding on anyone in the precincts of the Parliament while it is sitting.

Determination of issues

244. Parliament is a special institution. The law making power of the people is vested in the Parliament (see s100 of *Constitution*). An entity mandated to make laws must be given powers, privileges and immunities, in order for it to perform that role of law making. In issue is the integrity of the democratic system of government we adopted in our *Constitution* through the Constituent Assembly.

245. The Parliament's law-making power is exercised inside the chamber of the Parliament. The act of law-making goes to the heart of government; it is performed by elected representatives in complete freedom. As such the practices, procedures and processes by which the laws are enacted, are zealously guarded and protected by the *Constitution*.

246. The words *"parliamentary privileges"* in s 115 is a broad concept which in our view embraces a Member's rights. Applying the words this way gives a fair and liberal meaning to the section and it makes sense of the section. The office a Member holds entails the very essential element of a Member's right to freely exercise his mind on the issues raised and debated in the Parliament and to speak and express his views on such issues in accordance with what his conscience tells him. The rights and the privileges given to a Member to speak and to debate issues in Parliament are to be read subject to the *Constitution*, including the *NGDP* and the qualified rights, which for purposes of this *Reference* are ss. 45, 46 and 47, See; *Haiveta -v- Wingti (No.1)* [1994] PNGLR 160.

247. The Oxford Dictionary also defines the word *"privilege"* as:

> *"A right, advantage, or immunity, belonging to a person, class or office or a special right of members of Parliament to speak freely in*

Parliament without the risk of prosecution they might incur if they said the same thing outside.

248. Members of our Parliament not only make laws in Parliament but they also make a lot of important policy decisions in the National Executive Council. Collectively therefore, Members of Parliament do make a lot of very important decisions which may affect the lives of people and the way the country is run. In order for them to perform those functions they must have the privileges and immunities and freedom of speech, debate and proceedings. These privileges carry with them an obligation to use these freedoms with care and responsibility.

249. Parliamentary privilege was first claimed centuries ago when the English House of Commons was struggling to establish a distinct role for itself in Parliament. The privilege they were seeking was to protect the House of Commons and its Members not from the people, but from the power and interference of the King and the House of Lords.

250. The rules, principles, doctrines and conventions we adopted into our constitutional scheme have their origin in English common law and constitutional history.

251. Our parliamentary system of government is, therefore, derived directly from the English parliamentary system that evolved over centuries, and applied to its colonies and territories including PNG.

252. Throughout English history, all power, legislative and executive was descended from the Crown. Initially the monarchs had absolute power, but this was progressively reduced over time by documents such as the *Magna Carta* (Great Charter) and the *Bill of Rights* which was signed by King John in 1215, and by King William (of Orange) and Queen Mary in 1689 respectively.

253. The term *parliament* is derived from the English/French term *parlement,* meaning "speaking" or "to speak". It was first used in the 13th century to describe the gatherings and conferences at the instance of the king, developing later a national assembly or a body of people assembled for discussion of matters of national affairs: see, Joel Asher's *Australian Protocol and Procedures*

254. It began, therefore, as a group of people called together to advise the king when he found that he was not able to carry out the government of the country without such help, more particularly the raising of money to fight his many wars

on the ‘continent’. Thus, this assembly of advisors or counselors of the early English kings constituted or became the ‘parliament’.

255. It is of course a matter of constitutional historical record that the modern democratic systems of government today that are based on the Westminster system of parliamentary government was the result or culmination of the long struggle between parliament and absolute monarchs who believed in and relied on the concept of the *Divine Right of Kings* first formally propagated by King James 1.

256. Our democratic system is, therefore, a beneficiary of the hard and long struggles of early English parliaments to reduce or control the absolute powers of the monarch, and render parliament, the people’s assembly, more representative and independent.

257. The primary function of parliament was and is: discussion, debate and decision (on questions decided in accordance with the majority of votes of Members present). This cannot be achieved when people’s duly elected representatives are not free and independent.

258. To preserve the hard-won powers of parliament, and thus enable the unrestricted and unhindered exercise of these powers, certain rules were promulgated. Under these rules parliament and its members were accorded certain legal rights described as: *privileges and immunities*. One very important right in this respect is the right to *Freedom of Speech, Debates and Proceedings in Parliament*. This right preserves the security and independence of parliamentarians.

259. This right originates from Article 9 of the *Bill of Rights* which is in the following terms:

> *That the Freedom of Speech and Debates or Proceeding in Parliament ought not to be impeached or questioned in any court or place out of Parliament.*

260. On 19 June 1998, the Heads of governments of the Commonwealth endorsed the recommendations of their law Ministers on the *Commonwealth (Latimer House) Principles on the Three Branches of Government*. The Latimer House Principles are guidelines on good practice governing relations between the Executive, Parliament and the Judiciary in the promotion of good governance, the rule of law and human rights to ensure the effective implementation of the ‘Harare

Principles'. The *Latimer House Principles* re-affirmed Article 9 of the Bill of Rights. Under Guideline 111 which is in respect of 'Preserving the Independence of Parliamentarians', clause 2 provides for the security of members (of parliament) during their parliamentary term, which was considered to be fundamental to parliamentary independence. Clause 2 is in the following terms:

> *(a) the expulsion of members from parliament as a penalty for leaving their parties (floor-crossing) should be viewed as a possible infringement of members' independence; anti-defection measures may be necessary in some jurisdictions to deal with corrupt practices;*
> *(b) laws allowing for the recall of members during their elected term should be viewed with caution, as a potential threat to the independence of members;*
> *(c) the cessation of membership of a political party of itself should not lead to loss of a member's seat.*

261. Clause 3 of this Guideline reads as follows:

> *In the discharge of their functions, members should be free from improper pressures and accordingly:*
>
> *(a) the criminal law and the use of defamation proceedings are not appropriate mechanisms for restricting legitimate criticism of government or the parliament;*
> *(b) the defence of qualified privilege with respect to reports of parliamentary proceedings should be drawn as broadly as possible to permit full public reporting and discussion of public affairs;*
> *(c) the offence of contempt of parliament should be drawn as narrowly as possible.*

262. The term *parliamentary privilege* refers in general to the special legal rights and immunities (exemptions from the ordinary laws) which apply to legislatures modeled on the British system. Ours is such a legislature. These privileges apply also to committees and members, and to other participants in its proceedings.

263. The most authoritative exponent on parliamentary practice and procedures, *Erskine May (supra),* states this on the 'necessity of freedom of speech':

Freedom of speech is a privilege essential to every free council or legislature. Its principle was well stated by the Commons, at a conference on 11 December 1667, the conference which resulted in the reversal of the conviction in 1629 of Sir John Eliot and others:

> *"No man can doubt," they said, "but whatever is once enacted is lawful, but nothing can come into an Act of Parliament, but it must first be affirmed or propounded by somebody: so that if the Act can wrong nobody, no more can the first propounding. The members must be as free as the houses; an Act of Parliament cannot disturb the state; therefore the debate that tends to it cannot; for it must be propounded and debated before it can be enacted.*

This important privilege has been recognised and confirmed as part of the law of the land.

According to Elsynge, the "Commons did oftentimes, under Edward 111, discuss and debate amongst themselves many things concerning the king's prerogative, and agreed upon petitions for laws to be made directly against his prerogative, as may appear by divers of the said petitions; yet they were never interrupted in their consultations, nor received check for the same, as may appear also by the answers to the said petitions" (Elsynge, 177).

There could be no assured government by the people, or any part of the people, unless their representatives had unquestioned possession of this privilege. Thus only House of Commons was concerned in its vindication, and only in its connection with that House could it be a matter of constitutional importance. The Lords, of course, possess the right equally with the Commons, and thus nit is considered one of the common privileges of Parliament. But it seems never to have been an issue with the Lords.

264. Section 133 of the *Constitution* makes provisions for 'Standing Orders' of the National Parliament in the following terms:

> *The Parliament may make Standing Orders and other rules and orders in respect of the order and conduct of its business and proceedings and the business and proceedings of its Committees, and*

of such other matters as by law are required or permitted to be prescribed or provided for the Standing Orders of Parliament.

265. Such Standing Orders were promulgated as the first legislative act of the National Parliament under the *Constitution.* Part IX provides for Rules of Debate. In matters of 'Privilege', Part X makes provisions. But specifically on the important subject of 'Parliamentary Privileges, etc' the *Constitution* itself makes provisions in an exhaustive way matters that attract the operation of the rights, privileges and immunities discussed above, under s 115 (2).

266. The first of the specific privileges of parliament is, as noted already, the freedom of speech and debate that has its origin in the 1689 *Bill of Rights*. Thus, defamatory statements in parliament are not actionable in a court of law, though any outrageous statements might be the subject of disciplinary action by the Speaker or the House itself. The celebrated 1839 English case of *Stockdale v Hansard* is about the publication of defamatory matter outside the House of Commons. The case caused a conflict between the House and the courts of law.

267. These privileges and immunities accorded are necessary in order for all Members of Parliament to perform their parliamentary duties and functions. These privileges and immunities as envisaged by the *Constitution* are to be enjoyed by each and every Member of Parliament, be he in the government, the opposition, and be he a member of a registered political party or an independent. Moreover the privileges and immunities are also enjoyed collectively as a body of Members of Parliament as a whole for the protection of its members as well as Parliaments own authority and dignity. They are also enjoyed by Parliamentary Committees.

268. The government's right to introduce bills for enactment, the Members' right to introduce private members bills for enactment, Member's right to debate on motions for enactment of bills, and MP's right to vote on the motions for enactment of bills is governed by *Standing Orders of the Parliament* and *Constitution*, ss 111 and 114. Those provisions are to be read consistently with the freedom of speech, debate and proceedings in the Parliament given to Parliament and its Members by s 115 (2).

269. The rights and privileges accorded to Members by s115 are given by Constitutional Law and privileges and they cannot be taken away by any other law, especially the freedoms of speech, debate and proceedings which are pertinent to this Reference. These are essential aspects of a Member's duties and responsibilities to engage in full and meaningful debates in the Parliament on

behalf of his people. Thus, any law which interferes with and takes away these rights and privileges would be in direct contravention of s115 of the *Constitution,* see; *S.C.R. No. 2 of 1982; Re Organic Law* [1982] PNGLR 214 at 235-237 per Kapi J (as he then was).

270. We are satisfied that *OLIPPAC* ss 65, 66, 67, 69, 70, 72 and 73 offend against the powers, privileges and immunities of the Parliament and its Members, both the independent Members and Members of registered political parties, for the following reasons:

> (1) For the reasons we have given in respect of s 50 (1)(e) of the *Constitution*, these provisions restrict and prohibit a member in the performance of his duties as a Member of the Parliament in relation to exercise of his public function, to exercise the powers and enjoyment of privileges and immunities under s 115. The restrictions and prohibitions that are imposed by these provisions in respect of the matters set out in ss 65(1)(c), 69, 70, 72, and 73 contravenes a Member's right to freedom of speech, debate and vote and proceedings in the parliament generally under s115.
>
> (2) As we have concluded, the powers, privileges and immunities under s115 are subject to the *Standing Orders*, absolute. Those powers, privileges and immunities can only be qualified by an amendment to the *Constitution* or by an *Organic Law* that is expressly authorised by the *Constitution* for that purpose. In the present case, neither of those have been met. The amendment to the *Constitution* and *OLIPPAC* do not relate to s 115.

271. For the foregoing reasons, we are of the view that these provisions are unconstitutional and therefore invalid.

VI. FUNDING OF POLITICAL PARTIES
(Question 16), *Constitution*, ss 129(c) &130 (1) (b); *OLIPPAC*, s 81.

272. Question 16 reads:

> ***16. Section 81 of the Organic Law:***
>
> *16.1 Is Section 81 which allows non-citizens to contribute to the Central Fund and a registered political party and a candidate inconsistent with Section 129(1)(c) and 130(1)(b) of the Constitution?"*

16.2 Is Section 81 contrary to the minimum standards of leadership specified in Section 27 of the Constitution?

273. *OLIPPAC*, s 81 provides:

81. Contributions from non-citizens.

(1) Subject to this section, a non-citizen may contribute to—
(a) the Central Fund, to an unlimited extent; and
(b) a registered political party, to an extent provided by Subsection (2)(a); and
(c) a candidate, to an extent provided by Subsection (2)(b).
(2) Subject to Subsection (4), contributions made by a non-citizen—
(a) under Subsection (1)(b)—shall not exceed the sum of K500,000.00 in total in any calendar year; and
(b) under Subsection (1)(c)—shall not exceed the sum of K500,000.00 in respect of
any one election.
(3) Subject to Subsection (4), a non-citizen shall not—
(a) contribute, directly or indirectly, to a political party which is not a registered political party; or
(b) enter into any scheme to defeat the provisions of Subsection (2) or of Paragraph (a).
(4) Subsections (2) and (3) do not apply to a loan made to—
(a) a political party; or
(b) a candidate at an election,
by a non-citizen corporation which is licensed as a bank or financial institution under the Banks and Financial Institutions Act 2000, where the loan and the terms of the loan are similar to those available in the normal course of business of the bank or financial institution.
(5) A non-citizen, who makes a contribution to—
(a) a registered political party; or
(b) a candidate at an election,
shall, within 30 days of making the contribution, inform the Registrar of—
(c) the amount of the contribution; and

(d) the name of the political party or candidate, as the case may be, to which or whom the contribution was made; and

(e) the date on which the contribution was made; and

(f) such other matters concerning the contribution as may be prescribed.

(6) A person, who fails to comply with Subsection (5), is guilty of an offence.

Penalty: A fine not exceeding the amount of the contribution in relation to which the offence was committed.

(7) A—

(a) registered political party; or

(b) candidate at an election,

shall, within 30 days of receiving a contribution from a non-citizen, inform the Registrar of—

(c) the amount of the contribution; and

(d) the name of the non-citizen from whom the contribution was received; and

(e) the date on which the contribution was made; and

(f) such other matters concerning the contribution as may be prescribed.

(8) A—

(a) registered political party which; or

(b) candidate who,

fails to comply with Subsection (7), is guilty of an offence.

Penalty: A fine not exceeding the amount of the contribution in relation to which the offence was committed.

274. We answer in the affirmative to Question 16. It is conceded by the Interveners for the negative. It is not difficult to understand why s 81 is inconsistent with ss129 (1) (c) and130 (1) (b) of the *Constitution*. Section 129 (1)(c) provides for an *Organic Law* to make provision for *prohibiting* non-citizens from holding membership of political parties and contributing to the funds of those parties or any political party. Section 130 (1) (b) provides for an *Organic Law* to make provision for *prohibiting* a candidate or former candidate for election from accepting from a non-citizen any assistance (financial or otherwise) in respect of his candidate. *OLIPPAC*, s 81 allows those matters which are expressly prohibited by ss129 (1) (c) and130 (1) (b). An *Organic Law* provision in respect of a matter that is not authorized to be made by an *Organic Law* is inconsistent with the *Constitution* and therefore invalid: *Constitution*, ss 10,12 (1) (a) and (b).

275. Section 81 is therefore unconstitutional and invalid. In the light of our answer to the first part of the question, it is unnecessary to consider the second part of the question.

VII. SUMMARY OF ANSWERS TO QUESTIONS IN THE REFERENCE

276. In summary, our answers to the questions are as follows:

1. General questions - Question 6 & 17:

(1) Except to the extent that s 50 (1(e) (qualified right) of the *Constitution* is affected by amendments made to ss12 (4), 127 and 130, those amendments are authorized by the *Constitution*.

(2) To the extent that those amendments of the *Constitution* restrict or prohibit the exercise of the right given to Members of Parliament by s 50 (1) (e) of the *Constitution*, they are inconsistent with the existing qualification under s50 (2) and therefore of no force and effect.

(3) Except to the extent that *OLIPPAC* provisions the subject of this Reference restrict or prohibit the exercise of right under s 50 (1) (e), *OLIPPAC* complies with the formal requirements of s12, s127 and s130A of the *Constitution*.

2. Specific questions:

- Question 7: Yes, *OLIPPAC*, s 57 is unconstitutional.
- Question 8: Yes, *OLIPPAC*, s 58 is unconstitutional.
- Question 9: Yes, *OLIPPAC*, s 59 is unconstitutional.
- Question 10: Yes, *OLIPPAC*, s 60 is unconstitutional.
- Question 11: Yes, *OLIPPAC*, s 61 is unconstitutional.
- Question 12: Yes, *OLIPPAC*, s 69 is unconstitutional.
- Question 13: Yes, *OLIPPAC*, s 70 is unconstitutional.
- Question 14: Yes, *OLIPPAC*, s 72 is unconstitutional.
- Question 15: Yes, *OLIPPAC*, s 73 (1) (b) is unconstitutional.
- Question 16: Yes, *OLIPPAC*, s 81 is unconstitutional.

277. The answers given to questions 6 to 17 also affect other provisions of the *Constitution* and *OLIPPAC* that are not mentioned in the reference but they are directly related to those provisions. We have in our deliberations considered those other provisions. The effect of the answers given to the questions in the Reference is that they are also rendered invalid. Those provisions are as follows:

- *Constitution*, ss12 (4) and 114, only to the extent that they authorise an Organic Law to restrict and prohibit the exercise of a Members of Parliament's right under s 50(1)(e) of the *Constitution*.

- *OLIPPAC*, ss 65, 66, 67, 70 (3), 72 (2), 73 (1) (a) & (2).

278. In the light of these answers, it is unnecessary to answer the bulk of the sub-questions under each question that relates to *Constitution*, ss 27, 45, 46, 55, 99, 100, 103, 104, and109. We also decline to answer those questions for the reason that the issues raised in those questions raise non-justiciable matters, or that the questions are too general, ambiguous, vague, repetitive or duplicitous.

VIII. EFFECT OF THIS RULING ON PROVISIONS OF THE CONSTITUTION AND OLIPPAC THAT ARE NOT MENTIONED IN THE REFERENCE

279. Counsel for the affirmative submit that if all the questions were answered in the affirmative, the whole of *OLIPPAC* should, as a consequence, be declared unconstitutional. However we consider that the operation of the bulk of the *OLIPPAC* provisions are not affected by this decision and remain in force.

Henaos Lawyers: *Lawyers for the Referrer*
Jerewai Lawyers: *Lawyers for 1st & 2nd Interveners*
Attorney General: *Lawyers for 3rd Intervener*
Kelly Naru Lawyers: *Lawyers for 4th & 5th Interveners*
AD Lora Lawyers: *Lawyers for 6th Intervener*
Warner Shand Lawyers: *Lawyers for 7th Intervener*