SOURCES OF LAW UNDER THE CONSTITUTION OF VANUATU

J. C. Corrin*

On 31st July 1980, Vanuatu became independent. For the preceding seventy-four years the country had been the subject of an Anglo-French Condominium, an arrangement which arose for commercial reasons. In the 1870's the French moved into what had formerly been a primarily British trading area. In 1878 a policy of 'mutual exclusiveness' was agreed upon, followed in 1887 by a Convention establishing a joint naval commission to protect the lives and property of British and French subjects. However, this did not remedy the problems caused by a lack of satisfactory civil law to govern commercial transactions. In 1906, therefore, a further Convention between the two countries established the Condominium (still referred to by the Islanders as 'The Pandemonium'). This Convention was modified by the Anglo-French Protocol of 1914[1] under which, with some amendments,[2] the Condominium was governed until independence. The Convention established 'a region of joint influence, in which the subjects and citizens of the two signatory powers shall enjoy equal rights of residence, personal protection, and trade'.[3] Each power had sovereignty over its own subjects or citizens and other immigrants who opted for its legal system.[4] New Hebridians did not come under the jurisdiction of either power, a factor which added greatly to the impracticability of the system.

As an example of the complexities of such a system Article 10 of the Protocol has been set out in full:—

ARTICLE 10

Composition of the Joint Court

1. A Joint Court shall be established consisting of three judges, of whom one shall be President. A fourth officer shall act as Public Prosecutor and shall at the same time perform the duties of Examining Magistrate.
   The court shall be assisted by a Registrar and the requisite staff.
2. Each of the two Governments shall appoint one judge.
   His Majesty, the King of Spain shall be invited to appoint the third, who shall be President of the Court. The Public Prosecutor shall be appointed in the same manner.
   Neither of these officers shall be a British subject or a French citizen.
   The Registrar and the staff shall be appointed by the President.
3. If either of the two Governments considers that it has a cause of complaint against the President of the Joint Court, or the Public Prosecutor, it shall inform the other Government.

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* B.A.(Hons.) Law, M.Phil., Solicitor (England & Wales), Barrister (Qld.), Lecturer-in-Law,Queensland Institute of Technology.

1. Ratified in 1922 by the New Hebrides Order in Council 1922, S.R. & O. 1922 (No. 717) (U.K.) (The Protocol is scheduled to the Order in Council). The Order was repealed with effect from 30th July 1980 by the New Hebrides Act 1980 (U.K.).
2. The most important being the replacement of the Advisory Council with a Representative Assembly.
3. Protocol of 6th August 1914, Art. 1.1.
4. Protocol of 6th August 1914, Art. 1.2.

If both Governments agree, they shall request His Majesty, the King of Spain to appoint another person to fill the post.
If they disagree, His Majesty, the King of Spain shall determine whether the complaint is justified and whether the officer complained of shall be retained or superseded.
The arrangements as to salaries, travelling allowances, leave, acting appointments, and, in general, all matters relating to the working of the Joint Court, shall be settled by common agreement between the two Governments.

Recent History

The arrangements under the Condominium were obviously unsatisfactory — two of everything (e.g. two sets of postage stamps, two sets of coins, two police forces, two different educational systems) except for languages, of which there were three, English, French and Bislama, a pidgin dialect. This dual system produced ingrained divisions between the political parties — the Anglophone, Vanuaaku Pati (V.P.) and the Francophone Moderates. It also produced resistance movements such as the John Frum Movement, which still exists today, and promises a new earthly paradise to followers; all Europeans will go home and their material wealth will be transferred to the people.

In the 1970's steps were gradually taken towards independence. Elections for a Representative Assembly were held on 14 November 1979 and the V.P., led by Father Walter Lini, won a substantial majority. However Jimmy Stephens, leader of the Nagriamel,[5] an opposition movement formed on the island of Espiritu Santo, alleged that the elections were unfair. Nagriamel formed a coalition with French colonists, and they became jointly known as the Vemarana Movement. In December 1979, they chased government officials from Espiritu Santo and in January 1980 raised their flag in Luganville. They declared the independence of Santo and parts of the Northern District of the New Hebrides. Talks held in Europe in an attempt to reach a compromise were a complete failure. In late May an armed rebellion was launched by Vemarana, Santo was taken over and government officials and police kidnapped. The Vanuatu Government responded by imposing a blockade on Santo and evacuated 2,000 British subjects and V.P. members from the Island. British and French forces were sent in as peace keepers but the Resident Commissioners refused to take any positive steps to end the rebellion.

In mid August, after the official independence of Vanuatu had already been declared on 30 July, the new Vanuatu Government called on Papua New Guinea for help. The Papua New Guinea Defence Force moved in and the resistance collapsed, although not before extensive damage and looting occurred. Jimmy Stephens was arrested and, after escaping twice from the British jail, is now held in the old French jail.

The independent state of Vanuatu is governed by a Constitution drawn up during the struggles discussed above.[6] It was drafted by a Constitutional Committee, composed of representatives of the various political parties, assisted by British and French advisers. It is hardly suprising that alternative Constitutions (at least three), all described as 'Federal', were drawn up for Nagriamel.[7] The Nagriamel proposals form a sharp contrast with the Westminster style Constitution eventually adopted.

The spirit of the Vanuatu Constitution is epitomised in the preamble which states:—

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5. A group formed originally to protest against the effect of European land alienation and culture on local customs. The group gained backing from French and American business sources.
6. Constitution of Vanuatu 1980, contained in an Exchange of Notes between the U.K. and French governments. (7808, Treaty Series No. 17 (1980) (U.K.), as amended by Act No. 15 of 1981 (Vanuatu)).
7. See P. Larmour, 'Federal Constitutions that never were: "Nagriamel" in the New Hebrides and, the Western Breakaway Movement in the Solomon Islands', in P. Sack, ed., *Pacific Constitutions*, (1982) at 141.

We the people of the New Hebrides,[8]
Proud of our struggle for freedom,
Determined to safeguard the achievements of this struggle,
Cherishing our ethnic linguistic and cultural diversity,
Mindful at the same time of our common destiny,
Hereby proclaim the establishment of the united and free Republic of the New Hebrides founded on traditional Melanesian values, faith in God, and Christian principles,
And for this purpose give ourselves this Constitution.

This article focuses on the sources of law provided for by the Constitution. In particular it examines the role of Parliament and the Courts in law making, Custom and Chiefly Power, and Land and Custom.

Pre-Independence Sources of Law

The law under the Condominium came from the following sources:

1. English legislation and case law — applied only to British subjects and those who had elected to be subject to British law.
2. Queen's Regulations — (made, altered or revoked by the High Commissioner or Resident Commissioner), applied as in 1.
3. The French Civil Code — applied only to French citizens and those who elected to be subject to French law.
4. French Regulations — equivalent to the English Regulations mentioned in 2 above, applied as in 3 above.
5. Local Regulations — issued jointly by the High Commissioners of France and the United Kingdom[9] for the 'maintenance of order and for the good government of the group, and for carrying the present Convention into effect'. Such Regulations were binding on all inhabitants of the territory.
6. Native laws and customs — as codified by the High Commissioners and Resident Commissioners.[10] The native laws and customs were to be included in the Code 'where not contrary to the dictates of humanity and the maintenance of order',[11] The Code was also subject to such modifications as the Commissioners considered necessary.

Law Under The Constitution

1. **The Constitution and Statutes of the Vanuatu Parliament**
   The supreme source of law is of course the Constitution and this is expressly stated in s. 2 thereof. The Constitution confers legislative power on the Vanuatu Parliament by means of the well-worn common law phrase: 'Parliament may make laws for the peace, order and good government of the New Hebrides'.[12] The Vanuatu Parliament has not been slow to use its powers and has passed comprehensive schemes of legislation in, inter alia, the fields of health,[13] gaming,[14] criminal law,[15] and land law.[16]

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8. The official print of the Vanuatu Constitution, as issued, still used the old designation of New Hebrides. This should now be read as 'Vanuatu'.
9. Protocol of 6th August 1914, Art. 7.
10. Protocol of 6th August 1914, Art. 8.4.
11. Protocol of 6th August 1914, Art. 8.4.
12. S.16(1). For a criticism of the use of this phrase see J. Lynch, 'The Constitution of Vanuatu', (1982) 113 No. 3. The *Parliamentarian* 138 at 146.
13. Health Practitioners Act No. 5 of 1982.
14. Gaming (Control) Act No. 23 of 1983.
15. Penal Code Act No. 17 of 1981. It is interesting to note that the Act provides for the rehabilitation of offenders by expunging convictions after the lapse of a certain period of time (ss. 57 & 58), a progressive step which has yet to be taken in Australia.
16. E.g. The Land Leases Act No. 4 of 1983.

2. **Pre-Independence Rules and Regulations**
   The Constitution provides in s. 93(1) and (2) for all Joint Regulations and other British and French laws in force or applied in the New Hebrides immediately before independence to continue in force until otherwise provided by Parliament. The Regulations are to be construed with the necessary adaptations to bring them into line with the Constitution. British and French laws only apply to the extent that they are not incompatible with the independent status of the New Hebrides and, wherever possible, taking due account of custom. In fact many of the pre-independence laws have been repealed and replaced with Acts appropriate to local circumstances. For example a new Penal Code Act has been passed and specific applicability to local circumstances is evident in its provisions.[17]
3. **Custom**
   Section 93(3) specifically provides that customary law shall continue to have effect as part of the law of the Republic. This is backed up by s. 45(1) which requires the courts, in the absence of an applicable rule of law, to decide matters according to 'substantial justice and wherever possible in conformity with custom'.
   Also, in Chapter 8, the 'Justice' section of the Constitution, s. 49 states that Parliament may provide for the manner of the ascertainment of rules of custom. In pursuance of this power Parliament has provided for the recording of any decision applying customary law in the Island Courts.[18]
4. **Precedent**
   Until recently precedent was not a source of law in Vanuatu, as there was no system of law reporting. However as mentioned above precedents involving customary law are now being recorded in the Island Courts.

Parliament

Parliament is dealt with in Chapter 4 of the Constitution. It consists of a single chamber known simply as 'Parliament'. As already mentioned, it has the capacity to pass laws for the 'peace, order and good government of the New Hebrides'.[19]

Bills are introduced by members, Ministers, or the Prime Minister and are usually passed by a simple majority vote. However, there are several safeguards governing the law-making power, contained in the Constitution:

1. With regard to certain legislation a special procedure must be followed. In the case of regional government legislation, a two-thirds majority is necessary.[20] More importantly, amendments to the Constitution require a two-thirds majority at a special sitting of Parliament at which three-quarters of the members are present. If there is no such quorum on the first sitting, Parliament may meet and make a decision by the same majority a week later, even if only two-thirds of the members are present.[21]
2. Bills require the assent of the President.[22] If the President considers a Bill to be inconsistent with a provision of the Constitution, he refers it to the Supreme Court for its opinion. If the Court considers that it is contrary to the Constitution it is not brought into force.
3. The National Council of Chiefs must be consulted before national land laws are passed.[23]

Despite these safeguards the fact that there is no Upper House effectively gives the Government of the day the last say on legislation.

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17. *Supra* n15. See e.g. ss. 112 and 151.
18. The Island Courts Act No. 10 of 1983, s. 28.
19. S. 16 (2).
20. S. 81(3).
21. S. 83.
22. S. 16(4).
23. S. 74.

In addition to its law-making powers, certain treaties are required to be ratified by Parliament. These are treaties which:

(a) concern international organizations, peace or trade;
(b) commit the expenditure of public funds;
(c) affect the status of the people;
(d) require amendments of the laws of the New Hebrides; or
(e) provide for the transfer, exchange or annexing of territory.[24]

Parliament has a maximum life of four years.[25] It may be dissolved by a resolution passed by an absolute majority of members at a special sitting with at least three-quarters of the members present.[26] Parliament may also be dissolved by the President, on the advice of the Council of Ministers.[27] General elections must be held no less than thirty and no more than sixty days after any dissolution.[28] Parliament may not be dissolved within twelve months of general elections, following any dissolution of the previous Parliament.[29]

The Courts

The administration of justice is vested in the Judiciary and, in this area, attempts have been made to achieve a separation of powers. Thus the Judiciary are subject only to the Constitution and the law.[30] The arrangements for judicial appointments are also designed to secure independence as, apart from Supreme Court judges, they are made by the President on the advice of the Judicial Appointments Committee. This Committee, authorised by s. 46, consists of the Minister responsible for Justice, the Chief Justice, the President of the Public Service Commission, a judge appointed by the President and a representative of the National Council of Chiefs, appointed by that Council.

Similarly, tenure of judicial office is designed to protect independence. All members hold office until they reach the age of retirement.[31] They can only be removed before that time by the President of the Republic in the event of:

(a) conviction and sentence on a criminal charge; or
(b) a determination by the Judicial Service Commission of gross misconduct, incapacity or professional incompetence.[32]

By virtue of s. 45(4) the promotion and transfer of members of the Judiciary may only be made by the President of the Republic on the advice of the Judicial Service Commission.

The hierarchy of the courts in Vanuatu is as follows:

1. Island Courts;
2. Magistrates Courts;
3. The Supreme Court;
4. The Court of Appeal.

These courts will now be examined in detail:

1. **Island Courts**

Arrangements have been made for Island Courts by the Island Courts Act 1983,[33] enacted pursuant to s. 50 of the Constitution, which imposed a duty on Parliament to make provision to that effect.

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24. S. 24.
25. S. 26(1).
26. S. 26(2).
27. S. 26(3).
28. S. 26(4).
29. S. 26(5).
30. S. 45(1).
31. This age is not specified in the Constitution.
32. S. 45(3).
33. No. 10 of 1983.

The courts, of which there are so far four, are set up by the Chief Justice who also determines their geographical jurisdiction.

These courts have replaced Native Courts and have similar jurisdiction. By virtue of s. 3 of the Act not less than three justices are appointed to each Island Court by the President of the Republic, with the advice of the Judicial Service Commission. They are all to be persons knowledgeable in customary matters, and at least one of them is to be a Custom Chief (with a possibility of his being a member of the National Council of Chiefs). A supervising magistrate is also appointed for each court.

Criminal jurisdiction is limited to offences committed within the jurisdiction of the Island Courts, and the maximum penalty is a fine of VT 24,000 (A$200) or six months imprisonment. Interestingly, where a fine is ordered, the Court may order it to be paid in goods up to the value of the fine.

Civil jurisdiction arises where a defendant is ordinarily resident, or the cause of action arose, in the jurisdiction. It is limited to claims up to VT 50,000 (A$420).

Section 10 provides that the customary law which prevails within the territorial jurisdiction of the Island Courts shall be applied provided that this is not in conflict with any written law or contrary to justice, morality, or good order.

Section provides that where the court applies a prevailing customary law, the proceedings shall be recorded by a clerk of the court and thus become a precedent for the Island Courts.

The courts are not bound by the rules of evidence and legal representation is not allowed. Appeal lies to the Magistrates Courts, except in relation to disputes as to land, where appeal is to the Supreme Court. The court hearing the appeal must sit with two or more assessors knowledgeable in custom.

2. **Magistrates Courts**

Magistrates Courts operate under the Magistrates Court (Civil Jurisdiction) Act No. 4 of 1981, as first instance courts exercising summary jurisdiction over certain civil matters, where jurisdiction has been expressly conferred on them by statute. Section 1 of the Act provides for Magistrates to have a general jurisdiction in matters where the total claim does not exceed VT 200,000 (A$1,670). Magistrates also have jurisdiction to hear cases relating to:

(a) Disputes between landlords and tenants;
(b) Undefended divorce or judicial separation;
(c) Maintenance of children or wives.

By virtue of s. 2 Magistrates cannot hear cases dealing with the status of persons or with succession, wills, bankruptcy, insolvency or liquidation of corporate bodies.

As discussed above, the Magistrates Courts hear appeals, other than those relating to land, from the Island Courts.

3. **The Supreme Court**

This is governed by s. 47 of the Constitution. It consists of a Chief Justice and three other judges to be appointed only from amongst those qualified to practice as lawyers in Vanuatu. The Chief Justice is appointed by the President after consultation with the Prime Minister and the Leader of the Opposition. The other three judges are appointed by the President, one being nominated by the Speaker of Parliament, one by the President of the National Council of Chiefs and one by the Presidents of the Regional Councils.

As already mentioned, the President may withhold assent to a Bill passed by Parliament if he wishes to refer a constitutional point to the Supreme Court. The Supreme Court must also hear constitutional questions referred to it by lower courts, where such questions concern a fundamental point of law.[34] In addition, there is a general power of reference regarding infringements of the Constitution in s. 51(1). This provides that:

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34. S. 51(3).

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

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

4. The Court of Appeal

Appeals from the Supreme Court, both in the exercise of its original and appellate jurisdiction are heard by the Court of Appeal. This court is constituted under s.48 by two or more Supreme Court judges sitting together. There is no longer any appeal lying to the Privy Council.[35]

Custom and Chiefly Power

General Points

The safeguarding and recognition of custom was obviously a delicate issue in Vanuatu's independence. It is clear from the Constitution that efforts have been made to fulfil these aims. For example it is specifically stated in s. 93 (3) that customary law is to continue to have effect as part of the law of the Republic and s. 49 enables Parliament to provide for the manner of ascertaining the relevant rules of custom. Attention is also to be paid to custom by the Judiciary who, if no rule of law is applicable to a matter, must determine it according to substantial justice and 'wherever possible, in conformity with custom'.[36] Also, under s. 49 Parliament may provide for persons knowledgeable in custom to sit with the judges of the Supreme Court or the Court of Appeal and take part in its proceedings.

The National Council of Chiefs

The customary law of Vanuatu is closely linked with the role of the village chief. The Constitution seeks to maintain and make use of the authority of the chiefs. Chapter 5 sets up the National Council of Chiefs (known locally as the *Malfatumauri*) composed of 'Custom Chiefs' elected by their peers, sitting in District Councils of Chiefs. One of the chiefs is elected as President of the Council. The Council has general competence to discuss all matters relating to custom and tradition and then to make recommendations for the preservation and promotion of the country's culture and languages. The Council may also be consulted on any question relating to tradition and custom in connection with any Bill before Parliament.

In every island of the archipelago all the chiefs of the particular island form a smaller body called the District Council of Chiefs. Within the District Council one Chief is elected to sit in the National Council.

In the court sphere s. 50 laid a duty on Parliament to provide for the role of chiefs in the Island Courts. The Act which sets up and regulates the Island Courts[37] provides in s.3 that at least one of the three Justices sitting in each Island Court shall be a Custom Chief (with a possibility of his being a member of the National Council of Chiefs). Additionally appeals from the Island Courts which, as already discussed, lie to the Magistrates or Supreme Court, must be heard with at least two assessors knowledgeable in custom.

Also the President of the National Council has the right to nominate one of the three Supreme Court judges.[38] Another appointment made by the Council is a representative to

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35. New Hebrides Act 1980, s. 2(2), sch. 2, repealing New Hebrides (Appeals to Privy Council) Order 1975.
36. S. 45(1).
37. Island Courts Act No. 10 of 1983.
38. S. 47(4).

the Judicial Services Commission.[39] The Council must also be consulted on the appointment of an Ombudsman.[40]

The machinery set out in s. 81 for the establishment of regional councils includes provision for representation of Custom Chiefs. The National Council also has a consultative role in the formation of Vanuatu's land law which is discussed below.

Thus, the Council plays an important and fairly extensive part in administration. Interestingly its members attract exactly the same privileges as members of Parliament. One noteworthy omission from the Council's powers is that it is not involved in the appointment of the National President.

It has been suggested that there is a danger in conferring statutory authority on traditional leaders in that they may cease to be responsive to the community and, through increasing reliance on their statutory powers, cease to become acceptable to it.[41] However in Vanuatu, the statutory powers conferred are mainly consultative, so the problem seems unlikely to arise. Ideally the Council will become, in effect, a reviewing body and guardian of custom.

Land and Custom

Land, which was a particular subject of contention prior to independence, is specifically dealt with in Chapter 12 of the Constitution. It is clear from the provisions therein that the underlying aim is to enforce the customary system of land tenure and the rights of the indigenous owners. The most important sections are ss. 71 and 72 which provide that all land in the Republic belongs to the indigenous custom owners and their descendants and that the laws of custom govern its ownership and use. Section 74 invests Parliament with a duty, after consultation with the National Council of Chiefs, to pass a national land law making different provisions for different categories of land, one of which is to be 'urban land'. Under the scheme only indigenous citizens of the Republic who have acquired their land in accordance with a recognized system of land tenure are to have perpetual ownership of land. Land owners whose interests are adversely affected by this are to be paid compensation in accordance with criteria prescribed by Parliament. Restrictions are also placed on the right of the indigenous owners to deal with their land. Land transactions between indigenous citizens and either non-indigenous citizens or non-citizens are only permitted with the consent of the Government. This consent is not to be refused,

unless the transaction is prejudicial to the interests of:

(a) the custom owner or owners of the land;
(b) the indigenous citizen where he is not the custom owner;
(c) the community in whose locality the land is situated; or
(d) the Republic.[42]

These conditions underline the fundamental objectives behind the national land law.

Notwithstanding the provisions of ss. 71 and 72 the Government may own land, but only if this is acquired in the public interest.[43] The Government is also allowed to purchase land from 'custom owners' for the purpose of redistribution to indigenous citizens or indigenous communities from overpopulated islands. The important considerations in any such re-distribution are ethnic, linguistic, customary and geographical ties.[44] The express inclusion of these priorities emphasises the importance of custom and indigenous culture in the national land law.

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39. S. 46(1).
40. S. 59(1).
41. G. Powles, 'Legal Systems of the South Pacific' in *Australian and South Pacific Law*, IALL (1981) at 17.
42. S. 77(2).
43. S. 78.
44. S. 79.

The Vanuatu Parliament has just passed new land legislation, but this is not yet in force. The Land Reform Regulation[45] provides for interim measures to deal with land from the day of Independence until the national land law becomes effective. The Regulation provides, inter alia, for persons who before Independence had freehold or perpetual ownership of land, to become 'alienators' on the day of Independence with entitlement to remain on the land until they had reached an agreement with the custom owners for leasing the land from them or for payment for improvements.

Parliament has also passed the Alienated Land Act[46] which provides for dealings between owners of land in Vanuatu and alienators. Under the scheme, any person wishing To become an alienator must apply to the Minister so that he can be registered as such.[47] The Land Referee Act[48] has also been enacted to provide for a Land Referee to deal with disputes which arise between alienators and customary land owners regarding the value of improvements. He also deals with disputes arising between lessors and lessees. Finally, the Land Leases Act[49] provides for the creation and disposition of leases of land. It also makes provision for land registration, and a Torrens System of registration of titles is being set up.

Conclusion

The historical background to the making of the Vanuatu Constitution underlines the fact that, to a large extent, it embodies a political compromise. However, in spite of the Westminster type 'packaging' the ideals expressed in the preamble have to a large extent been carried through into the body of the Constitution. The principle that 'All land in the Republic belongs to the indigenous Custom owners and their descendants,'[50] established by Chapter 12, is a clear example of local objectives which are now being speedily realised.

The element of compromise is reflected in the transitional provisions allowing existing laws to remain in force after independence subject to their being 'construed with such adaptions as may be necessary to bring them into conformity with the Constitution'.[51] However, there is ample scope in the provisions for the gradual development of decentralized legal[52] and governmental[53] systems reflecting local customs and practical circumstances. There is also the flexibility necessary to produce national laws based on Melanesian, rather than western values.

With a stable form of government, which has used its constitutional power to fulfil the aims of the preamble, the pre-independence systems have been successfully absorbed into the present arrangements. Ideally their importance will gradually diminish as the Republic achieves its aims, and laws dating back to the Condominium are replaced by autochthonous legislation and custom.

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45. No. 31 of 1980.
46. No. 12 of 1982.
47. S. 4.
48. No. 15 of 1982.
49. No. 4 of 1983.
50. S. 71.
51. S. 93(1).
52. E.g., the Island Courts Act No. 10 of 1983 under which four regional Island Courts have, to date, been established.
53. E.g., the duty imposed on Parliament by s. 80.