THE EXECUTIVE PARDON OF BARAK SOPE: THE STRUGGLE FOR CONSTITUTIONAL STANDARDS IN THE REPUBLIC OF VANUATU

Patrick Keyzer*

Before his recent appointment to the position of Foreign Minister of the Republic of Vanuatu, Barak Sope was convicted for forgery and received an executive pardon (he was later re-elected). The Vanuatu Court of Appeal held that the pardon only had prospective effect, and so he was not entitled to resume his seat in the Parliament. Further consideration of the Barak Sope case provides an opportunity to reflect on the principles and techniques of statutory and constitutional construction applied in Vanuatu. The author concludes that consistent standards relating to questions of construction in this context are difficult to locate and steps may need to be taken to advance research and scholarship to harmonize the common law applied in the courts with local customs and traditions.

1 INTRODUCTION

The purpose of this article is to describe and analyse the decision of the Vanuatu Court of Appeal regarding the legal effect of a presidential pardon given to Mr Barak Mauutamate Sope, currently the Foreign Minister, but formerly the Prime Minister of the Republic of Vanuatu.[1] Last year the Vanuatu Court of Appeal held that even though Mr Sope received a full presidential pardon, this did not restore Mr Sope to his full civil rights.[2] I argue that this result is somewhat surprising in light of the support for Mr Sope's position in the United States jurisprudence of executive pardons. But much more importantly, the alternative conclusion that the executive pardon ought to have operated from the moment of conviction, rather than simply prospectively from the date of grant, is strongly reinforced when the language of the pardon that was granted and the language of the Vanuatu *Constitution* describing the executive power to pardon, is taken into account. The language of both documents should have tipped the scales in Mr Sope's favour.

Some further consideration of *Sope Mauutamate v Speaker of Parliament*[3] (*'Barak Sope'*) provides an opportunity to reflect on the principles and techniques of statutory and constitutional construction applied in Vanuatu. In *Attorney-General v The President of Vanuatu*,[4] Sir Harry Gibbs[5] held that the

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1 *Sope Mauutamate v Speaker of Parliament* (Unreported, Court of Appeal of Vanuatu, Robertson, Von Doussa, Fatiaki, and Saksak JJ, 9 May 2003).

2 Ibid.

3 Ibid.

4 (Unreported, Supreme Court of Vanuatu, Gibbs J, 1 January 1994).

5 Formerly Chief Justice of Australia.

Vanuatu *Constitution* was *sui generis*: the product of the work of a local Constitutional Committee and should be construed in accordance with its terms.[6] To what extent was that principle honoured in this case? Is it possible to locate consistent guidance on questions of constitutional construction in Vanuatu that might make adherence to this principle possible? This article seeks to answer those questions.

2 BACKGROUND

In July 2002 Mr Sope was charged and convicted of two counts of forgery relating to documents providing government guarantees of $5M and $18M US payable to a Vanuatu Investment Corporation Limited.[7] The Supreme Court found that the documents had fictitious identifying numbers and that Mr Sope had produced the documents with dishonest intent, reflected in a failure to comply with proper procedures mandated by public finance legislation. Justice Coventry of the Supreme Court sentenced Mr Sope to three years on each count; sentences to be served concurrently. In sentencing, His Lordship noted the presence of the Vanuatu *Members of Parliament (Vacation of Seats) Act*, which, it was suggested, would disqualify him from continuing to sit in Parliament if he were convicted. Section 3(1) of the *Members of Parliament (Vacation of Seats) Act*[8] provides that:

> If a member of Parliament is convicted of an offence and is sentenced by a court to imprisonment for a term of not less than two (2) years, he shall forthwith cease to perform his functions as a member of Parliament and his seat shall become vacant at the expiration of thirty days thereafter.

Mr Sope fell ill while he was in prison and he sought a presidential pardon.[9] After ceremonies consistent with indigenous traditions, the President, Father John Bennett Bani, gave Mr Sope a presidential pardon on 13 November 2002, expressed in the following terms:

> PARDON
>
> WHEREAS Article 38 of the Constitution provides inter alia, for the President of the Republic of Vanuatu to Pardon a person convicted of an offence;
> AND WHEREAS BARAK TAME SOPE was convicted and found guilty of certain offences by the Supreme Court of the Republic of Vanuatu on 19 July, 2002 and sentenced to three years imprisonment.

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6 *Ex parte Garland* 71 US (4 Wall) 333, 380 (1866). See also *Boyd v United States* 142 US 450, 453-454 (1892).

7 *Public Prosecutor v Sope Mauutamate* (Unreported, Supreme Court of Vanuatu, Coventry J, 19 July 2002).

8 Cap 174.

9 See Kathleen Dean Moore, *Pardons: Justice, Mercy and the Public Interest* (1989) 5, for the various justifications for granting an executive pardon, including illness.

> AND WHEREAS I am of the opinion that the continued imprisonment of BARAK TAME SOPE may be injurious to his health;
>
> In the exercise of the power conferred on me by Article 38 of the Constitution I, FATHER JOHN BENNETT BANI, President of the Republic of Vanuatu, HEREBY PARDON BARAK TAME SOPE of the offences for which he was convicted in the Supreme on 19 July 2002.
>
> MADE at the State Office this 13th day of November, 2002
> .....
> FATHER JOHN BENNETT BANI
> President of the Republic of Vanuatu

Following his pardon, Mr Sope sought to be reinstated to his parliamentary seat on the footing that he had been exonerated. However the Speaker of the Parliament of Vanuatu refused to recognize that Mr Sope had been exonerated by his pardon and steps were taken toward the holding of a by-election for Mr Sope's seat in Parliament. As a result, Mr Sope commenced proceedings in the Supreme Court of Vanuatu seeking declarations and other orders in relation to his entitlement to continue to sit in Parliament.

At first instance, Chief Justice Vincent Lunabek rejected Mr Sope's claims, holding that Article 38 of the *Constitution* of Vanuatu had a limited meaning: while it might exonerate Mr Sope for the conviction, it did not relieve him of the consequences of the conviction, and the operation of the *Members of Parliament (Vacation of Seats) Act*[10]. In particular, Lunabek CJ relied on English authority to the effect that a pardon could not quash a conviction.[11] His Honour in effect reasoned that as 'only the Courts on an appellate level can quash a conviction', a pardon did not eliminate the effect of the *Members of Parliament (Vacation of Seats) Act* which provided that a Member of Parliament's seat should be vacated on a Member being convicted of a crime and sentenced to a specified term of imprisonment.

3 THE ARGUMENTS ON APPEAL

On appeal to the Vanuatu Court of Appeal, Senior Counsel[12] for Mr Sope developed four interrelated arguments. First, Sope argued that Lunabek CJ had conflated treatment of the judicial power to quash convictions with the executive power to pardon convictions. It was conceded that the executive government could not *quash* a conviction; that this was a power that can only be properly exercised by an appeal court. The power to 'quash' is judicial in nature. However it was argued that a full pardon *can* remove the effect of a conviction. It does this, not by quashing the conviction, but by restoring the

10 Cap 174.

11 *R v Foster* (1984) 2 All ER 679.

12 Stephen Southwood QC.

person who is the subject of the pardon to the position they would have been in if the conviction had not taken place.

Secondly it was argued that the Chief Justice had erred in concluding that the presidential pardon could only have prospective effect. The scope and effect of a pardon falls to be determined by the intention of the grantor when he or she exercises this power.[13] The operative part of the pardon referred to 19 July 2002, the date of the appellant's conviction and sentence, unambiguously indicating that the pardon was effective from that date.[14] It was contended that the terms of the presidential pardon in this case were wide enough to conclude that Mr Sope had received an absolute and unconditional pardon, and the reference to the date of the conviction made it clear that the pardon was intended to operate from and including that date.[15] As to the intentions of the President in granting the pardon, it was contended that the Chief Justice ought to have had regard to the fact that the pardon was granted by the President after he received representations from the Chiefs and Elders of Vanuatu at ceremonies held in accordance with Vanuatu customs and traditions (I return to consider the significance of local traditions to constitutional construction in the conclusion).

The third argument was based on the structure of the Vanuatu *Constitution* and the text of Article 38. It was argued that a proper approach to the construction of the presidential power of pardon required the Court of Appeal to have regard to the separation of powers ordained by the Vanuatu *Constitution*: due respect ought be accorded by the judiciary to the exercise of executive powers, along similar lines to the approach taken in the United States.[16] The text of Article 38 of the *Constitution of the Republic of Vanuatu* provides as follows:

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13 *Kelleher v Parole Board of New South Wales* (1984) 156 CLR 364; *Re Royal Prerogative of Mercy Upon Deportation Proceedings* (1933) 2 DLR 348, 349-350.

14 This argument was specifically rejected by the Court of Appeal for reasons discussed below.

15 '[A]lthough the power of the President of Vanuatu to grant a pardon is entirely derived from the constitution, the power is one that corresponds to the power of the English Crown, so that English decisions may be assistance': *Attorney-General v The President of Vanuatu* (Unreported, Supreme Court of Vanuatu, Gibbs J, 19 July 2002). Counsel for Mr Sope argued that the words 'corresponds to' in this quotation ought be read as 'analogous to' though not necessarily 'in conformity with'.

16 Previous authority confirmed that the nature of the powers and position of the President of Vanuatu can be determined only 'by a consideration of the Constitution itself': *Attorney-General v The President of Vanuatu* (Unreported, Supreme Court of Vanuatu, Gibbs J, 1 January 1994).

PRESIDENTIAL POWERS OF PARDON, COMMUTATION AND REDUCTION OF SENTENCES

> The President of the Republic may pardon, commute or reduce a sentence imposed on a person convicted of an offence. Parliament may provide for a committee to advise the President in the exercise of this function.

This provision yielded the same result whether a literal approach or a purposive approach was taken. The ordinary grammatical meaning of the provision is that the President has the power to: pardon a person convicted of an offence; commute a sentence imposed on a person convicted of an offence; or reduce a sentence imposed on a person convicted of an offence.[17] The power is perfectly general, and apt to enable the President to order a full pardon or a conditional pardon at any point in time. Furthermore, the President's power of pardon is not confined to the pardoning of 'a sentence imposed on a person'. Such a construction would give the word 'pardon' no work to do. It would effectively mean that the President merely had the power to commute or reduce a sentence. The heading indicates that the Article itself is intended to deal with the topic of three discrete presidential powers: pardon, commutation and reduction of sentences. Emphasis should also be given to the grammar and punctuation of the Article in context. The natural and ordinary meaning of the sentence is that the President has the power to pardon (pause), the power to commute and (or) reduce a sentence. To the extent that there is any ambiguity, the heading to Article 38 ought to be used to determine the scope of the Article and to resolve ambiguity.[18]

The purpose of Article 38, set out in the heading, was to grant the President in full the prerogative of mercy. At common law a pardon could be free or conditional. In *R v Milnes and Green*,[19] Cox J said:

> A pardon ... at common law is the solemn act by which the Sovereign, either absolutely or conditionally, forgives or remits for the benefit of the person to whom it is granted the legal consequences of a crime he has committed.

The breadth of the prerogative power was noted in *Re Royal Prerogative of Mercy Upon Deportation Proceedings*[20] when the Supreme Court of Canada

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17 The language of Article 38 should be given its natural and ordinary meaning. The words of the Constitution should be construed with all the generality that the words admit, informed by the cultural traditions of Vanuatu and applying English analogies where this is appropriate: *Sope v Attorney General No 2* [1980-1994] Van LR 363.

18 See *R v Surrey Assessment Committee* [1948] 1 KB 29, 32; *Silk Bros Pty Ltd v State Electricity Commission of Victoria* (1943) 57 CLR 1; *K & S Lake City Freighters Pty Ltd v Gordon & Gotch Ltd* (1985) 60 ALR 509, 511-512 (resolving scope); *Hammersmith Railway v Brand* (1869) LR 4 HL 171; *Sanderson v Fotheringham* (1885) 11 VLR 190; *Police v Carpenter* [1975] 2 NZLR 621, 625-626 (resolving ambiguity).

19 (1983) 33 SASR 211.

cited Dicey's description of the prerogative as being 'both historically and as a matter of actual fact nothing else than the residue of discretionary or arbitrary authority, which at any given time is legally left in the hands of the Crown'. Australian authority also accords with this perspective on the prerogative.[21] The 'legal consequences of a crime' include arrest, charge, trial, conviction and punishment. Traditionally, the power to pardon could be granted either before or after attainder or conviction.[22] Given the wide variety of reasons for which a pardon can be granted, this is not surprising. A pardon could leave a judgment formally unreversed and, presumably, it may formally reverse the judgment.[23] In *Cuddington v Wilkes*,[24] the Kings Bench said that the 'King's pardon doth not only clear the offence itself, but all the dependencies, penalties, and disabilities incident unto it'. To like effect, the American cases emphasised that when a pardon is full it 'blots out of existence the guilt' and restores the former convict 'to all his civil rights, it makes him, as it were, a new man, and gives him a new credit and capacity'.[25] As Professor Williston remarked:

> if the mere conviction involves certain disqualifications which would not follow from the mere commission of the crime without conviction, the pardon removes such disqualifications.[26]

Counsel for Mr Sope relied on *Cuddington v Wilkes* and the US authorities to argue that the presidential pardon granted by Father Bani in accordance with local traditions had blotted out Mr Sope's guilt, and accordingly, he was entitled to resume his seat in Parliament. A by-election had not been held and Mr Sope had always contended that he had not forfeited his seat.

The final argument was that to the extent that the *Members of Parliament (Vacation of Seats) Act*[27] was relied on to remove Mr Sope from his seat, it was repugnant to the Vanuatu *Constitution*. Article 38 of the *Constitution* is not in

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20 (1933) 2 DLR 348, 351. See also *Kelleher v Parole Board of New South Wales* (1984) 156 CLR 364.

21 In the colony of New South Wales pardons were described as omnipotent: *R v Farrell* (Unreported, Supreme Court of New South Wales, Dowling and Stephen JJ, 30 July 1831). General pardons were distinguished from conditional pardons *R v Raine* (Unreported, Supreme Court of New South Wales, Forbes CJ, 9 December 1828).

22 Alpheus Todd, *Parliamentary Government in the British Colonies* (2nd ed, 1894) 359; cited with approval by Ambrose J in *Sharples v Arnison* [2002] 2 Qd R 444.

23 *Kelleher v Parole Board of New South Wales* (1984) 156 CLR 364.

24 (1614) 80 ER 231, 232.

25 *Attorney-General v The President of Vanuatu* (Unreported, Supreme Court of Vanuatu, Gibbs J, 19 July 2002).

26 Samuel Williston, 'Does A Pardon Blot Out Guilt?' (1915) 28 *Harvard Law Review* 647, 653. See also Sidney Buchanan, 'The Nature of a Pardon under the United States Constitution' (1978) 39 *Ohio State Law Journal* 36; 'Presidential Pardons and the Common Law' (1975) 53 *North Carolina Law Review* 785.

27 Cap 174.

terms expressed to be subject to the other provisions of the *Constitution*. Unlike other constitutions such as the Australian *Constitution*, the *Constitution* of the Republic of Vanuatu does not provide for the vacation of a member's seat in Parliament when a Member of Parliament is convicted of a serious criminal offence. Therefore, subject to what is stated below, once elected to Parliament Mr Sope had a right to remain a Member until the expiration of the Parliamentary term. Rather than provide expressly for the vacation of a Member of Parliament's seat when a Member has been convicted of a serious criminal offence, Chapter 10 of the *Constitution* establishes a Leadership Code for the conduct of leaders including a Member of Parliament and Article 68 states: 'Parliament shall by law give effect to the principles of this Chapter'. It was therefore arguable that Article 68 enables the Parliament to legislate for the disqualification of members of Parliament if they breach of the Code of Conduct and to stipulate what amounts to a breach of the Code of Conduct. However, the power granted to Parliament pursuant to either Article 68 or Article 16 was not such as to enable Parliament to override the other provisions of the *Constitution*. In the circumstances, the failure of Parliament to provide in the *Members of Parliament (Vacation of Seats) Act* for a Member of Parliament to receive the benefit of a pardon was therefore inconsistent with Article 38 of the *Constitution*.

4 THE JUDGMENT OF THE COURT OF APPEAL

All the arguments set out above were rejected by the Court of Appeal. The final argument was rejected on jurisdictional grounds that are not presently relevant. As to the arguments relating to the effect of the pardon, the Court held that the effect of Mr Sope's conviction was to trigger the operation of the *Members of Parliament (Vacation of Seats) Act*,[28] and that he was disentitled to resume that seat. The Court characterized Mr Sope's argument as one that was based on the proposition that the executive pardon was argued to operate retrospectively. That is, the Court did not give emphasis to the plain language of the pardon, which was expressed to operate from the date of conviction, or to the relevant article of the *Constitution*, which clearly authorizes unconditional pardons. Rather, the Court emphasized dicta in the US cases to the effect that a person who had forfeited their rights and entitlements consequent upon a conviction could not automatically resume those entitlements upon receipt of a pardon. This exception to the general rule that a pardon restores a person to their full civil rights is justified in circumstances where a third party has, through no fault of their own, assumed a right or entitlement that was formerly enjoyed by the (former) convict. The exception operates to protect a person in the equivalent position to a person who has acquired property on a bona fide basis for value

[28] Cap 174.

without notice. The Court of Appeal quoted the following passage, placing the emphasis on the italicized words:[29]

> A pardon is an act of grace by which an offender is released from the consequences of his offense, so far as such release is practicable and within control of the pardoning power, or of officers under its direction. It releases the offender from all disabilities imposed by the offense, and restores him to his full civil rights.

While the Court of Appeal emphasized the italicized words, the applicant drew attention to the entire passage of the judgment of the US Supreme Court.

While the exception referred to above may have a perfectly sensible policy rationale, it is certainly arguable that it should not have been applied to Mr Sope. The policy rationale for the exception to the rule was inapplicable in Mr Sope's case because there had been no by-election for Mr Sope's seat at the time he made his application to the Court to be reinstated. Nor had there been a by-election by the time the appeal was argued in the Court of Appeal. Since no one else could claim to hold Mr Sope's seat in Parliament (indeed for part of the period of his incarceration he was being paid), and he had consistently maintained his right to that seat, the restoration of his civil rights was, indeed, practicable.

Once Mr Sope was absolutely pardoned, in terms that were expressed to operate from the date of conviction, the text of Article 38 should have been given its full effect and the dicta in the United States cases had to be approached with due circumspection. Whatever the consequences of the decision in practical terms, due weight needed to be given to the intentions clearly expressed in the pardon by the executive government of Vanuatu.

5 FURTHER ANALYSIS AND CONCLUSIONS

The legal questions in this case were difficult and important, and as noted above[30] there is room for differences of opinion and differences of emphasis in the analysis of the jurisprudence of executive pardons. Nevertheless the development of a consistent constitutional jurisprudence in Vanuatu and adherence to the Chief Justice Gibbs' principle noted at the outset of this paper

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29 See *Knote v United States* 95 US 149, 154 (1877). The Court of Appeal quoted this passage, placing the emphasis on the italicized words: 'A pardon is an act of grace by which an offender is released from the consequences of his offense, so far as such release is practicable and within control of the pardoning power, or of officers under its direction. It releases the offender from all disabilities imposed by the offense, and restores him to his full civil rights'. While the Court of Appeal emphasized the italicized words, the applicant drew attention to the entire passage of the judgment of the US Supreme Court.

30 Williston, above n 26; Buchanan, above n 30.

presents significant challenges to courts and to counsel representing clients in constitutional cases.

First, reference to diverse sources of law create additional complicating factors in circumstances where a local provision relating to an executive power is under consideration, viz, should the UK or the US cases on executive pardons have been applied? Was the emphasis on a particular aspect of the US decisions warranted in a context where the language of the Vanuatu *Constitution* pointed in another direction?

Secondly, *Barak Sope* involved the exercise of the executive power of presidential pardon. That power confers one of the widest possible discretions. It is a power that is characterized by its exercise for reasons that are *often* controversial (even in the United States), but always *local*. In this case, Mr Sope was pardoned for ill health after ceremonies involving representations by the Council of Chiefs.

For these reasons, when the Court of Appeal declined to give effect to this pardon it took a very significant step. Did the Court show the proper degree of deference to the executive branch, ie., not just the proper measure of respect for the separate power exercised by the executive branch of government, but also the proper measure of respect for local traditions? As noted at the beginning of this paper, in *Attorney-General v The President of Vanuatu*, Sir Harry Gibbs, a former Chief Justice of Australia, held that the Vanuatu *Constitution* was *sui generis*: the product of the work of a local Constitutional Committee and should be construed in accordance with its terms.[31] This principle does not appear to have been applied in this case.

In conclusion, the Gibbs' principle pays the proper degree of deference to local customs and traditions. Having said that, the courts and the counsel who work in them cannot take steps to ensure that local customs and traditions are given due weight unless information relating to these traditions is made available. To that end, there is a strong case for further research to be conducted to determine the extent to which local circumstances may be used to inform questions of constitutional construction in the future. Scholarship that attempts to harmonize and synthesize Vanuatu customs and traditions with the common law applied in courts is necessary. Such efforts are quite likely to improve cross-cultural legal and constitutional understandings in the longer term.

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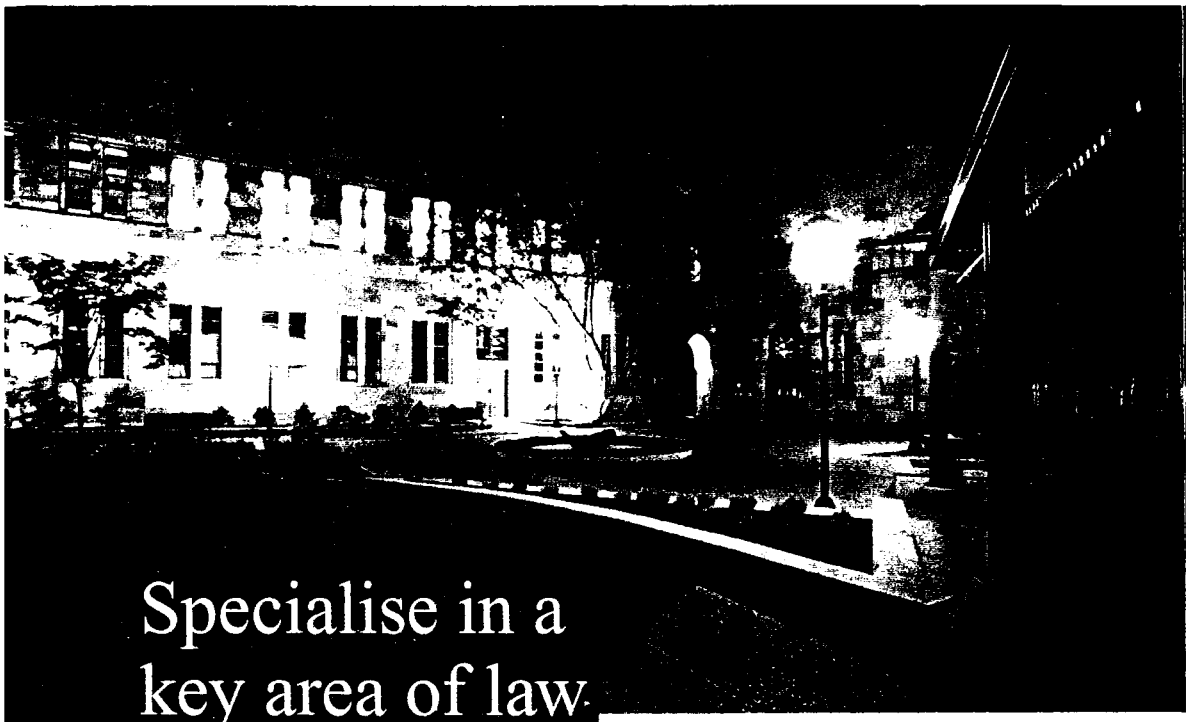
31 *Ex parte Garland* 71 US (4 Wall) 333, 380 (1866). See also *Boyd v United States* 142 US 450, 453-454 (1892).



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FOREWORD FROM THE PRESIDENT, LAWASIA

Dear Friends,

LAWASIA Journal 2003/2004 is the result of hard and intensive work by its editorial board under the able guidance of Dr Jennifer Corrin Care of The University of Queensland's TC Beirne School of Law. Extensive legal literature contained in this journal will, I am sure, serve as a useful legal tool and will be a source of required information and enlightenment.

LAWASIA was established in Canberra, Australia in 1966. Originally, it was composed of representatives from Bar Associations of only 18 countries but has by now acquired much larger numbers of Bar Associations, Law Societies and individual lawyers from the entire Asia-Pacific region. Its activities substantially contribute in the development of diverse branches of law including business law, energy law, arbitration law etc. However, what is most important is that LAWASIA concentrates on the rule of law and human rights.

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In closing, readers are reminded that each edition of the *LAWASIA Journal* is enhanced by the desire of its contributors to share knowledge and research in a truly egalitarian manner. LAWASIA members are encouraged to consider contributing to future editions.

Mr. G.L. SANGHI
President
November 2004

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