

Democracy and Constitution being destroyed by Supreme Court.

By Tiffany Twivey-Nonggorr

The current constitutional crisis in PNG has been created by certain members of the Supreme Court, not by O'Neill or by Somare. This has happened in three ways:

- a) Unconstitutional and undemocratic Orders made by the Supreme Court
- b) The refusal of Chief Justice to recognise the constitutional powers of the NEC for his removal, placing himself above the law, and
- c) Refusal by certain Judges to recognise the unlimited constitutional power of Parliament to legislate ó particularly, the Judicial Conduct Act

Unconstitutional and Undemocratic Orders made by Supreme Court

Certain Judges have exercised powers that according to the Constitution they do not have AND have never been claimed or exercised by any Judge in PNG or anywhere else.

These certain members of the Supreme Court gave orders in December 2011 and now again in April 2012 over Parliament, the type of which have NEVER, EVER been made, not only in the history of PNG, but in the history of any Westminster system of democracy, not since the theory of the divine right of kings was abandoned in 1688 and the first Bill of Rights of Parliament was enacted..

There is no provision in our Constitution or in any Westminster system of democracy anywhere in the world that allows Courts to make Orders over Parliament or over any of the internal workings of Parliament or over Members of Parliament performing their functions.

On the contrary, section 115(2) of the Constitution expressly states that *“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”*. Section 115(3) of the Constitution then provides *“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.”*

The policy behind this is one of the foundation principles of democracy ó the separation of powers between the three arms of the one government ó as opposed to one king. This is to avoid the concentration of power in one arm of government, as absolute power is known to corrupt absolutely.

Unfortunately certain members of the Supreme Court have smashed through their power boundary to make orders in a Supreme Court Reference over Parliament and interfere in the proceedings in Parliament.

The orders made by certain members of the Supreme Court are

1. Order for Parliament to re-instate Somare as PM (12 December 2012)
2. Order for a Stay on a decision of Parliament (April 2012)
3. Order for a validly passed Act of Parliament to be enjoined from implementation. (April 2012).

Repeat, these sorts of orders have NEVER, EVER been made by any Court in a Westminster system of democracy as they are clearly without jurisdiction and are unconstitutional.

The main principle of democracy is government by the people for the people. In a Westminster democracy the power of the people to govern and make laws is vested in Parliament and exercised by the elected representatives of the people. The power of judging ó a traditional power exercised by the king is vested in the Courts.

The Constitution of PNG allows the Courts to give advisory opinions to certain authorities as to whether the conduct of those authorities or laws is in accordance with the Constitution. Once the opinion is given, the authority is free to either leave the conduct or law as is, amend the law or vary the decision or even repeal the law or rescind the decision.

The Constitutional Planning Committee in 1975 wrote this about the Courts' jurisdiction to give advisory opinions ó which in itself exceeds a Courts' powers in many other jurisdictions

Under such a procedure specified bodies are authorized to refer a matter to the court for its opinion. It is not always necessary that a dispute should have arisen; an institution may wish to have an authoritative ruling on a constitutional point before embarking on a particular piece of legislation or a certain policy. It is flexible in that a party or parties can define clearly and precisely the issues on which they need a ruling, and yet the ruling is, strictly speaking, not binding.

Instead of this, instead of remaining within the EXTRA powers allocated by the Constitution to the Courts - Orders over Parliament were given.

Parliament's lawmaking powers are UNLIMITED by section 99 of the Constitution. It is unconstitutional for a Court to give an Order that restrains an exercise of the power by Parliament of law-making. Yet the Supreme Court did it ó gave an Order to injunct the implementation of an Act of Parliament.

The Supreme Court has for many years in other matters declared laws unconstitutional. This does not mean that they are quashing the law, or reversing a decision of Parliament. The piece of legislation stays on the Statute books, and the government can leave it as it is, or amend the legislation in accordance with the opinion of the Supreme Court to make it compliant with the Constitution or Parliament can repeal it all together.

What such a declaration does mean is that if anyone tries to enforce the law in any court, no Court will enforce it. It means that the law still exists but the Courts will not enforce it.

This is the position in England and every other Westminster system of democracy.

Many times have Parliaments made changes to laws on the opinions of Courts to make the laws Constitutional ó such as the NCDC legislation in PNG and the boat people in Australia ó as well as numerous environmental matters in many different countries.

The Courts cannot interfere with the proceedings or decisions of Parliament ó cannot quash them, set them aside or restrain them ó the proceedings of Parliament cannot be called into question in any Court AND Court Orders do NOT bind Parliament EVER.

There are many recent examples of orders made by Courts which cover the whole country BUT do not apply to proceedings in Parliament. In England there have recently been a number of "Super Injunctions" given. One such Super Injunction concerned discussion of a footballer's personal life as disclosed in a case. The Courts issued Orders to restrain the whole of England including the media from discussing or publishing anything about the case

and they banned the public from attending the case. Parliament however did not consider itself bound by the Orders and freely discussed the matter in Parliament ó it was recognised by all that the Orders could not bind Parliament as it would be unconstitutional.

There is one basic fact ó certain members of the Supreme Court have exercised powers over Parliament that they do not have and in so doing have caused chaos and confusion among the people of PNG. PNG is a democracy not a juristocracy and this usurping of powers vested in Parliament must be resisted.

Refusal by Chief Justice to comply with Constitution provisions for removal.

The separation of powers doctrine means that power needs to be split between 3 arms of government so that power is not concentrated in just a few people. Likewise the separation of powers is also dependant on checks and balances on the powers being exercised by the other arms of government.

No power can be completely unfettered. No power can be absolute. This is clearly because humans are human and they can sometimes be wrong. There must be a check and balance. For Parliamentarians, the checks and balances on them are many ó they are answerable to the electorate, they are answerable to the courts under the leadership code and they are answerable to the majority of other elected representatives in Parliament. Likewise, the Executive is answerable on decisions to the Courts and on composition to the Parliament.

Accordingly, the checks and balances on the Courts are vested by the Constitution in the other arms of government.

The only power to remove a Chief Justice is vested in the Head of State on advice from the National Executive Council. There is NO OTHER POWER TO INTERFERE WITH A CHIEF JUSTICE. It is the ONLY check and balance on the Chief Justice, other than the leadership code. Sections 179-182 provide for the steps for removal of a Chief Justice.

In November 2011 and again in February 2012, the National Executive Council exercised its constitutional powers and advised the Governor General to appoint a Tribunal to investigate allegations against the Chief Justice to ascertain whether they constituted grounds for his removal and also advised that the Chief Justice should be suspended pending the determination of the tribunal.

Both times, the Governor General DETERMINED TO APPOINT A TRIBUNAL AND TO SUSPEND the Chief Justice.

These decisions were made according to the Constitution and the processes provided.

The Chief Justice ignored these decisions and refused to step down.

The Chief Justice determined that he would not face the Tribunal and go through due process ó but rather he said on one occasion that he did not know what the allegations were about and then on other occasions he said that the allegations were not sufficient for his removal. He then said that the decision to suspend him and appoint a Tribunal was for other purposes.

Those determinations according to law are not his to make. The Constitution puts the power of these determinations in the hands of a Tribunal appointed by the Governor General as advised by the National Executive Council.

By refusing to comply with the decisions made by the Governor General, the Chief Justice is putting himself above the law, above the Constitution of Papua New Guinea.

If the Tribunal finds that there are no sufficient grounds for his removal and/or that the referral was done with a bad motive, then the Chief Justice will not be removed.

If the Tribunal does find the allegations sufficient for removal, then a determination will be made by the Governor General on the advice of the National Executive Council to remove the Chief Justice or not.

Depending on the decision, the Chief Justice is also free to challenge the decision to remove him in a Court of law or even the decision to refer him to a Tribunal.

But the Chief Justice has not complied with due process and the Constitution or choosing instead to remain in his position and issue orders for contempt and to stay the suspension whilst giving no reasons for his decisions.

The Chief Justice placed himself above the law, above Parliament and above the Constitution.

Refusal by certain Judges to recognise the unlimited constitutional power of Parliament to legislate or particularly, the Judicial Conduct Act

The power of Parliament to make laws is unlimited by Section 99 of the Constitution.

This is because the power of the people to make laws to govern themselves, to legislate, is vested in the Parliament by Section 100 Constitution.

Laws are made for the lawless. Laws are made to contain an existing mischief.

The Chief Justice ignored the sole check and balance on him or being the powers of the National Executive Council under the Constitution to suspend and to remove him. He ignored due process and instead issued Orders in his own interest to stay his suspension,

Orders issued by a Judge in his own interest are evidence of actual judicial bias.

Parliament needed to address a situation where a Judge shows bias but refuses to be removed.

The Constitution gives Parliament the SOLE power for the check and balance on the powers of the judiciary in section 157, as follows

157. Independence of the National Judicial System.

*Except to the extent that this Constitution specifically provides otherwise, neither the Minister responsible for the National Justice Administration nor any other person or authority (**other than the Parliament through legislation**) outside the National Judicial System has any power to give directions to any court, or to a member of any court, within that System in respect of the exercise of judicial powers or functions.*

This power was given to Parliament in 1975 in the Constitution. It is essential for a proper operation of the separation of powers. No one else in Papua New Guinea has this option to avoid the operation of the law; if they are charged by law they have to go through due process under the law. But the Chief Justice has placed himself above the law, above the Constitution.

The Judicial Conduct Act was passed by Parliament to enable examination of the conduct of a judge in certain circumstances, by a tribunal of his Judge peers and NOT politicians. After the examination, then a report would be prepared for Parliament, which would then determine to either act on the report if unfavourable to the Judge or take no action. The only action Parliament can take is to refer the report to the existing authorities such as the National Executive Council or the Judicial and Legal Services Commission or the Police for their action under the laws of Papua New Guinea that have been in place for 35 years.

Parliament cannot sack Judges under the Judicial Conduct Act.

Parliament cannot penalise a Judge for any conduct.

Parliament cannot even determine if the Judge's conduct is in breach of the Act ó that is up to the Tribunal of Judges.

All Parliament can do is refer the report of the Tribunal to an existing authority for their consideration and action.

Laws are made for the lawless. Laws are made to containing an existing mischief. In this case it is to create a review of a situation by his peers when a Judge's conduct is alleged to be biased or alleged not to be in accordance with accepted judicial standards.

Politicians have always had the constitutional power to remove Judges. It is the constitutional check and balance on the judiciary. The National Executive Council has, since Independence, always had the power under Sections 179-182 of the Constitution to advise the Head of State to suspend and then remove the Chief Justice.

The other Judges are hired and removed by the Judicial and Legal Services Commission ó which is made up of members of the legislature and executive plus the Chief Justice.

It is important to remember that on neither occasion when the Chief Justice was suspended in accordance with the provisions and powers of the Constitution did he take any recognised legal step to review or challenge the exercise of the power, such as instigate proceedings for judicial review of an administrative decision or to make an application under Section 57 of the Constitution for enforcement of his rights like any other person within the jurisdiction of Papua New Guinea would have to and as any legally trained person knows is the correct step. Instead he misused his judicial powers and granted orders in his own interest.

After the Judicial Conduct Act was passed in accordance with the procedures of Parliament and pursuant to section 157 of the Constitution, Parliament referred the Chief Justice and one other Judge to the head of State to appoint a Tribunal of Judges to review the conduct of the two Judges. The Governor General accordingly appointed a tribunal and the two Judges were suspended.

Both Judges refused to recognise the fact of the law being passed, or their referral or suspension.

Instead, the Chief Justice refused to be served with the Notice of the referral. The Morobe Provincial Government filed a Special Reference under the Constitution to challenge the validity of the Judicial Conduct Act and also filed an interim application for injunctions to (1) restrain the decision of parliament to refer the Judges for a tribunal to be appointed and (2) restrain the implementation of the Judicial Conduct Act.

The Chief Justice appointed three Judges to the Supreme Court Bench to hear the interim application, two of which are resident Judges in Lae. The three Judges unanimously made the interim orders contrary to established Supreme Court practice and contrary to the Constitution to restrain the decision to refer by Parliament and the implementation and effect of the Judicial Conduct Act.

These Orders were the first time interim injunctions had ever been made in a Reference, the first time the Courts have made an Order to restrain a decision of Parliament and to restrict the effect and implementation of a law.

And worse - it is a law that affects themselves.

By refusing to recognise the decisions and powers of Parliament contrary to Section 99, by refusing to recognise the unlimited law making of Parliament pursuant to Section 99, by refusing to be bound by Parliamentary Privileges in Section 115, by refusing to recognise the power of Parliament to legislate concerning Judge's functions or powers as set out in Section 157 ó certain Judges are destroying democracy and re-writing the Constitution and breaching the oath to uphold the Constitution that they swore to observe on their appointments as Judges..

Since Independence Papua New Guinea has every reason to be extremely proud of its hard working judiciary.

The present actions have created a crisis.

