

Non-justiciability of Parliament Procedures: Application Pursuant to Constitution, Section 18(1); Application by the Honourable Belden Namah MP (2021) SC2114

*Dr Eric Kwa**

Introduction

The question of whether the courts can invoke their powers under Sections 155 and 158 of the *Constitution* to scrutinise the workings of Parliament was brought to the fore once again in SC2114 in 2021. In previous cases such as *Haiveta v Wingti (No3)*¹, *SCR No.3 of 1999*; *Re Calling of Parliament*², *SCR No.3 of 2000*; *Reference by the Head of State on the Advice of the National Executive Council*³, *SCR No.1 of 2010*, *Re Organic Law on the Integrity of Political Parties and Candidates*⁴, *Polye v Zurenuoc*⁵ (Polye Case) and *Application by Peter O'Neill MP*⁶, the Supreme Court had sparingly argued that it can examine the proceedings of Parliament and rectify the mistakes of Parliament. However, in SC2114, the Supreme Court took a different view – that the proceedings of Parliament are non-justiciable, particularly in relation to the manner in which the Parliament conducts itself when dealing with a Vote-of-no Confidence (VONC) under Section 142 of the *Constitution*.

How does the decision in SC2114 affect future VONC? Also, to what extent does the above Supreme Court decision relate to the appointment of a Prime Minister, say after a National Election, the death or resignation of an incumbent Prime Minister? The answers to these and other issues will be briefly explored in this paper.

Vote of No Confidence (VONC)

The questions that arose in SC2114 and the *Polye Case* revolve around the VONC. The VONC is based on a principle of parliamentary democracy – responsible government, where the legislature can hold the executive accountable for its actions. It is a mechanism prescribed by the *Constitution* to hold the government accountable. This trigger can be utilized by Members of Parliament (MP) to remove an unpopular and bad government.

* Attorney General and Secretary for the Department of Justice and Attorney General.

¹ [1994] PNGLR 197.

² [1999] PNGLR 285.

³ (2002) SC722.

⁴ [2010] PNGLR 319.

⁵ (2016) SC2039.

⁶ (2020) SC2043.

When framing the *Constitution*, the Constitutional Planning Committee (CPC)⁷ considered the election, composition and removal of the executive arm of government in great detail in Chapter 7 of its Final Report.⁸ The CPC observed that:

One of the major principles in our recommendations for the National Executive Council is that it should be responsible to the National Parliament. Basically, this means that Ministers are individually and collectively answerable to members of the parliament for their executive actions and policies, including the work of their departments. Ultimately, however, it means that Parliament must be able to change the government.

The CPC suggested that, the following conditions must be satisfied before a VONC can be moved against a Prime Minister. These are:

1. A motion must be moved by one-tenth of the MPs;
2. The motion must be moved one week before the vote;
3. The motion must be approved by an absolute majority of votes;
4. The motion must name the nominee for the post of the Prime Minister; and
5. The motion must not be moved in the first six months (now 18 months) after the election of a Prime Minister.

The CPC provided four justifications for its proposal on the VONC. It said:

- Firstly, it reduces the element of uncertainty that might follow the fall of a government; one Prime Minister automatically gives way to another.
- Secondly, it ensures that the Speaker does not exercise any discretion as to who should be appointed to succeed the outgoing Prime Minister.
- Thirdly, the Parliament has a real choice; members know who will become Prime Minister if the motion is successful.
- Fourthly, it should ensure that a motion of no confidence is moved in all seriousness.

The gist of the CPC proposals is found in Sections 141, 142 and 145 of the *Constitution*.⁹ Section 141 talks about the collective responsibility of the national executive. Section 142 provides the procedure for removing a Prime Minister. The actual provision which provides for a VONC is Section 145, which is as follows:

Section 145 Motions of No Confidence

- (1) For the purposes of Sections 142 (the Prime Minister) and 144 (other Ministers), a motion of no confidence is a motion—
 - (a) that is expressed to be a motion of no confidence in the Prime Minister, the Ministry or a Minister, as the case may be; and
 - (b) of which not less than one week's notice, signed by a number of members of the Parliament being not less than one-tenth of the total number of seats in the Parliament, has been given in accordance with the Standing Orders of the Parliament.
- (2) A motion of no confidence in the Prime Minister or the Ministry—
 - (a) moved during the first four years of the life of Parliament shall not be allowed unless it nominates the next Prime Minister; and
 - (b) moved within 12 months before the fifth anniversary of the date fixed for the return of the writs at the previous general election shall not be allowed if it nominates the next Prime Minister.

⁷ See Kwa, EL., *Constitutional Law of Papua New Guinea* (Sydney: Law Book Co, 2001) 5. Also see Kari, S.S., *Decolonisation and the Birth of Papua New Guinea's Constitution 1959-1975 with Five National Goals and Directive Principles* (Goroka: NGDP Consultancy and Publishing Services, 2009) and Kwa, EL and Wolfers, T., *The Constitution of Papua New Guinea with Commentary* (Port Moresby: 110 Ltd, 2021).

⁸ Constitutional Planning Committee., *Constitutional Planning Committee Final Report 1974* (Port Moresby: Government Printer, 1974).

⁹ See Henry Ivarature, "The hidden dimension to political instability: Insights from ministerial durations in Papua New Guinea from 1972 to 2017" (2022) 9/2 *Asia and the Pacific Policy Studies*, ANU (<https://doi.org/10.1002/app5.352> or onlinelibrary.wiley.com, accessed 18/9/22).

- (3) A motion of no confidence in the Prime Minister or the Ministry moved in accordance with Subsection (2)(a) may not be amended in respect of the name of the person nominated as the next Prime Minister except by substituting the name of some other person.
- (4) A motion of no confidence in the Prime Minister or in the Ministry may not be moved during the period of eighteen months commencing on the date of the appointment of the Prime Minister.

The VONC mechanism was put under scrutiny by the Supreme Court in *Namah v O'Neill* (2015) SC1617. In this case, the Supreme Court was requested to determine whether an amendment to Section 145 to extend the grace period for a VONC from 18 months to 30 months was constitutional. The Supreme Court, after examining the history, purpose and principles of the VONC, ruled that the amendments were unconstitutional. A VONC can be moved within the first 18 months after the election of a Prime Minister. A VONC cannot however be moved 12 months prior to a general election.

Since Independence in 1975, there have been three successful VONC.¹⁰ These were:

1. Election of Julius Chan on 11 March 1980 (removed Michael Somare as Prime Minister);
2. Election of Paias Wingti on 21 November 1985 (removed Michael Somare as Prime Minister); and
3. Election of Rabbie Namaliu on 4 July 1988 (removed Paias Wingti as Prime Minister).

Apart from these successful VONC, there were three other changes in government when the incumbent Prime Ministers resigned to avoid a VONC. These were:

1. Election of Julius Chan on 30 August 1994 after the resignation of Paias Wingti as Prime Minister;
2. Election of Mekere Morauta on 14 July 1999 after the resignation of Bill Skate as Prime Minister; and
3. Election of James Marape on 31 May 2019 after the resignation of Peter O'Neill as Prime Minister

In the year since the first VONC, incumbent Prime Ministers, fearing this procedure, have attempted innovative strategies to avoid the VONC. Examples include:

- Attempt by Paias Wingti to resign and get re-elected in the same sitting of Parliament which was declared unconstitutional by the Supreme Court¹¹;
- The long adjournment of Parliament by seven months to avoid a VONC by Bill Skate which was again declared unconstitutional by the Supreme Court¹²;
- Amendment to Section 142 of the *Constitution* extending the grace period for a VONC from 18 months to 30 months (Peter O'Neill) which was declared by the Supreme Court as unconstitutional¹³; and
- Adjourning Parliament into the safe period (12 months prior to a National General Election) to avoid a VONC (Peter O'Neill) which was declared unconstitutional.¹⁴

The VONC procedure in the *Constitution* has played a critical role in the political history of PNG since 1975. The proceedings in the *Polye Case* and SC2114 are again examples of our political leaders vying for power through the VONC procedure.

¹⁰ Standish, B, "The Dynamics of Papua New Guinea's Democracy: An Essay" (<https://www.aph.gov.au>, accessed 18/9/22).

¹¹ *Haiveta v Wingti (No 3)* [1994] PNGLR 197.

¹² *SCR No 3 of 1999; Reference by Ombudsman Commission* [1999] PNGLR 285.

¹³ *Namah v O'Neill* (2015) SC1617.

¹⁴ *Polye Case*, *supra*.

Facts of the Case (SC2114)

The facts in this case can be summarized as follows. The Parliament was ordered by the Supreme Court on 9th December 2020, to meet on Monday 14 December 2020, after it had adjourned from 13 November 2020 to 20th April 2021. The events of this case followed on the heels of the events that went before the Supreme Court in *Application by Hon Peter O'Neill MP* (SC2043).¹⁵ To understand the facts of SC2114, one has to unpack the events in SC2043.

In SC2043, the Parliament had adjourned half way through its sitting (which began on 11th November) on 13th November 2020 to 1st of December 2020. This adjournment occurred after the Opposition successfully wrested power from the Government in Parliament. Relying on its new fortune, the Opposition used its numerical strength to adjourn Parliament to 1st December 2020. This meeting was presided by the Deputy Speaker of Parliament, Hon. Koni Iguan, the Member for Markham Open.

The Speaker of Parliament, Hon. Job Pomat, Member for Manus Open (who was absent at that time), disagreed with the decision of the Deputy Speaker and Parliament and said that the November Parliament session beginning on 11th November would continue on 16th November 2020. When the Parliament met on 17th November 2020, the Government had restored its numbers and was able to pass the 2021 National Budget and adjourn to 20th April 2021.

On 18th November, 2020, Hon. Peter O'Neill, who was the Member for Ialibu-Pangia Open, challenged the decision of Speaker Pomat and Parliament for the meeting on 17th November and adjournment to 20 April 2021. The Supreme Court agreed with Hon. Peter O'Neill, declaring that Speaker Pomat acted unconstitutionally and that the Parliament proceedings on 17th November were invalid. It therefore ordered the Parliament to reconvene on 14th December 2020.

Returning to the present case (SC2114), the Parliament did meet on 14th December 2020. It then adjourned to 16th December 2020, when it was able to change the membership of a number of Parliamentary Committees including the Private Business Committee. The Parliament also passed the 2021 Budget and adjourned to 20 April 2021.

When the Parliament met on Monday 14th December 2020, the Leader of the Opposition, Hon Belden Namah, presented a notice of a VONC to the Speaker, who is the Chairman of the Private Business Committee. On Wednesday, 16th December 2020, when the Parliament met, it passed the 2021 National Budget, completed its other businesses and rose at 11.35am to 20th April 2021.

Hon. Belden Namah, unhappy with the outcome of the Parliament proceeding, challenged the decision of Parliament to adjourn to 20th April 2021, without debating his notice of VONC, against the Prime Minister, Hon. James Marape.

¹⁵ Ibid.

Key Questions before the Supreme Court

There were four questions that were originally presented to the Supreme Court for determination by Hon. Namah. However, during trial, one of the questions was withdrawn. The Supreme Court was therefore left to answer the following three questions:

1. Was there a breach of Sections 11, 111, 115, 142 and 145 of the *Constitution*, when the Parliament made an unreasonable decision to adjourn Parliament for an unsubstantiated reason, and which prevented the notice of motion of no confidence from being moved on the 16th December 2020, and deprived members of their right to move the motion of no confidence?
2. Did the Speaker breach Sections 111 and 115 of the *Constitution*, by depriving Members of Parliament of their right to move the motion of no confidence, and to debate and vote on the motion of no confidence with complete freedom?
3. Did the Speaker breach Section 115 of the *Constitution*, by depriving Parliament of its conduct of the motion of no confidence by failing to take steps to clear the notice of motion of no confidence in time for Parliament to consider it on the 16th December 2020?

The Supreme Court ruled that there was no breach of the *Constitution* by the Parliament and the Speaker when the Parliament was adjourned to April 2021.

Distinguishing the Polye Case

Hon Namah's arguments centered on the findings and principles in the Polye Case.¹⁶ Basically, Mr. Namah argued that the actions of the Speaker and Government was contrary to the principles set down in the *Polye Case*.

The Supreme Court found in the *Polye Case* that every time a motion for a VONC was submitted to the Private Business Committee by the Opposition, it would consider the motion and exercise its powers to reject the motion. This practice persisted from 2014 to July 2016 (four times). When the Opposition made a final and last-ditch attempt to oust the Government in June 2016, the Parliament adjourned to August 2016 (*into the safe period*), protecting the Government from a VONC.

The Supreme Court observed the history of the VONC by the Parliament and concluded that there was a deliberate attempt by the Government to usurp the constitutional process to remain in power. The Supreme Court ruled that a motion of VONC "is not parochial in nature but one of national importance because of its ability to change government if it is successfully moved." It added that:

Granted the five (5) technical requirements are met on the face of the Notice, it should be cleared by the Committee without difficulty, in little time in order for it to be tabled in Parliament by the Clerk without delay. Standing Order 22(4) and 130(4) correctly envisages a notice of motion of no confidence will take utmost priority over any other private members' business and be tabled in Parliament as the first item on Private Members Business Day.¹⁷

¹⁶ Supra, n4, above.

¹⁷ Polye Case, supra, paragraph 42.

The five technical rules for a motion for a VONC that were established by the Supreme Court are; the Notice of Motion:

1. Is expressed to be a motion of no confidence in a named Prime Minister: *Constitution*, s145 (1)(a);
2. Must state the name of the alternate Prime Minister: *Constitution*, s145 (2)(a);
3. Must name the person and contain the signature of the person moving the motion: *Standing Order* 130(2);
4. Must name person and contain the signature of the person seconding the motion: *Standing Order* 130(2); and
5. Must name the persons and contain the signatures of not less than one – tenth of the Members of Parliament that support the motion: *Constitution*, s145 (1)(b).

When these five technical rules are satisfied, the Private Business Committee had no power to prevent the presentation of the motion of VONC to the Parliament. The Supreme Court held that where the Private Business Committee, had in its possession a valid motion of VONC, the Parliament must deal with this agenda as a priority in the next sitting day of Parliament.

The Supreme Court established that although the Notice of Motion lodged on 7th June 2016 was not of a parochial nature and did meet all the five technical rules, it was useless because Parliament had adjourned to the safe month of August. It therefore ruled that the adjournment was unconstitutional and invalid. The Supreme Court ordered the Parliament to meet within five days to deal with the motion of VONC. The Parliament did convene in July and the government defeated the VONC in the Prime Minister, Hon. Peter O’Neill.

The facts in SC2114 can be easily distinguished from the Polye Case. These include:

1. Although the Notice for VONC was delivered on Tuesday, the Private Business Committee could not deal with it because the Parliament had arisen at 11.30am on Wednesday to 20 April 2021. However, the safe period for the Marape Government began in July 2021. Thus, the VONC was still alive (so to speak)
2. The issue of whether the motion of VONC met the five technical rules could not be ascertained because the Private Business Committee had not yet dealt with the motion.
3. This was the first and only motion of VONC in the Marape Government, which was still within the purview of the Private Business Committee.
4. The Opposition still had the opportunity to lodge a new motion of VONC if it so wished because the safe period for the Government was after July 2021.

The Supreme Court agreed with our arguments¹⁸ and ruled that the Speaker and the Parliament had not violated the *Constitution* when it adjourned the Parliament to 20th April 2021.

Some Considerations

The Supreme Court in SC2114 seems to have finally realized that it needed to steer clear of the politics of Parliament, particularly in relation to VONC. There are two considerations that, in my view, influenced the Supreme Court to take this new direction. They are: (1) separation of powers; and (2) non-justiciability of Parliamentary proceedings.

¹⁸ As the Attorney General, I was the First Intervener in this Supreme Court case.

The Supreme Court had correctly held in *Mopio v Speaker of Parliament* [1977] PNGLR 420, that the proceedings of Parliament are non-justiciable. This decision was also based on the principle of separation of powers. However, after the Mopio case and recently (2020) in *Application by Hon. Peter O'Neill MP* (SC2043), the Supreme Court had not hesitated to exercise its constitutional powers under Sections 155 and 158 of the *Constitution* to reach beyond the principles of separation of powers and non-justiciability to fetter with the operations of the other two arms of government. This is exemplified in the Poyle Case; *SCR No3 of 1999*; *Reference by the Ombudsman Commission*; *SCR No1 of 2010*; *Re Organic Law on the Integrity of Political Parties and Candidates*; *Application by Hon Peter O'Neill MP*; and *Namah v O'Neill*.

In SC2114, the Supreme Court has finally reverted to its original position in the Mopio case. The leading judgment by the Chief Justice, Sir Gibbs Salika, reaffirms the Mopio decision. His honor was very explicit when he said at paragraph 40 and 41:

I was a member of the Court in the *Polye v Zurenuoc* case. ... With respect, I do not think we addressed s115 and s134 of the *Constitution* well in that decision. Having now given more thought to s115 and s134, I have come to the conclusion that by virtue of s115 and s134 of the *Constitution*, the procedures prescribed for Parliament or its committees are non-justiciable.

The Chief Justice is saying that the proceedings of Parliament and its committees are non-justiciable and therefore, the judiciary should not intrude into Parliamentary proceedings. The other four judges (Cannings J, Hartshorn J, Kariko J and Anis J) agreed with the proposition by the Chief Justice.

This is a major paradigm shift for the judiciary. This in my view, is the correct position. Based on the principle of separation of powers, the judiciary must refrain from overreaching its jurisdiction. Parliamentary proceedings must remain non-justiciable and not be subjected to the inadvertent adventures of the judiciary as exemplified in the abovementioned cases.

Conclusion

A motion for a VONC is a very serious constitutional matter as it involves the removal of a government. It is not parochial in nature. However, for it to proceed to Parliament, it must meet the five technical rules laid down by the Supreme Court in the *Polye Case*. When these five conditions are met, the Parliament must proceed to deliberate and vote on the motion of VONC.

Now that the rules for a VONC have been clarified by the Supreme Court, should it intervene in future cases of VONC? The full bench in SC2114 has ruled that the Supreme Court must not speedily rush to intervene in Parliamentary proceedings because they are non-justiciable. This is as I suggested is the correct position in law and must be maintained. However, how long this rule will last is anyone's guess.