



Restricting Party Hopping in Papua New Guinea's Parliament

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Executive summary

This paper argues that legislative initiative is needed to control party hopping by members of parliament (MPs), especially during the constitutional period for the moving of a motion of no confidence in Papua New Guinea (PNG). The Organic Law on the Integrity of Political Parties and Candidates (OLIPPAC) governs political parties in PNG. In 2003, certain amendments were made to OLIPPAC to control party hopping. However, the provisions were challenged in the Supreme Court. The Supreme Court nullified those amendments on the basis that they restricted and infringed the constitutional rights of MPs and were unconstitutional. The political conditions following the court's decision contributed to the constitutional crisis/impasse of 2011–12 and, later, the constitutional confusion of 2020. The Supreme Court's expectations for MPs to act in an orderly way through education have not been achieved. The challenge is to construct the OLIPPAC legislation in conformity with the court's deliberation. Rather than infringing and restricting MPs' rights, the balance should be to regulate those rights for a certain amount of time. The current crisis and confusion being faced should prompt the relevant law reform institutions to tailor a possible legislative solution.

Introduction

Party politics is an essential part of any democratic system. In PNG, most candidates are encouraged to contest elections under the banner of a political party (Reilly 2003). Under section 69(e) of the current OLIPPAC legislation, independent candidates must align with a political party to be eligible to participate in the election of the prime minister, which takes place straight after the general elections.

From 2003 until 2010, when the Supreme Court struck down certain provisions of OLIPPAC, it played the role of arbiter concerning the relationship between an elected parliamentarian, his/her political party, and the exercise of their constitutional functions and legislative mandate. One key feature was the OLIPPAC regulation of the conduct of MPs in terms

of a mandatory requirement to vote along party lines and majority party views on many issues, provided under sections 57, 58, 59, 60, 61, 65, 66 and 67 of OLIPPAC. Although troubling and restrictive, these provisions played the important role of keeping MPs in check. When the provisions of OLIPPAC were declared unconstitutional by the Supreme Court, it gave MPs the opportunity to move between political parties.

This Discussion Paper will argue for the need to reconsider the debate on regulating the movement of MPs and party politics in PNG. There are two parts to this paper. First, two case studies will be presented: the 2012 political impasse/crisis and the recent (2020) constitutional confusion. These events were triggered by the movement of MPs between rival political factions, which had destructive effects and led to the blatant disregard and contravention of multiple constitutional provisions. The second part will analyse the implications of the two case studies and provide reasons as to why there is a need for an anti-defection law. The paper argues that such a law will ensure the conduct of MPs is regulated, but without any infringement on MPs' constitutional rights.

Party politics in Papua New Guinea

Political parties in PNG emerged before independence and continue to evolve today. Among the various political organisations to appear on the scene before the elections for the second House of Assembly in 1968, the United Christian Democratic Party (later United Democratic Party — UDP) and the PNG National Union (Pangu Pati) are described as the first Indigenous, mass-based parties (May 2008). Since independence in 1975, many political parties have come and gone, with increasing regularity, with three major parties participating in most coalition governments: the People's Progress Party, People's Democratic Movement, and Pangu (Reilly 1999). During the 2017 national elections, a total of 44 political parties fielded candidates to contest the election (Naime 17/2/2017).

The general nature of political parties in Papua New Guinea has attracted widespread criticism.

A weak party system is a primary cause of political instability in PNG (Baker 2005). Okole (2002) labels political parties in PNG as poorly anchored in society, and typically they do not have a wide membership base among the populace. Sepoe (2006) reiterates that political parties in PNG are fragmented, fluid, and lacking in any sort of discipline or popular membership, tending to be more interested in power games than in fostering and promoting democratic governance.

The genesis of OLIPPAC

Party hopping has been an issue in PNG politics, giving rise to frequent no-confidence motions and political instability during prime ministerial elections. To ensure political stability and to regulate such practices, PNG embarked on an ambitious effort in 2000 to construct a party system by legislative means (Fraenkel 2012). PNG's Organic Law on the Integrity of Political Parties and Candidates and changes to the electoral system (from first past the post to limited preferential voting) are examples of attempts to manufacture stability via legislative means (Wolfers 2011). Several objectives can be served by such laws, which are sometimes referred to as political party integrity legislation (Nand 2015). These objectives include parliamentary stability and nation-building (Kumar 2012). The goal of strengthening parties is also driven by the view that strong political parties are an inevitable feature of 'proper' democracy (Fraenkel et al. 2008). The introduction of OLIPPAC was intended to strengthen political parties and give greater stability to the government (Standish 2007). OLIPPAC was aimed at regularising the process of post-election government formation, establishing a political party registration system, initiating public funding of political parties, and tying MPs more firmly to those political parties (Fraenkel 2012).

Amendments to OLIPPAC

There were certain provisions of OLIPPAC that were controversial even before it was challenged in the Supreme Court. For instance, section 57 provided for grounds of resignation from a registered political party, stating that a member must only resign under conditions specified in that section and if the member resigns because of other grounds he/she is guilty of misconduct in office. Under section 58, the member who resigned carried the burden of proof to establish that his/her grounds of resignation fell within the ambit of section 57 (permissible grounds of resignation). Section 59 provided for the procedures of resignation and the Ombudsman Commission's jurisdiction to investigate an MP. Section 60 defined the investigative process undertaken by the ombudsman and the procedure for informing the MP under investigation, and sections 69–73 of OLIPPAC provided that an MP vote along party lines regarding legislation and motions of no confidence.

Resentment grew among MPs concerning the prohibitory provisions of OLIPPAC. In the wake of the 2007 election, leading figures on the opposition

benches — including New Ireland Governor Sir Julius Chan — denounced the OLIPPAC legislation as 'promoting dictatorship' (*The National* 15/8/2008). This was because the new law provided protection for the incumbent prime minister and the opposition faced great difficulties in voting him out by way of a motion of no confidence (Fraenkel et al. 2008).

In highlighting the failures of OLIPPAC, Gelu (2005) stated that the prime minister and his government were protected by OLIPPAC, and the legislation failed to maintain political stability when political parties were divided in parliament; in short, the promise that OLIPPAC would strengthen the party system had not materialised. Kantha (2009) suggests there were three crucial problems with OLIPPAC: (1) it restricted the ability of MPs from exercising their votes in parliament; (2) it prevented them from resigning from political parties; and (3) it prevented them from exercising their votes in accordance with their conscience and the interests of their constituents.

Given the resentment against the provisions of OLIPPAC, there were two ways it could be challenged — either by the opposition in parliament leading to amendments or through the Supreme Court as a constitutional reference. The latter option was chosen as the opposition did not have the numerical strength in parliament to amend laws.

Supreme Court Reference challenging OLIPPAC

In 2008, the Provincial Executive Council of Western Province challenged provisions of OLIPPAC, claiming it prohibited rights guaranteed by the PNG Constitution. The case was titled *Special Reference by Fly River Provincial Executive Council; Re Organic Law on Integrity of Political Parties and Candidates* [2010] PGSC 3; SC1057. Sections 57, 58, 59, 60, 69, 70, 72, 73(1)(b) and 81 of the above law were declared unconstitutional by the PNG Supreme Court. The court held that those above sections that were amended restricted and prohibited the exercise of the right given to MPs to hold public office and exercise public functions.

Constitutional crisis (impasse) 2011–12

Following the 2008 Supreme Court decision on OLIPPAC, MPs were at liberty to change political parties and vote individually on legislation and motions of no confidence. In 2011, the incumbent prime minister, Sir Michael Somare, was hospitalised in Singapore, and he appointed cabinet minister the Honorable Sam Abal as the acting prime minister. This created division within the ruling National Alliance Party and heightened the potential for a motion of no confidence (Anere 2012). Sir Michael was absent from the country and in Singapore from 24 March 2011 to 26 August 2011 for medical treatment. During that time there were three meetings of the parliament in May, June and August. Sir Michael had leave of the parliament to be absent from the May meeting on medical grounds. However, there were concerns raised about his continued absence (*SCR No 3 of 2011: by East Sepik Provincial Executive* [2011] PGSC 41,5).

On 2 August, the speaker for parliament, the Hon Jeffery Nape, declared a vacancy in the office of prime minister. Parliament responded by electing as prime minister, in a vote of 70 to 24, Peter O'Neill of the People's National Congress Party and member for the Ialibu-Pangia electorate in the Southern Highlands Province (May 2013). The East Sepik provincial government (which was chaired by Somare) filed a Supreme Court Reference questioning the legality of the ousting of Prime Minister Somare and the election of the Hon Peter O'Neill. The Supreme Court ruled in a majority decision (three out of five judges) that the Hon Somare was unlawfully removed from office as prime minister by parliament on 2 August 2011 and that the speaker's decision went against the constitution (*SCR No 3 of 2011,295*).

This decision did not sit well with most parliamentarians who supported and had voted for Peter O'Neill, and as a result, the country entered a constitutional crisis. As May (2017) elaborates, this period is now referred to as the period of the impasse, during which PNG had two claimants to the office of prime minister, each with a cabinet, and for a while the country had two police commissioners and, briefly, two governors-general.

The cause of this crisis or impasse can be directly linked to the nullification of the provisions of OLIPPAC restricting party hopping by MPs. The Supreme Court was very clear that there was never a vacancy in the office of the prime minister: the actions by the speaker were unconstitutional and the election of Prime Minister Peter O'Neill was unconstitutional. However, because a majority of members had moved to support Prime Minister O'Neill, they intentionally did not comply with the court orders but used parliamentary procedures to convene parliament and have government members re-elect O'Neill. The prime minister can be appointed in parliament by an absolute majority of MPs present in parliament. They also amended laws to set an age limit for a prime minister so that Sir Michael Somare would be disqualified from being prime minister (*The National* 9/1/2012).

In terms of the movement of MPs, 11 defected from the Somare government to the opposition in 2009 (*Post-Courier* 22/10/2009). There was growing resentment against the Somare-led government and complaints of executive dominance of parliament and the public service and corruption at all levels of government (May 2011). The mass exodus of MPs from the National Alliance Party and its coalition partners was unprecedented. More than 70 members of the new government, led by Peter O'Neill and Belden Namah, Don Poyle, William Duma, Sir Puka Temu and Moses Maladina, marched into parliament to oust the government (*The National* 2/8/2011).

Laws breached during the 2011–12 impasse by parliamentarians

To stay in power, a government must command the support of a legislative majority (Costello and Robinson 2020; Heywood 2008). The prime minister's government serves only as long as it can command parliament's confidence and support (Ethridge and Handleman 2014). In the above scenario, when MPs switched parties and affiliations with the intent of changing government, their actions breached multiple constitutional provisions.

This means that several provisions of the constitution were intentionally breached by MPs. Table 1 below shows the different laws that were breached by parliamentarians trying to vote out the Somare/Abal government.

Table 1: Laws breached during the 2011–12 impasse

Laws that were breached	Action
PNG Constitution, s 142	Illegal declaration of a vacancy in the office of the prime minister.
PNG Constitution, s 104(2)(d)	Illegal declaration by the speaker that Prime Minister Somare was absent from three consecutive parliamentary meetings and thus lost his seat.
PNG Constitution, s 142(2)(3)(4)	When there a vacancy in the office of the prime minister, a new prime minister is appointed on the next sitting day. The parliament failed to do this and therefore was in breach of these constitutional provisions.
Prime Minister and National Executive Council Act 2002, ss 142(5)(c) and 6	Steps required to render a prime minister unfit for office were not followed.
PNG Constitution, s 103(3)(b)	Prime Minister Somare was illegally disqualified from being an MP.
PNG Constitution, s 50	Sir Michael Somare was not given the right to be heard.
Organic Law on National and Local Level Government Election (OLNLLGE), s 135, s 104 (2)(d) and Division 2	The speaker lacked the power to rescind the parliament's decision of 17 May to give Sir Michael leave of absence from the May sitting.

Source: Compiled by the author drawing on *SCR No 3 of 2011:by East Sepik Provincial Executive* [2011] PGSC 41,5.

Constitutional confusion in 2020

After the 2012 national elections, the Peoples National Congress (PNC) won a majority of the seats and was invited to form the government with its coalition partners. Peter O'Neill was elected as prime minister. The same results followed in the 2017 national elections and Prime Minister O'Neill was voted in for another term (Wood and Maholopa 2019). However, in 2019, there was a growing trend of resentment towards O'Neill and the PNC concerning several decisions, both from the public and from within the government ranks. The exodus of members from the government started with the governor for the Eastern Highlands, the Hon Peter Numu, who moved to the opposition citing the lack of basic services as his reason (Mou 23/1/2019). Following him, another five MPs from the PNC left the party over the government's handling of the latest major gas development project (Kuku 29/4/2019). The biggest blow to the government of Prime Minister O'Neill was the defection of PNC heavyweight and finance minister James Marape to the opposition (Blades 7/5/2019). With these defections, a motion of no confidence against the government was at hand.

On 29 May 2020, faced with losing a vote of no confidence, O'Neill delivered his letter of resignation to the governor-general, triggering a parliamentary vote to appoint a new prime minister. Following O'Neill's formal resignation, Marape and his renegade supporters moved back to the government benches with Marape elected to be the prime minister (May 2020).

Eighteen months later, the constitutionally mandated period to move a motion of no confidence against a prime minister was at hand once again. In the November sitting of parliament, there was a mass exodus of 13 government ministers to the opposition (*The National* 26/11/2020). On 13 November 2020, when the deputy speaker was presiding, the majority of government MPs defected to the opposition and adjourned parliament to 1 December 2020. On 16 November 2020, the speaker of the national parliament publicly announced his opinion that the ruling of the deputy speaker on 13 November, which led to the decision to sit next on 1 December 2020, was incorrect. The speaker overruled the decision of the deputy speaker and declared that the meeting that commenced on 10 November was still in progress. Parliament reconvened on 17 November 2020 without the presence of the opposition MPs, and it passed the 2021 national budget and adjourned to 20 April 2021. On 18 November 2020, O'Neill, an MP, commenced proceedings under section 18(1) of the PNG Constitution for the Supreme Courts' opinion on which faction of parliament had followed the right rules (*Application by O'Neill; Application [2020] PGSC 121; SCCOS No 7: 2020*).

The following are some of the key events that created confusion:

- Parliament was chaired by the deputy speaker on 13 November 2020 and entertained a motion by a majority of MPs to adjourn parliament. On

that day the majority of the MPs, including senior government ministers, were in the opposition and the government did not have the majority. All the opposition MPs flew to another province to set up camp after the adjournment.

- The speaker of parliament then claimed the move was illegal, reconvened parliament (the opposition MPs still being in another province), and with only a fraction of MPs passed the budget. Parliament was then adjourned to 20 April 2021.

There was considerable disagreement and confusion as to which party legally complied with the constitution and laws of parliament. The Supreme Court responded with the following verdict:

1. The parliament's decision of 13 November 2020 involved no breach of any procedure.
2. The speaker's decision of 16 November 2020 to overrule the deputy speaker's rulings of 13 November 2020 was made in excess of his powers, functions, duties, and responsibilities.
3. The sitting of the parliament on 17 November 2020 was unconstitutional, as it took place only because of the unconstitutional decision by the speaker of 16 November 2020, and the court ordered that the next sitting of the parliament should be on 14 December 2020.

There was an uncontrollable movement of MPs to different camps. One MP switched from government to the opposition camp for two weeks then later rejoined the government ranks (*The National* 2/12/2020), while another MP who was a deputy prime minister in the Marape government moved to the opposition to be one of the alternative prime minister nominees (Whiting and Walsh 21/11/2020); however, he moved back to the government when he was not nominated as the alternate prime minister (McLeod and Pryke 16/12/2020). Another government minister claimed the shocking shift of MPs caused him to unconsciously move to the opposition but that he later came back to the government after regaining his thoughts (*The National* 18/11/2020). The movement of MPs came to a spectacular end as 18 MPs moved from the opposition to the government to restore confidence in the Marape government and pass the budget and adjourn parliament to 2021 (*The National* 17/12/2020).

These events demonstrate several things about the political culture of party politics in PNG. First, without the control of OLIPPAC, an MP has the freedom to change parties and also support any candidate for prime minister whenever he or she pleases. Second, the reasons given justifying the movements may not be sufficient to a reasonable person. Third, an MP changing support in a matter of days and political parties in months does not speak of stability. These two constitutional events re-emphasise the need for anti-party defection legislation. OLIPPAC is important because it can keep in check irrational and unethical behaviour and its effects. Schattschneider (1942) proposed that disloyal behaviour by elected parliamentarians not only weakens the unity of

parliamentary political parties, but also works to undermine the effectiveness of parliamentary government. In a study by Nikolenyi and Shenhav (2015), the authors concluded that party hopping causes legislative defects to the quality of democracy, enhances corruption, threatens the stability of the governments, makes the legislative process difficult to manage, and erodes the institutionalisation of political parties.

Laws breached during the 2020 confusion by parliamentarians

It could be expected that from the experience of the constitutional impasse of 2011–12, in which the blatant disregard of laws was evident, the political turmoil should never have been repeated. Unfortunately, the constitutional confusion in 2020 resulted in serious breaches of the law (see Table 2).

Table 2: Laws breached during the constitutional confusion 2020

Laws that were breached	Action
PNG Constitution, s 108	The speaker’s decision of 16 November 2020 to overrule the deputy speaker’s rulings of 13 November 2020 was made in excess of his powers, function and duties.
PNG Constitution, s 114	The speaker does not have the power to override a decision of the parliament made by a majority of members.
PNG Constitution, s 59(2)	The speaker acted unfairly contrary to this section which provides for the principles of natural justice.
PNG Constitution, s 50 (right to vote and stand for public office)	The infringement of MPs’ rights by the speaker was especially serious in this case as it denied those members of the parliament the right to participate in the debate on the 2021 national budget, which was voted on and passed at the sitting of 17 November 2020.

Source: Compiled by the author drawing on *Application by O’Neill; Application* [2020] PGSC 121; SCCOS No 7: 2020).

Need for legislative measures to prevent party hopping by MPs

Party hopping is a term that was coined to mean moving from one political party to the other. In different parts of the Commonwealth, the phenomenon of defecting from a parliamentary party is known by different nomenclatures such as ‘floor-crossing’, ‘carpet-crossing’, ‘party hopping’, ‘dispute’ and ‘waka [canoe]-jumping’ (Malhotra 2006). A possible solution

to combat party hopping is to enact anti-defection laws. Legislative party switching is common in many advanced democracies and even more so in consolidating democracies (Sevi et al. 2018). A growing number of parliaments around the world (for example, in Israel, India and New Zealand) have adopted anti-defection laws that protect the unity of legislative party groups (Nikolenyi 2021). In a study conducted in sub-Saharan Africa, 26 countries have implemented anti-defection laws in their constitutions and electoral law (Goeke and Hartmann 2011).

To control party hopping by MPs in PNG would require a reconsideration of the provisions of OLIPPAC. Miskin (2003) believes an anti-defection law may suit the circumstances of countries such as PNG, where it may help to impose order on a chaotic party system to stabilise the government. However, with the deliberation of the Supreme Court in nullifying certain provisions of OLIPPAC, the task now is to structure the law so that it complies with the Supreme Court decision and any constitutional tests in the future. In a way, it is reverse-engineering the law in playing devil’s advocate and drafting the law in a manner and form that can withstand any constitutional challenge.

In the Fly River case above, in nullifying certain provisions of OLIPPAC, the Supreme Court held at paragraph 182:

Is OLIPPAC a law that is reasonably justifiable in a democratic society? This is a law that is directed at the conduct and behaviour of Members of Parliament. To control their behaviour and conduct, OLIPPAC is the Parliament’s answer to correcting human failures and shortcomings that only integral human development of the whole human person can correct and not through or by-passing laws to deal with that human failure. (*Fly River Provincial Executive Council; Re Organic Law on Integrity of Political Parties and Candidates* [2010] PGSC 3,182)

The Supreme Court might have regretted making such a profound statement and having faith in the integral human development of parliamentarians when it was called upon to solve the constitutional impasse and later the constitutional confusion in two separate Supreme Court references.

The freedom of assembly and association as provided for by section 47 of the PNG Constitution is a qualified right and can be restricted by an Act or law made by parliament passed in accordance with section 38 of the constitution. This applies to all qualified rights in the constitution. In the Supreme Court case *Re the Organic Law on National Elections (Amendment) Act 1981*, a law passed by parliament titled National Elections (Amendment) Act of 1981 increased the nomination deposit required of candidates for election to parliament from K100.00 to K1000.00. This law was challenged by the Ombudsman Commission on the basis that it was contrary to sections 50(1) and (2) (right to vote and stand for public office). The Supreme Court held that

the law had breached section 50 of the Constitution. Justice Kapi held, the right to stand for elective public office comes under the provisions which deal with qualified rights. Under these provisions, there are several ways a right may be qualified. One of the requirements under s. 38 of the Constitution and perhaps the most important one is that the law is reasonably justifiable in a democratic society having proper regard for the rights and dignity of mankind (SCR No 2 of 1982,26).

Regulating votes of no confidence

An MP can exercise his/her rights provided under the constitution, especially under section 47. However, to protect the sanctity of the constitution and parliamentary procedure there is a need to regulate an MP's rights in relation to the moving of a motion of no confidence. As shown in the above two case studies, MPs have changed political parties within a matter of weeks or even days. Party hopping by MPs has been the driving force behind the contravention of constitutional provisions. In the constitutional crisis case, MPs moved to support the O'Neill regime and violated several provisions of the constitution. They did not adhere to the Supreme Court ruling that found the O'Neill government to be unconstitutional.

In the constitutional confusion case, MPs jumped parties and adjourned parliament to the date at which the constitution provided for the moving of a motion of no confidence. However, parliament was illegally and unconstitutionally reconvened to vote and pass the national budget.

To restrict MPs from party hopping, OLIPPAC needs to provide that:

- If an MP intends to move to another political party, he/she must do so six months before the lapse of the 18 months in the moving of a motion of no confidence. After changing parties for the first time, a member can move parties as he or she chooses; however, it must be after six months has elapsed.
- The MP must give a formal letter of their intention to change parties to the speaker and the registrar of political parties and candidates, with the change taking effect as soon as the letter is delivered to the two offices.

These measures are a compromise between an MP's qualified rights and the greater good of PNG's constitutional democracy. The punishment given to an MP for party hopping is not drastic as compared to other countries such as New Zealand and India. In New Zealand, if a member resigns from a political party, he/she lose their mandate as an MP (Electoral (Integrity) Amendment Act 2018 (New Zealand), s 55A2). In 2018, the New Zealand government reintroduced a ban on party hopping to significant partisan acrimony (Ferrer 2020). This was because, in New Zealand, switching occurs so often that a law was enacted to mandate switchers to resign their seats (Geddis 2002).

The justifications for the New Zealand party-hopping law can be seen from the section in the Act stating that its purpose is to:

- (a) enhance public confidence in the integrity of the electoral system, and
- (b) enhance the maintenance of proportionality of political party representation in parliament as determined by electors. (Morris 2018)

A member of parliament is voted into parliament based on a party platform. To hold on to the seat while joining another party or sitting alone as an independent is seen as little short of a fraud upon the voters (Miskin 2003). When voters elect a candidate, they make the decision based on what the candidate campaigns for and what party they represent (Lau and Redlawsk 2001). In India, there are laws and regulations to control or prohibit party hopping by requiring parliamentarians to surrender their seats if they change sides (See Gauja 2016; Janda 2009; Miskin 2003). This is enforced in the Indian constitution. In 1985, India passed anti-defection constitutional amendments (Hassall and Saunders 2007). The Anti-Defection Law or 10th Schedule of the Constitution of India was interpolated in the constitution in 1985 by the 52nd Amendment Act to stop MPs shifting their loyalties from the parties they supported at the time of election or defying their parties at perilous times such as during voting on a cardinal resolution (Gupta 2020). This was because the 'menace of defections and political horse-trading has perpetually threatened the functioning and survival of political parties in India' (Mishra and Ghosh 2019). Sridharan suggests that 'all states of the Indian Union have been affected by defections, governments have been repeatedly toppled and new cabinets formed several times in the life of a single assembly by such acts of political nomadism' (DeSouza 2006).

Constitutional justification of anti-defection law

The PNG Constitution provides the following qualified rights under sections 42–56:

- Liberty of a person
- Freedom from forced labour
- Freedom from arbitrary search and entry
- Freedom of conscience, thought and religion
- Freedom of expression
- Freedom of assembly and association
- Freedom of employment
- Right to privacy
- Right to vote and stand for public office
- Right to freedom of information
- Right to freedom of movement
- Protection from unjust deprivation of property
- Equality of citizens.

Being qualified, these rights can be restricted by way of legislative enactment. However, there are two qualifications that must be satisfied for a purported law to regulate qualified rights.

First, a law can only restrict — and not prohibit — qualified rights. There is a distinction between

restricting a right and prohibiting a right. In *SCR No 2 of 1982*, Deputy Chief Justice Kearney makes this important distinction in the following terms:

In the ordinary use of language, “regulate” does not include “prohibit”; And the Constitution, Sch. 1.20, makes it clear that a law passed under the Constitution, s. 50 (2), cannot, under the guise of regulating law in effect prohibit the exercise of the s. 50(1) rights. But I think that regulating the exercise of a right will very frequently involve the imposition of some degree of restriction on its exercise. A law passed for the purposes of any of ss. 44–49, 51, and 52 can I think, go further in the way of imposing restrictions than can a regulating law under s. 50 (2). The difference between regulating and restricting is one of degree, not of kind, and I think the distinction is this: that the power to restrict in those provisions can extend to prohibition, while the power to regulate in s. 50 (2) cannot. (*SCR No 2 of 1982 (No 1); Re the Organic Law on National Elections (Amendment) Act 1981* [1982] PNGLR 214,11)

Requiring an MP to take a stance six months before the constitutionally mandated time for a motion of no confidence is restrictive in nature and not prohibitory. The office of an MP is legitimised through the people’s mandate, and they are obligated to act in the best interest of the people. The constitution of PNG also draws its validity from the people of PNG. An MP moving between political parties once, twice, or even three times in a matter of weeks does not reflect the spirit of the rights conferred to him/her under section 50 of PNG’s constitution. Although there may be just reasons for leaving a political party, an MP switching political parties to contravene and plunder the constitution is not a just exercise of the rights conferred to their office, and those rights must be regulated to preserve its sanctity.

All other rights of an MP as to how he or she votes concerning bills, motions, and which political party he or she chooses, are within their sole prerogative. The suggested restrictive nature of amendments to OLIPPAC is premised on the fact that a newly sworn government in PNG has 18 months to effect its policies and plans until it can be tested in a motion of no confidence. If an MP wants to change political parties (for example, from the government to the opposition) he or she must do so before the period of the motion of no confidence. This is to ensure an individual member has scrutinised the performance of the government and has clear intent as to whether there needs to be a change in government. After making that choice, MPs must be given reasonable time (another six months is suggested) to remain where they are or move.

Second, the law is necessary and is reasonably justifiable in a democratic society. The test for this is that the law that is passed must be reasonably justifiable in a democratic society having proper respect for the rights and dignity of mankind (PNG Constitution, s 38). In the case discussed above (*SCR No 2 of 1982*) in interpreting section 38 of the

constitution, the court held that it is clear the Act qualifies human rights given by the constitution, whether these qualifications are justified under section 38 or Part X of the constitution; in either case, the parliament needs to satisfy the requirements that:

- the qualifications are ‘necessary’ (s 38(1)(a)) or ‘reasonably required’ (s 233(1)) or ‘reasonably necessary’ (s 233(2)),
- and that the law is reasonably justifiable in a democratic society (ss 38(1) and section 233(2)). (*SCR No 2 of 1982*,16)

In *The State v. NTN PTY Limited*, concerning the meaning of ‘reasonably justifiable in a democratic society’, Justice Barnett said:

The test or question for the Court is whether the Act itself, as enacted by the National Parliament is reasonably justifiable in a democratic society in today’s circumstances ... For very good reasons s 38 of the Constitution provides that a law which is intended to regulate or restrict a constitutional right must very carefully follow certain prescribed formalities. (*The State v. NTN PTA Limited* 1992,22)

In *Re Constitution Section 19(1) – Special Reference by Allan Marat*, the Supreme Court, in invalidating certain legislation, held that:

Both these laws passed without Opposition votes, are self-serving interests of a few promoting vindictiveness and not serving the interests of the People of Papua New Guinea when laws are specifically passed to empower the government in control to remove Sir Michael Somare from parliament and to install Peter O’Neill as the Prime Minister. (*In re Constitution Section 19(1) – Special reference by Allan Marat; In re Constitution Section 19(1) and 3(a) – Special reference by the National Parliament* [2012] PGSC 20; SC1187,301)

Restricting MPs’ rights to move parties and allegiance in the period leading up to a motion of no confidence is reasonably justifiable in a democratic society. The monumental task that needs to be done is justifying the constitutionality of legislation to restrict rights. In the above Supreme Court case that nullified provisions of OLIPPAC, the court went on to make the following statements:

We are also not persuaded that the restrictions or prohibitions imposed by all these provisions are justified in a democratic society having proper regard to the right and dignity of mankind. The onus was on the State and those Interveners relying on the validity of those laws, to show that the restrictions or prohibitions were justified. We are not satisfied that they have discharged that burden. (*SCR No 11 of 2018*,184)

Section 39 of the PNG Constitution states:

(3) For the purposes of determining whether or not any law, matter or thing is reasonably justified in a democratic society that has a proper regard for the rights and dignity of mankind, a court may have regard to –

(a) the provisions of this Constitution generally, and especially the National Goals and Directive Principles and the Basic Social Obligations.

Restricting the rights of MPs is protecting the essence of the constitution, especially concerning the moving of a motion of no confidence and changing government. It is justifiable in a democratic society because it protects the fundamental pillars of democracy. Constitutional provisions cannot be hijacked to serve the interests of a few to grab power, as occurred in the political impasse, or to hold onto power, as seen in the constitutional confusion. Party hopping and its effects are a problem in PNG and the Supreme Court was called upon twice to solve these defects in the constitutional process.

The grave abuse of the constitution in a period when party hopping has been rife clearly indicates the need to set in place reasonable regulation on the rights of MPs. It will ensure that the great trust placed upon them by the people and constitutional institutions such as the Supreme Court is not wantonly abused.

Conclusion

Papua New Guinea is a constitutional democracy. The laws, system of government, and public offices are created under section 9 of the PNG Constitution. Because of the weak party system in PNG, MPs have taken advantage of this fact and abused the rights provided to them to hold public office. The constitutional crisis and confusion cases discussed in this paper took place during a sad period in the democratic history of PNG. They were instigated when MPs broke party ranks and undertook acts that were directly in breach of the constitution. The confusion and chaos created during periods of moving a motion of no confidence in PNG should be restricted.

A possible solution would be the introduction of anti-defection legislation. However, unlike the previous provisions of OLIPPAC, such a legislative measure should aim to restrict qualified rights to ensure it is not abused by MPs. Changing political parties in a matter of days or weeks is not a proper exercise of MPs' constitutional office. Expressing their intentions before the moving of a motion of no confidence portrays a sense of political maturity and shows that a member is convinced to move parties (even to the opposition) after losing confidence in the government.

However, the hurdle is that any anti-defection law must conform to the pronouncement by the Supreme Court and only *restrict* the rights of MPs as opposed to *prohibiting* them. Anti-party defection laws have been implemented in other countries but in those countries, the measures are draconian in the sense that a member loses his/her mandate. The proposal for PNG's anti-defection law is to avoid such a harsh effect yet have in place measures to firmly secure the stability of PNG's democracy and discipline of its party politics. Members of parliament occupy a privileged public office. An anti-defection law would ensure that they are restrained from abusing the rights and privileges conferred upon them.

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