



# Parliament vs Judiciary

*‘The Clash of the Titans’*

**Time to rethink the doctrine of  
separation of powers in  
Papua New Guinea**

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# Outline



- I. Why this topic/issue?
- II. Key cases of ‘Tension’: Parliament vs Judiciary
- III. What is the Role of the Judiciary under the PNG ‘Home-grown’ Constitution?
- IV. Thesis Findings: A “Home-grown” separation of powers doctrine
- V. Usefulness of the findings
- VI. Conclusion

# Why this topic/issue?

- ✦ **To rethink the doctrine of separation of powers doctrine as it was intended to apply in PNG?**
  
- ❖ Critical institutions to PNG's constitutional democracy
- ❖ Failure to fully appreciate what that doctrine was intended to mean for them in the context of Papua New Guinea is a cause for tension
  - **Proper understanding may lead to lessening tension**
  
- ❖ **PhD thesis**
  - ✦ Inspired a PhD thesis, so this is opportune time to share some findings
  - ✦ Some comparative analysis with Australia, South Africa, India, Kenya and Brazil



# Parliament vs Judiciary

## ✦ Key cases of 'Tension'

- ❖ 2011-2012      Constitutional crises cases
- ❖ 2016-2019      Judicially ordered VoNC (current SCR)\*\*

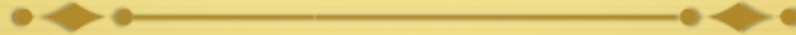


**2011-2012**

## **Constitutional crises cases**

- ✧ Parliament refused to follow Supreme Court's judgment
- ✧ 'Two' Prime Ministers co-existed for 7 months
- ✧ Chief Justice arrested; Some judges declared "war" on the Executive
  
- ✧ **Parliament's argument:** Judiciary – don't interfere in **internal** parliamentary matters
  - i. Non-justiciability (section 134)
    - Proceedings in parliament are not open to legal challenge
  - ii. **Doctrine of Separation of Powers** (section 99)
    - Aristotle, Locke, Montesquie, Blackstone, American Federalists, Australian Constitution = *Narrower view*
    - ONLY three arms of government
    - COURTS – a restrictive role to only deal with legal issues
    - Respect parliamentary sovereignty
    - Non-interference function

## Court's responses: (SR by Marat [2012] PGSC 20)

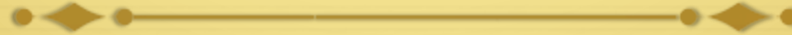


- ❑ “[T]he argument on separation of powers and sovereignty or supremacy of Parliament that was forcefully advanced by the [O’Neill government]...were mere smokescreens [to conceal their political interests]” (*Judgment, 21 May 2012, para 363-4*)
- ❑ “Just because Parliament is constituted by Members directly elected by the People and is the supreme law making body does not empower it with greater power than the other two arms.

**That is only wishful thinking and a misconception of a bygone era... No longer are we tied down with that colonial legacy”** (*para 363-4*).



# 2016-2019      Judicially ordered VoNC (current SCR)



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## PNG court orders the recall of Parliament to hear no-confidence motion in Prime Minister

**Pacific Beat** By [Eric Tlozek](#), staff


Updated 12 Jul 2016, 5:53pm

**Papua New Guinea's Supreme Court has ordered the recall of Parliament in five days to hear a no-confidence motion in Prime Minister Peter O'Neill.**

In compliance with the order, a Parliamentary meeting has been set by the house Speaker for 2:00pm (local time) on Friday, July 15.

Parliament has not reconvened since a rally by





2016-2019

## Judicially ordered VoNC (current SCR)

- ✧ UPNG students' protest/shooting
- ✧ Parliament adjourned, avoiding a Vote of No-Confidence
- ✧ Opposition Leader applied to the Supreme Court
- ✧ **Supreme Court ordered Parliament to sit or face criminal sanctions**
  - **“Such actions by the Committee (VoNC) and the Speaker are an affront to the rule of law and a real threat to Parliamentary democracy in this country”**  
*(Judgement, 12 July 2016)*



## Parliament's response



- ✦ Govenor Kelly Naru's response (on behalf of the Parliament):

“[T]he **principle of separation of powers** [requires] mutual respect to be maintained at all times between the three arms of the Government and in our situation **between the Judiciary and the National Parliament.**

In this respect, Parliament has no right to interfere with the functioning of the Courts in the discharge of their judicial function to dispense justice. **Likewise the Courts have no power to interfere with the way in which Parliament goes about to conduct its businesses.**” (*PNG Parliamentary Hansard, 22 July 2016*)

✦ Govenor Naru responded to the question:

“What are the exact ambit, limit...and operation of the principle of Separation of Power between Parliament and the Courts in our Constitutional democracy which we must embrace and follow?”

- Supreme Court’s answer – Hearing as of 12 August 2019
- *Findings from the thesis?*
  - (\*\*Restricted to academic discussion and without pre-empting the Court’s opinion)

# A response to Parliament: Findings from the Thesis



- ✦ The Doctrine of Separation of Powers was **fundamentally reconfigured** by the drafters of the PNG Constitution
  - ✦ “We must ensure therefore that the constitution is suited to the needs and circumstances of Papua New Guinea and is not imposed from outside. In short, **it should be a home-grown constitution.**’ (House of Assembly Debates, 23 June 1972)
  - ✦ We would not “merely follow some firm precedent, Westminster or otherwise” or allow the Constitution to be drafted in “Marlborough House in London or in Paris” or even be seen to “merely rubberstamp prefabricated ideas from Canberra”. (*Quotes from other sources, including the CPC Report of CPC members*)
  - ✦ CPC “wanted a truly ‘**home-grown**’ constitution to be **established** with an emphasis on restraint of executive power...” (Downs 1980, 493)





## ✦ The Supreme Court:

- being “a **‘home-grown’ constitutional document** [meant it was] **not one ‘made in Canberra’ or anywhere else**”. (Ref by OC [2010] PGSC 10, at [80])
- “**was not given to the country by somebody else, as in the case of Australia.** It derives from the people of Papua New Guinea, it grew here...” (*State v Wonem* [1975] Raine J)

# “Home-grown” Doctrine of Separation of Powers

## ✦ Characterized by:

1. **Highly liberal judiciary with socio-political interventionist functions**
  - Evidence: 12 textual indicators in the Constitution
    - E.g. ss 57, 225 (**voluntary** policing of HR and services to const. institutions) (**executive function**); s109 (“fair, large and liberal construction and interpretation”) (**beyond black-letter law**); ss 20, 21, 60 ect – to develop a body of law (Underlying Law) (**legislative role**)
  - CPC: “The courts tend to be formalistic and legalistic... We cannot afford to have our courts take a narrowly legalistic approach if the law is to be justly applied. (*CPC Report, 1974, Chap 8*)
2. **4<sup>th</sup> arm of government = Independent constitutional institutions** e.g. Ombudsman Commission, Public Solicitor, Public Prosecutor, Judicial and Legal Service Commission ect.
  1. Different to Integrity Branch
  2. Constitutionally birthed and protected unlike others, e.g. Australia
3. **A “Transformative Constitution”** –NOT programmatic, aspirational or conservative/preservative constitution.

Judiciary may therefore be described as having NOT an *activist*, but *interventionist* and *transformative* function

# Back to the “Q” in 2016-2019

✦ ~~Government's Policy on Privatization with Emphasis on Choice~~



# Usefulness of the findings?



- ✦ **Some benefits of having policing/interventionist functions of courts**
  - Responds to a decline in parliamentary democracy – “executive dictatorship” and parliament becoming a “mere rubberstamp” (*ESP Case, 2011 [64]*)
  - Strengthen weaknesses in good governance institutions
    - Constitutional lethargy, ...institutions of good governance such as the Ombudsman Commission are “sleeping at the wheel”. (*Ila Geno case, 2014*)
    - Reflect the growing movement globally towards “good governance courts”
  - Improve access to justice for those unable to access State legal services or afford to file proper proceedings

# Conclusion

- ✦ *Not to disregard the merits of the traditional model of the Doctrine of Separation of Powers.*
- ✦ **Rather, an invitation to re-examine the compatibility of the traditional model to PNG's circumstances.**
- ✦ **To embrace the social and political interventionist function of the courts as constitutionally mandated and a necessity.**
  - **Arnold Amet CJ:**

The Supreme Court has “...an increasing consciousness of the threat to constitutionalism”..., a “willingness to be involved in promoting change” and to adopt “**a more interventionist approach**”. (Saunders 1996, 261)
  - **Professor Peter Mulphern: “In law, as in science, a phenomenon that refuses to conform with orthodox theory should inspire re-examination of the theory.” (1988, 96)**

**“Take back PNG ‘Home-grown’ Constitution”**