

PAPUA NEW GUINEA’S ATYPICAL ACTIVISM: *RE ENFORCEMENT OF BASIC RIGHTS UNDER THE CONSTITUTION OF THE INDEPENDENT STATE OF PAPUA NEW GUINEA, SECTION 57*

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ABSTRACT

The case of *Re Enforcement of Basic Rights Under the Constitution of the Independent State of Papua New Guinea, Section 57* held that National and Supreme Court judges have the power to bring proceedings of their own initiative to protect and enforce human rights under the Constitution. This case note considers whether this judgment is consistent with a line of decisions dealing with s 57 *suo moto* jurisdiction, and whether it reflects the current state of the law. It then examines whether matters of ‘social policy’ can fall within the scope of s 57 jurisdiction, concluding that there is scope within the current legal framework for such proceedings. It also considers the policy and practical considerations support this interpretation. Finally, it discusses whether concerns regarding allocation of political decisions to judges, and the potential for improper exercise of the s 57 power, can be adequately managed.

I INTRODUCTION

Re Fish Ban,¹ decided by Cannings J in the National Court of Papua New Guinea (‘PNG’), affirms the power of National and Supreme Court judges, and the duty of National Court judges specifically, to bring proceedings of their own initiative to protect and enforce human rights. Against the backdrop of a ban on fishing in Madang Province following a mining spill, Cannings J examines the power as set out under s 57 of the PNG Constitution,² peculiar in its promotion of judicial activism in a common law system. This power, taken at its highest, has significant ramifications for the enforcement of human rights in PNG, potentially allowing judges to shape high-level executive and legislative policy. In light of PNG’s poor human rights record, and its weak human rights enforcement framework, it provides a mechanism for the judiciary to address a critical gap, and leverage this power within the distinctive PNG context, to shape the nation for the better.

This case note first sets out the factual background to the case and Cannings J’s findings. Secondly, it analyses the development of the law regarding s 57 jurisdiction, examining cases decided prior to and after *Re Fish Ban*. Thirdly, it discusses whether proceedings examining matters of ‘social policy’, such as healthcare, environment, and planning, can fall within the scope of s 57 jurisdiction. Finally, this case note examines the practical and policy reasons in favour of an expansive interpretation of s 57 jurisdiction, and attempts to address key criticisms aimed at such an interpretation. This case note

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¹ *Re Enforcement of Basic Rights under the Constitution of the Independent State of Papua New Guinea, Section 57* (National Court of Papua New Guinea, Cannings J, 19 February 2020) (‘*Re Fish Ban*’).

² *Constitution of the Independent State of Papua New Guinea s 57* (‘Constitution’).

argues that s 57 jurisdiction, coupled with proper procedural guidance on the conduct of proceedings, promotes a strong culture of accountability which is appropriate for PNG's postcolonial context.

II BACKGROUND AND DECISION

On 24 August 2019, there was a slurry spill into the sea at Basamuk Bay, in the Madang Province of Papua New Guinea due to a malfunction of the deep-sea tailings placement system of a nearby nickel refinery.³ The heavy metal pollution turned the sea red, caused mass fish deaths, and was the subject of widespread media coverage questioning the safety of consuming fish from the bay.⁴ One week later, the Madang Provincial Government imposed a ban on the harvesting, sale, purchase and marketing of fish and other marine produce from the maritime waters of the province (the 'Fish Ban').⁵

In the following months, Cannings J, a National Court judge who resided in Madang Province, took judicial notice of the effect of the Fish Ban on the local community, which relied heavily on the fishing industry for food and income.⁶ As no community member had initiated court proceedings challenging the ban, Cannings J decided on 8 January 2020 to invoke the constitutional power of the National Court to commence proceedings of its own initiative, to protect and enforce human rights.⁷ The main issues Cannings J considered were:

1. The Court's jurisdiction and the procedure by which the proceedings should be conducted.
2. In relation to human rights:
 - a. who imposed the Fish Ban;
 - b. under what law the Fish Ban was imposed;
 - c. whether there were any sound legal and factual, especially scientific, reasons for continuing the Fish Ban; and
 - d. whether any person's human's rights would be infringed by continuing the Fish Ban.⁸

A Jurisdiction and Procedure

Cannings J began by considering the jurisdiction of the Court and its ability to commence proceedings. PNG's Constitution enshrines specific human rights ('Basic Rights'),⁹ which are justiciable and enforceable in the National and Supreme Courts.¹⁰ More specifically, s 57 provides that:¹¹

(1) A [Basic Right] shall be protected by, and is enforceable in, the Supreme Court or the National Court... either on its own initiative or on application by any person who has an interest in its protection and enforcement...

(2) For the purposes of this section—

(a) the Law Officers of Papua New Guinea...

have an interest in the protection and enforcement of the rights and freedoms referred to in this Division...

³ *Re Fish Ban*, above n 1, [1].

⁴ *Re Fish Ban*, above n 1, [1]; see also John Papik, 'Papua New Guinean Man Dies After Eating Fish Caught Near Nickel Mine Spill', *ABC News* (Web Page, 2 October 2019) <<https://www.abc.net.au/news/2019-10-02/png-man-dies-after-eating-fish-caught-near-nickel-mine-spill/11566932>>.

⁵ *Re Fish Ban*, above n 1, [1].

⁶ *Re Fish Ban*, above n 1, [3].

⁷ *Re Fish Ban*, above n 1, [4].

⁸ *Re Fish Ban*, above n 1, [14].

⁹ See Constitution, above n 2, ss 32, 35–37, 41–53 and 55.

¹⁰ *Re Fish Ban*, above n 1, [5]–[7], citing Constitution, above n 2, ss 22, 23, 57 and 155(4).

¹¹ Constitution, above n 2, s 57 (emphasis added).

(3) A court that has jurisdiction under Subsection (1) *may make all such orders and declarations as are necessary or appropriate* for the purposes of this section...

(5) Relief under this section is *not limited to cases of actual or imminent infringement* of the guaranteed rights and freedoms, but may, if the court thinks it proper to do so, be given in cases in which there is a *reasonable probability of infringement*...

(6) The jurisdiction and powers of the courts under this section are in addition to, and not in derogation of, their jurisdiction and powers under any other provision of this Constitution.

Coupled with ss 22 and 23, which direct the National Court to ensure compliance with the Constitution, Cannings J held that these provisions authorised and obliged the National Court, *suo moto*, to inquire into and make orders protecting and enforcing Basic Rights.¹² Cannings J dismissed as non-binding obiter the previous decision of the Supreme Court (PNG's apex court) in *Independent State of Papua New Guinea v Transferees* ('*Transferees*'),¹³ which had quashed his *suo moto* s 57 inquiry into the rights of asylum seekers at Manus Island Detention Centre.¹⁴

Cannings J confirmed that proceedings were commenced in accordance with the procedure set out in the *National Court Rules 1983* (PNG) ord 23 r 8.¹⁵ Under s 57(3) of the Constitution, his Honour 'granted [leave] to 14 parties to join the proceedings, referred to as respondents',¹⁶ though the order under which they were joined appeared to be in mandatory terms, specifying that '[t]he following persons are joined to the proceedings and designated as respondents'.¹⁷ The respondents consisted of several government and community stakeholders:¹⁸

- (i) Madang Provincial Government (represented by Thomas More Ilaisa Lawyers);
- (ii) National Fisheries Authority (represented by NFA Legal Division);
- (iii) Conservation and Environment Protection Authority (represented by the Solicitor-General);
- (iv) Usino Bundi District Development Authority (represented by Bradley Wak Lawyers);
- (v) Basamuk Landowners Association;
- (vi) Madang Lagoon Association;
- (vii) Madang District Councillor; and
- (viii) Community representatives for the fish consumers of Madang, and the people of Nagada, Manam Island, Kurumbukari, Kranket Island, Bilbil and Riwo villages, Long Island and Coastal Atolls (Madang Province districts).

The purpose of this joinder was to gather evidence as to the circumstances leading up to and surrounding the Fish Ban, as well as its impact on the local community.¹⁹

¹² *Re Fish Ban*, above n 1, [12].

¹³ *Independent State of Papua New Guinea v Transferees* (Supreme Court of Papua New Guinea, Sakora, Gavara-Nanu and Ipang JJ, 5 August 2015) ('*Transferees*').

¹⁴ *Re Fish Ban*, above n 1, [10]–[11], quoting *Morua v China Harbour Engineering Co (PNG) Ltd* (National Court of Papua New Guinea, Kandakasi DCJ, 7 February 2020) [35] ('*Morua*').

¹⁵ *Re Fish Ban*, above n 1, [13]–[14]. Notably, this rule was held to be unconstitutional by Gavara-Nanu J in *Transferees*, above n 13, [38], but this finding was overturned in *Independent State of Papua New Guinea v Tamate* (Supreme Court of Papua New Guinea, Kandakasi DCJ, Manuhu, Makail, Kariko and Miviri JJ, 30 July 2021) [54]–[56] (Kandakasi DCJ), [113] (Manuhu J), [311] (Miviri J) ('*Tamate*').

¹⁶ *Re Fish Ban*, above n 1, [15] (emphasis added). Notably, Kandakasi DCJ in *Morua*, above n 14, [69], also joined parties pursuant to Constitution, above n 2, s 57(1) and *National Court Rules 1983* (Papua New Guinea) ord 5 r 8(1).

¹⁷ *Re Fish Ban*, above n 1, [15]. The originating process was issued in Form 126 of the *National Court Rules 1983* (Papua New Guinea).

¹⁸ *Re Fish Ban*, above n 1, [15] and [19].

¹⁹ *Re Fish Ban*, above n 1, [19].

B Human Rights Inquiry

Based on the evidence obtained by affidavit and cross-examination, Canning J concluded that:

- (i) The Fish Ban was imposed by a group of senior managers in the provincial administration on behalf of the Madang Provincial Government;²⁰
- (ii) The decision to impose the Fish Ban was motivated by public health and safety concerns, but not authorised under any law (and therefore *ultra vires*);²¹
- (iii) There were no sound legal or factual reasons to continue the ban, as no public body such as the National Fisheries Authority or the Conservation and Environment Protection Authority had been consulted or had advised on the ban based on available scientific evidence;²² and
- (iv) The continuation of the ban would infringe the human rights of all affected persons in Madang Province, namely freedom based on law, the full protection of the law, and freedom from acts that are harsh and oppressive, disproportionate to the requirements of the particular circumstances, or not reasonably justifiable in a democratic society having a proper regard for the rights and dignity of mankind.²³ Canning J relied on the extensive evidence of economic hardship and food insecurity wrought by the ban, along with the anxiety and confusion stemming from lack of communication from the provincial government.²⁴

Accordingly, Canning J declared and ordered that:

- (i) The Fish Ban was imposed *ultra vires*, and was therefore null and void and ceased to have effect as of 19 February 2020;²⁵
- (ii) Implementation of the Fish Ban infringed, and if ongoing would continue to infringe, the human rights of all affected persons in Madang Province;²⁶ and
- (iii) Those persons could resume the activities the subject of the Fish Ban.²⁷

Canning J commented *obiter* that it was inappropriate to order additional remedies, such as damages or an apology, as such remedies should be awarded between the specific parties. His Honour left this issue for consideration in separate proceedings.²⁸

III COMMENTARY

The key ratio of *Re Fish Ban* is that National and Supreme Court judges have the power, and National Court judges (singled out by ss 22 and 23 of the Constitution) have the duty, to commence proceedings *suo moto*, to protect and enforce Basic Rights. This position strongly endorses judicial activism, a significant departure from the traditional common law approach, which assigns to judges only an

²⁰ *Re Fish Ban*, above n 1, [20], [38].

²¹ *Re Fish Ban*, above n 1, [22], [38].

²² *Re Fish Ban*, above n 1, [25], [38].

²³ *Re Fish Ban*, above n 1, [26]–[30] and [38].

²⁴ *Re Fish Ban*, above n 1, [19].

²⁵ *Re Fish Ban*, above n 1, [38].

²⁶ *Re Fish Ban*, above n 1.

²⁷ *Re Fish Ban*, above n 1.

²⁸ *Re Fish Ban*, above n 1, [37].

adjudicatory role in disputes brought to them by litigating parties.²⁹ Assuming the power is widely embraced, it also has significant ramifications for the enforcement of human rights in PNG, as judges are armed with broad powers and actively encouraged to protect human rights. Given the breadth of these powers, there is a potential for PNG judges to play a key role in the country's human rights enforcement framework, and even effectively become 'social engineers',³⁰ reshaping executive policy according to judicial interpretation of Basic Rights. Against this backdrop, it is worth examining whether this proposal remains sound, both as a matter of law, and policy.

A The Development of the Law

1 First Tensions: Transferees

In confirming the jurisdiction to commence *suo moto* inquiries under s 57, Cannings J declined to follow the decision in *Transferees*.³¹ In that case, the Supreme Court unanimously overturned Cannings J's *suo moto* inquiry into possible breaches of the rights of asylum seekers at the Manus Island Detention Centre. While the key issue on appeal was whether Cannings J had breached the principles of natural justice through conducting proceedings as an inquiry, the Court exercised its inherent constitutional power of review, to determine whether Cannings J had jurisdiction.³² Gavara-Nanu J delivered the leading judgment, holding that 'a court's power to make an order or a declaration under [s 57] only arises upon an application being made by a party',³³ and citing case law in which orders and declarations were made under s 57.³⁴ Obiter, Sakora J stated that the European-style inquisitorial mode of proceedings was fundamentally incompatible with PNG's common law model.³⁵ Ipang J, without addressing s 57 jurisdiction, also critiqued the inquisitorial mode of proceedings adopted by Cannings J.³⁶

2 Subsequent Developments: Transferees as Obiter Dicta?

The decisions of *Morua* and *Tamate*,³⁷ which precede and succeed *Re Fish Ban* respectively, have distinguished *Transferees* on the issue of s 57 jurisdiction. Kandakasi DCJ, sitting in the National Court in *Morua*, described that aspect of the *Transferees* judgment as non-binding 'obiter dictum... as those were not the issues before the Supreme Court. What was before the Supreme Court was Cannings J's refusal to disqualify himself from the case'.³⁸ The majority in *Tamate* (including Kandakasi DCJ) echoed this view, holding that s 57 jurisdiction was not the key issue on appeal.³⁹ Makail J further stated that as s 57 jurisdiction was not raised by the *Transferees* parties, submissions should have been called in respect of it, and that it was a threshold issue because it had the potential

²⁹ See, eg, Chief Justice Gerard Brennan, 'Judicial Independence' (Speech, The Australian Judicial Conference, 2 November 1996).

³⁰ Bal Kama, 'Can PNG Judges Intervene in Social and Development Issues? The 2021 Madang Roads Ruling', *DevPolicyBlog* (Web Page, 19 February 2021) <<https://devpolicy.org/can-png-judges-intervene-in-social-and-development-issues-the-2021-madang-roads-ruling-20210219/>>.

³¹ See above Part II(A).

³² *Transferees*, above n 13, [30] (Gavara-Nanu J), citing Constitution, above n 2, s 155(4).

³³ *Transferees*, above n 13, [41] (Gavara-Nanu J).

³⁴ *Transferees*, above n 13, [35]–[37], citing *Constitutional Reference No 1 of 1977* [1977] PNGLR 362; *Ralph Rakhinand Premdas v The Independent State of Papua New Guinea* [1979] PNGLR 329; *Ready Mixed Concrete Pty Ltd v The Independent State of Papua New Guinea and Utula Samana and Samson Kiamba* [1981] PNGLR 396.

³⁵ *Transferees*, above n 13, [6] (Sakora J).

³⁶ *Transferees*, above n 13, [81] (Ipang J).

³⁷ *Morua*, above n 14; *Tamate*, above n 15.

³⁸ *Morua*, above n 14, [37] (Kandakasi DCJ).

³⁹ *Morua*, above n 14, [14] (Kandakasi DCJ), [176] (Makail J), [175]–[180] (Manuhu J).

of terminating proceedings without determining the merits.⁴⁰ As such, the comments in *Transferees* constituted obiter dicta, merely providing non-binding ‘persuasive authority’.⁴¹

However, this position is difficult to reconcile with the characterisation of s 57 jurisdiction in *Transferees* as a ‘threshold issue which underpins all the issues arising in this appeal and goes to the jurisdiction of the court’.⁴² Gavara-Nanu and Sakora JJ held that the incorrect invocation of s 57, resulting in the subsequent inquiry, directly ‘led to breaches of the... principles of “natural justice”’, the key issue on appeal.⁴³ The comments on s 57 jurisdiction seem to accord with the definition of ‘ratio’ in common law jurisdictions, including PNG, being the statements of law or observations necessary to the disposition or final decision in the case.⁴⁴ Kariko and Miviri JJ, in *Tamate*, took this approach, viewing the finding on jurisdiction as a condition precedent to the outcome of the decision.⁴⁵ On the other hand, it could be argued that the finding of breach of natural justice was principally due to the inquisitorial nature of the proceedings, rather than the act of commencing proceedings in itself. All three judges viewed Canning J’s apparent lack of judicial independence, in acting as a ‘party, prosecutor, witness, counsel and Judge’ as critical to the outcome.⁴⁶ However, this debate was not given extensive consideration in *Morua*, *Re Fish Ban*, or the majority judgments in *Tamate*, which merely dismissed the s 57 issue as one not before the Court in *Transferees*. Furthermore, the case authority relied on by Kandakasi DCJ to support this proposition distinguished between the inter-applicability of principles for murder and manslaughter,⁴⁷ separate causes of action, whereas in *Transferees*, the incorrect invocation of s 57 jurisdiction was held to be a necessary precondition of the breach of natural justice.

In any event, Kandakasi DCJ in *Morua* and *Tamate* held that even if those comments constituted ratio decidendi, that aspect of the judgment should be overturned.⁴⁸ However, if this were the case, only the Supreme Court in *Tamate* was authorised to do so under the Constitution, as *Transferees*, being a Supreme Court decision, was binding on all other courts except the Supreme Court itself.⁴⁹ Accordingly, while the *Transferees* judgment in respect of s 57 jurisdiction no longer represents the law in light of subsequent decisions, in the interest of promoting consistency in decision-making ‘for the society’s guidance and for the avoidance of chaos and disorder’,⁵⁰ arguably greater judicial attention should have been given to the application and operation of judicial precedent. This is particularly the case given that the relevant comments in *Transferees* seem to constitute ‘deliberate statements of law as opposed to a casual expression of opinion’,⁵¹ and should therefore hold high persuasive value.

⁴⁰ *Morua*, above n 14, [175] (Makail J).

⁴¹ *Morua*, above n 14, [166] (Makail J), quoting *Goma v Protect Security & Communication Ltd* (Supreme Court of Papua New Guinea, Injia CJ, Davani and Cannings JJ, 29 November 2013) [133] (Cannings J).

⁴² *Transferees*, above n 13, [30] (Gavara-Nanu J).

⁴³ *Transferees*, above n 13, [3] (Sakora J).

⁴⁴ *McBridge v Monzie Pty Ltd* [2007] FCA 1947, [6], cited in *Tamate*, above n 15, [266] (Kariko J).

⁴⁵ *Tamate*, above n 15, [260] (Kariko J), [305] (Miviri J).

⁴⁶ *Transferees*, above n 13, [44] (Gavara-Nanu J, Sakora J agreeing at [22]–[24], Ipang J agreeing at [92]–[93]).

⁴⁷ See *State v Ketu (No 2)* (National Court of Papua New Guinea, Kandakasi J, 17 October 2007) [16].

⁴⁸ *Morua*, above n 14, [38] (Kandakasi DCJ); *Tamate*, above n 15, [15] (Kandakasi DCJ).

⁴⁹ See Constitution, above n 2, sch 2.9(1).

⁵⁰ See *Morua*, above n 14, [19] (Kandakasi DCJ), quoting *Aihi v Isoaimo* (Supreme Court of Papua New Guinea, Kandakasi, Hartshorn and Yagi JJ, 1 October 2013) [27] (Kandakasi J).

⁵¹ *Goma v Protect Security & Communication Ltd* (Supreme Court of Papua New Guinea, Injia CJ, Davani and Cannings JJ, 29 November 2013) [133] (Cannings J).

3 A Principled Argument: *Morua*

In *Morua*, Kandakasi DCJ provided strong support for a s 57 *suo moto* inquiry jurisdiction, noting:

- (a) The failure in *Transferees* to consider the words ‘of its own initiative’ in the context of s 57 as a whole, and the context of constitutional drafting materials demonstrating the intention to address ‘actual, imminent, likely or reasonably probable’ breaches of human rights;⁵²
- (b) Previous decisions invoking s 57 *suo moto* jurisdiction, which, unlike the cases cited in *Transferees*, involved the protection or enforcement of human rights;⁵³
- (c) The availability of *suo moto* powers in other PNG legislative provisions,⁵⁴ and of *suo moto* jurisdiction to enforce human rights in Pakistan, Bangladesh, and India;⁵⁵ and
- (d) The case management benefits of inquisitorial-style proceedings.⁵⁶

Therefore, Kandakasi DCJ envisaged an expansive approach to s 57 *suo moto* jurisdiction, allowing for an inquisitorial mode of proceedings, aligned with Canning’s view in *Re Fish Ban*. However, *Morua* did not conclusively decide the issue; Kandakasi DCJ’s comments were made obiter in the National Court, as the proceedings were not initiated under the s 57 *suo moto* jurisdiction. Additionally, only two cases his Honour cited involved *suo moto* inquiries into human rights; the rest involved invocation of s 57 by an applicant. Both of those cases involved inquiries into conditions in custody, and were covered by a special legislative regime which requires judges to conduct judicial visits under the *Correctional Service Act 1995* (Papua New Guinea).⁵⁷ There was no such regime in *Re Fish Ban*; the basis for the inquiry being Canning’s judicial notice as a member of the Madang community. As such, there was reason to doubt the precedential value of *Morua* in respect of s 57 jurisdiction.

⁵² *Morua*, above n 14, [10] (Kandakasi DCJ) citing *Report of the Constitutional Planning Committee* (Report, 1974) Ch 5 Pt 1 [116] (‘CPC Report’).

⁵³ *Morua*, above n 14, [15] (Kandakasi DCJ), citing *Uma More v The University of Papua New Guinea* [1985] PNGLR 401; *Re Conditions at Buino Corrective Institution* [1988–89] PNGLR 266; *Re Lack of Correctional Service (CS) Facilities in the Enga Province* (National Court of Papua New Guinea, Ellis J, 2 February 2010); *Re Conditions of Detention at Beon Correctional Institution* (National Court of Papua New Guinea, Canning J, 2 February 2006); *Re Conditions of Detention at Biialla Police Lock-Up* (National Court of Papua New Guinea, Canning J, 22 March 2006); *Re Conditions of Detention at Kimbe Police Lock-Up* (National Court of Papua New Guinea, Canning J, 30 June 2006); *Re Conditions of Detention at Buka Police Lock-Up* (National Court of Papua New Guinea, Canning J, 25 August 2006); *Re Conditions of Detention at Buka Police Lock-Up* (National Court of Papua New Guinea, Canning J, 6 October 2006); *Re Conditions of Detention at Lakiemata Correctional Institution* (National Court of Papua New Guinea, Canning J, 9 October 2006); *Re Release of Prisoners on Licence* (National Court of Papua New Guinea, 31 July 2008); *Re Alleged Brutal Treatment of Suspects* (National Court of Papua New Guinea, Canning J, 26 February 2014); *Re Miriam Willingal* [1997] PNGLR 119.

⁵⁴ *Morua*, above n 14, [44]–[45] (Kandakasi DCJ), citing *Supreme Court Act 1975* (Papua New Guinea) s 28(1); *National Court Rules 1983* (Papua New Guinea) ord 5 r 8(1); *Election Petition Rules 2017* (Papua New Guinea) r 18; *Supreme Court Rules 1983* (Papua New Guinea) ord 3 r 3; *Alternative Dispute Resolution Rules 2010* (Papua New Guinea) r 5(2).

⁵⁵ *Morua*, above n 14, [46] (Kandakasi DCJ), citing *In Re: Human Rights Case (Environmental Pollution in Balochistan)* PLD 1994 SC (Supreme Court of Pakistan); *Hussainara Khatoon & Ors vs Home Secretary, State Of Bihar* (3) 1979 SCR 532 (Supreme Court of India); see also Mihir Rajamane, ‘Suo Moto Powers in Writ Jurisdictions: A South Asian Innovation?’, *Supreme Court Observer* (Web Page, 29 June 2021) <<https://www.scobserver.in/journal/suo-moto-powers-south-asian-innovation/>> and Bal Kama, ‘Reconceptualising the Role of the Judiciary in Papua New Guinea’s “Home-grown” Constitution’ (PhD Thesis, Australian National University, 2020) for further discussion of *suo moto* enforcement of human rights across multiple jurisdictions.

⁵⁶ *Morua*, above n 14, [47] (Kandakasi DCJ).

⁵⁷ See *Re Conditions of the Buimo Corrective Institution* [1988–89] PNGLR 266; *Re Lack of Correctional Service (CS) Facilities in Enga Province* (National Court of Papua New Guinea, Ellis J, 2 February 2010).

In *Re Fish Ban*, Canning J provided limited legal analysis aside from citing *Morua*, alongside his Honour's own previous decisions. Accordingly, the position following *Re Fish Ban* as to the existence and scope of s 57 *suo moto* jurisdiction remained uncertain.

4 Resolution: *Tamate*

Section 57 *suo moto* jurisdiction was confirmed by a 4-1 majority in *Tamate*, on appeal from Canning J's inquiry into the human rights of prisoners on death row,⁵⁸ though the Court ultimately quashed the inquiry on the basis that Canning J did not have a proper factual basis for initiating it.⁵⁹ The Court proceeded in separate judgments:

- (a) Kandakasi DCJ (with whom Makail and Miviri JJ agreed) drew from his own reasoning in *Morua*, but placed the following two qualifications on his previously expansive approach:
 - (i) Section 57 *suo moto* proceedings can only be initiated by the court as 'normal adversarial court proceeding[s]', and not as inquiries, partially affirming *Transferees*.⁶⁰ This is because there is no express provision for inquiries under s 57, while the *Commissions of Inquiries Act* already provides for inquiries.⁶¹ His Honour set out procedural guidelines for the initiation and conduct of such proceedings, including the appointment of a lawyer as an *amicus curiae* to avoid conflicts of interest;⁶²
 - (ii) Section 57 *suo moto* proceedings cannot derogate from processes already provided for by other relevant and applicable laws.⁶³ For example, in *Tamate*, Canning J had attempted to invoke s 57 proceedings to bypass the existing criminal appeals process;⁶⁴
- (b) Only Manuhu J adopted the expansive approach of permitting inquiries, describing it as 'clear Parliamentary interpretation',⁶⁵ and
- (c) Kariko J declined to decide the issue, having held the *Transferees* comments to be *ratio decidendi*.⁶⁶

Accordingly, the *Tamate* judgment finally resolved the ability of courts to bring proceedings of their own initiative under s 57, and provided clarity as to the conduct of proceedings, alongside important limitations on the use of the jurisdiction to circumvent existing legal processes.

B Scope of s 57 *Suo Moto* Jurisdiction: Social Policy?

In *Tamate*, notably, the Court did not express an opinion on proceedings inquiring into matters of broader social policy, such as the health and safety measures involved in *Re Fish Ban*. The judgment primarily focussed on the criminal context in which s 57 jurisdiction is most often invoked. However, the fact that Makail J cited *Re Fish Ban* as a case supporting s 57 *suo moto* jurisdiction may provide implicit support for the legitimacy of such proceedings.⁶⁷ Such an expansive approach would provide

⁵⁸ See *In the Matter of Enforcement of Basic Rights Under Section 57 of the Constitution of The Independent State of Papua New Guinea, Re Prisoners Sentenced to Death* (National Court of Papua New Guinea, Canning J, 12 October 2017).

⁵⁹ *Tamate*, above n 15, [79] (Kandakasi DCJ).

⁶⁰ *Transferees*, above n 13, [51].

⁶¹ *Transferees*, above n 13, [52], citing *Commissions of Inquiries Act 1951* (Papua New Guinea).

⁶² *Tamate*, above n 15, [70]–[72].

⁶³ *Tamate*, above n 15, [41].

⁶⁴ *Tamate*, above n 15, [90].

⁶⁵ *Tamate*, above n 15, [112].

⁶⁶ *Tamate*, above n 15, [274].

⁶⁷ *Tamate*, above n 15, [180].

judges with extensive influence over social policy and development. For example, Cannings J in *Re Dilapidated Roads*,⁶⁸ ordered road repairs, and directed funds from the National Budget for this purpose, activities normally within the responsibility of the executive government.⁶⁹ Given the potential avenue this provides for judges to exert significant influence on policy matters, the scope of ‘social policy’ proceedings under s 57 merits examination.

Of relevance are Kandakasi DCJ’s comments in *Independent State of Papua New Guinea v Siune* (‘*Siune*’),⁷⁰ a case decided prior to *Tamate*, in which his Honour explained that s 57 proceedings should not be initiated to derogate from processes already provided for in areas of law, such as environment, conservation, and health.⁷¹ As there is specific legislation that provides for the duties and responsibilities of relevant authorities, and the process they must adopt to deal with issues arising in those areas, social policy proceedings should only be initiated ‘where the relevant authorities fail to appropriately act or refrain from acting and a person’s human right is affected with actual or likely breaches’.⁷² While such proceedings may aim to ‘compel the relevant authorities to account for their actions or inactions and discharge their duties’, courts cannot ‘effectively assume [those] duties and responsibilities... or otherwise undermine... [their] authority’.⁷³ Thus, Kandakasi DCJ envisages some scope for social policy intervention, mainly as a judicial review mechanism.

However, there remains uncertainty as to when invocation of s 57 jurisdiction would amount to assumption or undermining of executive authority, especially in the PNG context. While the lifting of the fish ban in *Re Fish Ban* seems ‘appropriate or necessary’ to enforce the Basic Rights of Madang Province residents, Cannings J’s ordering of road repairs and the creation of an ad hoc committee, directing funds from the National Budget and directing staff towards those works could be seen as usurping key responsibilities of the Madang Provincial Government. Furthermore, as Cannings J was a resident of Madang Province at the time of the *Re Dilapidated Roads* proceedings, and was likely to have had a personal interest in the road conditions, this raises an ethical concern. A wide interpretation of s 57 jurisdiction would allow judges to initiate proceedings and shape social policy solely or principally in their own interest, rather than for the broader community. On the other hand, Madang Provincial Government’s had not fulfilled its responsibility regarding road conditions for years prior to the proceedings due to chronic underfunding, giving rise to serious health risks arising from air pollution from dust particles, and the danger of travelling on the dilapidated roads.⁷⁴ Such facts appear to indicate an actual or breach of Basic Rights, which could only be addressed by ‘necessary and appropriate’ orders as to high-level policy.

This indicates that further guidance is required on the term ‘necessary or appropriate’, as it appears under s 57(3). *Siune* serves as a useful example of a straightforward case. There, an early release from prison was determined not to be ‘necessary or appropriate’, given it did not directly address the applicant’s complaint of lack of proper medical attention.⁷⁵ However, issuing ‘necessary or appropriate’ orders in social policy proceedings may be significantly more complex, and may merit

⁶⁸ *Re Effect of Dilapidated Road Conditions on Enforcement of Human Rights in Madang Town* (National Court of Papua New Guinea, Cannings J, 30 January 2021) (‘*Re Dilapidated Roads*’).

⁶⁹ *Re Effect of Dilapidated Road Conditions on Enforcement of Human Rights in Madang Town*, above n 68 [34].

⁷⁰ *Independent State of Papua New Guinea v Siune* (Supreme Court of Papua New Guinea, Kandakasi DCJ, Thompson and Berrigan JJ, 4 February 2021) (‘*Siune*’).

⁷¹ *Siune*, above n 70, [57].

⁷² *Siune*, above n 70, [57].

⁷³ *Siune*, above n 70, [57].

⁷⁴ See *Re Dilapidated Roads*, above n 68, [16].

⁷⁵ *Siune*, above n 70, [102] (Thompson J).

guidelines or rules issued jointly by the Court, such as guidance on factors which may be relevant, or suggested orders.

C Policy Considerations

Having set out Kandakasi DCJ's comments, the next question is how broadly they should be interpreted in determining the scope of 'social policy' proceedings under s 57 *suo moto* jurisdiction.

1 Spirit of the Constitution

An expansive interpretation, and indeed the concept of *suo moto* proceedings itself, sits in tension with traditional common law systems, due to the fundamental importance of the separation of powers. In such systems, judges must impartially and apolitically resolve disputes, and refrain from involvement in political affairs.⁷⁶ As such, the enforcement of human rights largely rests on community members to represent their own interests, or to seek assistance from representative bodies to bring proceedings on their behalf.⁷⁷ This concern is echoed throughout *Transferees*, with Sakora J in particular citing extensive Australian authorities on the importance of judicial independence.⁷⁸ However, it is argued in this case note, drawing on the Constitution, that such a strict separation of powers is not appropriate for the unique PNG context.

The PNG Constitution, since its inception, was intended to be a 'home-grown' foundational document, 'symbolic of the definite break with the past' and former colonial powers.⁷⁹ The Constitution was the result of an exhaustive consultation process, which demonstrated strong support for 'a liberal judiciary with broad powers of accountability to actively hold institutions of government accountable, and as a partner in the development of society'.⁸⁰ For example, the Constitutional Planning Committee described judges as 'leaders', and noted their 'duty to protect the rights of the individual and minority groups'.⁸¹ As such, the judiciary is not only permitted, but intended to exercise an overtly political function.⁸² Judges have also warned against interpreting the Constitution with the "strict and complete legalism"... expect[ed] of the High Court of Australia... rather [than] the flexibility appropriate to the circumstances of a developing country whose political nature and direction are as yet inchoate'.⁸³ The drafters of the Constitution intended a liberal interpretation, a sentiment which is reinforced for s 57 given that that provision was inserted to facilitate public access to human rights proceedings.⁸⁴

On the other hand, adopting a postcolonial perspective, it could be argued that by the adoption of the Westminster system of government, the drafters of the Constitution intended that 'institutions and norms of colonial rulers continue to be imposed and maintained in the postcolonial era'.⁸⁵ However, the Constitution itself, and the accompanying drafting materials, demonstrate a counter-narrative of

⁷⁶ See above n 29.

⁷⁷ See, eg, 'Complaints', *Australian Human Rights Commission* (Web Page) <<https://humanrights.gov.au/complaints>>.

⁷⁸ *Transferees*, above n 13, [10] (Sakora J).

⁷⁹ *CPC Report*, above n 52, ch 15 [4]; Bal Kama, 'Expectations of Foreign Judges in the Implementation of Papua New Guinea's "Home-Grown" Transformative Constitution' (2022) 24(1) *Asian-Pacific Law & Policy Journal* 1, 2.

⁸⁰ Kama, above n 30.

⁸¹ Kama, above n 30, 34, citing *CPC Report*, above n 52, ch 8.

⁸² Kama, above n 30.

⁸³ John L Goldring, *The Constitution of Papua New Guinea: A Study in Legal Nationalism* (Law Book Company, 1978) 129–130.

⁸⁴ *CPC Report*, above n 52, ch 8 [116].

⁸⁵ Morsen Mosses, 'Custom as a Source of Law in Vanuatu: A Critical Analysis' [2017] *Journal of South Pacific Law* 37, 42.

resistance,⁸⁶ in the attempts of the Constitutional Planning Committee to craft a unique legal system to suit the complexities of PNG as a developing and newly independent nation. The Planning Committee expressed a desire to avoid ‘a mere continuation of the old colonial system’,⁸⁷ which ‘inevitably... meant changes from a number of institutions and procedures... from our recent colonial past’.⁸⁸ The Constitution’s pro-active approach is further demonstrated through the inclusion of judicial mandates to apply a fair and liberal standard of judicial interpretation to the Constitution, and to proactively develop the underlying law of PNG.⁸⁹ These factors demonstrate a narrative of ‘resistance-as-subversion’, in the form of the ‘disruption or modification of colonial modes of knowledge and authority’,⁹⁰ being unique features typically incompatible with traditional colonial legal systems. The postcolonial narrative of PNG, therefore, favours a wider interpretation of ‘social policy’ jurisdiction under s 57, as one which caters to the unique PNG context, and which subverts colonial ideals of judicial independence.

2 Practical Enforcement of Basic Rights

From a practical perspective, as to the enforcement of human rights, it is in PNG’s interest as a developing nation to adopt a wider interpretation of s 57 *suo moto* jurisdiction. This allows for more rigorous protection and macro-level enforcement of human rights in PNG, as judges may shape high-level social policy. PNG in particular would benefit from a strong human rights enforcement framework through the judiciary, for several key reasons. First, it suffers from a poor human rights record, including ‘economic mismanagement, gender-based violence, police brutality, sorcery accusations and related violence, [and] environmental degradation from the extractive industries’.⁹¹ The judiciary has the potential to address these endemic issues by engendering systematic reform of high-level policy. Second, the vast majority of PNG’s population lacks the resources and the legal knowledge to bring legal proceedings against measures infringing their Basic Rights, leaving room for proactive protection by the judiciary. Third, the other pillars of the human rights enforcement framework in PNG are also lacking, as the Ombudsman Commission, which investigates complaints into government processes, and the Public Solicitor, which assists individuals to bring human rights applications, are chronically underfunded and have failed to provide a strong net of human rights protection.⁹² Social policy proceedings under s 57 *suo moto* jurisdiction can fill this lacuna by providing strong accountability mechanisms, coupled with a broad range of possible orders and declarations. For example, after the fish ban challenged in *Re Fish Ban* was lifted, the community was able to promptly return to fishing activities, while in *Re Dilapidated Roads*, Cannings J’s inquiry compelled the National Government to provide further funding to the Provincial Government, allowing the prompt commencement of road repairs.⁹³ Finally, PNG’s Parliament has long suffered from political instability and corruption, and has faced intense criticism for merely ‘rubber stamping’

⁸⁶ David Jefferess, *Postcolonial Resistance: Culture, Liberation, and Transformation* (University of Toronto Press, 2008) 20.

⁸⁷ *CPC Report*, above n 52, ch 1 [13].

⁸⁸ *CPC Report*, above n 52, ch 1 [10].

⁸⁹ Kama, above n 79, 20–25, citing Constitution, above n 2, ss 20, 21, 60, sch 1.5(2) and 2.3.4; *Underlying Law Act 2000* (Papua New Guinea) s 5.

⁹⁰ Jefferess, above n 86, 20.

⁹¹ Moses Sakai, ‘When Will PNG Establish a National Human Rights Commission?’, *Lowy Institute* (Web Page, 11 March 2021) <<https://www.lowyinstitute.org/the-interpretor/when-will-png-establish-national-human-rights-commission>>.

⁹² Moses Sakai, above n 91.

⁹³ Bryan Kramer MP, ‘Court Put Me in Charge of Fixing Roads’, *PNG Attitude* (Web Page, 19 February 2021) <<https://www.pngattitude.com/2021/02/court-put-me-in-charge-of-fixing-roads.html>>.

the actions of the executive.⁹⁴ This suggests that some degree of flexibility is required in the notion of ‘separation of powers’ to ensure strong accountability systems for the executive government. Ultimately, the judiciary is viewed as PNG’s ‘last bastion of hope’ to ensure a basic quality of life in PNG, by upholding critical human rights.⁹⁵

3 Concerns

As noted above, there are legitimate concerns with the expansive interpretation of s 57 adopted by Canning J in *Re Fish Ban* and previous cases. The first is that judges lack the necessary knowledge and experience to make considered policy decisions. For example, judges may fail to take into account all relevant considerations, leading them to make inappropriate orders. The Court in *Tamate* criticised Canning J, in particular, for failing to take into account matters such as the rights and families of victims, and relevant sentencing factors, when assessing whether prisoners on death row should be pardoned.⁹⁶ In *Re Fish Ban*, Canning J also notably omitted to discuss a competing ‘right to life’, or right to a safe environment, which could be compromised by the slurry spill.⁹⁷ This criticism may be addressed by Kandakasi DCJ’s guidance in *Tamate* on the conduct of proceedings. In particular, the appointment of an *amicus curiae* to allow for adversarial proceedings, rather than inquiry, is a critical step towards the presentation of competing perspectives.⁹⁸ It is also worth noting that such oversights may be exacerbated in proceedings initiated by foreign judges, prevalent in Pacific Island courts,⁹⁹ who may apply the law without ‘a close knowledge of local context, customs, and values’ which may present competing considerations or rights.¹⁰⁰ Particularly in the context of the enforcement of human rights, foreign judges must be careful to avoid indiscriminately enforcing Basic Rights, which are drawn from the western legal tradition, without taking into account custom and cultural context.¹⁰¹ This is less of a pressing concern in PNG than in other Pacific Island nations, as PNG has the lowest percentage of foreign judges in the Pacific,¹⁰² and distinctively recruits several of its foreign judges as non-citizen residents from the local legal profession.¹⁰³ For example, in the cases of *Re Fish Ban* and *Re Dilapidated Roads*, whilst Canning J is an Australian citizen, his Honour is well integrated within PNG’s community and legal system, being a resident of Madang province, who has served as a judge in PNG for more than 15 years,¹⁰⁴ and who has been recognised as a ‘relentless advocate of using the liberal powers of the judiciary in addressing broader social and political issues’.¹⁰⁵ Accordingly, the majority of PNG judges will have the cultural background and understanding to assess a broad range of competing local considerations when enforcing human rights. The presence

⁹⁴ Michael Kabuni, ‘The Ineffective Dual Roles of Papua New Guinea Members of Parliament: Why It Matters’ (Issues Paper 43, The National Research Institute, Papua New Guinea, January 2023) 3.

⁹⁵ Bal Kama, ‘PNG in 2017: An Analysis of Papua New Guinea’s Political Condition and Trends Through to 2025’, *Lowy Institute* (Web Page, 6 December 2017).

⁹⁶ *Tamate*, above n 15, [80]–[87] (Kandakasi DCJ); see also *Siune*, above n 70, [76] (Kandakasi DCJ).

⁹⁷ Cf *Morua*, above n 14, [49] (Kandakasi DCJ).

⁹⁸ *Tamate*, above n 15, [70].

⁹⁹ Anna Dziedzic, *Foreign Judges in the Pacific* (Bloomsbury Publishing, 2021) 45.

¹⁰⁰ Kama, above n 30, 27.

¹⁰¹ Bernard Nakarobi, *Lo Bilong Yumi Yet* (Goroka, Papua New Guinea, 1989) 138.

¹⁰² Anna Dziedzic, ‘Right to Liberty, Unconstitutional Constitutional Amendments, and Foreign Judges in PNG’, *IACL-AIDC Blog* (Blog Post, 31 May 2015); Kama, above n 79, 7.

¹⁰³ Dziedzic, above n 99, 41.

¹⁰⁴ ‘Judge Canning to Serve For Another 3yrs’, *The National* (Web Page, 29 June 2022)

<<https://www.thenational.com.pg/judge-cannings-to-serve-for-another-3yrs/>>.

¹⁰⁵ Kama, above n 79, 32–33.

of *amicus curiae*, again, alongside cultural training or integration, are appropriate strategies to develop appropriate judicial awareness.¹⁰⁶

Secondly, there may be a concern that judicial intervention in the enforcement of human rights will place undue strain on the already limited judicial and financial resources of the courts.¹⁰⁷ In particular, *Cannings J* was criticised in *Tamate* for wasting resources by initiating an inquiry where there was insufficient evidence that the rights of prisoners were or would likely be breached.¹⁰⁸ However, this criticism may be addressed by Kandakasi DCJ's guidance that evidence establishing (1) a breach; (2) a likelihood of a breach; or (3) a reasonable probability of a breach of a person's Basic Rights must be presented by the judge to the parties at the beginning of the proceedings. Parties may then dispute the facts by trial, allowing the court to gain a more complete picture of the facts upon which the apparent breach is based.¹⁰⁹ This control also addresses ethical concerns of judges initiating proceedings for improper purposes, a major criticism of the *suo moto* jurisdiction in Pakistan and India, which allows for open-ended inquiries.¹¹⁰ Additionally, PNG has in place strong mechanisms to ensure the independence and impartiality of the judiciary, chief of which is the appointment by judges through the Judicial and Legal Services Commission, an independent body which is 'not subject to direction or control by any person or authority'.¹¹¹ Provided judges going forward adopt this suggested procedure in *suo moto* proceedings, and carefully consider the evidence justifying the initiation of proceedings, the encouragement of judicial activism should not place undue strain on judicial resources.

IV CONCLUSION

Re Fish Ban represents part of a set of cases clarifying the power of National and Supreme Court judges, and the duty of National Court judges under s 57 of the Constitution to bring proceedings of their own initiative, to protect and enforce human rights. Despite tensions in the case law, the weight of judicial authority has endorsed s 57 *suo moto* jurisdiction, subject to qualifications as to the conduct of proceedings. However, the judgments following *Re Fish Ban* provide limited guidance on the commencement of proceedings relating to 'social policy', such as the health and environmental considerations in *Re Fish Ban*. In this respect, this case note has argued for a wider interpretation of s 57 jurisdiction, given the spirit of PNG's Constitution in promoting judicial activism, and the practical potential for this power to benefit PNG's existing human rights landscape. This case note has also attempted, with reference to the procedural guidelines provided in case law, to address concerns regarding such judicial activism, including whether judges are well placed to make policy decisions, and the potential for commencement of proceedings in inappropriate circumstances. Ultimately, s 57 *suo moto* jurisdiction provides PNG courts with a unique and powerful tool drawn from the foundational document of the nation; courts should be encouraged to interpret its boundaries liberally, in order to shape PNG's social policy within its postcolonial context, to hold its government to account, and to better serve its people and uphold their human rights.

¹⁰⁶ Kama, above n 30, 7.

¹⁰⁷ See *Tamate*, above n 15, [87] (Kandakasi DCJ).

¹⁰⁸ *Tamate*, above n 15, [87].

¹⁰⁹ *Tamate*, above n 15, [75].

¹¹⁰ See Yasser Kureshi, "'Judicialising' the Pandemic in Pakistan", *Melbourne Law School* (Blog Post) <<https://law.unimelb.edu.au/centres/alc/engagement/asian-legal-conversations/jurisdiction-economy/pakistan/judicialising-the-pandemic-in-pakistan>>.

¹¹¹ Kama, above n 95, citing Constitution, above n 2, s 183(4).