

The Constitutionality of the Police Force and the Commissioner of Police

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Introduction

This article emanates from an opinion provided by the Office of the Public Solicitor (OPS) to a client who wanted the OPS to file a special reference under Section 19 of the *Constitution* relating to three special questions. The first one was whether the Police Force is a constitutional institution for the purposes of Section 221 of the *Constitution*? The second was whether the Commissioner of Police is a constitutional office-holder? And the third was whether Part IX which comprises Sections 221, 222, 223, 224 and 225 of the *Constitution* apply to the Police Force?

When considering the instructions and the questions raised, the OPS was guided by the principles:

1. Only a special class of persons can bring constitutional questions in a Supreme Court reference (s19 and s18 of the *Constitution*); and
2. The subject constitutional provision is ambiguous to invoke the power of the Supreme Court to interpret it.

It is well known in the Papua New Guinea (PNG) jurisdiction that previous decided cases often lend considerable assistance in this exercise. In fact, the Supreme Court has on many occasions refused to answer questions for not being ‘*constitutional questions*’. There is a difference between applying a provision of the *Constitution* to an issue and constructing or interpreting the provision to say what it means. Also, if the subject provision is clear and requires no amount of construction (interpretation), any proposed reference will be academic, lacking utility and is futile. This article is intended to help readers understand the constitutional status of the Police Force and the Commissioner of Police.

What is a Constitutional Office?

In attending to the questions posed by the client, the OPS sought guidance from two Supreme Court cases, namely *Reference by the Public Solicitor Pursuant to Constitution, Section 19(1), In re* (2019) SC1871 and *SCR No 1 of 1978; Re Ombudsman Commission Investigations of the Public Solicitor* [1978] PNGLR 345. These two cases distinguished a constitutional office from a State Service. The Supreme Court clarified that the *Constitution* establishes State Services under Section 188 of the *Constitution* as separate and distinct creatures from Constitutional Offices which are created under Section 221 of the *Constitution*. Section 188 of the *Constitution* establishes the following State Services:

1. the National Public Service;
2. the Police Force;
3. the Papua New Guinea Defence Force; and
4. the Parliamentary Service.

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In both cases, the Supreme Court shed light on the difference between a State Service and a constitutional office. In both SC136 and SC1871, the Supreme Court pointed out that the Office of the Public Solicitor is not a State Service, but a constitutional office since it is established by section 176(1) of the *Constitution* as an Office. In SC1871, the Supreme Court also said that since the Office of Public Solicitor is a constitutional office, the Public Solicitor is therefore a constitutional office-holder as evident in Section 221 of the *Constitution*.¹

As recently as 2022, the Supreme Court pronounced in *Reference by the Public Solicitor re Jurisdiction of the Public Services Commission and the Powers and Functions of the Auditor-General* (2022) SC2299, that the Office of Auditor General is not a State Service nor is it part of the National Public Service since it is a constitutional office. The court said that Section 213 of the *Constitution* establishes the Office of Auditor General. The provision reads:

213. Establishment of the Office of Auditor-General.

(1) An office of Auditor-General is hereby established.

In light of these judicial pronouncements, is the Police Force a State Service or a constitutional office?

What is a Constitutional Institution?

The pronouncements by the Supreme Court and Section 188 of the *Constitution* clearly show that the Police Force is a State Service and not a constitutional office. It is however a constitutional institution in so far as the definition under Section 221 of the *Constitution* is concerned. According to this provision, ‘constitutional institution’ ‘means any office or institution established or provided for by this *Constitution*, other than an office of Head of State or of a Minister, or the National Executive Council.’

The phrase “*institution established or provided for by this Constitution*” in this definition may equally extend to the Police Force since it is established and provided for by the *Constitution* under Section 188. Part IX refers to constitutional offices and constitutional institutions, but unlike constitutional offices, Section 221 does not elaborate or enumerate the list of constitutional institutions. If indeed the Police Force is a constitutional institution, then the only provisions that apply to it are Sections 222 (*Other provisions relating to constitutional office-holders and constitutional institutions*), 224 (*Special provision for constitutional institutions*) and 225 (*Provision of facilities, etc*). Section 223 does not apply to constitutional institutions since it expressly applies to constitutional office-holders. Section 223 is set out in full below.

223. General provision for constitutional office-holders.

- (1) Subject to this Constitution, Organic Laws shall make provision for and in respect of the qualifications, appointment and terms and conditions of employment of constitutional office-holders.
- (2) In particular, Organic Laws shall make provision guaranteeing the rights and independence of constitutional office-holders by, amongst other things-
 - (a) specifying the grounds on which, and the procedures by which, they may be dismissed or removed from office, but only by, or in accordance with the recommendation of, an independent and impartial tribunal; and
 - (b) providing that at the end of their periods of office they are entitled, unless they have been dismissed from office, to suitable further employment by a

¹ Section 221 of the *Constitution* provides the definition of “constitutional office-holder” which includes the Public Prosecutor and the Public Solicitor.

- governmental body, or to adequate and suitable pensions or other retirement benefits, or both, subject to such reasonable requirements and conditions (if any) as are laid down by an Organic Law.
- (3) A constitutional office-holder may not be suspended, dismissed or removed from office during his term of office except in accordance with a Constitutional Law.
 - (4) The total emoluments of a constitutional office-holder shall not be reduced while he is in office, except-
 - (a) as part of a general reduction applicable equally or proportionately to all constitutional office-holders or, if he is a member of a State Service, to members of that service; or
 - (b) as a result of taxation that does not discriminate against him as a constitutional office-holder, or against constitutional office-holders generally.
 - (5) The office of a constitutional office-holder may not be abolished while there is a substantive holder of the office but this subsection does not apply to the abolition of any additional constitutional office created by an Act of the Parliament.
 - (6) Nothing in this section prevents the making by or under an Organic Law or an Act of the Parliament of reasonable provision for the appointment of a person to act temporarily in the office of a constitutional office-holder.

If the Police Force falls in the definition of a constitutional institution, what effect does it have on the office of Commissioner of Police? This leads to the next question of whether the Commissioner of Police is a constitutional office-holder.

The status of the Commissioner of Police

The *Constitution*, Section 198, calls for the creation of an office for the Commissioner of Police. It states:

There shall be, within the Police Force, an office of Commissioner of Police, who shall be responsible for the superintendence, efficient organization and control of the Force in accordance with an Act of the Parliament.

It is instructive to note that Section 198 does not establish the Office of Commissioner of Police. It merely directs that within Section 188(1)(b) (State Service (Police Force)), an office of the Commissioner of Police must be established so that there is superintendence, efficient organization and control of the Police Force. It is Section 9 of the *Police Act* 1998 that establishes the office of Commissioner of Police. Section 9(1) reads:

The office of the Commissioner of Police established under the former Act is continued under this Act.

The Office of Commissioner of Police is a creature of statute (Police Act) and not a constitutional office. It goes without saying, that the Commissioner of Police, is therefore, not a constitutional office-holder. Whilst the Police Force is a constitutional establishment making it a constitutional institution, it does not make the Commissioner of Police a constitutional office-holder. It is important to note that Section 221 provides an exhaustive list of constitutional office-holders whose offices are also established by the *Constitution*. These constitutional office-holders are:

1. Judges.
2. Public Prosecutor.
3. Public Solicitor.
4. Chief Magistrate.
5. Ombudsman Commissioners.

6. Electoral Commissioner.
7. Clerk of Parliament.
8. Public Service Commissioners.
9. Auditor General.
10. ICAC Commissioners.²

Other constitutional office-holders may be declared by an Organic Law or an Act of Parliament. It is evident that the *Police Act* does not declare the office of Commissioner of Police to be a constitutional office, and rightly so, because it cannot be a separate constitutional establishment. It can only be a statutory office within the State Service (Police Force). It is similar to the Office of Solicitor General and Office of State Solicitor which are established by Sections 10 and 13A of the *Attorney-General Act* 1989 respectively and fall within the National Public Service, which is, one of the State Services. These two provisions are stated as follows:

10. Establishment of the Office of the Solicitor General.

(1) The Office of Solicitor-General of Papua New Guinea is hereby established as an office within the National Public Service.

13A. Establishment of the Office of the State Solicitor.

(1) There is established within the National Public Service, the Office of the State Solicitor.

The Commissioner of Police, the Solicitor General and the State Solicitor occupy offices that are established by statutes within State Services. Just because the *Constitution* mentions or provides for the office of the Commissioner of Police, this does not render it a constitutional office. A classic example is the Office of Attorney-General. Section 156(1)(a) of the *Constitution* makes express stipulation concerning the Attorney-General, and Section 156(2) authorizes the establishment of his Office by an Act of Parliament. Section 156(1)(a) states that:

156. The Law Officers.

(1) The Law Officers of Papua New Guinea are-

- (a) the principal legal adviser to the National Executive; and
- (b) the Public Prosecutor; and
- (c) the Public Solicitor.

(2) An Act of the Parliament shall make provision for and in respect of the office referred to in Subsection (1)(a).

The Office of the Attorney General is provided under Section 2 of the *Attorney-General Act*. It provides that ‘the Office of the Attorney General of Papua New Guinea is hereby established’.

It should be reiterated that just because the *Constitution* makes stipulations for the establishment of an office, this does not render the establishment itself as a constitutional office. The office must be expressly authorised by the *Constitution* and where Parliament intends to establish a constitutional office by an Organic Law or Act of Parliament for purposes of Part IX, that law must expressly state that it establishes such an office. This is the case with the Constitutional and Law Reform Commission. Section 3 of the *Constitutional and Law Reform Commission Act* 2004 (CLRC Act) states:

² The Independent Commission Against Corruption (ICAC) is established under Section 220A of the *Constitution* and complemented by the *Organic Law on the Independent Commission Against Corruption* which was enacted in 2020. Section 220A was amended in 2014 and the Organic Law was enacted in 2020. Section 220A and the Organic Law on ICAC declare that ICAC is a constitutional office and the Commissioners of ICAC are constitutional office-holders as specified in Section 220AC.

3. Establishment of the Commission.

- (1) The Constitutional and Law Reform Commission of Papua New Guinea is hereby established.
- (2) The Commission is a constitutional office to which Part IX (Constitutional Office Holders and Constitutional Institutions) of the *Constitution* applies.

The CLRC Act is a law authorized by Sections 21(2) and 260, and Schedule 2.13 and 2.14 of the *Constitution*. The CLRC is not a constitutional office in the traditional and conventional sense because it is not established by the *Constitution*. It does not share the same nature as the constitutional offices referred to in Section 221(a) to (h) of the *Constitution*. It is a creature of statute (CLRC Act) but a declared constitutional office for a specific purpose.

Ascribing and assigning constitutional status to this statutory commission (CLRC) is specifically “for the purposes of Part IX”. This part in the *Constitution* provides a machinery for constitutional offices to utilize. Section 221 does not authorize Parliament to establish constitutional offices in addition to those established by the *Constitution* outside of the purpose referred to in Part IX. The provision (Section 221) simply provides a platform to elevate and ascribe constitutional status to enable such offices to access the machinery provided under Part IX. It is different from provisions such as Section 188(2) which authorizes Parliament to establish additional State Services through Acts of Parliament:

188 Establishment of the State Services.

- (2) Acts of the Parliament may make provision for or in respect of other State Services.

An example is the Correctional Service which is an additional State Service established under the *Correctional Service Act 1995*. Section 5 of the Act is very clear. It states that:

5. Status of Correctional Service.

The Correctional Service is, for the purposes of Section 188 (*establishment of the State Services*) of the- *Constitution*, a State Service.

Conclusion

In summary, it can be said that the Police Force, having been established by the *Constitution* as a State Service is a constitutional institution for the purposes of Part IX of the *Constitution*. However, the Commissioner of Police is not a constitutional office-holder since his office is not established by the *Constitution* but the *Police Act*. Section 223 of the *Constitution* applies specifically to constitutional office-holders and so does not apply to the Police Force or Commissioner of Police.