

Papua New Guinea

**Supreme Court Reference No. 1 of 1986:
Re Vagrancy Act**

Supreme Court

Kidu C.J.; Amet, Woods, Cory, and Barnett J.J.

13 April 1987

Fundamental rights—right to personal liberty—s. 42 of Constitution—whether Vagrancy Act power to arrest is included in exceptions to s. 42 protection of personal liberty.

Fundamental rights—right to freedom of movement—s. 52 of Constitution—whether Vagrancy Act provisions are saved as “reasonably justifiable in a democratic society”.

10 *Constitutional law—Speaker’s certificate regarding law which restricts freedom—s. 38(2) of Constitution—whether Speaker’s certification of Vagrancy Act was deficient.*

Constitutional law—judicial review of statutes which restrict rights protected by Constitution—whether court should zealously guard entrenched rights as sentinel of rights and freedoms.

Statutory interpretation—entrenched rights in Constitution—statute which restricts or jeopardizes constitutional right to be carefully scrutinized.

Facts:

20 The Vagrancy Act (Ch. No. 268) enables the police to summons or arrest persons who have no or insufficient lawful means of support. Following an inquiry into the means of persons summonsed or arrested, a court may order such persons to be excluded from the relevant town (or district or province) for a period of six months. The court must be satisfied that the person so excluded has a home in another town, district, or province.

Under the special reference powers of section 19 of the Constitution, the public solicitor referred the Vagrancy Act to the Supreme Court, challenging its constitutional validity. Four questions were put to and answered by a majority of the Court, Woods J. declining to answer questions 1 and 2. There were originally seven questions put to the Court; in the original formulation, the questions currently
30 before this Court were numbered 1, 2, 6, and 7 originally. In the judgment of Kidu C.J. the questions now before the Court are renumbered 1, 2, 3, and 4. The questions are as follows:

1. Is the Vagrancy Act (Ch. No. 268) in its entirety unconstitutional in that it is inconsistent with section 38(1) of the Constitution so far as the regulation or restriction of the right to freedom of movement (Constitution, section 52) by the legislation, taking account of the national goals and directive principles and the basic social obligations, is not necessary for the purpose of giving effect to the public interest in public order and public welfare?
2. Is the Vagrancy Act (Ch. No. 268) in its entirety unconstitutional in that it is
40 inconsistent with the requirement of section 38(1) of the Constitution so far as the extent to which the right to freedom of movement (Constitution, section 52)

- is regulated or restricted by the legislation is not reasonably justifiable in a democratic society having a proper respect for the rights and freedom of mankind?
3. Is the Vagrancy Act (Ch. No. 268) in its entirety unconstitutional in that it contravenes section 42(1) of the Constitution?
 4. Is the Vagrancy Act (Ch. No. 268) in its entirety unconstitutional in that it has not been certified in accordance with section 38(2)(c) of the Constitution?

On its face, the Vagrancy Act appeared to violate section 42 of the Constitution, which protects the right of personal liberty, subject only to eight listed exceptions which relate to criminal offending, contempt of court, prevention of the spread of disease (quarantine), extradition, deportation, or civil committal. The Vagrancy Act also appeared, on its face, to violate section 52 of the Constitution, which protects freedom of movement. Section 52 is limited by the same exceptions enumerated in section 42, and, as well, by the general qualifications set out in section 38, which excepts measures taken to protect public safety, order, welfare or health, so long as such measures are reasonably justifiable in a democratic society.

In addition, section 38(2) imposes a further procedural requirement on statutory exceptions to the enumerated rights, being a Speaker's certificate, proving the express intent of an absolute majority of Parliament.

HELD:

The answers to the four questions were as follows:

- (1) The Vagrancy Act is unconstitutional respecting the right to movement, as it is not necessary per section 38(1)(a) for a public order or public safety (Woods J. declining to answer).
- (2) The Vagrancy Act is unconstitutional respecting the right to movement, as it is not reasonably justifiable in a democratic society (per section 38(1)) (Woods J. declining to answer).
- (3) The Vagrancy Act is unconstitutional in that it deprives persons of their personal liberty in the absence of any exception under section 42(a) through (h).
- (4) The technical failure to issue a Speaker's certificate in the constitutional formula of words is not, per se, unconstitutional in terms of the section 38 machinery respecting an infringement of the right to freedom of movement (Woods J. dissenting).

Legislation referred to in judgment:

Constitution, sections 19, 38, 42, and 52
Vagrancy Act (Ch. No. 268)

Counsel:

E. Kariko and *F. Pitpit* for the Public Solicitor
P. Young for the Attorney-General

KIDU C.J.

Judgment:

This is a special reference by the Public Solicitor pursuant to section 19 of the Constitution.

The questions raised by the Public Solicitor are as follows:

1. Is the Vagrancy Act (Ch. No. 268) in its entirety unconstitutional in that it is inconsistent with section 38(1) of the Constitution so far as the regulation or restriction of the right to freedom of movement (Constitution, section 52) by the legislation, taking account of the national goals and directive principles and the basic social obligations, is not necessary for the purpose of giving effect to the public interest in public order and public welfare?
2. Is the Vagrancy Act (Ch. No. 268) in its entirety unconstitutional in that it is inconsistent with the requirement of section 38(1) of the Constitution so far as the extent to which the right to freedom of movement (Constitution, section 52) is regulated or restricted by the legislation is not reasonably justifiable in a democratic society having a proper respect for the rights and freedom of mankind?
3. Is the Vagrancy Act (Ch. No. 268) in its entirety unconstitutional in that it contravenes section 42(1) of the Constitution?
4. Is the Vagrancy Act (Ch. No. 268) in its entirety unconstitutional in that it has not been certified in accordance with section 38(2)(c) of the Constitution?

I. Background of the Act

The Act was passed by an absolute majority of the Parliament on 1 March 1977 and certified on 7 March. It came into operation on 3 November 1977.

It is expressed to be an Act to regulate or restrict the right to freedom of movement conferred by section 52 of the Constitution for the purpose of giving effect to the public interest in public order and public welfare. In doing so the Act says the Parliament took into account the National Goals and Directive Principles and the Basic Social Obligations, in particular the following:

1. integral human development; and
2. traditional villages and communities to remain as viable units in Papua New Guinea Society; and
3. each person to work according to his talents in officially useful employment; and
4. each person to respect the rights and freedoms of others.

Also the preamble to the Act states that the Act is made in accordance with section 38(1) of the Constitution.

II. Scheme of the Act

The Act empowers the police either to apply to the court for the issuing of a summons directing a person to appear before the court, or to arrest a person where it is not practicable to apply for a summons and to take him to the nearest police station, if a policeman believes on reasonable grounds that a person:

1. has no lawful means of support; or
2. does not have sufficient lawful means of support (section 2(1)). Where a person is arrested on the reasonable suspicion of a policeman, he shall be taken before a court without delay (section 2(2)).

The court then inquires into the means of the person summonsed or arrested, and it is for the person before the court to satisfy the court that he has lawful means of support or sufficient lawful means of support (section 3(1)).

If the court is not satisfied that the person has lawful means of support or sufficient lawful means of support, it makes an order against him. This order may require the person named to:

1. leave the town in which he was found or the province or the district in which that town is located; and
2. remain out of the town, province, or district, as the case may be, for such period not exceeding six months as is specified in the order (section 3(1) and (2)).

¹⁴⁰ However, prior to making an order excluding a person from a town, the court must satisfy itself that:

1. the person concerned does not have a home in the town, province, or district from which it is proposed to exclude him; or
2. that the person has a home in another town, province, or district (section 3(3)).

The person affected by the order can apply for variation of that order if:

1. he requires medical or hospital treatment; or
2. a member of his family is suffering from illness or other hardship that requires his presence; or
- ¹⁵⁰ 3. he has business of an urgent nature that requires his presence; or
4. he has any other compelling reasons for which he requires the terms of the order to be varied (section 4).

The court before which such application is made shall, if satisfied that the application has merits, refer the case back to the court that had original jurisdiction over the matter with its recommendations, and if the court of first instance is satisfied that the variation is justified, it shall vary its original order but may impose conditions on the variation where necessary (section 4).

The court of first instance, where it considers necessary, may direct personal appearance of the person seeking variation before it to be examined (section 4(4)).

¹⁶⁰ On the application for variation the courts are empowered to communicate with one another by the fastest practical means including radio and telephone (section 4(5)) (whatever that means).

A person commits an offence against the Act if he refuses or fails to:

1. obey a summons; or
2. obey an exclusion order; or
3. comply with any condition of an exclusion order; or
4. comply with a direction to appear before the court for examination (section 5(1)).

¹⁷⁰ The defences are stipulated in subsections (2) and (3) of section 5 that the person affected must prove or establish to the satisfaction of the court for him to be exculpated from any of the four offences under subsection (1).

III. Constitutional Provisions

Section 52(1) of the Constitution guarantees citizens the right "to move freely throughout the country, to reside in any part of the country and to enter and leave the country". This right may be regulated only by a law which provides for the

deprivation of personal liberty in accordance with section 42 of the Constitution or a law which complies with section 38 of the Constitution.

Section 42 provides that no person shall be deprived of his personal liberty. The exceptions made and listed thereunder are that a person may not be deprived of his personal liberty except:

- (a) in consequence of his unfitness to plead to a criminal charge; or
- (b) in the execution of the sentence or order of a court in respect of an offence of which he has been found guilty, or in the execution of the order of a court of record punishing him for contempt of itself or another court or tribunal; or
- (c) by reason of his failure to comply with the order of a court made to secure the fulfilment of an obligation (other than a contractual obligation) imposed upon him by law; or
- (d) upon reasonable suspicion of his having committed, or being about to commit, an offence; or
- (e) for the purpose of bringing him before a court in execution of the order of a court; or
- (f) for the purpose of preventing the introduction or spread of disease or suspected disease, whether of humans, animals or plants, or for normal purposes of quarantine; or
- (g) for the purpose of preventing the unlawful entry of a person into Papua New Guinea, or for the purpose of effecting the expulsion, extradition or other lawful removal of a person from Papua New Guinea, or the taking of proceedings for any of those purposes; or
- (h) in the case of a person who is, or is reasonably suspected of being of unsound mind—
 - (i) or addicted to drugs or alcohol,¹ for the purpose of his care or treatment or the protection of the community, under an order of a court; or
 - (ii) for the purpose of taking prompt legal proceedings to obtain an order of a court of a type referred to in sub-paragraph (i).

Section 38 provides as follows:

38. General Qualifications on Qualified Rights.

(1) For the purposes of this Subdivision, a law that complies with the requirements of this section is a law that is made and certified in accordance with Subsection (2), and that—

- (a) regulates or restricts the exercise of a right or freedom referred to in this Subdivision to the extent that the regulation or restriction is necessary—
 - (i) taking account of the National Goals and Directive Principles and the Basic Social Obligations, for the purpose of giving effect to the public interest in—
 - (A) defence; or
 - (B) public safety; or
 - (C) public order; or

¹ Semble "or addicted to drugs or alcohol" was intended to form part of the introductory words to Paragraph (h).

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- (D) public welfare; or
 - (E) public health (including animal and plant health); or
 - (F) the protection of children and persons under disability (whether legal or practical); or
 - (G) the development of under-privileged or less advanced groups of others; or
- (ii) in order to protect the exercise of the rights and freedoms of others; or

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- (b) makes reasonable provision for cases where the exercise of one such right may conflict with the exercise of another, to the extent that the law is reasonably justifiable in a democratic society having a proper respect for the rights and dignity of mankind.
- (2) For the purposes of Subsection (1), a law must—
- (a) be expressed to be a law that is made for that purpose; and
 - (b) specify the right or freedom that it regulates or restricts; and
 - (c) be made, and certified by the Speaker in his certificate under Section 110 (certification as to making of laws) to have been made, by an absolute majority.
- (3) The burden of showing that a law is a law complies with the requirements of Subsection (1) is on the party relying on its validity.

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IV. Answers to Questions Raised

I preface my answers by emphasizing that the rights entrenched in the Constitution must be zealously guarded by the courts. Any restriction or regulation of such a right, although allowed by the Constitution, must be carefully scrutinized by the courts to ensure that no such right is unnecessarily jeopardized. Section 57 of the Constitution imposes a duty and responsibility on both this court and the National Court to adopt this role of sentinels of rights and freedoms.

The Vagrancy Act (Ch. No. 268) infringes on the *right to personal liberty* (section 42 of the Constitution) and the *right to freedom of movement* (section 52 of the Constitution).

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A. Right to Personal Liberty

Liberty is one of the most important of the rights and freedoms. The Constitutional Planning Committee thought so too. In its report it said:

... we recommend that the *personal liberty of all people be safeguarded, subject to certain specific exceptions.* (C.P.C. Report, Ch. 5.)

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These *specific exceptions* to the right are set out in section 42(1) of the Constitution (see above). Careful reading of section 42 of the Constitution can only show that neither being *without lawful means of support* nor *not having sufficient lawful means of support* is an exception contemplated by that provision. And therefore section 2 of the Vagrancy Act invalidly allows a policeman to arrest a person for a reason not sanctioned by section 42 of the Constitution.

As to the rest of section 2 of the Act there is no other law (criminal or non-criminal) which vests in the District Court or the Local Court the original jurisdiction to hear a "complaint" that a person is without lawful means of support or

has insufficient lawful means of support. Under the law at present, to be poor is neither a criminal offence nor a basis for a civil cause of action. A "section 2" summons may result in an exclusion order, which I now deal with.

B. Right to Freedom of Movement

Section 52 of the Constitution provides as follows:

- (1) Subject to Subsection (3), no citizen may be deprived of the right to move freely throughout the country, to reside in any part of the country and to enter or leave the country, *except in consequence of a law that provides for deprivation of personal liberty in accordance with Section 42 (liberty of the person).*
- (2) No citizen shall be expelled or deported from the country except by virtue of an order of a court made under a law in respect of the extradition of offenders, or alleged offenders, against the law of some other place.
- (3) *A law that complies with Section 38 (general qualifications on qualified rights) may regulate or restrict the exercise of the right referred to in Subsection (1) and in particular may, regulate or restrict the freedom of movement of persons convicted of offences and of members of a disciplined force. [My emphasis]*

None of the provisions of the Vagrancy Act can be said to come within the exceptions provided for in section 42 of the Constitution. I have already dealt with section 2 thereof. So under this head it is whether the Act can be justified under section 38(1) of the Constitution (I have already set out what section 38 says).

As required by section 38(3), the State (the party relying on the validity of the Act) has the onus of showing that the Vagrancy Act is a law that has complied with section 38(1).

I have already set out what the preamble of the Vagrancy Act states as well as the schemes of the Act.

The *exclusion order* that may be made in respect of persons found to be without lawful means of support or sufficient lawful means of support, under section 3 of the Act, is difficult to justify. It is said in the Act that such an order is "*to give effect to the public interest in public order and public welfare*". Is there then an assumption that poor persons in towns are more likely to cause public order or public welfare problems and therefore should be removed to other places? Experience quite clearly shows that public order and public welfare problems are caused by the rich and the poor alike. So if the basis of this Act is as stated above then it is wrong. It forms an improper reason for restricting or regulating the freedom of movement.

The Act has consequences which would be detrimental to family solidarity by removal of persons away from their traditional homes.

According to section 3 a Motuan from Hanuabada married to a Tolai woman could be moved by an exclusion order from Hanuabada, which is in Port Moresby. Surely that is not aiding traditional villages and communities to remain viable units of Papua New Guinea Society.

How can a law-abiding and peaceful person who fails to show he has no lawful means of support or sufficient lawful means of support be said to endanger the exercise of rights and freedoms of others?

How can it be seriously contended that such a person, without more, endangers the public order or public welfare?

The State has failed to show that the Vagrancy Act is necessary or justifiable in a democratic society.

There can be little doubt that the Vagrancy Act was meant to be used to remove unemployed trouble-makers from towns. But the operation of the Act very clearly applies to innocent poor people, who through no fault of their own are poor. As my brother Barnett J. says in his judgment [see below], which I have had the opportunity of reading, the righteous and rascal, the young and old, are covered by this Act.

For these reasons I find that the Act has not been shown to be one which complies with section 38(1) of the Constitution and it is an Act which unjustifiably restricts freedom of movement.

As to whether the certification of the Act is in accord with the requirements set out in section 38(1), I am in agreement with brother Barnett J.

I would answer the questions as follows:

Question 1: Yes.

Question 2: Yes.

Question 3: Yes.

Question 4: No.

AMET J.:

I have had the opportunity of reading in draft the judgment of Barnett J. [see below], and I am in complete agreement with him that the Vagrancy Act (Ch. No. 268) is in its entirety invalid as being unconstitutional. I would answer the questions referred as he does.

I have nothing further to add.

WOODS J.:

This reference arises as a result of purported breaches of certain provisions of the Constitution by an attempted enforcement of the Vagrancy Act (Ch. No. 268).

The Public Solicitor has asked a number of questions: however, following advice that certain questions would not be submitted upon and the addition of two further questions, there were only four questions outstanding to be answered by the Supreme Court [as set out by Kidu C.J., *supra*, at page 235].

I. Answers

A. Question 1

Question 1 leads to a consideration of the necessity for such legislation for the purposes of giving effect to the public interest in public order and public welfare and suggests either that for the Act to have been passed by Parliament there must be evidence that such legislation was necessary, and therefore there must have been evidence to satisfy the requirements of the Constitution, section 38. However, in this reference before us, we are not given the factual background which led the Legislature to pass this Act or, alternatively, we are not given facts which led to the situation of people being acted against under the Vagrancy Act and who are therefore claiming a breach of constitutional rights. Before a question like this can come to the Supreme Court we must have facts or a situation which give rise to this challenge. Without the facts which led the Parliament to pass this legislation or the facts of the situation of an individual being prosecuted under this Act, I find it is

impossible to approach this question in the way that it has been presented to us.

B. *Question 2*

This raises the question whether the Act is reasonably justifiable in a democratic society. The Act is expressed to be passed for specific purposes, mainly of giving effect to the public interest and public order and public welfare, and I refer here to the wording in a preamble to the Act. In looking at this question, once again I must ask: is there a need for evidence to be forthcoming before Parliament could consider such a question? Can we assume that Parliament saw that it was necessary to enact such legislation in the public interest, or must we see the evidence that was presented to Parliament, or alternatively once the question comes before this Court, must it be raised in a sample case where we have a fact situation on which to assess the public interest and public order and public welfare. I therefore feel that this question leads to the same situation as in question 1, and I feel that in the circumstances I am unable to consider the question the way it has been presented to this Court.

C. *Question 6²*

Section 62 of the Constitution is headed "liberty of the persons" and states that no person shall be deprived of his personal liberty except in certain specified situations and for the purpose of this case some are in the execution of the sentence or order of a court or by reason on his failure to comply with the order of the court or by reasonable suspicion of having committed an offence. Section 2 of the Vagrancy Act specifically allows for a policeman to arrest a person and take him to the nearest police station in order that he may be dealt with under section 3. A policeman may do this where he has reasonable grounds that a person in a town has no lawful means of support or does not have sufficient lawful means of support. It is quite clear that the power here of the police to arrest or deprive a person of his personal liberty purely on the basis that he believes that a person has no lawful means of support or does not have sufficient lawful means of support, is clearly contrary to section 42 of the Constitution. Therefore section 2 of the Vagrancy Act is clearly unconstitutional. With respect to the rest of the Vagrancy Act, and here, of course, one is looking at exclusion orders, one is led by the preamble of the Act to suppose that as the Vagrancy Act was expressed to be passed in accordance with section 38 of the Constitution and therefore, for the purposes of giving effect to the public interest and public order and public welfare, one would have to assume that the Parliament had sufficient evidence before it that the exclusion orders provided for in the Vagrancy Act were quite clearly in the public interest. An exclusion order, in itself by restricting a person's freedom of movement to a defined area, does not necessarily deprive a person of his personal liberty, a person has his liberty to live and exist in his home area. Section 52 of the Constitution (the right to freedom of movement) clearly provides that a law that complies with section 38 may regulate or restrict the exercise of the right of freedom of movement, so with exclusion orders we are not dealing with deprivation of personal liberty but the right of freedom of movement and exceptions to that are clearly provided for in section 52. I can therefore find no reason to say that the rest of the Vagrancy Act apart from section 2 is unconstitutional.

2 This question and the question that follows were numbered 3 and 4, respectively, in the judgment by Kioú C.J., *supra*.

D. *Question 7*

400 This question raises the question whether the Act has been properly certified. There is no doubt about it, all acts of the Parliament must be certified, this is a normal requirement. However, section 38 of the Constitution requires specific certification. If all Acts must be certified there is no need to specify that any particular Act must be certified. This is a requirement of all legislation so that, when a section of the Constitution makes specific reference to certification and such reference points to certain specific requirements for the legislation, should this requirement be interpreted strictly? Should, therefore, the certification required by section 38 be interpreted strictly to mean that the certificate must not only state that the legislation has been made by the Parliament in accordance with the normal certification requirements, but it must also affirm to the extra requirements for such 410 legislation and in this case the requirement of an absolute majority? Whilst these requirements may seem to be only procedural, we must not lose sight of the fact that we are dealing with the Constitution and the area that entrenches on human rights. Whilst Parliament at any one time is the expression of the will of the people, the founding fathers of the Constitution, when they entrenched human rights, wanted to ensure that when Parliament attempted to restrict or abrogate those rights, it clearly expressed to itself what it was doing and for what purpose so that each member would be well aware of how they were or may be attempting to restrict or abrogate human rights.

420 The Constitution lays down these requirements. Because of their possible effect it is not too much for this Court to insist that these requirements are strictly complied with. Once the court allows Parliament to adopt a casual attitude in legislating in the area of human rights, such an attitude may continue until you have no rights left. This Court cannot be a party to any casual inroads on the rights placed by the people in the Constitution.

In this case before us the certificate of the Speaker must make reference to the absolute majority required for such legislation.

430 The certificate to the Vagrancy Act makes no reference to the fact that it was passed by an absolute majority and therefore such certification is void. Thus the Vagrancy Act (Ch. No. 268) does not comply with the Constitutional requirements laid down in section 38 of the Constitution.

CORY J.:

I have had the opportunity of reading the judgment of the Chief Justice and Barnett J., and I am in complete agreement that the Vagrancy Act (Ch. No. 268) is in its entirety invalid as being unconstitutional. I would answer the questions referred as they do.

I have nothing further to add.

BARNETT J.:

440 This matter comes before the Supreme Court by way of special reference under section 19 of the Constitution seeking the courts' interpretation of various sections of the Constitution in its application to the Vagrancy Act (Ch. No. 268). That Act was enacted by absolute majority of Parliament on 1 March 1977 and came into force on 3 November 1977. The Act provides (section 2) for the arrest of persons found in

towns suspected of having no or insufficient lawful means of support. It places the burden on those persons to satisfy a magistrate of their lawful means of support. If they fail to satisfy the magistrate, they face an order under section 3 which can exclude them from the town for up to six months. Disobeying an exclusion order is an offence punishable by up to six months' imprisonment.

After various amendments were made to the reference, the Court has been asked to answer four questions [as set out by Kidu C.J., *supra*, at page 237].

The Public Solicitor has argued affirmatively that the Vagrancy Act (Ch. No. 268) is *ultra vires* the Constitution.

Mr Kariko has pursued three lines of argument.

1. Deprivation of personal liberty: section 42(1) — That the provisions for the arrest of persons suspected of having insufficient or no lawful means of support, provided for in section 2 of the Act, constitutes an unlawful deprivation of the personal liberty guaranteed by section 42(1) of the Constitution.
2. Infringement of a section 52 right of freedom of movement — That the exclusion order under section 3 of the Act constitutes a restriction of the freedom of movement guaranteed by section 52(1) and that it falls outside the general qualifications so that freedom permitted by section 38 (general qualifications on qualified rights).
3. Inadequate certification by the Speaker — That the Speaker failed to certify, in his certification under section 110, that the Act had been enacted by an absolute majority of the National Parliament.

I will deal with these three arguments in turn and then answer the questions referred.

I. Deprivation of Personal Liberty

Mr. Kariko argued that the arrest provided for by section 2 of the Vagrancy Act is a deprivation of personal liberty which does not fit within one of the allowable exceptions to section 42(1) of the Constitution.

Section 2 reads as follows:

2. Powers of Police

- (1) Where a policeman believes on reasonable grounds that a person in a town—
 - (a) has no lawful means of support; or
 - (b) does not have sufficient lawful means of support, he may—
 - (c) apply to a Court for the issue of a summons directing that person to appear before the Court at the time specified in the summons; or
 - (d) where he considers that it would not be practicable to apply for a summons under paragraph (c)—arrest the person and take him to the nearest police station.in order that the person may be dealt with under section 3.
- (2) Where a person has been arrested under subsection (1) and taken to a police station, the officer-in-charge of the police shall take the person or cause him to be taken before a Court without delay.

Miss Young, arguing the negative case on behalf of the State agrees that section 2(1)(d) is in breach of the Constitution and does not contest this point. She, however, foreshadowed an amendment to section 42(1)(h) of the Constitution which would

add the arrest of vagrants to the list of exceptions where deprivation of liberty is allowable. If enacted, such an amendment may remove this particular constitutional impediment to the Vagrancy Act.

I am prepared to go beyond the arguments of either counsel in this reference and to hold that even section 29(1)(c) (the power to summons) is invalid. To summons a person to appear before a magistrate "in order that the person may be dealt with under s 3" is itself unconstitutional. That person is not being summonsed to answer a charge of committing any criminal offence or to answer any civil cause of action known to law. To summons him constitutes a restriction on his freedom of movement under section 52 of the Constitution which as will be discussed hereunder, is not justified.

Accordingly I find the whole of section 2 of the Vagrancy Act is *ultra vires* the Constitution.

II. Infringement of Section 52

A. Right of Freedom of Movement

The relevant subsections of section 52 are [set out in the judgment of Kidu C.J., *supra*, at page 239].

Section 3 of the Vagrancy Act states:

3. Exclusion Orders

- 510 (1) Where a person appears or is brought before a Court, and that person fails to satisfy the Court that he has—
- (a) a lawful means of support; or
 - (b) sufficient lawful means of support
- the Court may make an order against that person
- (2) Subject to Subsection (3), an order under Subsection (1) may require the person named in the order to—
- (a) leave the town in which he was found or the province or district in which that town is located; and
 - (b) remain out of the town, province or district, as the case may be, for such period not exceeding six months as is specified in the order.
- 520 (3) Before making an order under Subsection (2), the Court shall satisfy itself that—
- (a) the person does not have a home in the town, province or district which it is proposed to exclude him; or
 - (b) that the person has a home in another town, province or district.
- (4) For the purposes of Subsection (3)—
- (a) the relevant facts shall be ascertained as at the date of making the order; and
 - (b) a temporary absence not exceeding two years shall not affect continuity of residence.
- 530 (5) An order under this Section may be subject to conditions including a condition that the person shall comply with the order to leave the prohibited area within such time as is specified in the order unless before the expiration of that time he obtains lawful employment in the area.

It is quite clear that section 3 of the Vagrancy Act regulates or restricts freedom of movement. As section 42 has not yet been amended to include arrest of vagrants as

an allowable reason for depriving a person of personal liberty, the restriction of movement contemplated by section 3 is not allowable under s 52(1).

The question remains, however, whether it complies with section 38 and is therefore an allowable restriction under section 52(3).

Section 38 is in the following complex terms [as set out in the judgment of Kidu C.J., *supra*, at page 237].

In its preamble, the Vagrancy Act states that it is:

... an Act to regulate or restrict a right of freedom referred to in subdivision 111.3.C of the Constitution namely the right to freedom of movement conferred by Section 52 of the Constitution for the public interest in public order and public welfare taking into account the National Court Goals and Directive Principles and the Basic Social Obligations and in particular the following Directive Principles and Social Obligations:—

- (a) Integral human development; and
- (b) traditional villages and communities to remain as viable units in Papua New Guinea society; and
- (c) each person to work according to his talents in socially useful employment; and
- (d) each person to respect the rights and freedoms of others, made in accordance with Section 38 (general qualifications and qualified rights) of the Constitution.

In this instance, in order to comply with section 38, the Vagrancy Act must:

1. do no more than regulate and restrict freedom of movement
2. to no greater extent than is necessary to give effect to the public interest in public order and public welfare (taking into account the National Goals and Directive Principles)
3. to no greater extent than is reasonably justifiable in a democratic society having a proper respect for the rights and dignity of mankind.

This reference has come before the Supreme Court pursuant to section 19 for a general ruling as to the validity of the Act.

It has not arisen on appeal from some specific decision where a particular person has been dealt with in a particular way.

It is generally undesirable to consider hypothetical cases which may possibly arise, but in order to rule on the questions of whether the Act is "necessary" and "reasonably justifiable" it is at least necessary to consider what the Vagrancy Act enables the authorities to do and to what types of people.

1. *Arrest* — (a) Pursuant to section 2 it enables the police to arrest any person in a town who is suspected of being without any or sufficient lawful means of support. This is admittedly an unconstitutional interference with personal liberty which may, however, shortly be legitimated by amendment to section 42(1) of the Constitution.
2. *Exclusion Orders* — (b) If the person cannot satisfy the court that he has sufficient lawful means of support, the court is empowered by section 3 to order him to leave the town, province, or district for up to six months.

(c) The exclusion order can be made if the person has no home in the town. Even

if he has a home in the town, the exclusion order can be made if he also has a home in some other place.

"Home" is defined very widely in these terms:

"Home", in relation to a person, means—

- (a) the place (if any) where he has resided continuously during the period of five years next preceding the laying of any information against him;
- (b) an area of customary land on which he may by custom, build or occupy a house or garden, whether in his own right or in right of his wife or some other relation; or
- (c) an area of customary land owned by a linguistic or cultural group with which he or his wife has customary affiliations involving usage rights in land; or
- (d) an area of land leased for a term of not less than 12 months or held in freehold by him or his wife under a law in force in the country; or
- (e) while he is under the control, by custom or otherwise of another person—any residence of that person; or
- (f) in a particular case where the provisions of Paragraph (a), (b), (c), (d) or (e) are inapplicable—any other place in which he or his wife has connections such that it should, in the opinion of the Court, be reasonably regarded as his home.

The effect of this provision would be, for instance, that a respected but unemployed Kerema man who is a second- or even third-generation resident in (say) the Papuan settlement in Lae, could be excluded from Lae, and forced to leave his house and family, if there is elsewhere an area of customary land where he or his wife have customary gardening rights. This is not a fanciful, isolated example. Section 3 exposes very many long-term town-dwellers to such exclusion orders. It applies not only to so-called "squatter settlements" but also to many traditional villages which are gazetted as being within town boundaries.

Under section 38(3) of the Constitution the burden is on the State to show that a law which can have such a draconian effect on long-term law-abiding residents of a town is not restricting freedom of movement to a greater extent than is necessary for public order and public welfare or to a greater extent than is reasonably justifiable in a democratic society.

It may have been different if exclusion orders were limited to "vagrants" who had just been convicted of a criminal offence. But this Act provides for exclusion orders for all those who have the misfortune to have insufficient lawful means of support, regardless of their previous employment record or standing in the community where they have been residing.

Failure to obey an exclusion order is punishable by up to six months' imprisonment and it is no defence that the person had insufficient means to arrange transport out of the town. The provisions for applying for variation of an exclusion order in section 4 are so unwieldy that they will be of little or no use to most of those excluded.

I find that the State, which called no evidence on these matters, has failed to discharge the burden of proving that section 3 of the Vagrancy Act is necessary for the purpose of giving effect to the public interest in public order or public welfare. Nor has it discharged the burden of proving that it is reasonably justifiable in a democratic society having proper respect for the rights and dignity of mankind.

630 Under the guise of removing potential and actual criminals, this Act provides a dragnet which can pull in righteous and rascal, young and old alike. It can separate families and break up homes.

For these reasons I find that the section 3 exclusion order does not comply with section 38(1) of the Constitution and that it constitutes an unconstitutional restriction on the right to freedom of movement guaranteed by section 52 of the Constitution.

It remains for me to rule on Mr. Kariko's submission: that the Vagrancy Act was not certified by the Speaker as required by section 38(2)(c) as having been enacted by absolute majority.

640 The certificate given was merely in the usual form provided for by section 110 of the Constitution. Despite Miss Young's attempt at grammatical gymnastics, I find that section 38(2)(c) does require the fact that the Act was enacted by absolute majority to be included in the certification and that this certificate was therefore defective.

I do not, however, believe it was the intention of the Constituent Assembly that this requirement be mandatory and that failure to do so certify would invalidate the Act.

650 The substantive constitutional requirement set out in section 38(2)(c) is that the law must be made by an absolute majority of the Parliament. The requirement for certification is merely to assist in proving that fact should it ever be disputed. In the absence of proper certification, enactment by absolute majority could be readily proved by other means.

Accordingly I find that section 2 and section 3 of the Vagrancy Act (Ch. No. 268) are both *ultra vires* the Constitution. I have decided also that it would make no sense to sever them and that the Act in its entirety should be ruled invalid.

I answer the questions referred as follows:

660 Question: Is the Vagrancy Act (Ch. No. 268) in its entirety unconstitutional in that it is inconsistent with section 38(1) of the Constitution so far as the extent to which the right to freedom of movement (Constitution, section 52) is regulated or restricted by the legislation, taking account of the National Goals and Directive Principles and the Basic Social Obligations, is not necessary for the purpose of giving effect to the public interest in public order and public welfare?

Answer: Yes.

Question: Is the Vagrancy Act (Ch. No. 268) in its entirety unconstitutional in that it is inconsistent with the requirement of section 38(1) of the Constitution so far as the extent to which the right to freedom of movement (Constitution, section 52) is regulated or restricted by the legislation is not reasonably justifiable in a democratic society having a proper respect for the rights and freedom of mankind?

670 Answer: Yes.

Question: Is the Vagrancy Act (Ch. No. 268) in its entirety unconstitutional in that it contravenes section 42(1) of the Constitution?

Answer: Yes.

Question: Is the Vagrancy Act (Ch. No. 268) in its entirety unconstitutional in that it has not been certified in accordance with section 38(2)(c) of the Constitution?

Answer: No.

Questions answered accordingly.

Editor's Note:

⁷⁶⁰ Vagrancy, when penalized as a status, has received constitutional scrutiny in the United States. See, for example: Foote, "Vagrancy-type Law and its Administration" (1956) 104 U.Pa.L.R. 603; Dubin and Robinson, "The Vagrancy Concept Reconsidered" (1962) 37 N.Y.U.L.R. 102; and comment, "Vagrancy Statute Unconstitutional" (1958) 53 Iowa L.R. 131. See also, Curry, "Vagrancy" in *Essays on Criminal Law in New Zealand*, Clark (ed.), Sweet and Maxwell, 1971.