INTEGRITY on the LINE: JUDICIAL POWER over ELECTIONS in PAPUA NEW GUINEA

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Electoral litigation is a rare bird, in a few senses. It is sproadic. After all, elections are seasonal events and most election outcomes are clear and indisputable. Unlike most civil litigation, election cases generate significant public attention because of their inescapable political consequences. Yet these dramatic qualities obscure an often mechanical process. Electoral litigation is not values-laden constitutional law. It tends to be highly fact-laden administrative (and occasionally criminal) law. Indeed its procedures are not well understood even by most lawyers. So it is unusual in being irregular, high profile, yet little understood.

This article explores the law on electoral litigation in Papua New Guinea (PNG) a country where, as we shall see, disputed elections are common, by common law standards. The article does so in three parts. Part 1 begins by outlining the various ways electoral matters may end up before various courts. It then explains the source and historical roots of the disputed returns – or election petition – process, by which particular election outcomes may be challenged. PNG can trace its system, via the Australian legal legacy, directly to Westminster reforms dating to 1868. This is a special jurisdiction, not just in its importance for electoral democracy but who its evolution reveals shifts in the relationship of the three branches of government.

Part 2 will detail the statutory foundations and key case-law governing election petitions in PNG. The focus will be on parliamentary elections to the national House of Assembly. (This is due to space. There are also disputed electoral races at local and provincial government level. But the principles and processes for litigation are similar at every level). In doing so, we will compare PNG with its Australian cousin, noting a few key differences but also the core attributes the two systems share.

The major difference is that in PNG, the National Court of Justice acts as a trial court for election disputes. The PNG Supreme Court of Justice then acts as a backstop, with a constitutionally guaranteed power of judicial review over any jurisdictional errors made by the National Court. In Australia, by contrast, the highest court in each jurisdiction – the High Court of Australia for national elections, and the State and Territory Supreme Courts – resolves disputed elections itself. As a general rule there is no right of review. The obvious explanation for the difference is that, in PNG, election disputes are more common. Everywhere, such disputes have to be resolved expeditiously, so parliament can meet and representative democracy have certainty. But asking trial judges to hear such cases quickly and alone may also require the safety valve of review by a higher bench.

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The core elements shared by PNG and Australia, however, are many. Election petitions must be brought quickly, so petitioners have to particularize their allegations within weeks of an election outcome. Elections may only be directly challenged via a disputed returns petition (unless parliament later refers an election on the basis of a disqualified candidate). Elections are challenging logistical exercises for the electoral authorities, especially given PNG's diverse terrain, society, passionate politics and limited resources. So election petitions are not vehicles to challenge impurities in the process if those problems did not affect the result. Ultimately, each election petition must be determined expeditiously, yet the onus and level of proof is not well-established. Instead, the bench is directed to consider the broad justice and merits of the case.

In the end, and in the most difficult cases, judges are confronted with a tension between competing approaches. Is an election something precious whose outcome must be certain? Or is challenging an election result, as declared by an independent Electoral Commission, something not lightly to be undertaken? On the whole, in PNG as in elsewhere, the tension tends to be resolved by erring on the side of stability and trust. Part 3 therefore ends the article by reflecting on the special context of electoral democracy in PNG. Part of this context is the relationship between elections and their administration in PNG and what is, by international standards, a fertile context for litigating election results.

This article is not an encylopaedic account of election litigation or case-law. Nor is this the first piece on this area in PNG. Readers are encouraged to also consult the 2003 edited book *Judicial Scrutiny of the Electoral Process in a Developing Democratic State*.[1] It includes four chapters of direct interest: 'Legal Framework for Resolving Election Disputes in Papua New Guinea'; 'Judicial Responsibility in Securing a Fair and Just Election Result'; 'Preventing the Abuse of Elections through Judicial Innovation and Intervention'; and 'Expediting Election Disputes in the Courts'.[2] It also has two broader chapters reflecting on the judicial role in developing electoral law and restraining legislative overreach: 'The Role of the Judiciary in Defining and Developing the Electoral Laws' and 'The Constitutional Aspects of Organic Law on the Integrity of Political Parties and Candidates'.[3] The book also includes an historical chronicle, in the form of an 'Overview of 1997 Election Petitions'.[4] Elsewhere, there is also a 2008 paper giving anecdotal insights by a former electoral commissioner.[5]

1 The NATURE and ROOTS of the ELECTORAL JURISDICTION

There is no single 'electoral' jurisdiction. There are actually five ways in which election laws, activity or administration can be directly subject to litigation. These are:

1. Contested election returns (aka election petitions to a court of disputed returns), and the related power to rule on an MP's qualifications.[6]

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[1] Eric Kwa, Alphonse Gelu and Wilfred Golman (eds), *Judicial Scrutiny of the Electoral Process in a Developing Democratic State* (UPNG in association with UBS Publisher's Distributors, 2003).

[2] Respectively found in ibid and authored by Eric Kwa and Wilfred Golman, ch 2; MJ Sheehan, ch 4; Eric Kwa, ch 6; and Lawrence Newell, ch 7.

[3] Respectively found in ibid and authored by Camillus Narokobi, ch 5 and Greg Sheppard, ch 10.

[4] Sir Arnold Amet, in ibid ch 3.

[5] Andrew Trawen, 'Elections and Resolving Election Disputes in Papua New Guinea' (Paper to the Association of Asian Election Authorities General Assembly, Taipei, 22-23 July 2008).

[6] Trial jurisdiction over either issue is vested in the National Court in PNG in the same breath: *Constitution* s 135.

2. Criminal cases involving electoral activity.
3. Judicial review of election administration and, relatedly, suits for injunctions to restrain errant political activists or party officials.[7]
4. Review of electoral administration outside campaign periods. Classic examples the maintenance of electoral rolls, party registers or election finance rules. (Such matters might involve administrative review by a bureaucrat or tribunal, with an ability to appeal to an intermediate court).[8]
5. Constitutional challenges to electoral legislation.

The most prominent of these is the disputed election return. This involves a petition to dispute the outcome of an election. Here 'outcome' means the return of the electoral writ, by the Election Commission to the Head of State.[9] The writ, so returned, names the new MP for the electoral constituency in question. So disputing an election return cannot encompass either a blanket objection to the total seats won by one party or another, nor a mere objection to the tally or percentage of votes recorded in a particular constituency. Such disputed election returns are the focus of this article. Both because it is a unique jurisdiction, hedged by an unusual history and special rules. But also because it is the pointy-end of the democratic process. Given the timing and ramifications of a disputed return, such a case cannot help but appear to be political.

The other electoral jurisdictions are also political in the effects they can have. But they are more familiar terrain for courts. An errant partisan may be charged with an offence, such as electoral bribery. Alongside specific offences in the *Organic Law on National and Local Elections 1997* ('Organic Law on Elections'), PNG's *Criminal Code* includes an array of 'corrupt and improper practices'. The Code offences may be committed not just at parliamentary, provincial or local government elections, but at any election 'under any law providing for the choice of persons to fill any [public office]'.[10] Many such criminal cases are heard in lower level courts. They typically do not generate much law beyond a finding of innocence or guilt plus sentencing remarks.

The administrative law jurisdiction, in turn, may include some special electoral elements. For example, who has standing to seek an injunction against an election commission, or to challenge the inclusion or exclusion of a citizen on the electoral roll. As political parties are increasingly subject to oversight and benefits regarding their finances, this administrative jurisdiction will increase in importance. But such cases are also a familiar part of the courts' role in overseeing the rule of law in a civil society.

Judicial review of legislation itself is hardly an everyday matter, even in PNG whose *Constitution* is famously long and rich. As Goldring observes, '[w]hat is special about the Constitution of Papua New Guinea is the detail with which it regulates the conduct of Parliament' –[11] a truism that includes some of the detail of elections and electoral politics. Given this, it is little surprise that an Independent Electoral Commission is enshrined in the PNG *Constitution*.[12] Whether a Supreme Court vetoes a law about elections is thus a big matter, and it may shape electoral outcomes into the future. But this power is a sub-branch of constitutional interpretation and constitutionalism. It is an established feature of the PNG Supreme Court's role as an apex court under a thick form of written constitutionalism,

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[7] See Graeme Orr, 'Judicial Review of the Administration of Parliamentary Elections' (2012) 23 *Public Law Review* 110.
[8] Compare *Dekena v Kuman* [2017] PGNC 181, [23] noting that such review or appeal is not a disputed election.
[9] *Organic Law on Elections* s 175.
[10] *Criminal Code 1974* (PNG) s 98. The offences are in Part II Division 3 of the Code. Unsurprisingly, given its heritage, this mimics the *Criminal Code 1899* (Queensland).
[11] John Goldring, *The Constitution of Papua New Guinea: A Study in Legal Nationalism* (LBC, 1978) 46.
[12] *Constitution* s 126(6)–(7).

and hence not so different from its review of other statutes, whether organic or ordinary legislation, for adherence to constitutional rights and procedures..

The Source of the Disputed Elections Jurisdiction

PNG's disputed elections jurisdiction is formally rooted in the *Constitution*, in electoral legislation and specifically the *Organic Law on Elections*, and in some special rules of court.[13] The shape of that jurisdiction draws heavily on 'colonial' law from the time of Australian stewardship. And, in turn, that Australian law is an inheritance from the 19th century Westminster system of the United Kingdom (UK). By heading south, then far north, and by travelling back in time – before not only PNG independence from Australia but before Australian independence from the British Empire – we can trace the unusual roots of the jurisdiction over disputed elections.

The British Inheritance

In a sense, PNG's election system traces back 750 years, to an old system and a cold land. For it was in the reign of King Edward I that the Westminster system of representation began to coalesce. Between 1265, when the earliest parliaments were summonsed in London and 1275, when the first written electoral law was promulgated, the process of issuing 'writs' coalesced. The writ required a selection of knights to represent each English county.[14] Over time, this system bureaucratized. Writs came to be handled by the 'Court' of Chancery, on behalf of the Crown. In this way, disputes about the selection of MPs also ended up back in Chancery.[15] But Chancery was more like an administrative co-ordinator than a modern court.

Early Westminster Parliaments were costly – in time, money and even personal risk – for the knights concerned. It took some centuries before serving as an MP became an appealing proposition. This happened as Parliament grew and its power waxed, and as the role of MP came to be associated with social status,[16] and sometimes corrupt economic advancement. Parliament in turn grew famously jealous of the 'executive' Crown, whose main interest was in ensuring Parliament was full of its friends. Parliament responded by asserting new found privileges, especially in its battles with the Stuart monarchs. The best known has been the privilege of absolute immunity of speech; but also it asserted *a sole right to resolve disputes about its own membership.*[17] To modern eyes, MPs ruling on the validity of the elections or qualifications of other MPs looks unseemly, especially in times of party loyalty. But the privilege was an important assertion of parliamentary independence. By the 1590s (late Elizabethan times) there was a powerful standing committee of parliament dealing with privileges *and* election returns.[18]

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[13] See the *National Court Election Petition Rules 2017* (PNG) and the *Supreme Court Election Petition Review Rules 2002* (PNG) and *Supreme Court Rules 2012* (PNG) order 5 div 2.

[14] Ludwig Riess, *The History of English Electoral Law in the Middle Ages* (Octagon, 1973) 17–18.

[15] Prior to that, disputes were sometimes resolved by the Assize court, sometimes by Parliamentary intervention: Graeme Orr and George Williams, 'Electoral Challenges: Judicial Review of Parliamentary Elections in Australia (2001) 23 *Sydney Law Review* 53, 56–7. The first recorded petition challenging a result was in 1318: Caroline Morris, *Parliamentary Elections, Representation and the Law* (Hart, 2012) 69.

[16] JE Neale, *The Elizabethan House of Commons* (Jonathan Cape, 1949) 31.

[17] Orr and Williams, above n 15, 58–9.

[18] Mary Keeler, 'The Emergence of Standing Committees for Privileges and Returns' (1982) 1 *Parliamentary History* 25, 26. This system became formalised in Grenville's Act of 1770, with a jury-style selection of MPs to sit on disputed elections hearings, to dilute the problem of partisan favouritism in the committee's deliberations.

By the mid-nineteenth century however, as elections started to become recognizably democratic, the level of vote-buying and shenanigans came to be recognized as a serious problem. In a multi-pronged 'war' on electoral corruption,[19] a crucial reform occurred in 1868. That was when Parliament ceded the power to rule on disputed elections to the courts.[20] Curiously, at first the courts baulked at this political, hot potato.[21] But soon, it became clear that firm judicial hands – in fact-finding, reasoning and judicial orders – outweighed (legitimate) concerns about the politicization of the judiciary and about the risk of unworldly legalism distorting the practice of election campaigns and administration.

By the end of the 19th century, this outsourcing of parliament's 'privilege' to decide disputes over its membership spread across the common law world, and arrived in colonial Australia. The system did not transplant exactly and there was some initial variation in method. (For example, in Queensland until 1915 an 'Election Tribunal' heard petitions, with a judge presiding on questions of law, but two MPs sitting as arbiters of fact and practical nous).[22] Nor was court involvement constitutionally guaranteed. To this day, the *Australian Constitution* of 1901 merely states that '[u]ntil the Parliament otherwise provides, any question respecting the qualification [of a national MP] and any question of a disputed election to either House [of the national Parliament] shall be determined by the House in which the question arises.' PNG's *Constitution* (s 135) is not so sensitive to parliamentary history.

In theory then, the source of this unusual jurisdiction was its seizure by the Westminster parliament from the executive back in Stuart times in England. As Chafeetz puts it, this history reveals a tension between two mindsets. The older mindset, which he attributes to 'Blackstonian' thought, is that parliament has the privilege to determine its own membership. '[A]llowing the intervention of any outside body would present a grave threat to the independence' of parliament. The other mindset, attributed to Millian thought, 'sees as a greater threat the potential for corruption and self-dealing [if a parliament is] the sole judge of who has been duly elected to it'.[23] In a spirit of modernity and independence, the PNG *Constitution* of 1975 firmly adopted the later route, guaranteeing that the Courts would be the sole arbiters of disputed elections.

The Australian Inheritance and the Evolution of Electoral Democracy in PNG

In practice, the first Australian *Electoral Act 1902* laid down the model that has not only endured since, but which became a template for PNG. In this model, the conundrum within the separation of powers, which Chafeetz identifies, is settled in favour of the power of the courts, especially in cases of disputed elections. The essential component of this model is that the 'validity of any election or return may be disputed by petition' to a court invested with disputed returns power 'and not otherwise'.[24] The petition must 'set out the facts relied on to invalidate the election or return'.[25] It

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[19] Graeme Orr, 'Suppressing Vote-Buying: the 'War' on Electoral Bribery from 1868' (2006) 27 *Journal of Legal History* 289.
[20] *The Parliamentary Elections Act 1868* (UK) s 11.
[21] The Lord Chief Justice, speaking for all affected judges, told Disraeli by letter that the bill conferring electoral jurisdiction was 'an impossibility'. Disraeli quipped that the judges were on strike: Maurice Gwyer, *The Law and Custom of the Constitution by Anson: Vol 1 The Parliament* (5th ed, Clarendon Press, 1922) 181 especially n 3.
[22] Further on this history see Paul Schoff, 'The Electoral Jurisdiction of the High Court as the Court of Disputed Returns: Non-Judicial Power and Incompatible Function' (1997) 25 *Federal Law Review* 317, 321–331.
[23] Joseph Chafeetz, *Democracy's Privileged Few: Legislative Privilege and Democratic Norms in the British and American Constitutions* (Yale UP, 2007) 144.
[24] *Commonwealth Electoral Act 1902* (Australia) s 192. See now *Commonwealth Electoral Act 1918* (Australia) s 353(1).
[25] Ibid s 194(a) of 1902 Act and s 355(a) of current Act.

must be filed within a very-short time of the return,[26] and be accompanied by security for costs.[27] If not, 'no proceedings shall be had'.[28]

Not much has changed in that formal model in Australia in 115 years, other than the addition of a secondary jurisdiction in 1907. That addition concerns questions of an MP's qualifications to sit – in particular MPs with conflicts of interest that are constitutionally forbidden, such as dual citizenship or certain employment or contracts with the Crown.[29] This secondary jurisdiction provides that whilst the Australian parliament can still rule on such qualifications questions, it can alternatively refer them to the court as an adjunct to its disputed returns role.[30] PNG law in providing similarly also retains an element of 'parliamentary privilege' but only over MPs and their qualifications, not elections as a whole.

In short, in terms of election disputes, PNG's *Organic Law on Elections* mirrors not just the structure, but most of the substance of the part of the Australian electoral act on which it was modelled.[31] This much was noted by the PNG Supreme Court in a 1977 election case.[32] In formal terms, this borrowing is intertwined with colonial rule of PNG by Australia and the evolution of parliamentary government in PNG. Colonial rule in PNG first relied on appointed, white Legislative Councils (in Papua from 1888 and in New Guinea from 1933). These were overlain on traditional clan governance. The size of those early Legislative Councils literally were a function of the numbers of the 'white resident population'.[33]

After WW2 a unified PNG Legislative Council emerged in 1951.[34] Only three of its 39 members were elected and then only by the white colonists. Of the appointed members, a majority were ex-officio bureaucrats: a mere three positions reserved for 'natives', the same number reserved for missionaries. Responsible government was underway, but not democratic government. The Legislative Council was granted power to legislate its own electoral law. But when it came to MPs' qualifications, these were set by Canberra, with the *Papua New Guinea Act 1949* (Australia) mimicking the qualification rules that applied to Australian MPs.[35] Also mimicking the Australian position, that act also ensured that the Legislative Council could either rule on those qualifications, or enlist the ruling of the Supreme Court.[36] By the *Legislative Council Ordinance 1951* (PNG) – essentially the first parliamentary election legislation in the country – any disputed election had to be by way of petition to the then Supreme Court.[37]

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[26] Ibid s 194(e) and s 355(e) of current Act.
[27] Ibid s 195 and s 356 of current Act.
[28] Ibid s 196 and s 358 of current Act.
[29] *Australian Constitution* s 44. Compare PNG *Constitution* ss 103–104.
[30] This reference power was added in 1907. See, now famously, the 'Citizenship Seven' cases, where seven MPs were referred and five found to be ineligible for election due to dual citizenships of which they were unaware until too late: *Re Canavan & Ors* [2017] HCA 45.
[31] *Organic Law on Elections* Pt XVIII, compare *Commonwealth Electoral Act 1918* (Australia) Part XXII.
[32] *Re Moresby North-East Election Petition; Lowa v Damena* [1977] PNGLR 429, 438.
[33] *Papua Act 1905* (Australia) s 29.
[34] Under the *Papua New Guinea Act 1949* (Australia). For a potted history of pre-independence legislatures see CJ Lynch, 'A Description of Aspects of Political and Constitutional Development and Allied Topics' in BJ Brown (ed), *Fashion of Law in New Guinea* (Butterworths, 1969) 39, 42–46.
[35] Ibid s 37, compare *Australian Constitution* s 44.
[36] Ibid s 39, inserted by the *Papua and New Guinea Act 1963* (Australia).
[37] *Legislative Council Ordinance 1951* (PNG) s 24. The Ordinance was quite short: the bulk of the rules about the early Council elections was in the *Legislative Council Regulations 1951* (PNG), and subsequently in the *Electoral Ordinance 1963* (PNG) and *Electoral Regulations 1963* (PNG).

In the 1960s a process of democratization was begun, then gained steam.[38] Starting in 1960 the Legislative Council was rationalized, with 12 members to be elected but with a kind of apartheid dividing those elected representatives into six for colonists and six for 'natives'.[39] Thus, for the first time, indigenous PNG people were enfranchised: almost two years before Aboriginal and Torres Strait Islanders were guaranteed the vote at Australian national elections.[40] These first steps to democracy and self-rule quickly proved insufficient. From 1964, and following reports of the Legislative Council into 'Political Development', that legislature was reconstituted as a House of Assembly. There were to be 64 members, with 10 of those seats reserved for colonial appointees and another 10 to be elected by 'non indigenous inhabitants'.[41] By 1966, the House was extended again, to 94 MPs, of whom 84 were to be elected.[42] Yet again, in 1971, the elected element was expanded, so that the House would have a minimum of 104 MPs.[43] During this process the legislation briefly mimicked the *Australian Constitution*: any election dispute or MP qualification issue could be resolved in the House of Assembly or referred by it to the Court.[44] Also, for a decade between 1964 and independence, the Supreme Court was notionally constituted as a 'Court of Disputed Returns' when it heard election petitions.[45]

In this process of democratization, the majority of electorates became 'open' or district level constituencies. The closed seats, in contrast, were reserved for the white colonists. Although replaced at the 1968 election with provincial-wide electorates, those electorates remained partly-closed as candidates for them were subject to 'educational qualifications'.[46] Goldring notes this was to steer those electorates to elect white MPs.[47] By independence in 1975, that vestige of electoral elitism was washed away.[48] Provincial electorates however have remained constitutionally prescribed,[49] to promote regionalism in an otherwise unitary national parliament.[50] Including the semi-autonomous island of Bougainville and the National Capital District around Port Moresby, MPs elected to the (now) 24 provincial seats ordinarily double as Governors of that region.

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[38] On the evolution of the PNG parliament in this period see (from a legal perspective) JR Mattes 'The Legislative Council of Papua and New Guinea' (1963) 37 *Australian Law Journal* 176 and 'The House of Assembly for Papua and New Guinea' (1964) 38 *Australian Law Journal* 159 and, from a broader perspective see EP Wolfers, 'Papua New Guinea and Self-Government' (1971) 48 *Current Affairs Bulletin* 130.

[39] *Papua and New Guinea Act* (Australia) 1949 s 36 as amended by *Papua and New Guinea Act 1960* (Australia) s 8.

[40] *Commonwealth Electoral Act 1962* (Australia). The history of this exclusion is traced in John Chesterman 'An Unheard of Piece of Savagery', in John Chesterman and David Philips, *Selective Democracy: Race, Gender and the Australian Vote* (circa, 2003) ch 2.

[41] *Papua and New Guinea Act 1949* (Australia) ss 35–6, as amended by *Papua and New Guinea Act 1963* (Australia) s 9. The first election under universal suffrage is explored in David Bettison et al (eds) *The Papua-New Guinea Elections 1964* (ANU, 1965) and in a symposium in (1964) 73 *The Journal of the Polynesian Society* 179–230.

[42] *Papua and New Guinea Act 1966* (Australia) s 6(1).

[43] *Papua and New Guinea Act 1971* (Australia) s 16.

[44] *Papua and New Guinea Act 1949* (Australia) s 39(1) as amended by *Papua and New Guinea Act 1963* (Australia) s 9.

[45] *Electoral Ordinance 1963* (PNG) s 201(1).

[46] *Papua and New Guinea Act 1949* (Australia) s 36(1)(c) as amended the *Papua and New Guinea Act 1966* (Australia) s 6(1). For the actual qualifications required see *Papua and New Guinea (Election Qualifications) Regulations 1967* (Australia).

[47] Goldring, above n 11, 41.

[48] The framers of the Constitution explicitly rejected the idea of a literacy test for candidates: *Constitutional Planning Committee Final Report* (House of Assembly, Constitutional Planning Committee, Augusts 1974) ch 6, [22].

[49] *Constitution* s 101.

[50] Goldring, above n 11, 41–42. Indeed a vestige of the colonial idea of appointed legislators also remains, in the potential for up to three members of the House of Assembly, on top of the 111 elected members, to be themselves appointed by a super-majority of the Assembly: *Constitution* ss 101–2.

PNG and Australian Disputed Returns Jurisdiction: a Comparison

To compare the PNG statutory law on election disputes to the Australian is to compare almost identical twins. Even the same strict limitation period for disputing a petition is set: just 40 days from the formalization of each electoral race.[51] The major distinction, which we noted at the outset, is that in PNG the highest court does not try election petitions, although it has a power of review. In Australia, the High Court tries petitions. It may refer mundane or factitious petitions to the Federal Court (the equivalent of the National Court):[52] but even this does not create a right of review.

Another difference of note is that a petitioner in PNG has to find K5000, upfront, as security for costs; and recently government sought to raise that to K20,000. In Australia, at A$500, it is only about a quarter of that.[53] At first glance this is odd, since Australia is a wealthier nation.[54] On reflection, the higher fee in PNG reflects a greater concern, in practice, to deter unworthy election disputes. In Australia, disputed elections are pretty infrequent. As a result, deterring unworthy petitions has attracted less reform attention and a deposit set long ago has remained untouched. In contrast, in PNG the original the original deposit was just K200,[55] but it has been increased 25 and potentially 100-fold. (The Ombudsman sought Supreme Court review of the latest proposed increase).[56]

Also reflecting the greater seriousness of election disputes, in PNG when the National Court finds that any 'offence' was likely to have been committed, it must refer that directly to the Public Prosecutor and Commissioner of Police. In Australia the court merely reports any likely breach of the electoral act ('illegal practice') to the relevant Minister. Curiously, PNG law also requires a party to seek leave to have a lawyer argue their case, unless all the other parties consent.[57] Even then advocacy is restricted to 'one counsel' per party. This rule too may have been framed in anticipation a high level of election litigation, reflecting concerns about excessive legalism, delay and costs. Some restraint may be wise: in Australia's 'Citizenship 7' case in 2017, concerning questions about the dual nationality of seven MPs, 26 barristers crowded the bar table at the ultimate hearings.[58]

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[51] *Organic Law on Elections* s 208(e), compare *Commonwealth Electoral Act 1918* (Australia) s 355(e).

[52] *Commonwealth Electoral Act 1918* (Australia) s 354.

[53] *Organic Law on Elections* s 209, compare *Commonwealth Electoral Act 1918* (Australia) s 356.

[54] Of course any deposit high enough to deter well-off Australian political parties from running frivolous cases might be prohibitively high for ordinary electors. One fear of the law in the 19th century, when courts first became involved, was that parties/candidates would collude to shut down cases where there was mutual wrongdoing. As a result, election petitions are open to electors, and not just institutional litigants like parties and electoral commissions. In Australia this has led to a situation where litigants-in-person are more likely to petition than the parties, an outcome which some lament: Stephen Gageler, 'The Practice of Disputed Returns for Commonwealth Elections' in Graeme Orr et al (eds), *Realising Democracy: Electoral Law in Australia* (Federation Press, 2003) ch 14.

[55] See eg *Epi v Farapo* [1983] PGSC 1.

[56] Eric Tlozek, 'Papua New Guinea Ombudsman Commission Fights Changes to Election Fees', *ABC News Online*, 7 February 2017 <http://www.abc.net.au/news/2017-02-07/png-ombudsman-challenges-governments-election-fee/8248794> accessed 10 January 2018. The Court found the increases so marked that a serious constitutional issue was raised, but would not intervene prior the reforms being enacted: *Reference by the Ombudsman Commission of Papua New Guinea v O'Neill* [2017] PGSC 2.

[57] *Organic Law on Elections* s 222. In contrast, the Australian law does not limit representation, and even permits costs to be awarded against the government (eg in a matter where a petitioner loses but the point of law was unclear, or there was administrative error by the electoral commission).

[58] That is, an average of over three counsel per case, allowing for the Solicitor-General representing the government. Because the cases were referred by the parliament, the lion share of the legal cost was borne by the taxpayers, which may have contributed to a lack of parsimony in briefing counsel!

2 CASE LAW and KEY FEATURES in COMPARATIVE PERSPECTIVE

Petitions disputing an election result can rest on the winner being disqualified, or on proof of some errors or illegal practices having likely upset the outcome. A person lacking the necessary constitutional qualifications to be elected or sit, logically speaking should not have been declared elected.[59] In either type of case, the usual order is that a fresh election needs to be held.[60] That said, given the gravity and cost of ordering a fresh election, a common intermediate step when malfeasance or misadministration is alleged in a close race, is to order a recount of disputed ballots.[61]

Section 135 of the *Constitution* provides explicitly that:

> The National Court has jurisdiction to determine any question as to—
> (a) the qualifications of a person to be or to remain a member of the Parliament; or
> (b) the validity of an election to the Parliament.

This provision stems directly from a 1974 recommendation of the pre-independence, Constitutional Planning Committee of the House of Assembly. Without arguing the case, it recommended that the power to rule over the membership of parliament ought not be one of the parliament's privileges, but instead such disputes should be judicially determined, by the National Court in the first instance.[62]

Disputes over the validity of an election are more common than disputes about the qualifications of a sitting MP. As noted, an election petition must be filed within 40 days of the declaration of the election result. Yet an MP qualification question under s 135(a) can be enlivened by a reference from the House of Assembly. By definition, that can only arise when parliament is sitting. A disqualification issue however may arise before an MP is elected (in effect, a 'candidate qualification' issue) as well as later during an MP's term. As noted earlier, the *Organic Law on Elections* copies the two-part division of the older Australian electoral act, to flesh out the power of the courts in this area. Thus Part XVIII Division 1 covers election petitions, and Division 2 covers parliamentary references.

Early on in the life of independent PNG, the question arose as to whether a qualifications question under s 135(a) could be brought via a petition challenging the validity of an election. (If not, there is no obvious way a citizen could raise a disqualification issue before the National Court.) In the *Moresby Northeast Parliamentary Election Petition*, decided in 1977, the Supreme Court said 'yes'. The Court noted the convention that if an MP's qualifications were seriously questioned in parliament, then the parliament would refer the matter to the judiciary rather than simply vote on party lines. But the Court tempered this with political realism: 'one may be forgiven for expressing anxiety as to whether reliance can be placed on such conventions being followed'.[63] This ruling pre-empted the same finding by the

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[59] Note that the presence of a disqualified losing candidate on the ballot should not upset an election result, no matter how close, unless perhaps voting was by 'first-past-the-post': Graeme Orr, 'Does an Unqualified but Losing Candidacy Upset an Election?' (2015) 14 *Election Law Journal* 424. PNG and Australia share the preferential (aka alternative vote) system. Even if electors vote for a disqualified losing candidate, their vote counts in accordance with their wishes.

[60] This works with single member electorates of the kind used in PNG. The outcome would be different where proportional representation is used.

[61] I am grateful to the anonymous reviewer for pointing this out.

[62] Constitutional Planning Committee, above n 48, ch 6 [84].

[63] *Re Moresby North-East Election Petition; Lowa v Damena* [1977] PNGLR 429, 437.

Australian High Court in the case of *Sue v Hill* by 22 years.[64] That said, there are good reasons to keep parliamentary discretion as to whether to refer disqualifications, especially where the issue is inadvertent and easily and quickly rectified.[65]

Despite the prevalence of disputed returns in PNG – or perhaps because of it – its Supreme Court has had cause to stress the unusual and limited nature of petitioning an election result:

> The electoral process in a democratic system allows the community a free and fair opportunity of electing the candidate that the majority prefers. The Organic Law creates strict provisions before there can be any challenge by electoral petition to the expression of the will of the majority. Such a process is inherently alien to the judicial process and … the courts may only interfere upon proof of a very high standard of certain well-established principles. To allow appeals in such matters further denies the right of representation by prolonging the process. The community is entitled to know who is its political representative.[66]

There is no distinct election tribunal or 'court of disputed return' in contemporary PNG.[67] Appeals from the National Court hearing election petitions can (and have) been ousted. But the Supreme Court retains a constitutional power to *review* determinations on such petitions. This flows from the language of s 15 of the *Constitution*:

> [B]efore Independence there was a special court of disputed returns set up by legislation. However, on 16 September 1975, when the *Constitution of The Independent State of Papua New Guinea* and the *Organic Law on National Elections* came into operation such a court was abolished and the law has provided as from that date that any election petitions be filed in the National Court … If the Parliament or founding fathers of our *Constitution* had intended that a special tribunal be set up to hear election petitions they would have made specific provisions either in the *Constitution* or in the *Organic Law on National Elections*. Therefore, it is the National Court of Justice which sits and hears election petitions and not any special tribunal.[68]

The Supreme Court's role on such a review is narrower than in a true appeal:

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[64] *Sue v Hill* (1999) 199 CLR 462. The Australian Court did not use such openly realist reasoning; unfortunately it did not even note the PNG precedent.

[65] Compare the chaotic avalanche of nine referrals (and counting) which overshadowed the Australian Parliament in 2017: *Re Culleton (No 2)* [2017] 4; *Re Day (No 2)* [2017] HCA 14; and *Re Canavan & Ors* [2017] HCA 45. Only Day's case involved a real conflict. Culleton's case caught out a candidate who had a minor conviction which was soon overturned because it was made in his absence. *Re Canavan & Ors* involved MPs who been unaware of inherited dual nationalities. The constitutional disqualifications in PNG are less stringent – because more modern – than in Australia. Thus s 103(4)–(7) of the PNG *Constitution* allows for criminal appeals (cf *Culleton's case*) and there is no blanket ban on offices of profit or pecuniary interests with the Crown nor (cf *Day's case*) nor any rule against MPs who are dual citizens (cf *Re Canavan & Ors* 2017] HCA 45). Instead, PNG has a constitutional barrier to MPs receiving payments for services in parliament, something that in Australia is only indirectly regulated by bribery laws or contempt of parliament.

[66] *Balakau v Torato* [1983] PNGLR 242, 254–5 (per Andrew J).

[67] Compare the original 'Election Courts' in the UK after 1868, or some Australian states where a distinct 'Court of Disputed Returns' is notionally established but always staffed by Supreme Court judges from that state. The Australian High Court, in this area, also adopts that title. Whilst this issue sounds highly formalistic, at state level if the Supreme Court is vested with electoral jurisdiction, its decisions may be constitutionally be subject to appeal to the High Court. Whereas if a notionally distinct 'court' is established and/or if the judges are given power as designated persons rather than in their direct capacity as Supreme Court judges, then any avenue of appeal can be sutured off. See Schoff, above n 22, 331–4.

[68] *Balakau v Torato* [1983] PNGLR 242, 247–8 (per Kidu CJ).

> Review … is not an appeal procedure. It is concerned not with the decision itself but with the decision making process. It is the supervisory jurisdiction of the ... Supreme Court empowering it to intervene, at its discretion, to ensure that the decisions of inferior courts or authorities made are within the limits of, and in accordance with, duties imposed on them by law … . Nonetheless the Court may intervene by judicial review where a Court or authority acts outside the jurisdiction given it by law, that is where it makes determinations it is not authorised to make. It can intervene where there is error of law on the face of the record, procedural irregularity or when it is plain that the decision reached is such as to be unsustainable in law or reason.[69]

As noted, this contrasts with the Australian position, where at national (and at most state) elections,[70] there is no avenue of appeal or review. The various courts of disputed returns are given power to rule definitively. This fits the deliberately hurried nature of the jurisdiction to review elections. In PNG, where petitioning is relatively common, the *Constitution* vested power to try petitions with the National Court. Ultimately any tension between finality, certainty and speed needs to be balanced.[71] PNG does this with a constitutional guarantee of a right to seek review of a National Court decision in all cases, including a disputed election or MP qualification case. But whilst the law recognises the need for the Supreme Court to be able to 'review' significant errors by the National Court, it also bars any general right 'appeal' from an election case.[72]

Review is not an automatic right for a disgruntled party to an election case. The PNG Supreme Court must give leave. It does so following certain principles. 'The grant or refusal of leave for review is discretionary. It is a judicial discretion and it must be exercised on proper principles and proper grounds … .'[73] The normal criteria for leave to appeal ordinary cases do not apply, instead there are two criteria. If the review is sought on a point of law 'the only criteria to be satisfied are that there is an important point of law to be determined and that it is not without merit'. If review is sought on factual grounds, there must have been a 'a gross error clearly apparent or manifested on the face of the evidence'. In other words, the Supreme Court is a longstop backstop to the National Court in cases of factual error. Its review role focuses more on unsettled legal questions, which will be agitated as long as the point of electoral law is not trivial.

At the start of this article we noted that there are some five ways election matters can come before the courts. One of these is seeking an injunction in the lead up to an election; for example to restrain parties breaking campaign rules or to require the electoral commission to enforce or follow a law. Is this a collateral attack on the election, ousted by the rule that 'an election may only be disputed by petition' after its conclusion? Ordinary principles of judicial review of administrative legality would suggest that such injunctions are allowed, at least against the electoral commissions. But the campaign period is both time – and politically – sensitive.

In PNG, the National Court has held that it has no power to order injunctions against the Electoral Commission during the counting of votes, even where irregularities or discrepancies are alleged in the

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[69] *Avei v Maino* [2000] PNGLR 157 (per whole bench).

[70] Queensland and Tasmania both permit appeals from decisions of a single judge of their state-level Supreme Court, on a disputed return, to their Full Court or Court of Appeal. On the policy behind that see Legal, Constitutional and Administrative Review Committee, *Report on Issues of Electoral Reform in the Mansfield Decision: Regulating How-to-Vote Cards and Providing for Appeals from the Court of Disputed Returns* (Report 18/1999, Legislative Assembly of Queensland) 29–55.

[71] Orr and Williams, above n 15, 78 –9.

[72] *Constitution* s 155(2)(b) (review); *Organic Law on Elections* s 220 (no appeal).

[73] *Jurvie v Overraya* [2008] PGSC 22, [9].

count.[74] (Australian courts agree).[75] In effect, a lot of trust is reposed in the independent electoral authorities. Elections are not meant to be perfect, and only if the errors are so large that the result is likely to be affected can such matters be litigated without risk of hefty legal costs.[76] This firm line was held as recently as 2017, in a case where two writs were returned, for the one seat, by two different returning officers. The initial winner's claim for an injunction against his usurper (who had been sworn in as the MP) sitting as an MP was held to be not justiciable as a matter of form.[77]

Yet in the earlier case of *Masive v Okuk* the PNG Supreme Court held that injunctions are available against a candidate – in this case one who was allegedly unqualified – prior to polling day.[78] The term 'election' in both the *Constitution* and the *Organic Law on Elections* was held to mean the result, in the sense of the final act of declaring successful candidates to have been elected. This contrasts with a stricter view in Australia.[79] In making this contrast, the Supreme Court stressed that PNG constitutionalism allowed its courts to reject overseas case law, however much on point. More broadly, the Court stressed the constitutionally guaranteed power of the PNG courts over elections:

> [I]n interpreting and construing these various provisions of the *Constitution* and the *Organic Law on National Elections*, an overriding consideration which ought to be borne in mind is the unique autochthonous nature of [the PNG] *Constitution*. Any references to and study of case law from other jurisdictions of notions and principles, which may have been borrowed or adopted, may lose their persuasive value in the context of this background.[80]

The Court cast the PNG *Constitution* as a modern mandate, different from those common law countries where parliaments had chosen to cede some of their traditional power to the courts:

> Cases from other jurisdictions are of limited assistance to the Court because of different constitutional and statutory provisions. [Although] in most common law jurisdictions Parliament has reserved to itself the full and exclusive right and power to determine its own membership but has delegated part of this power to a court of disputed returns. Consequently, it is unknown in those jurisdictions to challenge the qualifications of a candidate at any stage before the declaration of the poll. The framers of our *Constitution*, however, decided at the very outset that such power would not be placed by the people in the exclusive hands of Parliament but was an area of concern to the judicial arm of Government (*Constitution*, s 135) also to be shared in certain circumstances with Parliament as recognised in the Organic Law (for example s 228).[81]

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[74] *Waranaka v Ralai* [2017] PGNC 148.

[75] Eg *McDonald v Keats* [1981] 2 NSWLR 268.

[76] This does not mean the electoral authorities may not be accountable in less legalistic ways. In Australia, a Joint Standing Committee on Electoral Matters conducts open public hearings after each election, to review any issues arising from the election, with a view to reform in the law or practice.

[77] *Dekena v Kuman* [2017] PGNC 181.

[78] *Masive v Okuk* [1985] PNGLR 263.

[79] See Angela O'Neill, 'Justiciability: the Role of Courts in Reviewing Electoral Administration' in Orr et al (eds), above n 54, ch 15. This strict rule can be problematic (sometimes a stitch in time saves nine), so some Australian jurisdictions now have a bespoke statutory rule giving electoral commissions and candidates standing to seek injunctions to restrain breaches of the electoral act: see Orr, above n 7, 116–18.

[80] *Masive v Okuk* [1985] PNGLR 263, 271–2 (per Amet J). See also Goldring, above n 11, chs 2–5, discussing the 'home grown,' 'autochthonous' and aspirational nature of the Constitution. On that 'home grown' process see further Bernard Narokobi, 'The Constitutional Committee: Nationalism and Vision' in Anthony Regan, Owen Jessep and Eric Kwa (eds), Twenty Years of the Papua New Guinea Constitution (Lawbook Co, 2001) 25 at 27–8, and the panel discussion of constitutional framers at the rear of that volume.

[81] *Masive v Okuk* [1985] PNGLR 271 (per joint judgment).

In other respects, the procedural law around election dispute petitions in PNG has developed with a similar strictness to elsewhere.[82] To give a taste of this, the petition that originates the claim must plead sufficient relevant facts for each ground upon which the election is sought to be invalidated. The petition is not a mere shell of a writ, but a statement of claim. Matters not plead within the 40 day time period cannot be considered, even if it was impossible to uncover them within that time. There is thus early Supreme Court authority stressing the strict requirements for petitioning, including an inability to amend the petition, to correct otherwise fatal errors in its pleading, outside the time limit.[83] In this we see the preference, common in most countries, for certainty and strict time limits as opposed to more forgiving and elongated way that ordinary civil litigation evolves. It is difficult to think of another form of civil litigation in which the principle of *finis litium*, or colloquially 'life must go on', is so apparent.[84] The rationale remains that articulated by the Privy Council in 1870: whoever rules on election disputes needs to exercise that power 'in a way that should as soon as possible be conclusive [to] enable the constitution of the Assembly to be distinctly and speedily known'.[85]

In PNG, these questions of juggling competing principles and practicalities are particularly important. There is a need to balance court oversight over malfeasance and malpractice in elections, with the amount of election disputes, and the potential for litigation to be misused by disgruntled election losers. Given the concern with litigiousness, the Supreme Court has accepted that a trial judge can dismiss a claim at the end of the petitioner's case, on a motion of 'no case to answer' raised by the respondent candidate or electoral commission.[86]

3 CONCLUSION

PNG: a Fertile Electoral Jurisdiction

Moving away from the key features of the law underlying election cases, what does a snapshot of the disputed returns jurisdiction in PNG reveal? It is difficult to get an exact handle on this, as there is no distinct Court of Disputed Returns, nor a comprehensive case law database in PNG (Paclii is in its infancy, and cases leading to written judgments are only a subset of all litigation). But by any standards this is a fertile jurisdiction, generating a high workload on judges and counsel.

As former Electoral Commissioner Trawen reported, 'election related disputes in the PNG Courts increased [after] PNG's fourth general election in 1997'.[87] And as more recent figures collated by David Gonol show starkly, that upward trend has continued. Apparently prior to 1997 there were fewer than 30 petitions after national elections. Yet 1997 alone produced 88 filings. Whilst the 2007

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[82] There is even a primer on procedure: David Gonol, *National Court Registry Manual on Election Petitions* (Marapa Publications, 2017).

[83] *Biri v Ninkama* (1982) PNGLR 342. Pleading the core factual allegation underlying each claim does not mean that a petition should plead the underlying law: *Mune v Agiru* (1998) PGSC 3.

[84] *Interest republicae ut sit finis litium*: Latin for 'for society's sake, litigation must end'. Outside perhaps unfair dismissal claims (which have to be filed quickly, but they relate to a single broken relationship, not to something with a broad public interest like an election.

[85] *Théberge v Laudry* (1870) 2 App Cas 102, 106.

[86] *Baira v Genia* (1998) PGSC 47. This power was inferred from the general invocation to election courts to consider the 'real justice' of each case: *Organic Law on Elections* s 217.

[87] Trawen, above n 5, 8.

election produced 'only' 57 petitions, that number more than doubled after the 2012 elections to 109 petitions.[88] That is almost one petition per constituency, on average! [89]

In the 2000s, more than half the cases filed were withdrawn or dismissed for lack of competency or seriousness, and a few were out of time. Nonetheless, the trial load remained heavy: the 1997 election produced 40 trials; the 2002 general election produced 34; 2007 produced 32.[90] Cases going to trial form only part of the load. Of those that went to full hearing and survived Supreme Court review, five in each of 1997 and 2002 led to fresh elections in the constituency concerned.[91]

A related measure is the number of judgments produced, which reflects the seriousness of disputed facts or legal arguments in the jurisdiction. A search for all judgments, in Paclii's PNG case database, that include the term 'disputed return' or 'election petition' on that database throws up many hundreds of cases in the 42 years since independence. The exact number is unclear because, before 2005, the Paclii database typically has multiple entries for the same case. But in the more reliable 12.5 year period since, the database throws up 315 distinct judgments. Admittedly a few of these use the terms incidentally. A few include Supreme Court reviews of election petitions tried by the National Court and so represent additional court-load but not a distinct disputed election. On the other hand, as we noted at the outset, disputed returns petitions are under-representative of all election cases. There are also criminal cases involving election offences, not all of which give rise to election petitions as miscreancy may taint the process but without threatening the majority of the winning candidate.

The figures from the Paclii database, unlike Trawen's figures, cover provincial – including Bougainville – and local election disputes, as well as national ones.[92] In most liberal democracies, sub-national elections tend to make up a majority of election disputes, for the simple reason that there are many more local positions to fill and in smaller electorates there is more chance of a tight vote margin. Curiously this is less apparent in PNG. That is, election petitions – as Trawen reported – are a real feature of PNG parliamentary elections. In short, a rough empirical survey reveals a very active petitioning system in PNG, especially at the national level. This is especially so given its population and GDP is not huge by world standards and its national elections are on an elongated, 5 year cycle.[93]

We might contrast the relative lack of petitioning in the UK and Australia, which after all were the font for both PNG's Westminster system of government and its system of court-based election petitions. In doing so, remember that the UK and Australia have bigger parliaments than PNG (hence more outcomes to potentially contest). And political parties and movements in both those countries are not short of resources to afford to litigate.

In the UK, during the long, Victorian period of democratization and the battle against electoral corruption, petitioning went from very common, to relatively uncommon.[94] Then, across the 20th

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[88] Gonol, above n 82, iii.
[89] For further statistical insights, see Amet's review of petitions generated by the 1997 national election, above n 4.
[90] Trawen, above n 5, 8.
[91] Ibid.
[92] Whilst PNG is a unitary state, the *Constitution* provides for elective provincial and local governments, albeit ones whose powers are subject to national parliamentary definition: s 187C.
[93] *Constitution* s 105. PNG Prime Ministers are formally anointed by a vote of the House. They may lose that office, after an 18 month grace period, to a rival by way of a parliamentary vote of 'no confidence', except in the fifth year of a parliament when a loss of confidence triggers an election: *Constitution* ss 105, 142 and 145.
[94] Caroline Morris, *Parliamentary Elections, Representation and the Law* (Hart, 2012) 82–7.

century, petitioning in the UK became very rare. The last successful petition alleging electoral corruption against a House of Commons MP was in 1929. The next successful disputed election was 68 years later, and only involved minor administrative errors in an election decided by a mere 2 votes.[95] In between, there was just one successful petition and that was a disqualification issue involving an MP who had inherited a peerage.[96] Throughout the 20th century, and to this day, the British parties seemed content with the competence and fair play of the election process. Any errors in electoral administration or overly zealous campaign tactics either cancelled each other out, or were better left to media scrutiny and administrative reform than to litigation.[97] In Australia too, a century passed between instances of national election results being overturned for anything other than the winning candidate being unaware that they suffered a disqualification.[98] In the handful of successful UK and Australian cases in the 20th century, electors in constituencies which had to return to the polls seemed to resent their original choice being overturned on what felt like technicalities. The ousted MPs were invariably returned with an increased margin.[99]

This rosy picture has eroded a little since then. In the UK, a couple of Commons constituencies have been successfully petitioned in the past two decades and several local, especially postal, elections have been annulled since 2005 for outright fraud. In addition there is rising concern about the flouting of campaign expense limits and manipulation through false advocacy online. In Australia, the entire 2013 Senate result in one state was annulled by petition, due to lost ballots.[100] In Australia, increasing concerns are raised about fairness and integrity in political donations, but this is dealt with more by regulatory laissez-faire than UK style strictures. Nonetheless, whilst in the 21st century the UK and Australia are refocusing on electoral integrity, disputing elections in the courts remains an irregular event and secondary to other forms of review.[101]

So a contrast with PNG remains. The younger democracy remains a more fertile one for election disputes, and these appear to have risen since independence rather than falling. The *Constitution* locks in a guaranteed role for the PNG courts in superintending elections. In PNG, one rationale for not investing the highest court in the land with disputed returns power, even over national elections, must have been a realization that petitions would be common. Similarly, allowing a discretionary right to appeal balances the need for superior court oversight of such important cases as election disputes (as well as the co-ordinated development of the law) without the risk of unworthy cases being strung out by mischievous litigants appealing as-of-right.

Whilst challenges to outcomes in national parliamentary constituencies are significant political moments, they are also trials turning on disputed facts more often than legal principle. This insight is rooted in the jurisdiction: the *Organic Law on Elections* requires judges hearing election petitions to rule in accordance with 'the substantial merits and good conscience' of the case, rather than focus on technicalities.[102] But there is also a paradox in the election jurisdiction. Short time limits on

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[95] *Winchester Election Petition; Malone v Oaten* (Unreported, High Court of Justice (England and Wales), 6 October 1997).
[96] *In re Parliamentary Election for Bristol South East* [1964] 2 QB 257.
[97] Graeme Orr, *Ritual and Rhythm in Electoral Systems: a Comparative Legal Approach* (Routledge/Ashgate, 2015) 176.
[98] Ibid 176–7.
[99] This was the case for Australian MHRs Phil Cleary (1988), Jackie Kelly (1996) and UK MPs Tony Benn (1964) and Michael Oaten (1997).
[100] Michael Douglas, 'Lessons from the Australian Senate' (2014) *Election Law Journal* 559.
[101] Such as the standing committee that consults about and reviews each national election (mentioned at n 76 above).
[102] *Organic Law on Elections* s 217.

petitioning, and strict rules over pleading and even security for costs,[103] means that petitioners need exacting legal advice as a matter of urgency after an election, or a meritorious case may never reach a full hearing. Yet the PNG courts in recent times have struggled to deal with all election disputes expeditiously, in some cases requiring several years to finalise a case. Such delays obviously contradict the purpose of the requirement of a rapid filing of petitions.[104]

When we turn from the law to the political context, we see that election campaigns are 'often robust, exaggerated, angry, mixing fact and comment and commonly appealing to prejudice, fear and self-interest' (to quote from Justice Kirby in an Australian electoral defamation case).[105] In PNG, still a young electoral democracy and facing socio-economic challenges, we can add unsavoury practices. Physical intimidation and bribery are still part of PNG experience –[106] just as they demarked elections throughout the Victorian era, which was the first century of UK and Australian democracy. In turn PNG election campaigns are not just passionate: its election litigation is. Outside one election petition hearing, fights including threats of gun violence against police broke out, between supporters of an MP and a rival candidate involved in the litigation. This lead to instantaneous referrals for (ultimately successful) contempt charges.[107]

The relatively high prevalence of petitions and disputed returns, therefore, reflects both well – and poorly – on PNG. On the upside, PNG is a passionate democracy where people are willing to agitate through legal process. On the downside, despite the efforts of its constitutionally entrenched, independent Electoral Commission, PNG does not rank superlatively in terms of its perceived electoral integrity. And although filing fees and time limits for election petitions are significant hurdles, some litigation in PNG as elsewhere is more a continuation of political mud-slinging.

Everyone's Integrity on the Line

Electoral law matters, at a variety of levels. Faith in the integrity of electoral outcomes underpins the legitimacy of each MP and the overall composition of the political branches. It also influences the long-term level of trust that citizens will ultimately repose in those branches. One only has to look at the Kenyan Supreme Court's decision to order a re-run of Kenya's 2017 presidential election. By a 4-2 majority, the Court annulled the apparently clear re-election of President Kenyatta (54% to 44%).[108]

This decision showed starkly how such litigation can matter. It was the first African presidential election to be overturned judicially, even though many such elections have been of dubious outcome in some countries. Within hours of the annulment, the now caretaker President threatened to 'teach them [the judges] a lesson once the fresh presidential elections are over. I will 'fix' the judiciary if re-

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[103] See eg *Epi v Farapo* [1983] PGSC 1 (accepting that a personal cheque might suffice, but rejecting petitions because post-dated cheque was used even though the payments were honoured). See also Aihi v Isoaimo [2014] PGNC 146 (failure to pay deposit on time 'renders the whole proceeding invalid such that this Court cannot even begin its inquiry into the allegations').

[104] I am grateful to the anonymous reviewer for pointing out the problem of delay).

[105] *Roberts v Bass* (2002) 212 CLR 1, 63.

[106] Violence was particularly marked in the 2017 election leading to up to 20 deaths in ongoing tribal clashes in the Enga Province: Anon, Enga Death Toll Up to 20 After Latest Election Related Violence, *Radio New Zealand online*, 14 August 2017 <https://www.radionz.co.nz/international/pacific-news/337143/enga-death-toll-up-to-20-after-latest-election-related-violence> accessed 4 December 2017.

[107] *Augerea v Koroma* [2014] PGNC 192 and *Augerea v Yama* [2014] PGNC 3

[108] *Odinga v Independent Electoral and Boundaries Commission* (Supreme Court of Kenya, Presidential Petition No 1 of 2017, orders made 1/9/2017, reasons delivered 20 September 2017).

elected.'[109] Some weeks later, on the day the Court issued its (belated) reasons, tear gas was used to disperse protesters. Kenyatta, doubling down on his rhetoric, called the judicial majority 'crooks'.[110] Chief Justice Maraga, reflecting on the 'unlawful and savage' vehemence of responses to the ruling, stated that the judges were 'willing to pay the ultimate price'.[111]

The Kenyan Court thus faced a backlash. Both from Kenyatta's supporters but also from those who questioned the practicality of its timeline (60 days) for the fresh election. Ultimately, even to outsiders who welcomed the Court's forthrightness, there remained a paradox. The ruling impugned the integrity and competence of the independent electoral commission, but the resulting order required it to quickly organize a credible re-run.[112] Its ability to do so was sorely questioned in two ways. First, the opposition leader – who had prevailed in the court case – withdrew from the re-run due to concerns about its viability. Then a senior election official resigned, alleging the election commission was unprepared and under 'siege'.[113] She fled to the US, citing fear of intimidation. In the re-run, with the opposition boycotting, Kenyatta attracted 98% of a turnout less than half of the original poll.[114]

The Kenyan example reminds us that the integrity of all sides, in such high stakes matters, is always at risk: the integrity of the administrators, the politicians and of the court exercising the disputed returns power. Earlier we noted that the *Constitution* of PNG is a detailed and rich one, especially by the standards of most common law countries. Like its South African and indeed Kenyan counterparts, the *Constitution* of PNG benefits from its modernity. It adopts a liberal, republican conception of the rule of law, distinct from the sparser Westminster and Australian models of its colonial past, which placed more faith in responsible and parliamentary government.[115]

But it also belies a sense of unease. That unease manifests in a fear that the organs of governmental power and, in particular, the power of the political branches of government, are not fully trustable. Those organs are therefore bound by a detailed form of legal constitutionalism.[116] The old view that electoral jurisdiction is 'extremely special' for it 'concerns what, according to British ideas, are normally the rights and privileges of the Assembly itself, always jealously maintained and guarded',[117] holds little

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[109] Njeri Kimani, 'Kenyatta's Rash Remarks May Cost Him', *Mail and Guardian (online)*, 22 September 2017 < https://mg.co.za/article/2017-09-22-00-kenyattas-rash-remarks-may-cost-him> accessed 27 September 2017.

[110] Anon, 'Kenyan Judges Criticize Kenyatta over "Veiled Threats"', *Al-Jazeera (online)*, 3 September 2017 < http://www.aljazeera.com/news/2017/09/kenyan-judges-criticise-kenyatta-veiled-threats-170903081232522.html> accessed 27 September 2017.

[111] AP, 'Kenya's Judges Who Annulled Election Face Savage Threats', *New York Times (online)*, 19 September 2017 < https://www.nytimes.com/aponline/2017/09/19/world/africa/ap-af-kenya-elections.html> accessed 27 September 2017.

[112] Anon, 'Supreme Court Criticises IEBC Electoral Commission', *BBC News Online*, 20 September 2017 <http://www.bbc.com/news/world-africa-41334702> accessed 27 September 2017.

[113] Anon, 'Kenyan Election Official, Roselyn Akombe, Flees to US', *BBC News Online*, 18 October 2017 <http://www.bbc.co.uk/news/world-africa-41660880> accessed 19 October 2017.

[114] Anon, 'Kenyan Election: Kenyatta Re-elected in Disputed Poll', BBC News Online, 30 October 2017 <http://www.bbc.co.uk/news/world-africa-41807317> accessed 5 November 2017.

[115] Compare Enid Campbell, 'Papua-New Guinea Government – Consideration of a Bill of Rights' in LK Young (ed), Constitutional Development in Papua and New Guinea (International Commission of Jurists Australian Section, 1971) 68.

[116] As opposed to the 'political constitutionalism' that demarked the United Kingdom historically and another Oceanic, non-federal inheritor of that tradition, New Zealand. For more on the distinction between 'legal' and 'political' constitutionalism, see Richard Bellamy, *Political Constitutionalism: A Republican Defence of the Constitutionality of Democracy* (CUP, 2007).

[117] *Strickland v Grima* [1930] AC 285, 296 (Privy Council).

sway in PNG. Further, PNG's Independent Electoral Commission is entrenched – and mentioned no fewer than 10 times – in the *Constitution*.

Despite that, standard works on PNG constitutional law tend to gloss over this entrenchment and indeed the Independent Electoral Commission altogether. Perhaps because it is seen as an obviously good thing yet a second order machinery matter; perhaps because the *Constitution* is extensive and mandates a variety of integrity bodies. Jack Goldring, writing during his time as an academic in PNG, sagely predicted that 'elaborate and detailed statements in the *Constitution* and the Organic laws may be worthless if insufficient scarce legal resources are allocated to them. Even if they are not meaningless, the amount of verbiage … will permit interest groups and political organisations ample scope [to litigate]. This is not to say that such provisions ought not to appear in the *Constitution*; it is merely to point out their vulnerability'.[118] Fair electoral administration can be enhanced by guarantees of constitutional independence, but not guaranteed. Resources and culture matter at least as much.

Yash Gai has made a similar point. The *Constitution* contains an 'unusual number of safeguards', because its drafters 'did not necessarily trust politicians'.[119] Yet the republican, liberal ideal in the PNG Constitution has been more formal than effective in practice, since no constitution can 'control the unfolding social forces [at best] it may nudge them'.[120] PNG in particular experiences a weak state-political system, with politics moderated by clans as much as accountable political parties. In this lies a tension, since electoral democracy itself is a product of fair electoral laws and their enforcement.

The PNG courts are, in a key sense, another type of 'integrity' body entrenched in the *Constitution*.[121] They oversee the legality of the other branches and civil society as a whole. This includes both the Electoral Commission and the political parties and candidates who ultimately make up the House of Assembly and the Cabinet. But the National and Supreme Courts in PNG cannot wave a magic wand to ensure integrity in administration, let alone in the rivalrous realm of partisan politics. They can at best offer sanctions for misconduct or error, and nudge the other institutions and political actors towards adherence to something approximating the ideal of free and fair elections. As the Kenyan example demonstrates – and whether they like it or not – in election disputes the courts themselves are on trial. They are subject to the witness of the public eye and the judgement of political history. With that weight on their shoulders, getting the procedure and substance of electoral disputes (trials and reviews) right, and balancing the tensions between expedition and accuracy, legality and fairness, are weighty obligations. This is especially so in PNG, a maturing democracy with an often turbulent electoral politics.

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[118] Goldring above n 11, 47.

[119] Yash Gai, 'Establishing a Liberal Political Order through a Constitution: the Papua New Guinea Experience' (1997) 28 *Development and Change* 303, 308.

[120] Ibid, 328.

[121] Compare Justice Jim Spigelman's account of the integrity role of the courts: 'The Integrity Branch of Government' (2004) 78 *Australian Law Journal* 724, 730–2. See also ibid, 309–10, on the formal strength of the PNG Constitution's formal provision for the rule of law and integrity offices, over pure democracy.