

# CHALLENGING ELECTION OUTCOMES IN PAPUA NEW GUINEA THROUGH THE COURTS

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*This paper discusses the main features of challenging election results through various case authorities that have been decided in Papua New Guinea under the Organic Law on National and Local Government Elections. It provides a rich ground to study how the courts in Papua New Guinea have tried to balance democratic outcomes against upholding the rule of law through strict rules of participating and conducting elections. It is an area little discussed in the legal literature of Papua New Guinea and indeed the Pacific.*

*A la lumière d'une sélection de décisions rendues en Papouasie-Nouvelle-Guinée dans le cadre de la loi organique sur les élections nationales et locales, cet article examine les principales caractéristiques qui encadrent les modalités de contestation des résultats électoraux.*

*Ces décisions constituent un terrain propice à l'étude de la manière dont les tribunaux de Papouasie-Nouvelle-Guinée se sont efforcés en encadrant strictement les modalités de participation et d'organisation des élections, de maintenir un équilibre entre les résultats démocratiques et le respect de l'État de droit.*

*Il s'agit d'un champ de recherches rarement étudié dans la littérature juridique de Papouasie-Nouvelle-Guinée et plus largement dans le Pacifique anglophone.*

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## **I INTRODUCTION**

The right to vote and stand for public office is provided for in s 50 of the Papua New Guinea Constitution. The way an election is conducted, and its results challenged in court is prescribed in a separate law, the Organic Law on National and Local-Level Government Elections (Organic Law on Elections). The principal state agency that conducts elections in Papua New Guinea is the Electoral Commission,

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an independent Constitutional office.<sup>1</sup> There are 118 seats in a unicameral parliament, that is contested every five years. Of the 118, 96 come from open electorates and 22 from regional seats. Candidates are elected by universal adult suffrage on a limited preferential voting system. The last national general election was held in 2022. After the election, the prime minister is appointed by the governor-general having first been voted in by parliament. The next national general election will be in 2027.

## **II GENERAL LEGAL FRAMEWORK**

Following the 2022 national general elections 102 election petitions were filed in the National Court.<sup>2</sup> This is not unusual given the social reality in Papua New Guinea in the way elections are conducted. The majority of the election petitions, have however have been dismissed for want of compliance with the Organic Law on Elections. Two seats so far have been declared vacant by the National Court and are awaiting by-election, subject to any possible reviews in the Supreme Court.

The Organic Law on Elections s 206 provides that the validity of an election or return may be disputed by petition addressed to the National Court.<sup>3</sup> A major issue that runs through challenging election results in courts in Papua New Guinea is whether the court should adopt a strict approach or liberal approach in determining an election petition. This issue is created by the Organic Law on Elections and the case authorities since independence have grappled with how they should dispose of an election petition depending on a strict or liberal approach.<sup>4</sup> Each approach has its compelling policy justification.<sup>5</sup> The main policy rationale for the strict approach is the court's reluctance to interfere with the democratic process.

In Papua New Guinea's Constitutional regime, the Constitution is regarded as the supreme law (ss 10 and 11, Constitution). All laws must be consistent with the Constitution. Any law or provision of a law that it inconsistent with the Constitution

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1 In the performance of its functions, the Electoral Commission is not subject to the direction or control of any person (see Constitution, s 221(e), 223(2)).

2 *The National*, 3 July 2023 <<https://www.thenational.com.pg/writs-expected-july-13/>>.

3 In Papua New Guinea, the National Court is a court of unlimited jurisdiction, except for constitutional questions, unless another court has been given specific jurisdiction to hear the matter. The Supreme Court is the final court of appeal, from the National Court.

4 Papua New Guinea became independent from Australian colonial administration on 16 September 1975.

5 For a history of the policy reasons behind each approach from a historical common law perspective, see Graeme Orr "Integrity on the Line: Judicial Power Over Elections in Papua New Guinea" [2017] *LAWAsia Journal* 65-81.

is to the extent of the inconsistency, invalid.<sup>6</sup> Following the Constitution, the next most important law in Papua New Guinea's hierarchy of laws is an Organic Law.<sup>7</sup> Schedule 1.2 of the Constitution defines the term "Constitutional Law" to consist of the Constitution and Organic Laws. The fact that the Organic Law on Elections is an Organic Law underscores the importance of the subject. The Organic Law on Elections provides the statutory framework guiding the way an election for a seat in the National Parliament is contested and within which a person may challenge the results of a particular electorate.

The validity of an election or return may be disputed by petition addressed to the National Court.<sup>8</sup> Prior to independence it was called the court of disputed returns.<sup>9</sup> A case challenging an election outcome is described as an "Election Petition." Although the Organic Law on Elections expressly provides that there are no appeals against a decision of the National Court, stating that the "decision of the National Court is final and conclusive and without appeal and shall not be questioned in any way",<sup>10</sup> the Supreme Court, the final court of appeal in Papua New Guinea has interpreted this provision as being subject to the inherent power of the Supreme Court created by s 155(2)(b) of the Constitution to review all acts of the National Court.<sup>11</sup> This means that whilst an appeal is not permitted, a review of the decision of the National Court is.<sup>12</sup> Leave for review would have to be obtained from a single judge of the Supreme Court within a strict time frame before the substantive merits of the review can be heard by three or more judges.<sup>13</sup> The Supreme Court decision

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6 Numerous cases decided in Papua New Guinea have held entire legislation or provisions of a legislation to be invalid on account of their inconsistency with the Constitution. For a short survey of some of these cases see Vergil Narokobi "Judicial Review of Constitutional Questions in Papua New Guinea," in (2021) 26 CLJP/JDCP at 61.

7 Constitution, s 9 sets out the types of laws applicable in Papua New Guinea.

8 Organic Law on Elections, s 206.

9 See *Balakau v Torato and Openakali* [1983] PNGLR 242.

10 Organic Law on Elections, s 220.

11 In *Balakau v Torato and Openakali* [1983] PNGLR 242 the Supreme Court held that s 220 of the Organic Law on Elections, insofar as it purports to prohibit the review power of the Supreme Court in any way, is in conflict with s 155(2)(b) of the Constitution and is invalid.

12 It was "...observed by Salika DCJ and Batari J in *Amet v Yama* [2010] PGSC 46 at [4], the power of the Supreme Court to review all judicial acts of the National Court under Section 155(2)(b) of the Constitution is well settled, and extends to review of Election Petitions (against which there is no right of appeal under Section 220 of the Organic Law," cited in *Nomane v Mori* [2013] PGSC 14; SC1242 (12 July 2013) at 14.

13 See *Hagahuno v Tuke* (2018) SC1712 for an example of the exercise of this jurisdiction of the Supreme Court. After leave was granted for review in the Supreme Court, since the issues were

in *Aihi v Isoaimo* (2015) SC1598 explains in some detail the main difference between an appeal and a review. Essentially a review considers the integrity of the process and does not seek to replace the decision of the primary judge with its own decision. In practice though, it is difficult to distinguish between an appeal and a review, but the review grounds should not be couched as appeal grounds.<sup>14</sup>

To challenge an election result, there are three electoral processes that must be observed. They are the issuance of writs, declaration of a winner, and return of writs.<sup>15</sup> Strict time limits to file a petition, are imposed, and they commence from the time of the declaration of the results.<sup>16</sup>

### **III ELECTION PETITION RULES**

The procedural aspects of an election petition are provided for in judge-made rules of the court. Section 212(2) of the Organic Law on Elections confers on Judges of the National Court power to make rules with respect to pre-trial conferences and procedures used to challenge an election petition. The current rules adopted by the judges are described as the Election Petition Rules 2017 and have been consolidated to Election Petition (Miscellaneous Amendments) Rules 2022 (EP Rules).

The EP Rules provide the forms for an election petition.<sup>17</sup> Service requirements must also be strictly observed.<sup>18</sup> If an election petition has not been filed on time, or complied with any relevant provisions of the Organic Law on Elections the EP Rules provide the formal procedure by which this issue may be raised for an election petition to be struck out, through a notice of objection to competency.<sup>19</sup>

An election petitions list is maintained by the Registrar, which contain the reference numbers, names and status of election petitions and related proceedings (Rule 2(1)). The Chief Justice may appoint a judge to be judge administrator of the

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significant, a five-member bench was empaneled to hear the review (as opposed to the usual three panel bench). That Supreme Court decision is reported as *Hagahuno v Tuke* (2020) SC2018.

14 *Electoral Commission of Papua New Guinea v Solo* (2015) SC1467.

15 *Powi v Kaku* [2019] PGSC 101; SC1856 (27 May 2019) per Deputy Chief Justice Kandakasi, at para 43.

16 Organic Law on National and Local-level Government Elections (Organic Law on National Elections), s 208(e); The first day is reckoned a day after the declaration, see *Hagahuno v Tuke* [2019] PGSC 12; SC1776 (1 March 2019), at para 22.

17 Election Petition (Miscellaneous Amendments) Rules 2022 (EP Rules), Rule 4.

18 EP Rules, Rule 8.

19 EP Rules, Rule 12.

election petition track and may from time to time appoint any Judge to deal with matters on the election petitions list (Rule 2(2)).

The EP Rules prohibit "consolidation" of petitions, however, where two or more petitions relating to the same election or return are filed, then unless good cause is shown for separate trials, they shall be heard together in a joint trial.<sup>20</sup>

Rule 22(4) of the EP Rules importantly provides:

Nothing in this rule excuses a failure to comply with a requirement of the Organic Law, however when determining an allegation of failure to comply with a requirement of the Organic Law, the Court shall pay close regard to the requirements of s 217 of the Organic Law.

Section 217 asks the court to have regard to the substantial merits of the case when determining an election petition.

What must be always borne in mind regarding the EP Rules is that s 206 of the Organic Law on Elections only stipulates the method by which an election or its return can be challenged in the National Court but does not contain any conditions requiring strict compliance as to the form a petition shall take.<sup>21</sup>

#### ***IV STRICT REQUIREMENTS OF AN ELECTION PETITION***

Compliance with the Organic Law on Elections is mandatory.<sup>22</sup> Failure to comply will result in summary dismissal of the election petition. The reason for this strict approach is essentially from the fact that the requirements are provided for in a constitutional law as opposed to for instance court rules, which more often than not have provisions to relax strict application of the rules.<sup>23</sup> The other equally and perhaps more compelling consideration is that if there is going to be a challenge to the incumbent the petition must strictly comply with the laws and the rules because it will affect the people's right to be represented in Parliament; the people have exercised that right through an election and a court must be wary of interfering with the democratic process. This view was advanced with some prominence in *Delba Biri v Bill Ninkama* [1982] PNGLR 342 (hereafter *Biri v Ninkama*). This case is perhaps the most often cited case in election petition cases in Papua New Guinea.

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20 EP Rules, Rule 17. *Tulapi v Luta* PNGLR 120 discusses the conditions for a joint trial.

21 *Sauk v Poyle* [2004] PNGLR 677.

22 Organic Law on Elections, s 210 "No Proceedings unless Requisites Complied With. Proceedings shall not be heard on a petition unless the requirements of Sections 208 and 209 are complied with."

23 See for instance Order 1 Rule 7 of the *National Court Rules* which allows for the rules to be waived. Civil litigation in Papua New Guinea are litigated in compliance with the *National Court Rules*.

Other cases have gone on to say that the term of Parliament is fixed for five years, and if there is going to be a challenge, it must be done well.<sup>24</sup>

## **V LEGAL REPRESENTATION**

Under the Organic Law on Elections legal representation is not automatic. Section 222 specifically states that a party to a petition shall not, except by consent of all parties or by leave of the National Court, be represented by counsel or solicitor.<sup>25</sup> The question of legal representation is determined at the directions hearing before the judge administrator.

In *Sauk v Poyle* [2004] PNGLR 677 the Supreme Court held that:

That "fair and liberal meaning" ought to be applied to the phrase "addressed to the National Court", that does in fact take cognizance of the original intention of the legislature that parties to election petitions could commence proceedings themselves without the benefit of legal advice and representation.

Often arguments for a liberal approach to applying the provisions of the Organic Law on Elections, rely on s 222 (apart from s 217), because a petition is meant to be litigated by the petitioner himself or herself.<sup>26</sup>

In no case shall more than one counsel appear on behalf of a party.<sup>27</sup> This presents a dilemma in litigating an election petition. The legal requirements are strict, as will be discussed below, but the law provides that a petitioner himself or herself is required to prosecute the matter.

## **VI RUBRIC FOR THE COURTS IN DETERMINING AN ELECTION PETITION**

The jurisdiction of the National Court to deal with election petitions is as the National Court of Justice and not as a special quasi-judicial or administrative tribunal.<sup>28</sup> In the United Kingdom, the question of the eligibility of a member of Parliament used to be determined by the House of Commons itself until it was changed by law.<sup>29</sup> The implications of an independent court hearing the election

24 See *Aihi v Avei* (2003) SC720 and *Salika DCJ and Batari J in Amet v Yama* [2010] PGSC 46.

25 Organic Law on Elections, s 222(1).

26 See also *EP 73 of 2003 Benias Peri v. Nane Petrus Thomas and Andrew Trawen Acting Electoral Commissioner and the Electoral Commission* (unreported decision of 20/4/2004), cited with approval in *Sauk v Poyle* [2004] PNGLR 677

27 Organic Law on Elections, s 222(2).

28 *Balakau v Torato* [1983] PNGLR 242 at 247 & 249.

29 See the Parliamentary Elections Act 1868 (UK).

petition impacts on the question of the burden of proof and the standard of proof when the court considers whether an allegation has been made out.<sup>30</sup>

The main provision that deals with how an election petition is to be determined by the National Court is set out under s 217 of the Organic Law on Elections. Section 217 states:

**217 Real Justice to be Observed**

The National Court shall be guided by the substantial merits and good conscience of each case without regard to legal forms or technicalities, or whether the evidence before it is in accordance with the law of evidence or not.

It is not very clear what s 217 means. One of the earliest cases that dealt with this provision soon after independence stated that it only applies during the trial of an election petition and not at the competency challenge of an election petition on the basis of a procedural impropriety.<sup>31</sup> In *Agonia v Karo* [1992] PNGLR 463 Justice Sheehan's statement (at p 466) was cited with approval in *Mune v Agiru, Kaiulo and Electoral Commission* (1998) SC590:

Any aggrieved person has the right to bring a petition challenging an election for breaches of the electoral process. But an election petition does not inaugurate some general inquiry into the process of an election to see if any offences or omissions have occurred. A Court of Disputed Returns is not an open forum for unspecified complaints where, after all parties have aired their dissatisfaction, the court sifts the complaints and reports whether, on balance, the election can be considered satisfactory or whether a new election should be held. The Court of Disputed Returns has the duty of hearing and determining only those petitions which challenge an election by definite specific charges that, if proved, will result in an election being set aside.

More recently in *Hagahuno v Tuke* (2020) SC2018 it was held that s 217 applies to all stages of an election petition, and being a Constitutional law, invites the court to adopt the constitutional principle that a provision must be given a fair, large and liberal interpretation.<sup>32</sup> The issue was whether one of the attesting witnesses providing his occupation as a "subsistence farmer," met the requirements to state one's occupation. The court of first instance finding that the petitioner did not comply with s 208(a) was overturned on a liberal construction of s 217 applied at the early

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30 *Ganasi v Subam* (2013) SC1277 at para 26.

31 *Biri v Ninkama* [1982] PNGLR 342.

32 *Hagahuno v Tuke* (2020) SC2018.

competency challenge. This was a move away from *Biri v Ninkama*, which held that s 217 only applied at the trial hearing of an election petition.

In *Warisan v Arore* (2015) SC1418 Supreme Court decided that when an application is made to dismiss the petitioner's case after it has completed its evidence on the basis that the evidence is insufficient to prove the allegation, the court should have regard to s 217. The court stated that the legislative intent in s 217 implores the court to be guided by substantive merits and good conscience of the case and not by legal forms or technicalities or rules of evidence. The opinion of the court was that s 217 conferred a wide discretion on the court to decide what are the substantive merits and good conscience of a case which would guide the court to do real justice in the case.<sup>33</sup> It would be open to a judge having regard to the terms of s 217 to stop a case without the need for hearing the respondents, if it is clear that there is no evidence to prove any ground for invalidating an election.<sup>34</sup>

Another important consideration that must be borne in mind is the standard of proof in an election petition. Election petitions are civil cases as opposed to criminal cases. The standard of proof is lower than the criminal standard.<sup>35</sup> The standard of proof depends on the stage of the proceedings and the nature of the allegation in the petition. At the early stages it will be on the balance of probability. For example, an application to dismiss a petition on the basis that it is incompetent, would usually be based on the balance of probability. On the other hand, where the allegation is bribery, which is also a criminal offence, it would be a higher standard. In *Neville Bourne v Manasseh Voeto* [1977] PNGLR 298, the National Court held:<sup>36</sup>

The onus of proof in such proceedings is upon the petitioner to prove to the entire satisfaction of the Court the grounds relied upon; that is to say it may be just short of the criminal standard although in application there being no real practical difference.

In *Kramer v Duban* (2013) N5688, the National Court found that allegations of bribery and undue influence were proved to the entire satisfaction of the court and ordered a by-election. This case is discussed in more detail later in this paper.

## **VII FORMAL REQUIREMENTS OF A PETITION**

For an election petition to be heard, six prerequisites must be met. Section 208 of the Organic Law on Elections is the first provision to be aware of in relation to these

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33 *Warisan v Arore* (2015) SC1418, at para 18.

34 *Desmond Baira v Kilroy Genia and Electoral Commission* (1998) SC579.

35 *Re James Eki Mopio* [1981] PNGLR 416; SC 211.

36 Cited with approval in *Kramer v Duban* (2013) N5688.



prerequisites. It uses the term mandatory term "shall" as opposed to the discretionary "may":

### 208 Requisites of Petition

A petition shall—

- (a) set out the facts relied on to invalidate the election or return; and
- (b) specify the relief to which the petitioner claims to be entitled; and
- (c) be signed by a candidate at the election in dispute or by a person who was qualified to vote at the election; and
- (d) be attested by two witnesses whose occupations and addresses are stated; and
- (e) be filed in the Registry of the National Court at Port Moresby or at the court house in any Provincial headquarters within 40 days after the declaration of the result of the election in accordance with Section 175(1)(a).

The first requirement is to set out the facts relied on (s 208(a)). This means facts, as opposed to the law.<sup>37</sup> That however does not obviate the necessity to plead the particular laws that were alleged to have been breached beside the relevant facts.<sup>38</sup> The facts are "material or relevant facts which would constitute a ground or grounds upon which an election or return may be invalidated."<sup>39</sup> For instance in a case alleging bribery, the material facts are facts which disclose the essential elements of bribery.<sup>40</sup> It is not necessary to plead the facts in the usual robust way lawyers plead the facts in an ordinary civil suit, but what is necessary is to plead facts that disclose a known ground to challenge the outcome of an election petition.<sup>41</sup> The evidence should not be pleaded.<sup>42</sup>

Secondly, the petition must state the relief being sought (s 208(b)). There are various reliefs under the Organic Law on Elections. They are set out in s 212. For the courts to grant a particular relief they must be specifically pleaded in the petition.<sup>43</sup> The petitioner must select which of the reliefs in s 212 of the Organic Law on Elections is being sought and state it clearly in the petition. Asking for a relief

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37 *Gordon Wesley v Isi Henry Leonard* (2016) SC1477, per Salika DCJ, Sakora and Hartshorn JJ (as they then were) at para 6.

38 *Albert Karo v Carol Kidu* (1997) N1626, cited with approval in *Mune v Agiru, Kaiulo and Electoral Commission* (1998) SC590.

39 *Barry Holloway v Aita Ivarato and Electoral Commission* [1988-89] PNGLR 99.

40 *Hagahuno v Tuke* (2020) SC2018.

41 *Hagahuno v Tuke* (2020) SC2018, Kandakasi DCJ at para 24

42 *Barry Holloway v. Aita Ivarato and Electoral Commission* [1988-89] PNGLR 99.

43 See *Kramer v Duban* (2013) N5688 at para 118.

that was not pleaded can result in the court not entertaining the petition, and not granting the relief being sought.<sup>44</sup>

Thirdly, a petition must be signed by a candidate at the election in dispute or by a person who was qualified to vote at the election (s 208(c)). Unlike other civil proceedings in the National Court where the originating process is signed by the lawyer, in election petitions, the situation is different.<sup>45</sup>

The fourth requirement is that the petition must be attested by two witnesses whose occupations and addresses are stated in the petition (s 208(d)). Many election petitions have been defended successfully against a petition on the basis that the two attesting witnesses have not stated their occupation.<sup>46</sup>

Section 208(e) imposes the fifth requirement. Within 40 days after a declaration is made a petition must be filed. A petition that is filed after 40 days will be determined to be incompetent by the court.<sup>47</sup> The first day in the reckoning of the 40 days is the day after the declaration.<sup>48</sup> There have been authorities that have opined that the 40 days commences immediately after the declaration, but the settled view now is that the first day in the calculation of the 40 day period is the day after the declaration.<sup>49</sup>

Section 209 of the Organic Law on Elections provides for the sixth requirement. A petition must be filed together with a security deposit of K5,000.00 (US\$1,500).<sup>50</sup> The payment of the security must be done at the same time as the petition is filed.<sup>51</sup> Filing a petition, and later paying the security will not do, and the petition will be

44 *Kobol v Powi* (2018) SC1713 at para 12.

45 National Court Rules, Order 2, Rule 30.

46 *Kassman v Tkatchenko* (2023) N10213, at para 25.

47 *Kassman v Tkatchenko* (2023) N10213.

48 *Hagahuno v Tuke* (2019) SC1776, at para 22.

49 Hartshorn J in *Hagahuno v Tuke* (2018) SC1712 at para 14 refers to various conflicting National Court decisions on when the computation of the 40 days begins: *Labi Amaiu v Andrew Mald* (2008) N3334; *Amaiu v Kaupa* (2017) N7004; *Ganim v Moses* (2018) N7233; *Pini v Nunji* (2018) N7243; *Auwi v Donald* (2017) N7062 and *Waranaka v Maru* (2018) N7346.

50 Organic Law on Elections, s 209.

51 *Kuberi Epi v Albert Farapo & Anor* (1983) SC247, where Kidu CJ and Pratt J held:

Whilst the Court must strive to avoid sophistry, the act of filing petition and lodging deposit must be part of one act, an act of filing which is manifestly one and the same, not two separate and distinct acts requiring two separate and distinct visits to the Registry, one with the cheque and another with the petition.....The language is clear and unambiguous. "At the time of filing" means what it says, - neither more nor less... (our underlining).

dismissed.<sup>52</sup> If the petition succeeds, the money is returned to the petitioner. Where the petition fails the money is usually paid as part of the costs of the incumbent member of parliament.

### **VIII COMPETENCY CHALLENGE**

The initial challenge to the procedural propriety of an election petition is done through an application described as an "objection to competency." The Supreme Court explained the nature of an objection to competency in *Sir Arnold Amet v Peter Charles Yama* (2010) SC1064:

27 The issue of competence is to do with legal and jurisdictional aspects of the court process. Often, this concerns the validity of the very proceedings before the court. Hence, it can be raised and determined at any stage of the proceedings. In *Chief Collector of Taxes v Bougainville Copper Limited and Bougainville Copper Limited v Chief Collector of Taxes* (2007) SC853 the Supreme Court, adopting the principle in *Patterson Lova & Ors v Wapula Akiye & Ors* [1992] PNGLR 399 made that clear when it held:

It is settled law that, the Courts have an inherent jurisdiction to watch over their processes and procedures to ensure that they are not abused. This is an issue that is always open to the court at any stage of the proceedings. As such, it does not matter whether a party appearing before the Court is raising it, because it goes to the competence of the very proceedings brought before the Court.

A quick study of the election petition cases reported the Pacific Islands Legal Information Institute website <[www.pacilii.org](http://www.pacilii.org)> shows that over 90 per cent of petitions are dismissed at this stage. The basis of such an application is usually whether ss 208 and 209 of the Organic Law on Elections have been complied with. Other grounds for competency challenge relate to whether known grounds for challenging an election petition are pleaded<sup>53</sup> and whether the relief is one which is provided for in s 212 of the Organic Law on Elections.<sup>54</sup> If the petition overcomes the competency challenge, it will go to trial on the substantive allegations where the petitioner will rely on the grounds stated in the petition and lead evidence with the objective to overturning the results of a particular electorate challenged.

Section 210 of the Organic Law on Elections states that the court will not hear the petition unless ss 208 and 209 have been complied with:

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52 *Aihi v Isoaimo* (2015) SC1598.

53 *Ganzik v Iguan* (2023) N10122.

54 *Kobol v Powi* (2018) SC1713 at para 12.

## 210 No Proceedings Unless Requisites Complied With

Proceedings shall not be heard on a petition unless the requirements of Sections 208 and 209 are complied with.

If one or several of the requirements of ss 208 and 209 have not been met, the National Court will not have jurisdiction to hear the election petition. That is, where an election petition has complied with s 208 and s 209, the jurisdiction of the National Court would have been enlivened.<sup>55</sup> Many of the objections to competency are filed pursuant to s 210. The question arises as to the relationship between s 210 and s 217. This apparent conflict is picked up in the discussion below.

## IX GROUNDS TO CHALLENGE AN ELECTION RESULT

Election petitions seeking to challenge the outcome of an election must plead known grounds under the Organic Law on Elections. If grounds other than those recognized by the Organic Law on Elections are pleaded, the petition will not be eligible to be heard.

There are two known categories of grounds to challenge on election outcome:<sup>56</sup>

- (1) Irregularities by election officials; and
- (2) Corrupt or illegal practice, including undue influence.

Within each category are specific offences created under the Organic Law on Elections and the Criminal Code on election related offences. These two grounds can be seen from the table reproduced from *Ganzik v Iguan* (2023) N10122 at para 50:

Case	Proposition of Law
<i>Bourne v Voeto</i> [1977] PNGLR 298	"There are two types of cases which come before this Court under the Disputed election provisions of the Organic Law and they are, first, cases where the petition is founded on irregularities by electoral officials, and the other consists of corrupt or illegal practices including undue influence" (per Frost CJ)
<i>Tulapi v Lagea</i> (2013) N5235	"20. ... The Grounds upon which an election or return may be invalidated are set out in s 215 (1) (illegal practices - bribery, attempted bribery, undue influence,

<sup>55</sup> *Sauk v Poyle* [2004] PNGLR 677, see also *Pomat v Benjamin* (2023) N10215.

<sup>56</sup> Discussed generally in *Ganzik v Iguan* (2023) N10122.

	attempted undue influence), s 215 (3) (a) (other illegal practices); and, s 218 (errors and omissions). They are distinct legal grounds and there are fundamental legal differences between them. The essential and relevant facts pertaining to those grounds are different from those legal grounds." (per Injia CJ)
<i>Alfred Manase v Don Polye</i> (2009) N3718	"The results of an election can be set aside if it is alleged in the petition and the evidence proves that (1) there were illegal practices which might have affected the result of the election, and, if the successful candidate is not guilty of any illegal practice, it is still just and equitable that the result of the election be set aside: Section 215 of the Organic Law. (2) Or where there are errors or omissions on the part of an officer which did affect the result of the election: Section 218(1) of the Organic Law; <i>Dick Mune v Anderson Agiru &amp; ors</i> (1998) SC590". (Per Lay J)
<i>Kikala v Electoral Commission</i> (2013) SC1295	At para 52: "A petition must make it clear whether an illegal practice or an error or omission is being alleged, as the test of what has to be proven in order to avoid the result of the election differs according to which ground is proven ( <i>Eoe v Maipakai</i> (2013) N5066). Section 215 of the Organic Law deals with illegal practices, while Section 218 of the Organic Law deals with errors or omissions". (Per Salika DCJ (as he then was), Cannings and Kariko JJ)

What is an illegal practice has historical links to election related offences. However, the list is not exhaustive. In *Okuk v Nilkare* [1983] PNGLR 28 the court held that an underage candidate contesting amounts to illegal practice. Relevantly, Justice Andrews observed at p 30:

The expression "illegal practice" is one which historically has been used to denote offences relating to elections. They are set out in the Criminal Code and in s.179 of

the Organic Law. But the list contained therein is not exhaustive. I agree with the passage of Pritchard J in *In Re Koroba-Lake Kopiago Open Parliamentary Election* [1977] PNGLR 328 at 335, (and followed by Woods, AJ in the matter of *Thomas Kavali and James Kuru Kupul* (Unreported judgment dated 26 November 1982) that:

When one looks at s 215 of the Organic Law, it is perfectly clear that the expression 'Illegal practice' was intended to describe more than those offences spelt out in s 179 or those in s 105 and s 106 of the Criminal Code. If not, why in s 215(3)(b) was it necessary to exclude undue influence in bribery from the general expression 'illegal practice' if they were not be inference deemed to be included in the first place. They quite clearly were included and, in my view, all offences in the Code Chapter XIV 'Corrupt and Improper Practices at Election', s 98 – s 117, Chapter X 'Interfering with Political Liberty', s 78, together with the offences created under Pt XVII of the Organic Law are all included in the meaning of that expression.

This statement was cited with approval in the Supreme Court in *Mune v Agiru, Kaiulo and Electoral Commission* (1998) SC590 when it overturned the decision of the primary judge. In that case the allegation was that unauthorised persons were allowed to take over the control and scrutiny of the counting of votes. In the National Court the primary judge dismissed the allegation on the basis that it did not fall within the meaning of an illegal practice under s 215 of the Organic Law on Elections.

A third ground that has been introduced by amendment to the Organic Law on Elections relates to what are generally referred to as "Special Circumstances".<sup>57</sup> This arises where elections in an electorate are disrupted and the Electoral Commissioner decides that it is not practical to complete the election, and therefore based on the information available to it, declares a candidate as duly returned as the member of Parliament for that electorate.<sup>58</sup>

The type of relief that can be awarded by the court will depend on the grounds a petitioner has proven and the relief that is being sought.

## **X ELECTION PETITION REMEDIES**

Section 212 of the Organic Law on Elections sets out the types of reliefs that may be sought by a petitioner. These reliefs include:

- granting to a party to a petition leave to inspect, in the presence of a prescribed officer, the Rolls and other documents (except ballot-papers) used

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57 Organic Law on Elections, s 175(1A)(b).

58 *Ganzik v Iguan* (2023) N10122.

at or in connection with an election and take, in the presence of the prescribed officer, extracts from those Rolls and documents;<sup>59</sup>

- order a re-count of ballot-papers in an electorate;<sup>60</sup>
- examine witnesses on oath;<sup>61</sup>
- declare that a person who was returned as elected was not duly elected;<sup>62</sup>
- declare a candidate duly elected who was not returned as elected;<sup>63</sup> and
- declare an election absolutely void;<sup>64</sup> and
- dismiss or uphold a petition in whole or in part.<sup>65</sup>

Any of the reliefs spelt out in s 212 of the Organic Law on Elections pleaded for by the petitioner can be granted. Whatever relief granted should however not contradict each other. In *Yagama v Yama* (2013) SC1244 it was held that a declaration of a nullity of an election with an order for re-count of ballot papers were incongruent with each other.<sup>66</sup>

In *Holloway v Ivarato and Electoral Commission* [1988] PNGLR 99, the Supreme Court was of the opinion that it is:

...also possible for a party to apply to the court at the hearing of a petition for inspection of a roll which has been used in connection with an election in order to prove a ground upon which an election may be invalidated. He does not have to plead this evidence under s 208(a) of the Organic Law. In fact he could not plead this evidence because he would have no way of knowing of it until an application is made to the court for an order for an inspection under s 212(1)(c) of the Organic Law. This supports the view that it is not necessary to plead this evidence under s 208(a) of the Organic Law. I conclude that s 208(a) only requires pleading of material or relevant facts which would constitute a ground and not the evidence by which those facts are to be proved. Bredmeyer J came to the same conclusion in *Siaguru v Unagi and the Electoral Commissioner*....

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59 Organic Law on Elections, s 212(1)(c).

60 Organic Law on Elections, s 212(1)(d).

61 Organic Law on Elections, s212(1)(e).

62 Organic Law on Elections, s 212(1)(f).

63 Organic Law on Elections, s 212(1)(g).

64 Organic Law on Elections, s 212(1)(h).

65 Organic Law on Elections, s 212(1)(i).

66 At para 77.

An important provision the court takes into consideration when determining what kind of remedy to apply is s 212(3) of the Organic Law on Elections. This provision states:

- (3) The Court may exercise all or any of its powers under this section on such grounds as the Court in its discretion thinks just and sufficient.

In *Yama v Yagama* (2013) N5222 the court considered this provision and held amongst other things that:

- (7) It was not appropriate to make any of the declarations provided for by Sections 212(1)(f), (g) or (h) as that would amount to 'avoiding' the election, which Section 218(1) provides can only be done if it is clear that the errors affected the result of the election; and here it was not clear that the errors affected the result.
- (8) However, the significance of the errors and the fact that they occurred at critical stages of the election were for the purposes of Section 212(3) "just and sufficient" grounds on which to exercise the power of the court under Section 212(1)(d) to order a recount of ballot papers in the electorate.

Leave was sought to review the decision of the National Court but was refused and the decision of the National Court was confirmed.<sup>67</sup> Section 212(3), coupled with s 217 of the Organic Law on Elections, gives some scope to move away from the strict application of the Organic Law on Elections that *Biri v Ninkama* advances together with s 210 of the Organic Law on Elections and the application of English authorities.

In *Kramer v Duban* the petitioner challenged the election of the first respondent as Member for the Madang Open electorate in the 2012 general election. The first respondent polled 8,483 votes and the petitioner who was the runner up polled 7,939 votes, a difference of 544 votes.

One of the allegations that was proven was undue influence. The first respondent presented a Gaming Board cheque for K300,000.00 (USD\$100,000) to Yagaum Lutheran Rural Hospital, monies procured through the office of the Prime Minister. It was argued that he intended to unduly influence and induce those who were at the cheque presentation to vote for him. He did this by falsely telling the people that he was personally donating the money to the hospital. Around 200 people witnessed the cheque presentation. The source of the cheque was not disclosed.

A recount or declaration that the first respondent's election void was sought by the Petitioner who wanted the court to then declare him as the duly elected Member

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<sup>67</sup> *Yagama v Yama* (2013) SC1244.



for Madang Open electorate. Gavara-Nanu J decided against granting such relief because firstly, such relief was not pleaded in the petition and secondly, granting such relief was not appropriate in cases such as this where the election result has been declared void based on acts of bribery and undue influence and attempted bribery and attempted undue influence committed by the winning candidate. His Honour went on to say that such "...relief would be appropriate in cases where the petitioner is disputing the manner in which the votes were counted or where ballot boxes had been wrongly rejected by a Returning Officer, this case does not fall into that category."

*Kramer v Duban* is an example of the type of remedies the court can award in a case of successful challenge to an election result. The remedy depends on what the petitioner seeks and the allegation that has been proven. Although this is a decision of the National Court it has not been overturned by the Supreme Court.

## **XI CURRENT ISSUES IN ELECTION PETITIONS**

One of the early issues faced by the court was how to reconcile s 210 and s 217 of the Organic Law on Elections. The case of *Biri v Ninkama* required the petitioner to strictly comply with the requirements of s 208 and s 209 of the Organic Law on Elections before a petition can be heard because s 210 says they must be complied with before the National Court would have jurisdiction over the matter. *Hagahuno v Tuke* takes the position that the court should not be too technical and legalistic in dealing with election petitions, taking its cue from s 217.

The apparent conflict between ss 210 and 217 was first considered in *Mapun Papol v Antony Temo and The Electoral Commission* [1981] PNGLR 178. The issue there was that two attesting witnesses did not sign the petition as required by s 208. The National Court held that if s 208 was not complied with, there is no proceeding before the court to consider. Section 217 was found to apply, only after the court determined that ss 208 and 209 had been complied with, that is, at the trial hearing when considering the evidence. *Biri v Ninkama* endorsed this view, and justified it by stating:

An election petition is not an ordinary cause (*In Re The Norwich Election Petition; Birbeck v Bullard* (1886) 2 TLR 273), and it is a very serious thing. It is basic and fundamental that elections are decided by the voters who have a free and fair opportunity of electing the candidate that the majority prefer. This is a sacred right and the legislature has accordingly laid down very strict provisions before there can be any challenge to the expression of the will of the majority.

The case of *Biri v Ninkama* addressed this issue of a strict approach versus a liberal approach. The approach it took was determined by a line of English authorities that placed emphasis on the democratic process. The court did not want

to interfere with the will of the people. Disputing outcomes must only be in the clearest of cases. The court said s 217 only applied during a trial, that is after the petition was found to be competent. The National Court has to carefully scrutinize the procedural propriety of an election petition before the merits of the case are dealt with. If it ticks all the boxes and went to a trial on its merits, that is when s 217 can be applied by the courts, especially in its consideration of the evidence. *Biri v. Ninkama* concerned a situation where one of the attesting witnesses did not state their occupation, a requirement of s 208(a) of the Organic Law on Elections. The Court held that challenging an election outcome was a serious matter, and a petition must strictly comply with the requirements of the law. Only after a petition has met the threshold requirements under s 208 and s 209 is it entitled to be heard.

The principles enunciated in *Biri v Ninkama* in which a petition is to be considered by the courts has since then influenced many courts considering election petitions. It is to be remembered that this decision was decided in 1982, seven years after Papua New Guinea's political independence.

Papua New Guinea's political, social, economic, and cultural conditions have changed rapidly since those early years after independence. Widespread concerns of electoral irregularities and illegal activities such as bribing and burning of ballot boxes have troubled the collective conscience of the country. International election observers consisting of eminent persons have repeatedly raised concerns every general election about whether the elected leaders were in fact the democratic choice of the people.<sup>68</sup>

Against this backdrop the case of *Hagahuno v Tuke* emerged. That was a case where an objection to competency was filed citing two grounds of objection. The first was that material facts were not pleaded (as required by s 208(a)). The second was that one of the attesting witnesses did not state their occupation (as required by s 208(d)). A person stating that they were "self-employed" did not meet the requirement of stating one's employment. The court of first instance upheld the objection on both grounds and dismissed the petition.

A review of the National Court's decision to dismiss the petition was conducted by the Supreme Court. The review involved looking at the appropriateness of *Biri v. Ninkama* in present day Papua New Guinean circumstances, given the changing social setting. Five judges sat to hear the review. The Supreme Court took the view that *Biri v Ninkama* placed too much reliance on English authorities. It did not

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68 See for instance the call by the Commonwealth Observers on the 2022 Papua New Guinea National General Elections reported in the international media, <<https://asiapacificreport.nz/2022/07/26/commonwealth-observers-call-for-urgent-review-of-png-electoral-process/>>.

incorporate the rules of statutory interpretation sanctioned by the Constitution to give a liberal interpretation to provisions of Constitutional laws, of which the Organic Law on Elections is one. Schedule 1.5 of the Constitution states:

Sch.1.5. Fair meaning to be given to language used.

- (1) Each Constitutional Law is intended to be read as a whole.
- (2) All provisions of, and all words, expressions and propositions in, a Constitutional Law shall be given their fair and liberal meaning.

By applying a liberal interpretation, the court will be led to the view that s 217 of the Organic Law on Elections should not only apply at the trial, but also at the preliminary stage, that is at the hearing of any objection to competency. With the benefit of s 217 of the Organic Law on Elections and a fair and liberal interpretation, the Supreme Court said the court of first instance fell into error on both counts.

It is interesting that in *Hagahuno v Tuke*, the Supreme Court acknowledged that the social conditions in Papua New Guinea have changed:

**11** Adopting and applying the strict approach has resulted in serious allegations and in some cases actual instances of illegal production, hijacking and marking of ballot papers, to group voting, to deliberate misallocation of ballot papers at counting centers, to lack of proper scrutiny both at the polling and counting of votes, with many instances of bribery in some cases with the use of public funds and offices and other facilities, have now become common place and are getting repeatedly featured in elections and election petitions: See for example *Paru Aihi v. Peter Isoaimo* (2013) SC1276, per Kandakasi (as I then was), Yagi and Hartshorn JJ and *Sandy Talita v. Peter Ipatas*. In recent times, the serious compromise on the integrity of the election process and outcomes have now crept into the nominations process.

What this means is that the assumptions made by the court in *Biri v Ninkama* are no longer relevant.<sup>69</sup>

On the first ground, the petitioner alleged bribery. The Supreme Court in *Hagahuno v Tuke* said, the court of first instance required a level of pleading of facts that was onerous and played into nit picking. What was needed to be pleaded was just the essential elements of the allegation. In that case the elements of bribery were pleaded. The court of first instance fell into error by requiring more than what was necessary.

On the second ground the Supreme Court said by applying a liberal method of statutory (constitutional) interpretation, the words "self-employed" was sufficient to

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<sup>69</sup> *Biri v Ninkama*, per Kandakasi DCJ at para 14.

meet the requirement of stating one's employment and satisfying the requirements of s 208 of the Organic Law on Elections. The Supreme Court therefore found that the National Court fell into error. As a result, the review was successful, and the Supreme Court ordered that the matter be remitted back to the National Court for the hearing of the trial before another judge.

*Hagohuno v Tuke* is not an entire cure for defects in an election petition. The leading judgment by Deputy Chief Justice Kandakasi states that there are "incurable defects". These are:<sup>70</sup>

- (a) Not disclosing by the statement of facts a known ground for invalidating an election; or
- (b) Not stating the occupation of an attesting witness as was the use in *Biri v. Ninikama*; or
- (c) Not stating both or either of the required attesting witnesses' address; or
- (d) Failing to specify the relief sought; or
- (e) Petition not signed by the petitioner; or
- (f) Filing the petition 40 days after the declaration of the results.

Comparing the two cases, the benefits of *Hagohuno v Tuke* to a petitioner are twofold. The first is that it introduces the application of s 217 of the Organic Law on Elections to the competency stage, thereby sanctioning the liberal method of statutory interpretation as opposed to the strict rules of interpretation. This is consistent with Schedule 1.5 of the Constitution on principles of constitutional interpretation. Schedule 1.5 was not discussed in *Biri v Ninkama*.

The second benefit is that whilst it is still mandatory to plead the necessary facts or material facts, *Hagahuno v Tuke* has made it clear that the level of pleading must not be too legalistic requiring intricate and complex pleadings. What is necessary is to state the basic elements of the allegations. Rule 22(4) of the EP Rules appears to be saying that this is the approach the court should be taking considering s 217 of the Organic Law on Elections.

There are concerns that the true import of s 217 of the Organic Law on Elections has not been realised. The intentions of Parliament to allow substantive justice to eventuate, by incorporating related provisions such as s 222 (lawyers are required to obtain leave to represent petitioners) and s 212(3) (observing justice to determine an appropriate remedy), appear to be secondary to the strictures of the law. Apart from Schedule 1.5 of the Constitution, there is also scope for incorporating the National Goals and Directive Principles and Basic Social Obligations into buttressing the

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70 At para 68.

application of s 217 as required by ss 25 and 63 of the Constitution. National Goal Two on equality and participation is relevant.

## ***XII CONCLUSION***

Since the passage of the Organic Law on Elections and subsequent amendments much has changed in Papua New Guinea's social and political landscape. One of the key concerns is the need to have a free, fair and safe electoral process. Whilst it is the primary responsibility of the Electoral Commission and law enforcement agency to ensure that this happens, there should be measures provided within the Organic Law on Elections for the courts to have a more active oversight of the electoral process to contribute to the integrity of the democratic process with slogans such as those of the 2022 general election of "every voice matter" becoming a reality.<sup>71</sup> An important provision in the Organic Law on Elections that should become more relevant is the power given to the courts to refer cases to the police for criminal prosecution where allegations of bribery have been proven.<sup>72</sup>

The law governing election petitions is highly technical and legalistic notwithstanding the fact that a petitioner is given preference to prosecute the case without a lawyer. Only a person familiar with the law in this area can ensure that genuine petitions are brought to a full hearing to determine the case on its merits. This is despite the pockets of provisions that push against a legalistic approach. If the law has become too legalistic and is creating a barrier for citizens to access justice then it may be appropriate to look at legislative reforms to ensure meritorious cases are dealt with so that the integrity of the electoral process is preserved, and the will of the people is not subverted by illegal practices.

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71 Refer generally to the Papua New Guinea Electoral Commission website <<https://www.pnhec.gov.pg/>>.

72 Organic Law on Elections, s 216.