JUDICIAL REVIEW OF CONSTITUTIONAL QUESTIONS IN PAPUA NEW GUINEA

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Section 19 of the Papua New Guinea Constitution provides an opportunity for authorities identified in s 19(3) of the Constitution to apply to the Supreme Court to seek its binding opinion on any question relating to the interpretation and application of a constitutional law including the constitutional validity of a law or proposed law. This article discusses some of the main features of this special process in the Papua New Guinea Constitution and highlights briefly some of the significant cases that have been deliberated on by the Supreme Court since independence.

L'article 19 de la Constitution de Papouasie-Nouvelle-Guinée prévoit la possibilité pour les autorités listées à l'article 19(3) de la Constitution de s'adresser à la Cour suprême pour obtenir un avis ayant force de chose jugée sur la conformité constitutionnelle d'une proposition de loi et sur l'application d'une loi constitutionnelle déjà votée. Cet article, illustré par de récentes décisions de la Cour suprême, présente les principales caractéristiques et les conséquences de cette procédure particulière.

I INTRODUCTION

The invoking of the process of judicial review of constitutional questions in Papua New Guinea is popularly described as filing a "Constitutional Reference" or a "Special Reference." It is a special mechanism provided by the Papua New Guinea Constitution for the Supreme Court to oversee the interpretation and application of the Constitution, usually from actions and/or omissions of the executive or legislative branches of government. The reference is heard in the Supreme Court, the highest court in Papua New Guinea, and is usually considered by five judges or, in

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some cases, where the issues arising are thought to be particularly significant, seven judges.[1]

II RATIONALE FOR THE SPECIAL REFERENCE PROCEDURE UNDER S 19 OF THE CONSTITUTION

Prior to independence the question arose as to how constitutional disputes would be resolved in an independent Papua New Guinea. The basic thrust of the debate was to emphasise the supremacy of the Constitution. A number of proposals were considered, including the view:

> … that the best guarantee of the supremacy of the Constitution lies in the vigilance of the people who, acting as an electorate, and through pressure groups, keep a check on state institutions. If this task is transferred to a specific institution, especially the courts, the political process is weakened, and the way is opened ultimately to greater arbitrariness.

The rationale behind the mechanism conferring this special jurisdiction on the Supreme Court established in s 19 of the Constitution prevailed and can be found in the Constitutional Planning Committee ("CPC") Report of 1974. In Chapter 8 of the Report, the CPC discusses the advantages and disadvantages of empowering the Supreme Court with the jurisdiction to resolve constitutional disputes. One disadvantage the CPC identified was that the Supreme Court may be going against the wishes of the people.[2] Against this view, the CPC felt that:

> the courts have adequate constitutional protection are generally impartial, serving no narrow political or regional interests. The court procedures ensure a fair hearing for all sides, and in view of our proposals for the Public Solicitor, access to courts should be comparatively easy. Courts enjoy respect and prestige in our country, and their decisions are unlikely to be ignored or challenged.

Taking all these considerations into account the CPC was of the view that a Special Reference served two main aims:[3]

> We envisage advisory opinions as serving two aims. An advisory opinion will help an institution charged with the enforcement of a constitutional provision or the executive to establish what the law on a particular constitutional point is. It should also help to

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1 See for example the cases challenging the adjournment of Parliament in *SC Reference No 3 of 1999; Re Calling of the Parliament* [1999] PGLawRp 673; [1999] PNGLR 285 (25 June 1999).

2 Constitutional Planning Committee Report 1974 <http://www.paclii.org/pg/CPCReport/main.htm>

3 Above no 2 at Chapter 8, para 153, see also *SCR No 2 of 1981; Re Electoral Boundaries* [1981] PGSC 22; [1981] PNGLR 518 (10 December 1981).

resolve a dispute about what the constitutional law is on a particular issue before the dispute becomes aggravated and the parties to it take strong and inflexible positions.

All in all, the CPC decided that settlement of constitutional disputes by the Supreme Court was the best option and recommended as such in its report. This recommendation was taken up in the Constitution when it was adopted by the Constituent Assembly on 15 August 1975, a month before independence on 16 September 1975.

III JURISDICTION UNDER S 19(1) OF THE CONSTITUTION

Section 19(1) of the Constitution is in the following terms:

19. Special references to the Supreme Court.

(1) Subject to Subsection (4), the Supreme Court shall, on application by an authority referred to in Subsection (3), give its opinion on any question relating to the interpretation or application of any provision of a Constitutional Law, including (but without limiting the generality of that expression) any question as to the validity of a law or proposed law.

The definition of a constitutional law is provided for in Schedule 1.2, which states that "Constitutional Law" means the Constitution, a law altering the Constitution or an Organic Law. There are various types of laws in Papua New Guinea and they are all provided for in s 9 of the Constitution in the following manner in the order of their superiority:[4]

9. The laws

The laws of Papua New Guinea consist of—

(a) this Constitution; and

(b) the Organic Laws; and

(c) the Acts of the Parliament; and

(d) Emergency Regulations; and

(da) the provincial laws; and

(e) laws made under or adopted by or under this Constitution or any of those laws, including subordinate legislative enactments made under this Constitution or any of those laws; and

4 *Ombudsman Commission of PNG v Denis Donohoe* [1985] PGSC 14; [1985] PNGLR 348 (3 December 1985).

(f) the underlying law,

and none other.

Supreme Court references are usually filed to clarify the meaning of a particular provision of the Constitution or an Organic Law or if any of the above laws such as an Act of Parliament either as a whole or certain provisions are considered to be inconsistent with the provisions of the Constitution or an Organic Law, then a declaration is sought to invalidate the particular provision of the law. Where the question does not involve a constitutional law, the Supreme Court will not hear the Reference.[5]

The question of consistency arises from time to time because of ss 10 and 11 of the Constitution. Section 10 provides as follows:

10. Construction of written laws.

All written laws (other than this Constitution) shall be read and construed subject to—

(a) in any case—this Constitution; and

(b) in the case of Acts of the Parliament—any relevant Organic Laws; and

(c) in the case of adopted laws or subordinate legislative enactments—the Organic Laws and the laws by or under which they were enacted or made,

and so as not to exceed the authority to make them properly given, to the intent that where any such law would, but for this section, have been in excess of the authority so given it shall nevertheless be a valid law to the extent to which it is not in excess of that authority.

Following from s 10, s 11 of the Constitution goes on to emphatically state the supreme position that the Constitution occupies amongst the laws of Papua New Guinea:

11. Constitution, etc., as Supreme Law.

(1) This Constitution and the Organic Laws are the Supreme Law of Papua New Guinea, and, subject to Section 10 (construction of written laws) all acts (whether legislative, executive or judicial) that are inconsistent with them are, to the extent of the inconsistency, invalid and ineffective.

5 See *SCR No 2 of 1981; Re Electoral Boundaries* [1981] PGSC 22; [1981] PNGLR 518 (10 December 1981); *SCR No 2 of 1987; Reference by Robert Henry Seeto Member for West Coast Namatanai in the New Ireland Provincial Assembly and Former Premier* [1987] PGSC 16; [1987] PNGLR 31 (1 April 1987).

(2) The provisions of this Constitution and of the Organic Laws are self-executing to the fullest extent that their respective natures and subject-matters permit.

The opinion of the Supreme Court in a Constitutional Reference is legally binding in the same way as other decisions of the Supreme Court. This is clear from s 19(2) of the Constitution which states "An opinion given under Subsection (1) has the same binding effect as any other decision of the Supreme Court". For example, where the Supreme Court declares a particular provision of a law unconstitutional, then that law is no longer valid and ceases to have effect.[6]

Another important characteristic of Special References is that the questions raised may relate to a hypothetical set of circumstances. The Supreme Court stated this in *Special Reference Pursuant to Constitution Section 19; Special Reference by the Morobe Provincial Executive* [2005] PGSC 32; SC785 (13 May 2005):

> Section 19 envisages a number of "hypothetical circumstances". First, "any question relating to the interpretation or application of a Constitutional Law" could relate to construction of a word. That question need not arise in a cause of action in a particular case. That question can be referred directly to the Supreme Court. It is "hypothetical" (see SCR No. 2 of 1981; *Re Electoral Boundaries* [1981] PNGLR 518).

Section 19 therefore creates an opportunity for key institutions of state to seek guidance from the Supreme Court in the performance of their functions.

Where facts are in dispute in a reference, the Supreme Court will adjourn the case to a single judge to determine the facts and have the matter reverted back to the full bench of the Supreme Court. This is for the reason that it may not be appropriate for a full bench to embark on a fact finding exercise.[7]

The Constitution, s 19 (4) and Supreme Court Rules 1984 O 3 r 2 (b) give the Supreme Court jurisdiction to grant interim relief in a Reference brought under s 19 of the Constitution.[8] The importance of this is that the Supreme Court can order that a law passed by Parliament be stayed until the issue of the constitutionality of the law is determined.

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6 See for examples the case of *Reference by the Ombudsman Commission Pursuant to Constitution, Section 19(1), Re Public Money Management Regularisation Act 2017* [2020] PGSC 43; SC1944 (27 May 2020) where the Supreme Court found the Public Money Management Regularisation Act 2017 unconstitutional, invalid and of no effect.

7 *In re Reference by East Sepik Provincial Executive* [2011] PGSC 50; SC1133 (19 October 2011).

8 *Reference by the Ombudsman Commission; Re Section 19 of the Constitution* [2010] PGSC 43; SC1027 (17 May 2010).

IV AUTHORITIES RECOGNISED UNDER S 19 OF THE CONSTITUTION TO FILE SPECIAL REFERENCES

A Special Reference is not open to any person to agitate before the Supreme Court. Section 19(3) of the Constitution provides for this particular jurisdiction to be accessed by specific authorities only, and they are:

(1) the Parliament;

(2) the Head of State, acting with, and in accordance with, the advice of the National Executive Council;

(3) the Law Officers of Papua New Guinea;

(4) the Law Reform Commission;

(5) the Ombudsman Commission;

(6) a Provincial Assembly or a Local-level Government;

(7) a provincial executive;

(8) a body established by a Constitutional Law or an Act of the Parliament specifically for the settlement of disputes between the National Government and Provincial Governments or Local-level Governments, or between Provincial Governments, or between Provincial Governments and Local-level Governments, or Local-level Governments; and

(9) the Speaker, in accordance with Section 137(3) (Acts of Indemnity).

The Supreme Court has ruled that a reference filed by one of the authorities in s 19(3) is not open to other authorities to "piggy-back" on. They do not have standing as of right and must apply to be joined and demonstrate sufficient interest in the issues raised in the reference before they are allowed to intervene.[9]

It is important to note that the Special Reference must be signed by a properly authorised officer of the referring authority and not its lawyer. The rationale for this is to ensure that the special nature of s 19 proceedings is preserved, that the power to make such a reference is properly controlled and that the decision to make a reference is considered carefully by the referring authority.[10]

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9 *Special References pursuant to Section 19(1) of the Constitution by the Honourable Davis Steven* [2019] PGSC 22; SC1790 (18 March 2019).

10 *In re Fly River Provincial Executive* [2007] PGSC 42; SC917 (31 August 2007).

V AVENUES FOR LITIGATING CONSTITUTIONAL QUESTIONS OTHER THAN S 19 OF THE CONSTITUTION

Whilst this article is about s 19 of the Constitution, it is necessary to briefly discuss avenues outside of that provision which enable persons who are not listed under s 19(3) to raise constitutional questions. Section 18 of the Constitution makes it the sole preserve of the Supreme Court to hear any question relating to the interpretation and application of the Constitution. Since the Constitution is postulated as encapsulating the aspirations of the people, access to the Supreme Court for persons other than those listed in s 19(3) of the Constitution is provided for.

The first avenue alternative to s 19 is s 18(2) of the Constitution. This provision creates an obligation on a court or tribunal, including the National Court and the District Court, to refer to the Supreme Court any question relating to the interpretation and application of a constitutional law.[11] Whenever a question arises, the court or tribunal is obliged to state the question and refer it to the Supreme Court to resolve and have the matter referred back to the referring court or tribunal to complete its hearing in light of the determination of the Supreme Court.

The second avenue is where an aggrieved person seeks declaratory relief directly in the Supreme Court. Under this alternative, the aggrieved person is required to demonstrate that he or she has sufficient interest in the questions raised. The process to utilise this avenue is through Order 4 of the Supreme Court Rules. The basis of this process is found in s 18(1) of the Constitution. A case which was brought to the Supreme Court using this process was the case of *Application by Air Nuigini Ltd and Rei Logona pursuant to Constitution, Section 18(1)* [2020] PGSC 16; SC1922 (21 February 2020) where Air Niugini, the national airline, asked whether it was subject to the jurisdiction of the Ombudsman Commission under the Organic Law on the Ombudsman Commission, a constitutional law.

Where two different proceedings have been initiated, one under s 19 of the Constitution and another under s 18(2) of the Constitution, it is permissible for the two different proceedings to be amalgamated and heard together by the Supreme Court.[12] Obviously this is where the issues raised are similar.

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11 See *SCR No 1 of 1976; Peter v South Pacific Brewery Ltd* [1976] PGSC 16; [1976] PNGLR 537 (29 November 1976) for an older case and for a more recent one, see *Alleged Improper Borrowing of AUD1.239 Billion Loan, In re* [2017] PGSC 8; SC1580 (30 March 2017). A referral by a Leadership Tribunal was made *in Miviri, In re* [2019] PGSC 84; SC1852 (27 September 2019).

12 *Special Reference by the Attorney General pursuant to Constitution, Section 19* [2016] PGSC 52; SC1534 (1 September 2016).

What must also be appreciated is that the Constitution confers jurisdiction on courts or tribunals other than the Supreme Court to hear questions in relation to the application of the Constitution. One clear example is in relation to the enforcement of human rights and freedoms, which are enshrined in the Constitution. This is a matter the National Court also has jurisdiction over.[13]

VI BRIEF SURVEY OF QUESTIONS BROUGHT BEFORE THE SUPREME COURT

The nature of questions raised in Special References has varied over time. They relate to asking the Supreme Court to interpret provisions of Constitutional Laws and to directly asking the Supreme Court to invalidate a law or specific provisions of the law. In some cases, the question relates to the limits of power of one branch of the government. A brief survey follows of some of the significant cases from independence (1975) up until the present.

In *SCR No 2 of 1976; Re Motion of No Confidence* [1976] PGSC 17; [1976] PNGLR 228 (2 June 1976), the question before the Supreme Court was whether a motion of no confidence can be moved against a government that came into being immediately after independence – that is, a transition government before the first national general elections. The Supreme Court interpreted s 145(2)(b) relating to no confidence motions as being incapable of operation in relation to the First Parliament, because it only refers to motions of no confidence moved in a Parliament elected at a previous general election held pursuant to the Constitution and for a five-year term and therefore not intended to apply to the First Parliament.

Another Special Reference dealt with in 1976 was *SCR No 3 of 1976; Re Calling of a General Election* [1976] PGSC 18; [1976] PNGLR 242 (21 June 1976) where the Supreme Court answered "Yes" to the question:

> If the Parliament by an absolute majority vote decides to hold a general election pursuant to s. 105 (1) (c) of the Constitution, does the Constitution allow such a general election to be held before the Parliament has determined the number of open and provincial electorates and their boundaries in accordance with s. 125 of the Constitution?

The application of human rights in criminal trials was the issue in *SCR No 1 of 1977; Re Rights of Person Arrested or Detained* [1977] PGSC 15; [1977] PNGLR 362 (26 October 1977). A person who is arrested is entitled to talk to a family member, friend and or lawyer as soon as is practicable under s 42(2) of the Constitution. The question related to the effect of non-compliance with this right in

13 Constitution, s 57(1).

a criminal trial. The Supreme Court decided that it was at the discretion of the trial judge to decide as to the consequences of non-compliance with s 42(2) after an arrest.

Two Special References were decided by the Supreme Court in 1978. In *SCR No 2 of 1978; Re Corrective Institutions Act 1957* [1978] PGSC 9; [1978] PNGLR 404 (25 October 1978) the Court found s 30 of the Corrective Institutions Act 1957 unconstitutional as it prevented appeals against guilty findings in respect of offences under that Act. The Court said it breached s 37(15) of the Constitution which confers the right of appeal on persons convicted of an offence.

The laws relating to the Ombudsman Commission have been the subject of a number of references. In *SCR No 1 of 1978; Re Ombudsman Commission Investigations of the Public Solicitor* [1978] PGSC 7; [1978] PNGLR 345 (6 October 1978) the Court considered whether the Public Solicitor was a governmental body and therefore subject to the jurisdiction of the Ombudsman Commission. Interestingly the Supreme Court answered that it was not as it was directly established under the Constitution. In *SCR No 2 of 1992; Re The Leadership Code* [1992] PGSC 16; [1992] PNGLR 336 (31 July 1992) the reference arose in circumstances where allegations of misconduct in office were referred to Leadership Tribunals against members of the National Parliament who resigned from Parliament before the Tribunals completed their investigations and determined the charges. The questions referred were (1) whether the resignation ousted or deprived the Tribunals of jurisdiction to continue to investigate and determine the charges of misconduct against the leader; (2) whether the Tribunal has jurisdiction to hear and determine a reference where the holder of an office ceases to occupy the office which he held at the time of the alleged misconduct but is holder of another office within the Leadership Code.

The Constitution provides for the manner in which the Constitution will be amended and how an Organic Law is to be enacted.[14] Where an Organic Law was enacted outside of the process prescribed in the Constitution the Organic Law will be declared to be invalid. The Supreme Court held as much in *In the Matter of the Organic Law on National Elections (Amendment) Act 1981* [1982] PGSC 25 (5 March 1982). Another important case in 1982 filed by the Public Solicitor, was *Motor Traffic Act 1950, S138A District Courts Act 1963 and S38A Local Courts Act 1963, Re* [1982] PGSC 12; [1982] PNGLR 122 (22 March 1982). The question asked was whether amendments made to s 19ab(2)(e)(iii) of the Motor Traffic Act 1950, s 138a(1)(b) of the District Courts Act 1963, and s 38a(1)(c) of the Local Courts Act 1963 was inconsistent with ss 37(4)(a) and 37(5) of the Constitution. The

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14 Constitution, ss 13, 14, 15, 16 and 17.

amendments enabled the police to issue notice for fines to motorists for traffic infringements. If the fine is not paid within 14 days, the police can prosecute an offender in their absence and the court can proceed to enter a guilty plea and impose a sentence. The court only needs to be satisfied that the notice was served on the traffic offender. The Supreme Court held that the amendments were unconstitutional on the basis that they infringed the right to presumption of innocence under s 37(4)(a) of the Constitution and the right of an accused to be present for their trial pursuant to s 37(5) of the Constitution.

One area which has been the subject of a number of references over the years has been the nomination fees of candidates in national general elections. Prior to the national general elections in 1982, Parliament increased the nomination fee of a candidate from K100 to K1,000 – a tenfold increase. The Ombudsman Commission asked whether that was contrary to the right of a citizen to hold public office in *Re the Organic Law on National Elections (Amendment) Act 1981* [1982] PGSC 1; SC226 (5 April 1982). The Supreme Court agreed and the increase was found unconstitutional and invalidated. In 1992 Parliament tried again and the Supreme Court maintained its position in *SCR No 1 of 1992; Re Constitutional Amendment No 15 Elections and Organic Law on National Elections (Amendment No 1) Law 1991* [1992] PGSC 15; [1992] PNGLR 73 (23 March 1992). Parliament also passed an amendment to require voters to have a voter identification card. The Supreme Court in *SCR No 5 of 1992; Re Organic Law on National Elections (Amendment No 1) Law 1991* [1992] PGSC 17; [1992] PNGLR 114 (5 June 1992) found that it breached the right to privacy.

Provincial Governments, the second tier of the three tier system of government, are also a body recognised to file Special References. In *SCR No 2 of 1984; Re New Ireland Provincial Constitution* [1984] PGSC 14; [1984] PNGLR 81 (27 April 1984) the Court held that s 18(1)(h) of the New Ireland Provincial Constitution was unconstitutional in that it prohibited those who breached s 19(a) from ever being nominated to stand for New Ireland Provincial Elections, thereby breaching the right of a citizen to hold public office. The Simbu Provincial Government had a dispute with the national government and sought to clarify the process of suspension of a provincial government by the national government in *SCR No. 3 of 1986; Ref By Simbu Provincial Executive* [1987] PGSC 17; [1987] PNGLR 151 (10 April 1987). In *Executive Council of the Enga Provincial Government, Reference by the* [1990] PGSC 10; [1990] PNGLR 532 (28 December 1990) the reduction of funding to the provincial government was raised.

Due to the growing problems with rural to urban migration Parliament passed the Vagrancy Act (Ch No 268). It was enacted by an absolute majority of Parliament and came into operation on 3 November 1986. The Act provided in s 2(1)(c) for the

arrest without warrant of persons found in towns reasonably suspected of having no or insufficient lawful means of support. Section 3 placed a burden upon those persons to satisfy a magistrate of their lawful means of support. If they failed to so satisfy the magistrate, the magistrate was impowered by s 3 to order that they be excluded from the town for up to six months. Disobeying an exclusion order was an offence punishable by up to six months in prison. The Supreme Court found this law to be unconstitutional as it breached a citizen's right to freedom of movement under s 52 of the Constitution: *SCR No 1 of 1986; Re Vagrancy Act (Ch 268)* [1988] PGSC 29; [1988-89] PNGLR 1 (13 April 1987).

Concern about the number of days Parliament sits in a parliamentary year resulted in a number of Special References filed. It began with *SCR No 4 of 1990; Reference by the Acting Principal Legal Adviser* [1994] PGSC 17; [1994] PNGLR 141 (11 January 1991) where the Supreme Court held that the requirement in s 124 that the Parliament meet not less than nine weeks in each period of 12 months applies "in principle" only. In light of the definition of that phrase in Sch 1.6, the requirement is directory rather than mandatory. Compliance is the prerogative of Parliament. Some years later in *Special Reference Pursuant to Constitution Section 10; Calling of the Parliament; Reference by the Ombudsman Commission* [1999] PGSC 21; SC628 (25 June 1999) the Supreme Court by majority decision said it was mandatory to meet for a minimum number of sitting days. Similar issues were raised in *Special Reference Pursuant to Constitution Section 19; Re Sitting Days of Parliament and Regulatory Powers of Parliament* [2002] PGSC 2; SC722 (31 December 2002) and the Supreme Court declined to answer the questions on the basis that there was no provision in the Constitution to enable the court to hear the issues for a third time.

The relationship between Papua New Guinea and another country has also been the subject of references before the Supreme Court. In *Special Reference Pursuant to Constitution Section 19; Special Reference by the Morobe Provincial Executive* [2005] PGSC 32; SC785 (13 May 2005). The issue was whether the Enhanced Co-operation between Papua New Guinea and Australia Act, 2004 (No. 8 of 2004) is inconsistent with ss 21, 22, 23, 34, 37, 42, 44, 47, 49, 52, 53, 176, 177, 197, and 198 of the Constitution. The rationale of the legislation was that:

> Australia may, in consultation with the Government of Papua New Guinea, deploy police and other personnel to Papua New Guinea to work in partnership with the Government of Papua New Guinea to address core issues in Papua New Guinea in the area of governance, law and order and justice, financial management, economic and social progress as well as capacity in public administration, including the Royal Papua New Guinea Constabulary.

The Supreme Court in a unanimous decision decided that the Act in question did not comply with s 38 of the Constitution which sets out the process for legislation to comply with if the law restricts rights and or freedoms in the Constitution.

Reference by the Ombudsman Commission of Papua New Guinea [2010] PGSC 10; SC1058 (4 June 2010) was a reference by the Ombudsman Commission on the validity of ss 1 and 2 of Organic Law on Provincial Governments and Local-Level Governments (Amendment No 10) Law 2006. Section 1 amended s 10(3) of the Organic Law on Provincial and Local-Level Governments (OLPLLG) by repealing subs (3)(b) and (c). The effect of the amendment was that it removed heads of local-level governments and representatives of Urban Councils and Authorities from the Provincial Assembly. Section 2 repealed OLPLLG, s 18(2) and replaced it with a new subs (2), the effect of which was to exclude heads of local-level governments and representatives of Urban Councils and Authorities from holding the position of Deputy Governor of the Province. The Supreme Court held that ss 1 and 2 of the Organic Law on Provincial Governments and Local-Level Governments (Amendment No 10) Law 2006 were inconsistent with the spirit and purpose of s 187C(2)(a) of the Constitution to have "a mainly elective (elected directly or indirectly) legislature" and therefore declared it unconstitutional.

One of the challenges in Papua New Guinea's political system is instability in Parliament. The political party system is fluid and members do not remain committed to one political party in the five-year life of the Parliament. In a bid to address this issue, Parliament passed the Organic Law on Integrity of Political Parties and Candidates by making it an offence under the Leadership Code if a member of Parliament moved from party to party. The Supreme Court found that those provisions of the particular Organic Law restricted a member of Parliament's right to vote according to his freedom of conscience and were unconstitutional and invalid.[15]

A controversy of national importance occurred in 2011 – this was the so-called "two prime minister's saga."[16] Then Prime Minister Michael Somare was ill and out of the country. Peter O'Neil attempted to seize power from him by getting Parliament to meet and vote him in. In *In re Reference to Constitution section 19(1) by East Sepik Provincial Executive* [2011] PGSC 41; SC1154 (12 December 2011) the Supreme Court held by a majority that Sir Michael Somare was not lawfully removed from office as Prime Minister. Peter O'Neil refused to accept the decision. That

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15 *Special Reference By Fly River Provincial Executive Council; Re Organic Law on Integrity of Political Parties and Candidates* [2010] PGSC 3; SC1057 (7 July 2010).

16 For an article on this see Vergil Narokobi "The Papua New Guinea "Two Prime Minister's Saga": Parliament Testing the Supremacy of the Constitution" (2013) 24/2 PLR 92.

decision was challenged by another Special Reference, *In re Constitution Section 19(1) - Special reference by Allan Marat; In re Constitution Section 19(1) and 3(a) - Special reference by the National Parliament* [2012] PGSC 20; SC1187 (21 May 2012) and the Supreme Court confirmed its position in the earlier decision by a majority of 3-2.

In re Constitutional (Amendment) Law 2008, Reference by the Ombudsman Commission of Papua New Guinea [2013] PGSC 67; SC1302 (19 December 2013) dealt with amendments to laws relating to the functions and powers of the Ombudsman Commission. The Ombudsman challenged the validity of proposed constitutional amendments affecting the powers and functions of the Ombudsman Commission under s 27(3)(c) & (5); s 28(1) & (5), s 29 and s 219 of the Constitution. The amendments were contained in the Constitutional (Amendment) Law 2008 (amendment law). At the time the Reference was filed, the amendment law, though passed by Parliament, had not been certified by the Speaker. Before the Court delivered its opinion on the reference, the Speaker certified the amendment law. The Supreme Court held that the amendments affected the constitutional independence of the Ombudsman Commission and the amendments were declared unconstitutional, invalid and of no effect.

The powers and functions of the Police Commissioner were also sought to be clarified in *In re Powers, Functions, Duties and Responsibilities of the Commissioner of Police* [2014] PGSC 19; SC1388 (2 October 2014). Amongst other matters, the Supreme Court held that the Commissioner of Police has authority to issue directions to other members of the Police Force regarding the conduct of criminal investigations, including applying for arrest and search warrants, laying charges, and presenting information.

Another case which also dealt with the powers of the Ombudsman Commission was that of *Special Reference by the Attorney General pursuant to Constitution, Section 19* [2016] PGSC 52; SC1534 (1 September 2016). This case dealt with the power of the Ombudsman Commission to issue directions, akin to an injunction to preserve the status quo until the determination of its investigations. It also considered the powers of the Public Prosecutor in relation to a referral from the Ombudsman Commission.

An interesting issue arose in *Special Reference by the Fly River Provincial Executive v Pala* [2017] PGSC 25; SC1602 (1 September 2017) which dealt with pre-independence laws. The Fly River Provincial Executive filed a Special Reference challenging the constitutional validity of the Commissions of Inquiry Act 1956 (the Act). The reference was filed after a Commission of Inquiry, established by the Prime Minister under the Act to investigate and report on the procedures

employed by the Department of Justice and Attorney-General to brief private law firms to represent the State, commenced hearing and summoned the Provincial Administrator of Western Province to give evidence in relation to brief out arrangements by the Fly River Provincial Government. The Provincial Executive took issue with the summons and filed the reference. The Provincial Executive argued that the Act was a pre-Independence law that should comply with the law-making conditions prescribed by s 38 of the Constitution, which the Act failed to do. The Court held that the Commissions of Inquiry Act 1956 is a "pre-independence law" pursuant to Schedule 2.6(1) of the Constitution. Pursuant to Schedule 2.6(1) and (2), the adoption of, and application of, the Commissions of Inquiry Act 1956 is "Subject to any Constitutional Law..." but not to s 38 of the Constitution and was therefore a constitutionally valid law.

Another case dealing with the powers and functions of the Electoral Commissioner was the case of *Special Reference Pursuant to Constitution, Section 19(1); Special Reference by the Ombudsman Commission of Papua New Guinea* [2019] PGSC 109; SC1814 (24 May 2019). One key ruling of the Supreme Court was that the Electoral Commission has a wide and unfettered discretion by virtue of Schedule 1.2(1) of the Constitution to extend the return date for writs as many times as is required provided such extension does not exceed the "fifth anniversary of the day fixed for the return of the writs for the previous general election" nor the time periods stipulated under s 124(1) of the Constitution for Parliament to convene after the elections.

In *Reference by the Public Solicitor Pursuant to Constitution, Section 19(1), In re* [2019] PGSC 93; SC1871 (13 November 2019), the Public Solicitor referred a question of constitutional interpretation regarding the jurisdiction of the Public Services Commission to the Supreme Court under s 19(1) of the Constitution. The question was: "Does the Public Services Commission have jurisdiction under Sections 191 and 194 of the Constitution to review any decision of the Public Solicitor or an officer or employee of the Public Solicitor's office?" The Public Solicitor argued that the question should be answered "no". The Public Services Commission argued that the question should be answered "yes". The Supreme answered "no" on the basis that the Office of Public Solicitor is not part of the National Public Service.

In 2020 the Ombudsman Commission questioned the constitutional validity of the Public Money Management Regularisation Act 2017 in *Reference by the Ombudsman Commission Pursuant to Constitution, Section 19(1), Re Public Money Management Regularisation Act 2017* [2020] PGSC 43; SC1944 (27 May 2020). The Court found the Act unconstitutional for a number of reasons, one of which was that the law conferred on the government the power to compulsorily acquire property

of public bodies, and because they had a level of autonomy, they were found to have property rights and therefore the law amounted to unjust deprivation of property.

Also in 2020 the Bougainville Executive (the referrer) referred two questions of constitutional interpretation to the Supreme Court. The questions concern two provisions of the Bougainville Constitution, ss 89(2) and 91(4)(f), which provide that a person cannot be elected as President of the Autonomous Region of Bougainville on more than two occasions. The questions were whether those provisions were inconsistent with s 50 (right to vote and stand for public office) of the National Constitution due to their preventing a person who has been President on two occasions being re-elected as President. On a 4-1 majority the Supreme Court held that ss 89(2) and 91(4)(f) of the Bougainville Constitution are not inconsistent with s 50 of the National Constitution, and are not unconstitutional.

As can be seen from the nature of the various cases filed in the Supreme Court, the Court has not shied away from upholding the Constitution where it is of the opinion that a law needs to be clarified or, if the law is contrary to the Constitution, striking the law down. Except for the events of 2011, the three arms of government have respected the separation of powers and accepted the outcome of the Supreme Court in all cases. This is a remarkable feat in a country that is challenged by rising law and order problems.

VII CONCLUSION

It appears, from the experience from 1975 up until the present, that the procedures under s 19 of the Constitution have met the expectation of the Constitutional Planning Committee in its proposed inclusion of this special procedure for judicial review of the Constitution. The Supreme Court has played a very important role in this regard and the counter-majoritarian difficulty has not prevailed. Papua New Guinea has displayed a strong culture of accepting the rule of law and the role of the courts in resolving constitutional disputes.