BULSIT BILONG MEKIM BEL ISI-

THE CONSTITUTIONAL STRUCTURE OF PROVINCIAL GOVERNMENT

BY JOHN GOLDRING*

1. *The Why? and How? of Provincial Government.*

Although the recommendations of the Constitutional Planning Committee (henceforth 'CPC') in favour of provincial government were expressed in strong terms,1 and the proposals were supported in principle by the government, the Independence Constitution contained no provision for provincial government. The reasons for this are still unclear, but were probably connected with the differences which arose during 1975 between the National Government and the provincial government which had been established in Bougainville,2 and partly because the CPC itself recognised that its proposals were incomplete, especially the proposals relating to the division of powers between central and provincial governments, and the transfer of the administrative structure. Certainly the CPC proposals at the time were criticised by the administration; some of the criticisms were sound, and this was apparently sufficient to convince the government.

Part VIA of the Constitution was inserted by *Constitutional Amendment No. 1*, passed in accordance with ss. 14 and 15 of the Constitution in 1976. Part VIA contains only ten sections, and provides a bare outline of the structure and functions of the provincial governments. The detailed provisions relating to the powers, functions, and finance of provincial government are found in the *Organic Law on Provincial Government*.

Provincial government, as it exists in Papua New Guinea, is not federal government, though it does satisfy one of the tests laid down by Wheare for federal government, i.e. that the people of any part of the country where provincial government is in force are subject to the laws and administrative control of both the national and the provincial government.3 The CPC did not want a federal state; it heeded the advice of Sir Ivor Jennings who said "nobody would have a federal constitution if he could possibly avoid it".4 In paragraph 10.19 of its Final Report it said:

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* Senior Lecturer in Law, Australian National University; Formerly Senior Lecturer in Law, University of Papua New Guinea.

1. Papua New Guinea, Constitutional Planning Committee, *Final Report*, Ch. 10, (1974).

2. D. Conyers, *The Provincial Government Debate* (I.A.S.E.R. Monograph No. 2, Port Moresby 1976).

3. K.C. Wheare, *Federal Government*, 32 (1946).

4. W.I. Jennings, *Some Characteristics of the Indian Constitution*, 35 (1955).

"Experience in other recently independent states does not incline us towards recommending a federal system for Papua New Guinea. The overwhelming majority of our people favour the maintenance of a unitary state."

The provisions of Part VIA of the Constitution and the Organic Law establish a system of government in which the bulk of power - both legislative and political - remains with the national government, though provincial government has some definite and guaranteed rights. It may, perhaps, be described as quasi-federal. However, the charter granting Provincial Government to Bougainville is expressed in terms not of federalism, but of confederation.5

Why, then, have the new provisions on provincial government been inserted in the Constitution? Partly, the answer lies in political reality. Secession by a part of Papua New Guinea has been a real threat ever since the establishment of copper mines on the island of Bougainville. The people of that island had for some time expressed a desire for 'secession', by which they meant at least substantial local autonomy. The demands set a precedent, especially in East New Britain, and in parts of Papua and the Highlands. The history of the political factors leading to the establishment of provincial government has been given by Conyers.6 The demands for secession and autonomy were so popular and pressing that some concession by the national government was necessary. Two basic desires were apparent to the CPC, and also to the pre-Independence government. These were partly connected with secession movements, but even without pressure from this quarter would have carried a good deal of weight. Both were a reaction to the colonial system of administration. The first was that governments and administrators should be responsive to the needs and aspirations of the

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5. Though the Prime Minister has, in accordance with the wishes of the people of the Province, stated that it should be referred to as the 'North Solomons Province', the only reference to the North Solomons is in the Charter granting Provincial Government to *Bougainville* Province. That Charter recites that, while the people of the Province acknowledge the unity of Papua New Guinea and agree to uphold the National Constitution, they assert that "the relationship between Provincial and Central authorities, are founded on principles of complementarity" and that "Provincial and Central Government are necessarily partners in the government of the Nation, and one is not inferior in its nature to the other ...". The Charter also recites that "the National Government has welcomed and accepted that Statement [by the North Solomons Constituent Assembly, called the *Statement of Principles of Complementarity*] and the concept of partnership as the basis of the relationship between Central and Provincial authority ...". This asserts even more than federalism, which assumes that the Central authority has powers over and above those of the provinces or states. In practice, however, Bougainville accepts the superior position of the Central government, and the *legal* status of the Charter is uncertain.

6. Conyers, *op.cit.*; Cf. P. Hastings, "Internal Nationalist Movements in Papua New Guinea" in E.P. Wolfers, ed., *Australia's Northern Neighbours* (1976).

people in the villages and other areas outside the capital. The second was a realisation that the public service of Papua New Guinea was both too large and too centralised. The CPC formed the view that both these reactions could be satisfied by the creation of a system of provincial government. There was also a belief that there would be substantial economies from political and administrative decentralisation. "Decentralisation" was one of the 'eight points' for national policy stated by the Somare Government early in its term of office, and all politicians, in theory, pay lip service to political and administrative decentralisation.

Some quotations from the CPC Final Report give an indication of the thinking that lay beyond the recommendation that there should be a system of provincial government, and each is related to the system of administration. In paragraph 10.7 the CPC said: "The structure of government bequeathed to us by our colonial rulers has placed power in the hands of public servants rather than the people whom the bureaucracy should serve". In paragraph 10.157 it said: "The system of district administration inherited from Australia was designed to rule rather than serve the people of Papua New Guinea". In paragraph 10.3, the CPC stated that in its opinion the effect of the colonial system of administration had been to remove any possibility of local initiatives, and in other parts of the report, such as those quoted, one has the sense that the CPC had concluded that this was a specific, if unstated, aim of Australian colonial policy. The basis of the solution suggested by the CPC may be summarised in yet another paragraph of the Final Report:

> Power must be returned to the people. Government services must be accessible to them. Decisions should be made by the people to whom the issues at stake are meaningful, easily understood, and relevant. The existing system of government [i.e., presumably, "administration"] should therefore be re-structured, and power should be decentralised, so that the energies and aspirations of our people can play their full part in promoting our country's development.7

It should be made clear at this stage that the views of the author, as a result of his experiences as an Australian citizen, are unashamedly centralist. I agree with the Australian nationalist, H.B. Higgins, who said, "if you scratch a states-rights man, you will find a reactionary tory".8 It is my view that die-hard toryism has no place in a nation whose Constitution commits it to "development" as set out in the National Goals and Directive Principles. The system of provincial government in Papua New Guinea was promoted not by conservative interests, as was the Australian federal system, but by a desire for

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7. CPC, *Op.Cit.*, para. 10.8.

8. "Address on the Premiers' Amendments", *The Australian Commonwealth Bill, Essays and Addresses* (1900), quoted in R. Gollan, "Nationalism, the Labour Movement and the Commonwealth 1880-1900" in G. Greenwood, *Australia: A Social and Political History*, (1975) 191.

responsive government, with the maximum of popular participation. Nevertheless, the constitutional provisions may allow the conservative elements in Papua New Guinea to frustrate progressive policies of the centre, and *vice versa*. These views, no doubt, colour what is said in this article.

The structure of provincial government recommended by the CPC was quite different from that which has emerged in the constitutional provisions and the *Organic Law*. The CPC recommended that provincial governments should be given definite and entrenched legislative power over a range of subjects which should be part of the Constitution. It recommended a large measure of fiscal independence and power for the provinces. It also, and far more significantly, recommended that the Constitution and Organic Law should radically alter the administrative structure of the country so that in addition to providing an opportunity for local participation in government, the provincial governments should coordinate *all* government activities (whether activities of the national or of the provincial government) within the particular provinces, and that they should act as agents of the national government in execution of national government policies, as well as acting as principal in the administration of the laws and policies for which, under the Constitutional arrangements, it was responsible.9 The material for the CPC's recommendations is to be found largely in a report prepared by outside experts for the CPC.10

Under the provisions contained in *Constitutional Amendment No. 1*, the Constitution itself establishes a system of provincial government (s.187A), and states that a number of other relevant matters may be prescribed by an organic law. There is no requirement that any part of the country shall be or become part of a province, but where the people of a part of the country express the wish for a provincial government, under s.3 of the organic law, the Minister responsible for provincial government may recognise any body of persons which is "properly organised" and which he deems appropriate as a channel of consultation with the people of the province to be a provincial constituent assembly (s.2). Thereafter the Minister is required to consult with the provincial constituent assembly on the Constitution for the province. Provincial government bodies established under the *Provincial Government (Preparatory Arrangements) Act* 1974 are deemed to be Constituent Assemblies by s.108 of the Organic Law, and by s.109 of that law, the Parliament is deemed to have approved the grant of provincial government to provinces where such bodies have been established. When the

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9. CPC, *op.cit.*, paras. 10.165 - 10.168.

10. W. Tordoff and R.L. Watts, *Report on Central-Provincial Government Relations* (Port Moresby 1974). The legal structures were somewhat amplified in a further report, R.L. Watts and W.R. Lederman, "A Proposal for the Provisions of the Organic Laws Necessary to Define the Authority and Relations of the National Government and the Respective Provincial Governments of Papua New Guinea after Independence" (Port Moresby 1975). A further report on implementation was prepared by a firm of management consultants, McKinsey & Co., but this does not affect the legal structure

Constitution of a province comes into effect, in accordance with s.7 of the Organic Law, the body established under the 1974 Act is deemed to be abolished and is succeeded for all purposes by the new provincial government (s.111). There are few specific requirements as to the form or content of the provincial constitution, in the Constitution and in the Organic Law. Section 187C(1), (2) and (3) of the Constitution and s.6(1)(b) of the Organic Law, require that the Provincial Constitution shall not be inconsistent with the National Constitution or the Organic Law, and s.187C(2) requires that provincial assemblies be elective, or mainly elective, and that there shall be a provincial executive, and a head of the provincial government. Certain parts of the Organic Law will dictate a good deal of the matters contained in the Provincial Constitutions. There still remains some scope for individual provincial constituent assemblies to insert into the Constitutions of their provinces specific provisions which are designed to meet the particular needs or whims of those provinces. Sections 8 and 9 of the Organic Law prescribes the way in which the Constitution is to be adopted by the provincial Constituent Assembly.

The National Parliament, under s.100 of the Organic Law, may by a resolution supported by a two-thirds absolute majority, "provide that some or all of the powers, functions, duties and responsibilities of provincial governments' shall not be conferrred on a particular provincial government, or if so conferred, shall be subject to such limitations as are laid down by the Parliament in that resolution. If the powers of any province are so limited or excluded, s.101 ensures that the financial grants receivable by that province shall be reduced accordingly. It seems that financial grants form an important tool at the hands of the National Government for exercising control over provincial government, and especially for ensuring that its policies are implemented.

There is no requirement, either in the Constitution or in the Organic Law, that the provincial constituent assemblies be democratically elected, merely that they be "elective or mainly elective". The intention appeared to be that bodies, particularly "provincial assemblies established under the *Provincial Government (Preparatory Arrangements) Act* 1974 and Area Authorities established under the *Local Government Act* 1963, and other bodies generally representative of local opinion or sections of it, should become the basis for the provincial constituent assemblies. The provincial assemblies and Area Authorities are a relatively recent development, superimposed on the structure of local government councils which were, for many Papua New Guineans, the first introduction to the machinery for western-style democracy.

Until provision is made either by a national or a provincial law, s.112 of the Organic Law requires that elections be conducted in accordance with the law in force at the commencement of the Organic Law. In fact, the regulations made in 1975 under the *Provincial Government (Preparatory Arrangement) Act* apply. These do provide for the type of election suggested by the CPC, but are susceptible to change.

In its Final Report, the CPC (at paras. 10.215 ff) recommended that local government had an important role to play in Papua New Guinea, and that decentralisation of power to local government by negotiation with the provincial governments was to be encouraged. However, the CPC

was aware that the local government bodies established under the 1963 Act were very much dependent on the *kiaps*, who, in the guise of "council advisers" had the role of instructing councillors in the working of local government. Many of these *kiaps* were not content with an instructional role, and had an undue influence on the policies and operations of many councils.11 The CPC made no formal recommendations on local government bodies, but was content to say that the national government should not deal directly with those local government bodies which functioned efficiently and which continued to exist. All dealings with local government should be through the provincial government (para. 10.85). It was conscious that the local government councils were set up as a political exercise by the Australian administration, a fact which had been recognised in some areas where the people had resisted the imposition of local government. Thus local government bodies, as such, might be suspect as a basis for the establishment of provincial government. The CPC also recommended that no area of the country should have provincial government forced upon it, although it was eager for provincial governments to be established throughout the country as soon as possible (para. 10.205).

Some slight assurance that provincial government is not imposed upon an unwilling section of the community may be found in the requirements of ss.4 and 6 of the Organic Law. Section 4 requires that the National Parliament must approve by absolute majority vote the granting of a Charter (defined in s.1 as the formal document granting provincial government), it may also rescind the resolution approving the grant of a Charter by the same majority. There is, however, no requirement that provincial government should not be granted before, for example, the first elections to the Provincial Assembly have been held. However, the granting of the Charter by the Head of State (acting with and in accordance with the advice of the National Executive Council) is conclusive evidence that the requirements of the Constitution and of the Organic Law have been complied with (s.6(5)). Under s.7 of the Organic Law, the Provincial Constitution, which must not be confused with the Charter, comes into effect when the Charter is granted by the National Government.

These provisions are quite at variance with the proposals of the CPC. A good deal of Chapter 10 of its *Report* and much of the expert report by Tordoff and Watts to the CPC[12] is taken up with detailed suggestions of how provincial government might be established in three stages (paras. 10.205-255). These suggestions of the CPC cannot in any way be regarded as radical; indeed, they smack of great caution, and a full appreciation of the difficulties which would have ensued if the proposals of the CPC for the transfer of administrative responsibility had been implemented in full. Provincial government has been established willy-nilly, and one suspects that, contrary to the expectations of those who originally suggested the system of provincial government, the structure of some provincial governments will be very much influenced by the policies and wishes of the National Government. However, in some areas of Papua New Guinea, provincial government has, to some extent, been implemented under the provisions of the *Provincial Government*

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11. N.D. Oram, "Administration, Development and Public Order" in A.I. Clunies Ross and J. Langmore, eds. *Alternative Strategies for Papua New Guinea* (1973). Conyers, *op. cit.*

12. See fn. 10, *supra*.

(Preparatory Arrangements) Act 1974, and where this is the case, the need for the establishment of provincial government in stages may have been obviated. In fact, a provincial government was created in Bougainville in 1974 by regulation under the Act, and a number of other provincial governments had been established in this way at the time of the Constitutional Amendments late in 1976. These provincial governments were carrying out many governmental operations at that time.13

By s.107 of the Organic Law, the Provincial Government (Preparatory Arrangements) Act 1974 is continued in force until all provinces have been granted provincial government in accordance with the Organic Law. This article is concerned with the background and structure of the National Constitution, and so will not venture further into questions of provincial governments and constitutions. It suffices to say that despite the few structural requirements imposed by the Constitution and the Organic Law on provincial government, a system of provincial government is developing rapidly in Papua New Guinea. The following will simply examine the legal arrangements and their background, and some of the implications of those legal arrangements on the political structure of the country.

II. *"Consultation".*

Throughout Part VIA of the Constitution and the Organic Law runs a requirement of "consultation" between the various levels of government. It is intended that provincial government should embody a spirit of friendly cooperation between the levels of government. This view may turn out to show a high level of political naivete, as politicians who see or suspect a threat to a vested interest are unlikely to wish to cooperate, or at least to give the appearance of cooperation. That, at least, has been the result in many other federal or quasi-federal systems, particularly in Australia, from which the fiscal structure of provincial government has largely been borrowed.14

In Papua New Guinea, those who think that the requirement of consultation means what it appears to mean may have little to fear. The question of what constitutes "consultation" was considered by the pre-Independence Full Court of the Supreme Court in *Paikara v. Nau.*15 This case concerned the interpretation of s.18 of the *Local Government Act* 1963, which gave power to the administration to do certain things "after consultation with the council or councils concerned". The Court (Minogue CJ, Clarkson and Kelly JJ) held:

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13. Conyers, *op. cit.*

14. G. Sawer, *Australian Federalism in the Courts* (1967); J.E. Richardson, *Patterns of Australian Federalism* (1973), Ch. VI.

15. [1971-1972] PNGLR 354.

> We agree that the administration is obliged to consult with the Council - the [Act] says so. But it does not lay down any procedure to be followed nor does it require any accord to be reached. The nature and extent of the communication necessary to constitute a consultation could depend on the nature and complexity of the proposal, where and when it originates, say previous communications or even a refusal by the council.16

In reaching this conclusion the Court referred to two decisions of the Privy Council[17] as well as a New South Wales decision.18 The statement of the law appears to be found appropriate to the provisions of the Organic Law, and therefore, is likely to be applied, though it is questionable whether it is strictly consistent with the National Goals and Directive Principles embodied in the Preamble to the Constitution.

The conclusion that can be drawn from these cases is that "consultation" will be regarded as a real consideration by the court. If a law requires consultation, and there is none, the court may find the act *ultra vires*, though they will presume that it has occurred, because of the operation of the maximum *omnia praesumuntur rite esse acta*.18A A minimum of evidence of communication between the parties required to consult should be enough to satisfy the court that there has been consultation. In practice, "consultation" is a requirement that, in legal terms, requires some compliance, even if it is minimal. Whether or not the consultation must be effective or meaningful is deemed to be a political, rather than a legal question.

III. *Constitution and Structure of Provincial Governments.*

Section 187C, (1), (2) and (3) of the Constitution provides:

(1) Subject to this Part, an Organic Law shall make provision in respect of the constitution, powers and functions of a provincial government.

(2) For each provincial government, there shall be established -

(a) an elective, or mainly elective, provincial legislature with such powers as are conferred by law; and

(b) a provincial executive; and

(c) an office of head of the provincial executive.

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16. *Ibid*, at p.368.

17. *In re the Union of the Benefices of Whippingham and East Cowes, St. James* [1954] A.C. 245 and *Port Louis Corporation v. Attorney-General of Mauritius* [1965] A.C. 1111.

18. *Attorney-General v. J.N. Perry Constructions Pty. Ltd.* (1962) 79 WN (NSW) 235.

18A. J.A. Griffin & J. Goldring, 'Proof of the Due Exercise of Delegated Powers' (1974) 48 ALJ 118.

(3) An Organic Law shall provide for the minimum number of members for the provincial legislature and the maximum number of members that may be appointed as nominated members of the legislature.

The Organic Law, Part V, provides a basic structure for provincial constitutions, but little more. It does, however, provide in s.15 for at least a nominal separation of legislative and executive powers, even if this did not follow from s.187C(2). There is no provision such as s.99(3) of the National Constitution which provides that the separation of powers should be "in principle" only, and therefore not enforceable in the courts, but this result would probably have been reached in any case. Section 16 provides that the legislative power of the province shall be vested in a legislature of not less than 15 elected members. Subsection 16(5) expressly preserves the right for a provincial law to confer legislative power on authorities other than the provincial legislature. This curious provision is apparently designed to allow local level governments to legislate on certain matters. The powers and functions of the legislature, by subsection (4), are to be as provided in the Organic Law and in the Constitution. If the provincial consitituion so provides, there may also be a number of appointed members - no more than 10% of the number of elected members or three, whichever is the greater. If the constituent assembly of a province so decides, any or all of the "elected" members may be appointed by "village, community or other local level governments". There is nothing to prevent a provincial assembly from being comprised entirely of indirectly elected members, as were the old Area Authorities established under the pre-Independence *Local Government Act* 1963 or the provincial assemblies established by the *Provincial Government (Preparatory Arrangements) Act* 1974.

Elections to provincial assemblies are, until provision is made otherwise in a national or provincial law, to be conducted in accordance with the legislation in force at the time of the making of the Organic Law; i.e. the *Provincial Government (Preparatory Arrangements) Act* 1974 and such other enactments as are appropriate. The CPC had recommended (at paras. 10.56-10.62) that elections for provincial assemblies should be conducted on the same basis as elections for the National Parliament, and the fact that these recommendations were not incorporated into the Constitutional Laws on provincial government must be regarded as a victory for the established interests of the public service and the established local government bodies and provisional provincial governments. There appears to be no reason why Part VI. 2.G and H of the National Constitution relating to the conduct of elections and the protection of elections from outside interference, should not apply *mutatis mutandis* to the conduct of provincial elections. It has already been pointed out that s.112 of the Organic Law provides for election to provincial assemblies under the provision of the *Provincial Government (Interim Electoral Provisions) Regulations* 1975 until a different system is established by a provincial constitution or law or a National Law. The electoral provisions of the constititutional laws, which do not require elections on a democratic basis, appear to be contrary to the democratic spirit of the Constitution, and may arguably offend against the right to participate in public affairs, to vote, and to stand for public office conferred by s.50(1) of the National Constitution, unless each provincial constitution provides for direct and democratic elections. The people of Papua New Guinea are by now sufficiently familiar with the machinery of western democracy for there to be little danger of excluding

from political activity at any level the really powerful local leaders by forcing them to run the gamut of electoral politics. The constitutional laws do, however, provide that the Electoral Commission established under s.126 of the National Constitution may be involved in provincial elections, and if the Commission is involved, s.113 of the Organic Law applies. This section allows the Electoral Commission to delay or cancel elections if, because of clashes with National or other provincial elections, the holding of a provincial election is impractical. In practice, it is to be expected that most provincial elections will be democratic.

At para. 10.59 of its report, the CPC indicated the benefits and economies that would flow from simultaneous National and provincial elections, but this advice has been disregarded. It is also notable that the constitutional laws do not make any provision for the qualifications of electors or candidates for provincial elections, though a reading of s.50 of the Constitution may have an effect on these matters. In paras. 10.56 *et seq* of its report the CPC made a series of recommendations, relating to the desirability of full-time elected members of representative bodies, whether members of the National Parliament should be eligible also for election to provincial governments, etc., but under the constitutional laws such matters are left to the provincial constitutions.

Section 187C(2)(b) and (c) of the Constitution provides that there shall be a provincial executive and a head of the provincial government, and s.17 of the Organic Law makes provision for these offices. There is no specific requirement that the members of the provincial executive should have any ministerial responsibility: such matters are left to the provision of provincial constitutions. The executive power of the provincial government is to be vested in this executive, (s.17(1)) but this does not preclude the vesting of executive power in other authorities (s.17(4)). Tordoff and Watts had some reservations about a ministerial system in the provinces, and suggested a small provincial executive with joint responsibility.19

The original view of the pre-Independence government and public service was that the Constitution should merely provide the bare bones of the structure of government for the Independent State.19A These bones, according to that view, would be fleshed out by Acts of the Parliament. The Organic Laws were devised as a compromise solution, and also because the CPC realised that a Constitution containing the matters of detail which it considered necessary or desirable would be unworkable. The Independence Constitution adopted by the national Constituent Assembly reflected the political ascendancy of the CPC. After nearly two years of independence, the CPC and its political successors simply did not have the political influence in the Parliament to have its detailed recommendations on provincial government - which the CPC saw as central to the Constitution - embodied in the Constitutional laws. Thus those Constitutional laws simply provide the framework for the structure of provincial governments. Another factor is that by mid-1976, the National Government had already had some distressing confrontations with the Bougainville Provincial Government. It had learnt from experience that it would be in the interests of the National Government to ensure that the structure and functions of provincial governments could be changed from time to time

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19. *Op. cit.*

19A. *PNG Government Paper* 1974, Ch.1.

and it was not prepared to be tied to a relatively rigid constitutional provision which might inhibit the development of provincial government either along lines which it desired, or which the provincial governments themselves desired.20

The substance of the structure of provincial government is left to the provincial constituent assemblies themselves to express in the constitutions they prepare.. These constitutions will not be discussed here. Though provincial constitutions must be approved by the National Parliament, few guidelines are provided in the constitutional laws themselves. The provincial constituent assemblies are free to decide whether or not to follow the recommendations of the CPC.

In paras. 10.32 - 10.36 and 10.187 ff., the CPC stressed that the system of provincial government would need to be flexible, but emphasised the need for certain minimum requirements relating to provincial government to be exhausted within the Constitution. The views of the CPC as to what those minimum requirements may be do not seem to be reflected in the provisions of the Constitution or of the Organic Law.

Once the Constitution of a province has come into effect, section 13 of the Organic Law gives to it the Status of an Organic Law of Papua New Guinea. Section 11 of that Law provides that it may be altered by an Organic Law of the National Parliament, or in accordance with its own provisions. Presumably ss.14 and 17 of the National Constitution, relating to the amendment of Constitutional Laws by the National Parliament will also apply. This does allow the National Parliament some measure of control of the structure of provincial government, provided that it can command the necessary two-thirds majority of votes in the National Parliament. However, as indicated elsewhere in this article, there are other means by which the National Government will be able to control the functioning of provincial governments, in political terms, so that the matter of the structure of governments is less important than might at first seem the case.

IV. *Legislative Powers of Provincial Government.*

Once a Charter of provincial government has been granted, the province, by virtue of the Organic Law, is given substantial legislative power. This power is not laid down in the Constitution, as it is in Australia (primarily in ss.51 and 52 of the Commonwealth Constitution) or in the "lists" of powers appended to the Indian or Malaysian Constitutions, though s.187C(6) states that an Organic Law shall provide for the legislative powers of provincial governments. Instead, s.19 of the Organic Law provides that any legislative power of provincial governments does not affect the general law-making power of the National Parliament under s.109 of the Constitution, except as expressly provided in the Organic Law. Subject to that qualification, and to the requirements of any other Constitutional Law, the provincial legislature, by s.20(1) of the Organic Law, "has full legislative power to make laws for the peace, order and good government of the province". Section 20(3) provides:

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20. Conyers, *op. cit.*

(3) Provincial laws may be made -

(a) on any subject provision for which by way of a provincial law is expressly authorised by any provision of this Organic Law other than this Part, or by any other National Constitutional Law; and

(b) in the field of primarily provincial competence, as provided for by Division 3; and

(c) in the field of competence concurrent with that of the National Parliament, as provided for by Division 4, and

(d) in any other field in which there is no competing National legislation, as provided for by Division 5; and

(e) in relation to judicial matters, as provided for by Part VII; and

(f) under delegation by the National Government as provided for by Part VIII; and

(g) in relation to taxation, as provided for by Division X.2.

Laws made by a provincial government are not to have extraterritorial effect (s.21) and are to be interpreted subject to the Constitutional Laws so as not to exceed the authority properly given to make them (s.22). In addition, s.14 provides that "Full faith and credit shall be given throughout Papua New Guinea to the laws, the public acts and records and the judicial proceedings of all provinces." This section is virtually a licence to the legal profession to make money; the words are virtually identical with those of s.118 of the Australian Constitution, which themselves are closely modelled on Art. IV, Section 1 of the United States Constitution. The intention of the section is that the laws of one province should be recognised throughout the country, but the manner of recognition is an extremely difficult legal question.21

There are two types of legislative power granted to the provincial governments. The first is an exclusive legislative power to make laws with regard to matters of primarily provincial concern, set out in s.24:

(1) Subject to Subsection (2), the subjects to which this Division applies are -

(a) the control by licensing of mobile traders (other than mobile banks); and

(b) primary schools (including community schools and village self-help schools) and primary education other than curriculum; and

(c) the sale and distribution of alcoholic liquor; and

(d) the control by licensing of public entertainments and of places of public entertainment; and

(e) housing (other than housing owned or to be owned by the State); and

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21. Cf. M. Pryles and P.J. Hanks, *Federal Conflict of Laws* (1974) Ch.3.

(f) libraries, museums, cultural centres and Cultural Councils, and

(g) sporting activities; and

(h) to the extent provided for by Section 39, village courts; and

(i) subject to Section 1871 *(local and village governments)* of the National Constitution, local, community and village governments and other local level governments within the meaning of that section,

but not including the imposition of taxation (which is provided for by Division X.2).

(2) Subsection (1)(f) does not apply to libraries, museums, cultural centres and Cultural Councils (as the case may be) that are -

(a) conducted, or to be conducted, by the State or by an Authority established by or under an Act of the Parliament; or

(b) established or conducted, or to be established or conducted, by or under an Act of the Parliament

or to the establishment or conduct of such institutions.

Power to make such laws is conferred by s.25. Section 26 purports to deprive the National Parliament of power to make any law with respect to such matters, except when a provincial legislature has not made an exhaustive law on the subject, and then only to the extent to which the law is not inconsistent with any provincial law. The expression "exhaustive law" is clarified by s.23, which provides that a law is exhaustive if it shows an intention by the legislature that it intends to set out completely the law or policy on the matter. The section appears to be an attempt to state in statutory form the "cover the field" test laid down by the High Court of Australia in connection with the test of inconsistency between Commonwealth and State laws to be applied when deciding an issue arising under s.109 of the Australian Constitution. The test was determined in such cases as *Clyde Engineering Co. Ltd. v. Cowburn*22 and *Ex parte McLean.*23 While s.23(3) of the Organic Law provides that a statement in legislation that it is, or is not, intended to be exhaustive is not conclusive on that matter, the Australian High Court has held that such a statement will be a helpful indication of whether or not the central legislature intends to "cover the field".24

It would appear that s.26, and also s.29, which purport to limit the powers of the National Parliament to legislate in respect of matters where the national and provincial legislatures have concurrent

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22. (1926) 37 C.L.R. 466.

23. (1930) 43 C.L.R. 472.

24. *Re Credit Tribunal: Ex parte General Motors Acceptance Corporation, Australia,* (1977) 14 A.L.R. 257.

legislative powers, are clearly inconsistent with s.100(3) of the Constitution, which provides that "Nothing in any Constitutional Law enables or may enable the Parliament to transfer permanently, or divest itself of, legislative power." The two sections must therefore be treated as having no effect whatever, though this does not mean that the National Parliament may, if it chooses, refrain from legislating in an area which it considers more appropriate for provincial legislation.

Though decisions of foreign courts do not bind the courts of Papua New Guinea, a decision of the Judicial Committee of the Privy Council may be relevant. In this case, *In re The Initiative and Referendum Act*,[25] the Committee held that the *British North America Act* 1867 (the Canadian Constitution conferring power on the central and provincial legislatures in Canada) did not permit a provincial legislature to divest itself of the legislative power conferred upon it by the Constitution. The words used by the Judicial Committee reflected the nature of the *British North America Act:* but that Act contained an express provision similar to s.100(3) of the Constitution of Papua New Guinea.

The second type of matter upon which the provincial legislatures have power to legislate are those upon which the power, conferred by s.28 of the Organic Law, is concurrent with the legislative power of the National Parliament. The subjects of such legislative power are set out in s.27.

The subjects to which this Division applies are -

(a) community development and rural development; and

(b) primary school (including community school and village self-help school) curricula; and agriculture and stock; and

(c) agriculture and stock; and

(d) fishing and fisheries; and

(e) health, and

(f) public works; and

(g) trade and business, and commercial and industrial investment and development; and

(h) high schools, and vocational and technical schools; and

(i) gambling, lotteries and games of chance; and

(j) tourism; and

(k) transportation and transportation facilities; and

(i) town planning; and

(m) land and land development, and

(n) forestry; and

(o) wild life protection; and

(p) parks and reserves; and

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25. [1919] A.C. 939.

(q) family and marriage laws (including laws relating to divorce and other matrimonial proceedings and to the custody of children); and

(r) courts and tribunals (other than village courts) and their jurisdiction, and

(s) communications and mass media; and

(t) wharves and harbours; and

(u) aviation; and

(v) labour and employment; and

(w) research and training institutions; and

(x) marketing; and

(y) renewable and non renewable natural resources

but not including the imposition of taxation (which is provided for by Division X.2).

It is in this area that the greater possibility of inconsistency between Provincial and National laws arises. Section 28(1) provides expressly that provincial legislation shall not be inconsistent with an Act of the Parliament. This section appears redundant, as s.187D(1) of the Constitution provides that "Subject to any Constitutional Law, the application by its own force of an Act of the Parliament is not affected by a provincial law." Subsection 28(2) expressly prohibits the making of a provincial law which is inconsistent with a Constitutional Law.

Questions of whether a provincial law is or is not consistent with a Constitutional law are justiciable at the suit of any person with sufficient standing by s.187D(2) of the Constitution, but a question of inconsistency between a provincial law and an Act of the National Parliament is justiciable only at the instance of the National Government or of a provincial government. This is the effect of s.28(2) of the Organic Law which is expressly authorised by s.187D(3) of the Constitution "In order to avoid fruitless controversy and litigation ...". Certainly, in a country where legal resources are as limited as they are in Papua New Guinea, it is eminently desirable to avoid unnecessary litigation, but it may be asking too much to require that officers of the National Government, upon whom the burden will inevitably fall, to scrutinise carefully every provincial law, to ensure consistency between Acts of the Parliament and the laws of all 20 provinces when notice is given in accordance with s.35 (discussed *infra*). The resources of the centre are overtaxed in any case, and it might have been more desirable, while not precluding the National or provincial governments from seeking a ruling - preferably by way of declaratory order - to allow the question of consistency of National and provincial laws to be raised in the ordinary course of litigation. It seems that in as much as litigation will be contested by publicly funded lawyers they, and, in appropriate cases, the private legal profession, should not be powerless to raise what appears to be a clear question of inconsistency. However, the probable consequence of this is that if a private litigant becomes aware of a possible inconsistency in the course of legal proceedings in which he is involved, a reference to the office of the State Solicitor or Minister for Justice will bring about necessary action by the National Government, provided that no political factors influence the National Government not to take such action.

Section 29(1) purports to prevent the National Parliament from legislating with respect to a matter on the "concurrent" list in s.27 except in relation to a matter of national interest. Such a question is "non-justiciable" by virtue of subsection (2). However, questions arising under s.100 of the Constitution are justiciable, and it is suggested that s.29, like s.26, is clearly in breach of s.100(3). The conclusion is that for all practical purposes, the legislative powers of the National Parliament remain full and unfettered. There is no definition of "national interest"; and as such questions are non-justiciable, the judge of what is in the national interest is the Parliament, and not the Judiciary.

Division VI. 4.C of the Organic Law deals with consultation between National and provincial governments over the exercise of legislative powers. Section 31 requires the National Government to notify each province concerned of any proposed national legislation on a matter which is listed in s.27, at least two months before the making of an Act, unless the matter is one of national urgency, etc. The question of compliance with s.31 is non-justiciable, and failure to comply with the provisions of s.30(1) does not invalidate any law. The provisions of the subdivision must therefore be taken as a direction to governments to consult where possible, and no more.

Part VI.5 of the Organic Law empowers the provincial governments to make laws with respect to any other matter upon which the National Parliament has not enacted an "exhaustive law" and provided that the provincial law is not inconsistent with any Act of the Parliament (s.33(1)). If there is any inconsistency between a provincial law and an Act of the Parliament, the provincial law, by s.33(2) is deemed to have been repealed *by a provincial law*, to the extent of the inconsistency. This provision appears to be unduly complex, but the effect of s.23 of the Organic Law, and of the other provisions dealing with inconsistency are so closely modelled on the corresponding provision (s.109) of the Australian Constitution and the judicial application of that section by the High Court of Australia, that s.33(2) is necessary to prevent the revival of the provincial law upon the national law ceasing to operate because of repeal, effluxion of time or any other reason. The High Court decided in *Butler v. Attorney-General (Victoria)*26 that where a State law had been superseded by an inconsistent Commonwealth law, and the Commonwealth law subsequently ceased to operate, the State law revived.

The legislative power of the provincial governments in respect of "unoccupied" legislative fields is limited by s.32 of the Organic Law; a provincial government may not make laws under Part VI.5 with respect to matters which can only be dealt with by an Organic Law, an emergency law under s.226 of the Constitution, or matters which are dealt with in the Organic Law itself; matters which are dealt with in Part VI.3 (matters of primarily provincial concern) Part VI.4 (matters subject to "concurrent" legislative power) or Division X.2 (provincial taxation). Nor does legislative power under Part VI.5 apply to laws of the kind referred to in s.109(2) of the Constitution, which allows Acts of the Parliament to "provide for all matters that are necessary or convenient to be prescribed for carrying out and giving effect to this Constitution". Arguably, as the establishment of provincial government is the subject of Part IVA of the Constitution, the provisions of that

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26. (1961) 106 CLR 268.

Part and the Organic Law on provincial government are matters necessary for the putting into effect of the Constitution. Therefore matters such as the operation of the system of provincial government, and the making of provincial constitutions, are beyond the legislative powers of the provincial legislatures themselves. The consequence of this argument is that, despite the detailed system of controls which, under the Organic Law, the National Government may exercise over provincial governments, the National Parliament, by an ordinary Act, may alter the structure of any or all the provincial governments, provided that such alterations are not inconsistent with the Constitution or an Organic Law. Any purported change made by any or all provincial governments to their own structure is arguably unauthorised, as such alterations can only be made by an Act of the National Parliament under s.109(2) of the Consitution, because s.32(d) of the Organic Law excludes the provincial legislatures from this type of legislation.

Though failure to comply with section 35 does not invalidate any provincial law, that section does require provincial governments to give notice to the National Government of the making of all laws. The sanction for ensuring compliance with the notice provisions is found in s.36 which provides that a provincial law shall only come into effect 30 days after notice has been given to the National Minister as required by s.35. The requirement of notice has two effects. If the National Government is of opinion that the proposed provincial law is inconsistent with a National Law, it may commence appropriate legal action. This may be the simplest means of seeking to avoid the consequences of provincial legislation which the National Government finds undesirable, as, under s.37, provincial legislation can only be disallowed by a two-thirds absolute majority vote of the National Parliament, not less than two months after a resolution to consider the question of disallowance has been carried by a simple majority vote in the Parliament. In addition, s.37(4) requires consultation between the responsible National Minister and the provincial government on the question of the proposed disallowance of the provincial law - and consultation within the meaning of this section is probably of the type referred to in *Paikara v. Nau*.27 A resolution for disallowance of a provincial law requires the National Parliament to form the opinion that the disallowance is in the national interest. The provisions of s.37 would appear to be justiciable, but again, it is not for the courts to decide what is or is not in the national interest, and a finding of national interest by the Parliament, especially if the resolution recites that it is based on an opinion as to the national interests, would seem to be conclusive on the matter.

V. *Judicial Matters.*

Section 88(1) of the Organic Law precludes provincial governments from making any law relating to the administration of courts or the exercise of judicial power, except in the closely limited circumstances set out in Part VII. The National Parliament may, by an Act, confer power on provincial governments in relation to the administration of courts or tribunals, but not in relation to judicial powers or functions (s.38(2)(a)). Provincial governments may also establish administrative

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27. [1971-1972] PNGLR 354.

tribunals, and provincial laws may provide for the imposition of fines and penalties. The Provincial Courts (formerly the District Courts established under a pre-Independence statute of 1963), and the Local Courts, which have the function of carrying out the great bulk of the administration of the criminal law and a substantial part of the civil law in the country, remain firmly within the control of the National Government. However, s.40 permits the provincial governments to establish courts where this is permitted under Division VI.4 ("concurrent" matters). It is difficult to see how this power can be exercised, as it makes little sense in a country where resources, including the number of trained magistrates, are so scanty, to establish dual systems of "official" courts especially where the subject matter of one of those systems is so limited. The expenditure of scarce resources by provincial governments on a separate system of courts would seem ill-advised.

There already exists a dual system of courts in Papua New Guinea: the Village Courts, whose members are drawn from the communities they serve, and which settle disputes primarily by mediation and compromise, regardless of any distinction (in the first place) between "civil" and "criminal" matters, have been established since 1974. Under S.39 of the Organic Law, administration of the Village Courts may be the subject of provincial laws, but the jurisdiction of such courts is as prescribed by the *Village Courts Act* 1973 unless and until the jurisdiction is altered by or under an Act of the Parliament. The philosophy of the Village Courts is quite consistent with placing the control of the appointment, training, and administration of such courts, if not directly in the hands of the communities served by the courts, at the level of government which is closest to the grass-roots. Between 1974 and 1977 the Village Courts Secretariat established by the National Government, has developed considerable expertise in matters relating to the administration of the Village Courts. The *Village Courts Act* places a good deal of responsibility for administration and supervision of the courts with officers of the magisterial service, and provincial laws, it seems, would not be able to override any power or function conferred on any official by an Act of the Parliament. This factor, together with the good sense in relying on the accumulated wisdom of the Village Courts Secretariat, would suggest that provincial governments should not readily change the existing structure and functions of Village Courts without considerable thought. Any such changes, though supported by local politics, would have to overcome substantial problems, both legal and practical.

VI. *Delegation of Powers.*

In any system of government where legislative responsibilities are divided between different organs of government, it is desirable that those organs should be able to rely upon each other for the performance of certain functions where it is more convenient for one, rather than the other of those organs, to do so. Section 187C(5) of the Constitution states than an Organic Law shall provide for delegation of powers and Part VIII of the Organic Law, and especially s.43, is an attempt to put in statutory form the means of delegation of powers. Part VIII does not apply to the financial responsibility of the National Parliament to prepare the National Budget and to make national laws with respect to taxation, nor does it apply to judicial powers or functions.

Paragraphs 43(1)(c) and (d) also preclude delegation by the National Parliament of any power to make or amend a Constitutional Law or Regulation, or an Emergency Law, or to exercise any power or function given to the National Government under an Act of the Parliament. In addition, the National Parliament would have to beware of the effect of s.100(3) of the Constitution, as discussed earlier, in the unlikely event that it should wish to delegate more than a reasonable proportion of its legislative power to a provincial government.

The constitutional doctrine of non-delegation of legislative power is of doubtful validity,28 but the matter seems to have been put beyond doubt by s.43(3) which expressly authorises the power of delegation or sub-delegation.

VII. *Suspension of Provincial Governments.*

Having discussed the legislative powers of provincial governments, including the circumstances in which the National Government may disallow laws made by provincial governments, it may be worth at this stage examining the manner in which provincial governments may be suspended. The material discussed so far should indicate that the powers and functions of the provincial governments may be considerably less than is apparent at first sight, and that those powers and functions are less than was envisaged by the CPC, even though the CPC itself was not entirely clear about the details of powers that should be transferred from the centre to the provinces. Probably any attempt by the National Parliament to preclude itself by a Constitutional Law from legislation on a particular subject is invalid under s.100(3). Acts of the National Parliament may always supersede those of provincial governments; the National Parliament may, subject to certain requirements of manner and form, notice, and majorities, disallow provincial legislation which is deemed not to be in the national interest. In addition to these matters, s.187E of the Constitution, which follows closely the recommendations of the CPC, allows the National Parliament to suspend provincial governments, though not, without repealing the constitutional provisions, to abolish the system of provincial government.

The grounds upon which a provincial government may be suspended are set out in s.187E(1):

> (1) Parliament may, by an absolute majority vote, suspend a provincial government if -
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> (a) there is wide-spread corruption in the administration of the province; or
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> (b) there has been gross mis-management of the financial affairs of the province; or
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> (c) there has been a break-down in the administration of the province, or
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> (d) there has been deliberate and persistent frustration of, or failure to comply with, lawful directions of the National Government.

In addition, where a State of Emergency affecting either the province or

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28. D.C. Pearce, *Delegated Legislation* (1977) Ch.5.

the whole country is in force under Part X of the Constitution, s.187E(4) permits the National Executive Council, rather than the Parliament, to suspend a provincial government that cannot carry out its functions effectively. These grounds are basically those recommended by the CPC.29 The procedures to be followed when it is proposed that a provincial government be suspended are prescribed by Part XII.2 of the Organic Law. The motion for suspension may only be moved by a Minister, after the Head of State, acting with and in accordance with the advice of the National Executive Council has made a formal report for presentation to the Parliament that a ground for suspension exists, that the matter can only be resolved by suspension, and that suspension would be in the national interest (s.90(1)). It might have been possible when the National Government suspended the Bougainville Provincial Government in 1975, that a justification of the type referred to in s. 187E(1)(d) could have been sustained, but the constitutional laws may make such suspensions more difficult. There is a requirement for consultation, and again the decision of the pre-Independence Supreme Court in *Paikara v. Nau*[30] indicates the type of consultation required. The suspension of a provincial government appears to be a far more significant question than the alteration of council rules; however, the composition of the Gazelle Council, which was the subject of the alteration of the rules of the council considered in *Paikara v. Nau*, was also regarded as signifcant by virtually all of the Tolai community, and the court was satisfied that a minimum of formal consultation satisfied the requirements of the *Local Government Act* as to consultation in that area

Once a motion for suspension has been moved in the Parliament, it may not be withdrawn or dealt with until the Commission appointed under Part XII.2.B has either reported, or has failed to report within the permitted time (s.90(2)). The resolution will have effect only if it is supported by an absolute majority vote of the National Parliament on at least two occasions, more than 24 hours apart (s.91). The suspension of the provincial government takes effect from the time specified in the resolution, or, if no such time is specified, "at midnight on the day on which the resolution is made" which presumably means the day upon which the second vote is taken (s.92(1)).

The Commission, comprising four permanent members, two of whom are non-ministerial members of the National Parliament, and one additional member appointed *ad hoc* "to represent the interests of the province", (all members must be citizens (s.93)) is required to investigate and report to the National Parliament, especially on the views of the National Executive Council, within 21 sitting days of the resolution (s.94). With the exception of the provisions relating to the Commission, the provisions of the Constitution and the Organic Law follow closely the suggestions of the CPC, which were accepted by the Government. The investigating Commission may be seen as an unnecessarily bureaucratic requirement, but it serves three important functions: first, it may protect the National Parliament from accusations that it has acted from improper motives; second, it may serve to bring to light information which might not be produced in the ordinary course of Parliamentary debate, third, it may provide evidence which the National Government may use if the question of suspension is litigated. The delay while the Commission's report is being prepared

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29. CPC *Report, op. cit,* at paras. 10.198 ff.

30. [1971-1972] PNGLR 354.

may provide opportunities for compromise of the differences. It also allows the provincial government an opportunity to be heard and to present a case in its own defence, which is consistent with the theme of "natural justice" which runs through the Constitution. The Commission's report is in no way binding upon the Government or the Parliament. A National Government which chooses to suspend a provincial government when the report suggests that no ground for suspension is made out, or that the evidence is ambiguous, must face political risks, and also the possibility of a challenge to its actions in the courts.

Sections 95-99 inclusive of the Organic Law implement s. 187E(5) which provide for the National Executive Council to exercise the powers and functions of the provincial government during the period of suspension. These sections also provide for the continuing validity of legislation made by the suspended government, and of acts of the National Executive while it exercises the powers and functions of the suspended government.

Where a provincial government is suspended, the Constitution requires that the National Minister responsible for provincial government shall report immediately to the Parliament on the reasons for, and circumstances of the suspension (s.187E(6)(a)) and thereafter on the measures being taken to re-establish provincial government (s. 187E(6)(b)). Section 187F requires that provincial government be re-established, and fresh elections held for the provincial assembly, within nine months of the suspension. This period may, however, be extended by periods of at most six months by an absolute majority vote of the Parliament (s.187F(3)) and the period of nine months is subject to special provisions, (s.187F(2)) where the suspension of the provincial government takes place in the context of a State of Emergency. In any event, s.87 of the Organic Law provides that the suspension may be lifted by the Parliament at any time by an absolute majority vote.

The consitutional laws require that the structure of provincial government shall be maintained whenever this is possible. However, the power of the National Parliament to suspend provincial governments is relatively unfettered. Section 187E(1)(d) gives ample scope for the National Government to give directions to the provincial governments, and to suspend those governments if those directions, or National Government policy, is deliberately or persistently frustrated or is not complied with. Section 187F(3) allows the Parliament, provided the government can maintain an absolute majority, to maintain a suspension of provincial governments virtually indefinitely, and because of s.187E(5) and the provisions of the Organic Law giving effect to that section, the National Executive Council can exercise the powers and functions of the provincial governments during the period of any suspension. This amounts to a virtual guarantee that though provincial governments will be entrusted with matters regarded by the central government as essentially provincial, the central government always has the power to ensure that national policies are put into effect, and that ultimate political control rests with the central government.

There is no restriction on the justiciability of matters concerning the suspension of provincial governments. It seems, therefore, that the courts will have jurisdiction to ensure that the National Government does not abuse the powers which the Constitution and Organic Laws confer upon

it. For example, the courts, and not Parliament, would seem to be the final arbiters of whether or not a ground for suspension under s.187E(1) has been made out. Provincial government is a matter taken most seriously by the Constitution. Though the burden of proof of compliance with s.187E(1) will be the civil burden of establishing a case on the balance of probabilities, the courts will require that the burden be completely discharged. With respect, though there may be areas where matters arising under Constitutional Laws should not have been made non-justiciable, the question of s.187E(1) is one in which the decision of what is in the national interest, and whether provincial government ought to be allowed to continue, is basically political. For this reason the decision should have been left in the hands of the Parliament. As matters stand, the Supreme Court will unnecessarily, it seems become involved in predominantly political issues. Because courts tend to lean in favour of vested interests, they may be reluctant to find that a provincial government ought to be suspended. This reluctance may lead to frustration of the interests of the nation as a whole by the vested and local interests of a particular province.

VIII. *Administrative Structures.*

One of the main reasons why the CPC was so anxious to establish a system of provincial government was to ensure that the overstaffed and overcentralised bureaucracy bequeathed to the new State of Papua New Guinea would be dispersed and reorganised. Predictably, this was one of the main grounds of public service opposition to the CPC proposals on provincial government. Those proposals contained at paras. 10.157 ff. were that all administration should be coordinated at a provincial, rather than a national level. All members of the National Public Service working within a province should be responsible primarily to the Provincial Secretary, who would answer to the provincial government and yet remain a member of the National Public Service with the status of a Departmental Head. Though this suggestion apparently would give rise to a conflict of interest, the CPC appeared to consider that no such conflict would occur in practice, as the central government would be responsible for national governance and the provincial government for more local matters. This would reflect the change of the administrative system from one designed to carry out the policies and programs of a foreign colonial government to one designed to serve the needs of the people of the country and to fulfill the National Goals and Directive Principles. The changes would also involve a major reorganisation of central administrative departments, so that the focus of administration would be moved from the centre to the provinces. These recommendations followed closely the suggestions of Tordoff and Watts.31

The amendment to the Constitution does not mention administrative structure. Part IX of the Organic Law provides, in s.48, for the establishment of a provincial secretariat of not more than six persons, who are not members of the National Public Service, and who are under the sole control of the provincial government. These persons are

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31. *Op. cit.*

apparently intended simply to provide services to the provincial government. The Organic Law does not establish any office of Provincial Secretary as such. However, s.50(1) of the Organic Law provides that "The Prime Minister, on the recommendation of the provincial government made after consultation with the Public Services Commission, may, by notice in the National Gazette, appoint a member of the National Public Service to act for the purposes of this section in relation to a province". This person, under subsections (2) and (3), is to be stationed in the province, and to have the status of a Departmental Head in respect of members of the National Public Service assigned to work in the province. He is responsible, in so far as a departmental head under the *Public Service (Interim Arrangements) Act* 1973 is responsible to any person, to a Committee of Management to be appointed under a provincial law rather than to a Minister. This person is to be called the 'Administrative Secretary', and depending on the structure adopted by individual provinces, he will be responsible on some matters to the Provincial Executive either directly or through the Provincial Secretary.32

Section 49 provides that members of the National Public Service may be assigned to a provincial government by the Public Services Commission after consultation with the provincial government, and the salaries of these people are to be paid by the National Government. In addition, the Public Services Commission may assign other members of the National Public Service to the provincial Governments at a cost to be met by the provincial government. The provincial government may also employ individuals under contract, provided they do not have "any executive responsibility for the discharge of functions assumed by the provisional government" (s.46(1), though if any such person is employed for more than one year, s.46(3) requires the provincial government to consult with the Public Services Commission with a view to the assignment of a member of the Public Service to fulfil the functions of that person. Section 46 is designed specifically to cover consultants and advisers, and it also excludes from the operation of Part IX of the Organic Law employees of statutory authorities created by provincial governments. It will ensure that all permanent administrative and clerical officers are members of the National Public Service.

Section 51 requires the National Government to grant unconditionally to each province in any year a sum as provided in subsection (1), which is calculated on the basis of the amount of the salaries of a number of National Public Servants holding specified positions. This sum may be spent in accordance with the wishes of the provincial government, which is not required to employ persons holding positions at the specified level. The intention, however, is to ensure that the provincial administration is able to employ a minimum staff with appropriate experience and qualifications.

These provisions will not require that administration be carried out in the manner recommended by the CPC. They do, however, provide a basis for the establishment of a framework for the coordination

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32. Papua New Guinea, Ministry of Decentralisation, Office of Implementation, *Administrative Decentralisation* (1977).

of governmental activities at the provincial level. The Administrative Secretary is intended, apparently, to fulfill many of the functions which the CPC suggested should be performed by the Provincial Secretary as well as those of the former Provincial Commissioners. He is, by s.50(4) responsible to the Committee of Management - but he is also responsible to the Public Services Commission on matters of employment. All members of the National Public Service, indeed, except as required by any law relating to the National Public Service, by s.47(2), "are subject to the direction and control of the provincial government." Thus members of the National Public Service who are assigned to the provincial government staff will be subject to control, on matters of policy, by that government. The legal framework does allow the National Government a substantial measure of control, at least indirectly; its approval, and that of the Public Services Commission, is required before any member of the National Public Service is transferred to a provincial staff, and it may thus, by restricting the manpower available for provincial staffs, limit the activities of provincial governments. There is no requirement that any of the activities of the national Public Service should be transferred to provincial administration, or that any central administration departments should be disbanded or reorganised. Since Independence, though provincial administrations in many parts of the country have taken on considerable responsibilities, there is little evidence that the size of any of the major national administrative departments has been reduced, though Conyers has stated that some departments have made considerable efforts towards decentralisation and coordination at provincial level.33 The appointment, in 1976, of a Minister responsible solely for provincial government, special attention by the Public Service Commission, and the establishment of an Office of Implementation show that in pratice the National Government is committed to decentralisation though this commitment is only one way in which the structural provisions of the Constitutional Laws may be implemented.

Section 24(1)(b) provides that primary schools are a matter falling within the exclusive legislative power of the provinces. Accordingly s.52 provides for the continued availability of members of the National Teaching Service to staff primary schools and for the eventual transfer, by agreement of national and provincial governments, of teaching staff to the control of the provincial executive.

IX. *Provincial Boundaries.*

Recommendation 10.2 in the CPC report was that provinces should be established on the basis of the administrative districts which existed before Independence. This recommendation was designed as a counter to suggestions that the intermediate level of government in Papua New Guinea should be "regional" government, e.g. based on a division of the country into a small number of large regions. The basis for such regions existed under certain pre-Independence administrative arrangements. However, the CPC, whose views on this matter were accepted by the government, believed that a regional administration would suffer from most of the same defects as a single central administration, and would in particular be too remote from the people it was designed to serve.

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33. *Op. cit.*

The Organic Law on provincial government makes no mention at all of the boundaries of provinces. Section 4 of the Constitution provides for the establishment of a National Capital District, and s.5 for an Organic Law to make provisions for the division of the country into provinces. In fact, the Organic Law on Provincial Boundaries certified on September 12, 1975, provided for the establishment of provinces on the basis of existing district boundaries. In cases where the people of a particular area wish to divide an existing province, the Parliament has made provision for the creation of new provincial boundaries by a further Organic Law. It makes sense for such a procedure to be followed, as it is no real extra effort for the Parliament, when approving the grant of provincial government under s.4 of the Organic Law on provincial government, also to make an Organic Law providing for boundaries.

X. *Financial Matters.*

The key to the division of power and responsibility between different levels of government is finance. It was recognised by the CPC that if provincial government did not have sufficient revenue, it would not work. It therefore recommended, in paras. 10.111 - 10.127 of its report, that the Constitution should provide for provincial governments to have a guaranteed source of revenue. These sources would be grants from the National Government, and also revenue raised from local sources. The CPC was, of course, committed to a unitary system of government, and therefore recommended that major sources of revenue, including taxes on income and corporate profits, and customs, excise and other import and export duties should be left solely in the hands of the National Government, to ensure the fiscal dominance of the National Government Accordingly Part VII.1.A. of the Constitution gives to the National Executive Council the sole initiative for the raising of taxes and loans, and vests control of such matters solely in the National Parliament. This is a fundamental federal principle.

Section 115 of the Organic Law continues in force all national laws with respect to taxation, including types of taxation which are reserved to the province, unless and until a provincial law is made which deals with that kind of taxation

In other states, such as Australia, where there is a division of governmental responsibility, finance lies at the roots of most differences between governments at the various levels, and is a constant source of inter-governmental litigation and non-litigious disputes. Mathews and Jay have written what amounts to an economic history of Australian federalism based on financial relations between the States and the Federal Government.34

Writing of "fiscal balance" in a Federal system, Professor Russell Mathews says:

> Vertical fiscal balance in a federal system requires each level of government ... to have the financial resources necessary for it to carry out its constitutional responsibilities. For each level of government, expenditure needs in relation to those responsibilities

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34. R.L. Mathews and W.R.C. Jay, *Federal Finance* (1972).

> will of course change over time: Vertical fiscal balance implies that the sources of finance available to that level of government ... are flexible enough to permit a conscious balance to be struck between financing decisions and the expenditure decisions.35

On this test, the constitutional provisions for provincial government in Papua New Guinea employ a built-in vertical fiscal imbalance, requiring substantial transfers from the National Government to the provinces. As the National Government controls the greater part of these transfers, it has a ready instrument for exercising control of the policies and finances of provincial government, and of ensuring that its policies prevail over those of provincial governments.

Section 187H of the Constitution provides for an Organic Law to establish two distinct bodies concerned primarily with fiscal matters. The National Fiscal Commission is mentioned in s.187H(1) of the Constitution and Part XI.1 of the Organic Law. The remainder of s. 187H, and Part XI.2 of the Organic Law deal with the Premiers' Council. Both these bodies resemble very closely bodies established at the federal level in Australia. The Commonwealth Grants Commission has been in existence in various forms since 1933, and is established under a series of Commonwealth Acts. It is responsible for the allocation of grants to the States out of Commonwealth funds. The Premiers' Conference is an informal body which meets at irregular intervals to discuss matters of mutual concern to the Commonwealth and States, many of which are fiscal. These conferences have no basis in the Australian Constitution or in statute law. In addition, the Financial Agreement of 1927 between the Commonwealth and the States led to the assumption by the Commonwealth of the loan debts of the States. All future loans were to be made to the Commonwealth, and the Loan Council, established by the agreement, comprising representatives of the Commonwealth and the States, has since that time supervised the allocation of loan moneys between the various parts of Australia.36

In Papua New Guinea, s.71 of the Organic Law limits the power of provincial governments to borrow money. Under s.71(3) provincial governments may only borrow money for a period of up to six months, or from the National Government, with the prior approval of the National Government. All other borrowing must be by the National Government, provided that, if a loan concerns "major investment" in a province, s.85 of the Organic Law provides for consultation between the national and provincial governments. Section 84(a) requires the Premiers' Council to discuss all matters relating to loans.

Section 53 of the Organic Law states that the sources of provincial finance comprise the receipts from taxes which the provinces are empowered to collect under the provisions of the Organic Law, grants from the National Government, the proceeds of court fees and fines in provincial courts, other provincial charges which may lawfully be imposed, income from property and investments of the province, and other funds authorised by an Act of the Parliament.

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35. "Federal Balance and Economic Stability" (Presidential Address to A.N.Z.A.A.S., Melbourne, 1977) (Mimeo. p.2.).

36. R.J. May, *Federalism and Fiscal Adjustment* (1969); Mathews and Jay, *op. cit.*

Section 55 provides for immunity of the activities of property and "instrumentalities" (neither of which term is defined) of national and provincial governments with respect to taxaction by each other. Sections 56 and 57 of the Organic Law provide for the types of taxation which may be imposed by a provincial government. Section 56(2) purports to preclude the National Government from imposing any tax of the type listed in s.57, but this provision may contravene s.100(3) of the National Constitution. Section 57 provides:

> The kinds of taxation referred to in Section 56 are -
>
> (a) retail sales tax, in accordance with Section 58; and
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> (b) taxes on public entertainments for which admission is charged, and on places kept for the purpose of such entertainments; and
>
> (c) fees for licences for mobile traders (other than mobile banks within the meaning of the pre-Independence *Banks and Financial Institutions Act* 1973); and
>
> (d) fees for the licensing of places where intoxicating liquor is sold; and
>
> (e) fees for licences to operate or carry on gambling, lotteries and games of chance; and
>
> (f) taxes on land, in accordance with Section 59, and
>
> (g) head tax, in accordance with Section 60; and
>
> (h) any other tax that could, and to the extent that it could, have been imposed, immediately before the commencement of this Organic Law, by Local Government Councils.

The sections following define matters such as retail sales tax (s.58), taxes on land (s.59) and head tax (s.60). Of these, only head tax was widely imposed in the country before Independence, in the form of taxes payable to local government bodies. The other types of tax are designed to bolster the revenues of provinces from sources previously untapped in Papua New Guinea. The powers of provincial governments to raise revenue are limited by the provisions of s.61. Under that section, the National Parliament may repeal or alter a provincial law imposing taxation, and may require the provincial government to make restitution of taxes imposed under a law which is so altered or repealed. The National Parliament may so act where the provincial rate is set at an unreasonably high level; where it discriminates "unjustly" between persons, or discriminates "unjustly" against persons or products from outside the province. Section 61 is designed to ensure that the National Parliament, by an ordinary Act, may ensure that a common market for goods, services or labour is maintained within the country, and that the persons controlling a provincial assembly do not use taxes to impose an unfair burden upon members of other language, cultural or ethnic groups. By preventing the provincial government from imposing unduly high levels of provincial taxation, the National Government can ensure that it, and

it alone, maintains control of the economic management of the country. However, the National Parliament is required, before making any law under s.61, to refer the question to the National Fiscal Commission, in accordance with s.62. The report of the Fiscal Commission is not binding on the National Executive Council or the Parliament, and because s.61(3) makes non-justiciable questions as to the propriety of an Act under s.61, or the grounds for the making of such an Act, the decision of the National Parliament is final on such questions.

The income of provincial governments permitted under these provisions will only partly satisfy the financial requirements of provincial government. The main source of funds will therefore be grants and subventions from the National Government.

Part XI.3 of the Organic Law deals with grants by the National Government to Provincial Governments. Section 64 provides that in each year the National Government shall unconditionally grant to each provincial government an amount calculated in accordance with Schedule 1 of the Organic Law. The amount is based on the cost to the National Government in the financial year 1976-1977 of an activity carried on by it in the financial year 1976-1977 and transferred at any subsequent time to the provincial government. This figure is to be "indexed" to the cost of living, or the percentage of increase in the payments into consolidated revenue for the preceding financial year. If the payments into consolidated revenue in the preceding financial year show a decrease, then the unconditional grant from the National to the provincial Government will be decreased accordingly.

In addition to the unconditional grants, the National Government may under s.65 grant to the provincial government an amount agreed upon by the two governments for a purpose agreed by them. An amount so granted may be used by the provincial government only for the agreed purpose. This provision is substantially different from s.96 of the Australian Constitution, which does not in terms require the agreement of a State to the making of a conditional grant of financial assistance. Section 96 has been used by Australian federal governments of various shades of political opinion as a means of carrying out policies for which it lacks legislative power under the constitutional division of powers between the States and the Commonwealth. Conditional grants in Papua New Guinea require the *agreement* of the provincial government: it is not sufficient that there be *consultation*. Thus the system of conditional grants which has been used so effectively in Australia to implement the policies and programs of the Federal Government would not necessarily be effective in Papua New Guinea.

Section 66 provides that the National Government shall grant to the provincial government concerned an amount equal to 1.25% of the value derived from the export of goods from the province in the preceding fiscal year, less the total amount of royalties in respect of minerals (including petroleum and natural gas, timber, fish and privately-generated hydro-electricity) which, under s.67, must be paid as soon as practical after the end of each fiscal year to the province from which they are derived. The "value derived" is to be calculated in accordance with Schedule 2 of the Organic Law. The concept of a "derivation grant", in Papua New Guinea, can be traced to the demands of the local leaders in Bougainville for a share of the governments' receipts from the copper mining operations at Panguna in that province. Papua New Guineans do not share the attitudes of English common law with

respect to land and minerals contained in the land. It was regarded as a significant challenge to the British and Australian concept of reservation of mineral rights to the Crown when the House of Assembly in 1968, against the wishes of the Australian administration, amended the Bougainville Copper Agreement legislation to allow for the payment of a royalty to the dispossessed landowners.37 The amendment was supported by a substantial majority of the Papua New Guinean members of the House. This move established the principle that extractive industry should, in addition to the payment of royalties to the State, compensate those who suffered directly from its activities, and the activities of the Bougainville secession movement were always motivated by the desire that the people of Bougainville, which produced revenue, should reap a greater part of the benefit of that revenue than other Papua New Guineans, with whom they had little in common.

The principle of derivation grants has now been extended to other areas of substantial export earnings, such as other mining activities, forestry and fisheries, and to the use of natural water for generating hydro-electricity.

It is intended that it will not be necessary for the National Parliament to appropriate annual sums from consolidated revenue and to pay them to the provinces to satisfy the obligations imposed upon it by ss.64, 66 and 67, for s.68 provides for a standing appropriation of such amounts. It is at least arguable that s.68 offends against s.209(2) of the National Constitution which appears to require *annual* budgets and appropriations, though in general practical terms there is no reason why a standing appropriation of the type which s.68 of the Organic Law purports to make should not be permitted.

Sections 72, 73 and 74 of the Organic Law require provincial governments to keep proper books and records, and make these available to, and subject to audit by, the Auditor-General, who must examine the accounts and records annually and report thereon to the Minister and to the provincial government.

The minimum unconditional grants required to be made under s. 64(2) may be supplemented by further unconditional grants out of national funds, though it will, in any year, be a political question, for decision by the National Government and Parliament, whether any such grants are to be made, and if so, how much money is to be made available for such grants. The primary function of the National Fiscal Commission, is to recommend to the National Executive Council on the allocation of such grants between the provinces (s.78(1)(b)). The Commission is formally established by s.75 of the Organic Law, and s.76 provides that it shall be independent of the control of any other person or body in the performance of its functions. Under s.76, the Commission is comprised of five citizens, appointed for four years on the advice of the National Executive Council, following consultation with the heads of provincial governments which have been established, and with the chairman of Area Authorities, and the leaders of provincial constituent assemblies, in cases where provincial government is not yet established.

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37. D. Woolford, *Papua New Guinea, Initiation and Independence* (1977) 32-33, 225-227, Cf. J. Momis, 'Bougainville Copper: The Case for Re-Negotiation" in P. Bayne and J. Zorn, eds. *Foreign Investment, International Law and National Development* (1974), and A. Paliwala, "The Bougainville Agreement. Is a Deal a Deal?" (1974) 2 *Melanesian Law J.* 130.

The Commission established by the Constitution is quite different in composition and in function to that recommended by the CPC in paras. 10.153 - 10.156 of its report. The CPC envisaged an expert body, whose members would not necessarily be citizens even though this departed from the CPC's general principle that members of all bodies established under the Constitution should be citizens. According to the CPC, the Commission should make long-term recommendations to the National Parliament on the allocation of unconditional grants. It would be required to report on the allocation of grants over a four-year period. It should include people professionally qualified in accountancy, economics, law and one, at least, in social services. The members should be:

> neither too strongly oriented towards the executive arm of the National Government, nor antipathetic towards its objectives .... they [should] take social as well as economic considerations into account in framing their recommendations.38

The Parliament has chosen to pass over this advice, and preferred to adopt the Australian model which was better known to the administrators. Because few citizens as yet have the requisite knowledge and experience in economics, public finance, the legal intricacies of intergovernmental relationships etc., the members of the Commission may not be able to supply the guidance of disinterested experts which the CPC envisaged. It may also be that the Commission will be unduly influenced by political considerations. In addition to its functions relating to the disallowance of laws imposing provincial taxation under s.61, and advising on the allocation of funds available for unconditional grants to the provinces, under s.79, the Commission may also advise on any fiscal matter referred to it by the National or by a provincial government (s.78(1)(c)). Sections 80 and 81 deal with meetings of the Commission, and provide for matters relating to its staff and administration to be laid down in an Act of the Parliament.

In Australia, the basis of the operation of the Grants Commission, at least until 1973, was to ensure that funds made available to the States by the Federal Government shall be distributed so that, as far as possible, the benefits are spread as evenly as possible over the population, subject to certain allowances for areas which are in special need. Section 79(4) lays down guidelines for the recommendation on the disbursement of unconditional grants to the provinces of Papua New Guinea which are based on similar principles.

The Minister is required by s.79(2) to consult the Commission before any decision is made as to the allocation of unconditional grants to the provinces in any year. Subsection (3) requires the Commission to consider the matter and to "recommend to the National Executive Council a just and equitable allocation, within the limits of finance available, to each province". Under s.79(4) the Commission must:

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38. CPC Report, *op. cit.*, para. 10.154.

in principle, base its decision on equal grants per head of population, at its estimate of population, to each province, and

(b) may depart from the principle set out in paragraph (a) where, and to the extent that, in its opinion -

(i) the location and physical nature of a province; or

(ii) the lack of development of a province, or

(iii) any other relevant factor (whether or not of a similar kind),

would make the strict application of that principle unjust or inequitable.

It should be emphasised that the recommendations of the Commission do not bind the National Parliament. There is a definite possibility that the National Parliament might exercise its power of granting or withholding unconditional grants, even those recommended by the Fiscal Commission, on political grounds. Though the agreement of the provincial governments are required for grants under s.65 of the Organic Law which are *formally* to be applied to specific purposes, it is well within the range of political possibilities that *informal* pressures could be used to influence provincial governments, backed by the sanction that an unconditional grant might be withheld.

The provisions of s.79(4) also open the way to the politicization of the National Fiscal Commission, especially as this body may be comprised of members appointed for political reasons, rather than the independent experts suggested by the CPC. Mathews39 explains how at one period the Commonwealth Grants Commission penalised claimant States which did not follow financial policies of which it approved. Though the CPC saw the Fiscal Commission as a body whose task would be to equalise the *per capita* expenditure of public sector funds throughout the country, while maintaining the responsiveness and flexibility that provincial government was supposed to bring, the legal provisions will enable the Fiscal Commission, acting under s.79(4)(b)(iii) to penalise those provinces which did not follow policies which are acceptable. Again, as Mathews points out,40 the imposition of requirements in order to qualify claimants for grants can be a means of increasing the powers of the central fiscal body.

In Australia, Commonwealth-State financial arrangements have been almost as fruitful a source of constitutional litigation as the

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39. R.L. Mathews, "Fiscal Equalisation in Australia: The Methodology of the Grants Commission" (1975) Finanzarchiv (N.S.) 66: Centre For Research on Federal Financial Relations Reprint No. 10.

40. R.L. Mathews, "Mechanisms for Fiscal Equalisation in an Integrating European Community" (Centre for Research in Federal Financial Relations Reprint No. 19, Canberra, 1977). Cf. May, *op. cit.*

limits of the Commonwealth's legislative powers.41 Thus section 187H(5) of the Constitution provides that "A major function of the [Premiers'] Council ... shall be to avoid legal proceedings between governments by providing a forum for the non-judicial settlement of inter-governmental disputes." The success of Village Courts has shown that between individuals, mediation and compromise, the 'Melanesian Way' of dispute settlement, can work. It is, perhaps, a pious hope that the same principles will be able to settle inter-governmental disputes between politicians who, in order to achieve office, must have acquired a reasonable amount of experience and craft. It is just as important to politicians in Papua New Guinea as it is to politicians anywhere else, not to appear to lose face or to fail to protect the interests of their constituents. Yet a compromise of the type envisaged by s.187H could lead to political attacks. It is much easier for politicians to leave decisions to a supposedly neutral court, which can always be blamed if the resolution of the dispute is politically unpalatable. It remains to be seen whether the Premiers' Council will have the desired effect. The Constitution (s.187H(6)) allows an Organic Law to vest mediatory or arbitral functions in the Council to that end, but the Organic Law on provincial government, in s.84, merely requires the Council to provide a forum for the non-judicial settlement of inter-governmental disputes.

The composition of the Council, which is formally established by s.82 of the Organic Law, is set out in s.187H(2) and (3) of the Constitution. The members are the Prime Minister, or his nominee, who shall be chairman, the Ministers responsible for provincial and financial affairs the head of each provincial government or his nominee, and the representatives of provinces which, at the time, have no provincial government. The Constitution states that the Organic Law shall provide a method of appointment of these representatives, but no such provision appears in the Organic Laws. The council may be compared with the advisory council on inter-Governmental relations established by the Australian (Commonwealth) Government in 1976.

Section 84 provides that the Premiers' Council shall meet at least once in each year to discuss all matters relating to provincial finance, provincial legislative powers, and other matters of inter-provincial or inter-governmental concern.

XI. *CONCLUSION: Bulsit bilong mekim bel isi.*

The *tok pisin* title to this Chapter summarises the author's view of the worth of provincial government in Papua New Guinea. *Bulsit* is not as strong an expression in *tok pisin* as its literal translation is in English, *'mekim bel isi'* means to keep tempers calm. Provincial government, in the view of the CPC, was a real means of bringing government closer to the people, and of breaking down the bastion of bureaucracy established by the Australian colonial administration.

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41. G. Sawer, *Australian Federalism in the Courts* (1967).

What emerges, in legal terms, from an analysis of the amendment to the Constitution and from the Organic Law is a confirmation that, though provincial governments will be staffed, the administrative structure established before Independence remains largely unaltered. There is a division of legislative and executive responsibility between the National Government and the provincial governments, but one in which the real powers of provincial government are strictly limited. Those powers are limited by the nature of that division; they are limited because the National Government has firm control of the administrative staff that will be assigned to the provinces; and they are limited because, despite the guarantee of a measure of finance through constitutionally guaranteed minimum unconditional grants, and derivation grants, the provinces will remain firmly dependent upon the centre for adequate finance. The main sources of public sector finance in Papua New Guinea will remain customs and excise duties, personal and corporate taxation, and foreign aid, all of which remain with the centre. In those provinces which contribute substantial export earnings, derivation grants may be a fairly significant contribution to provincial revenues. In others, fiscal dependence on transfers from the National Government will be more marked. The two provinces in which the movement for provincial government has the greatest popular support are Bougainville, with a large proportion of mineral exports, and East New Britain, which exports significant quantities of timber and fish.

Well before Independence, the secession movements in Bougainville, and, to a slightly lesser extent in East New Britain, posed a significant political problem for the National Government. These movements may have many causes, but one of them was certainly a general popular feeling of remoteness from the centre of power, and of being pushed around by the administration, most directly by the *kiaps*. The substitution of black faces for white in the government offices in Port Moresby and in the villages made little difference to these feelings, not least because, in the case of both Bougainville and East New Britain, the majority of the black faces belonged to people who, ethnically and culturally, were as distinct from the islanders of Bougainville and the Tolai of East New Britain as were the Europeans. Popular feeling was quite capable of leading these people, and people in other parts of the country to militant action. Some action at the centre was politically necessary to avoid violence and the division of a country, which though an artificial creation of colonial rule, needed to remain unified in order to survive economically. The CPC had consulted widely with the people, and it found that the feelings of remoteness and alienation were not confined to any particular parts of the country, although there were differences of degree. It saw the opportunity to combine the creation of a system of government which would be responsive to local demands and more accessible to the people with an important measure of needed administrative reform, by moving the focus of administration from the centre to the provinces, and thus breaking up the colonial administrative machinery. The CPC's proposals were both a response and a solution to the problem of changing a colonial system of government and administration to one which, in its opinion, was better suited to the needs of the country and the people.

The constitutional arrangements for provincial governments are certainly a response to the problem of the colonial legacy, and, in

political terms, may provide an answer. However, they are a palliative rather than a cure. The National Government, with the undoubted support of the Public Service establishment, has ensured that real control may be maintained at the centre. The machinery established by the constitutional arrangements is such that if the National Government has certain policies which it wants to be carried out by provincial governments, its ability to control provincial administration (by control of manpower) and of provincial finance can ensure that its wishes prevail, even though this means of control may not be capable of producing the desired results immediately.

There are some short-term deficiences of provincial government. The resources - principally of capital and manpower - available to Papua New Guinea are limited. The establishment of a system of provincial government means that a substantial part of those resources must be diverted from national purposes to the establishment of the machinery of provincial government. Experts, especially economists, lawyers and skilled administrators, whose talents might be more effectively used for national purposes, will be required to work at provincial level, and the effectiveness of these experts will be limited, because most real policy making and administration remains with the National Government and the central administrative departments. It is necessary to ask whether the country can afford this use of scarce resources in a manner which is obviously wasteful. If the CPC proposals had been implemented in full, so that provincial governments had a real role in policy making, and were the focus of all government activities in the province, the diffusion of scarce resources would probably be justified, if not in terms of pure economic costs and benefits, certainly by the benefits flowing from responsive and accessable administration. While the system of provincial government remains so tentative,and always subject to the supervision of the National Government and administration, the justification is less clear.

The people of the country almost certainly welcome any form of provincial government. However, the present arrangements may contain the seeds of destruction of the existing constitutional structure. If provincial governments are frustrated by the central government, the people of the provinces will demand more real power for provincial government. This could lead to heightened feelings of provincial solidarity which would create greater division within the nation. If, on the other hand, provincial governments are given too much real power, national policies may suffer; the important aim of spreading economic benefits equally among the people of Papua New Guinea will be frustrated, and the division of rich and poor provinces will become more marked.

The solution suggested by the CPC may have been subject to the same criticisms. The CPC itself was aware of this, and its report indicates that it had considered the possible divisive effects of provincial government. The CPC was as committed to national unity as is the present National Government; like the National Government it saw the need for some concession to the wishes of the people for more accessible administration. Its suggestions, it seems, provided a more effective solution to these problems, as well as others, than the present constitutional arrangements, which, in legal terms, appear to be mere window-dressing.

These remarks are made in the spirit of a lawyer's criticism, in which it is necessary to point out how the laws *may* operate. It is not certain that they *will* operate in that way. Given a proper approach by the National Government to the political issues of provincial government, there are few reasons why the system of provincial government which the CPC envisaged, and to which the government committed itself in its 1974 proposals on the Constitution, should not be realised. The law simply does not provide the safeguards for the system of provincial government which the CPC thought would be necessary.