

## DECENTRALISATION: CONSTITUTIONAL FORM AND POLITICAL REALITY\*

This paper is narrow in its geographic focus and modest in its scope. And it is concerned more with politics than with law. But the question it addresses is, I believe, significant and of some relevance to other Pacific states facing demands for local autonomy. That question is twofold: what is the substance of 'decentralisation' as embodied in the Papua New Guinea Constitution and Organic Law on Provincial Government; does the political reality of decentralisation correspond to the concept elaborated by the 'founding fathers'?

### **The concept**

In the course of planning the Constitution, the Constitutional Planning Committee (CPC) made an early decision in favour of decentralisation. In its *1st Interim Report* of September 1973 it discerned 'the emergence of some clear majority views', according to which 'a system of district government should be introduced with greater powers for districts than those vested in area authorities' (ibid.).

Two months previously the CPC had been presented with a demand for immediate district government<sup>1</sup> in Bougainville and

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\* This paper was written for a legal workshop on Pacific constitutions and was first published in Peter Sack (ed.) *Pacific Constitutions* (1982). It makes extensive use of material presented in a consultancy *Report to the Committee to Review the Financial Provisions of the Organic Law on Provincial Government* (May 1981).

<sup>1</sup> 'Districts' were renamed 'provinces' in 1975, though the term 'provincial government' was in widespread use from around 1973.

a detailed draft (prepared by the Bougainville Special Political Committee (BSPC)) of the form which it should take. Referring specifically to the demand from Bougainville the CPC proposed a tripartite meeting between the national government, the CPC and the BSPC 'to find a solution to the immediate Problem of making interim arrangements for district government [in Bougainville], pending the Committee's final recommendations' (CPC 1973a:9-10). In its *2nd Interim Report* of November 1973 the CPC noted that this proposal had been accepted by cabinet 'subject only to the condition that any agreement which might be reached must be within a general legislative framework to be applied to the country as a whole' (1973b:1/7), and on the general question of decentralisation it said:

We are convinced it is essential that decentralisation of decision-making be political and not merely bureaucratic if the basic objective of involving our people as much as possible in their own development is to be achieved. [ibid.:4/3]

It saw district-level government as:

an important step towards accommodating strong political pressures for the granting of significant autonomy to particular areas of the country which have been building up over the last five years. [ibid.:4/4]

The *2nd Interim Report* did not resolve the question of what powers should be exercised by provincial governments though it did recommend that there should be a single national public service and that 'certain powers should be vested by law in provincial governments'. The subject was then referred to expert consultants, W. Tordoff and R.L. Watts.

The precise form of provincial government which was finally recommended by the CPC in its *Report* of 1974 drew heavily on the recommendations of the consultants' *Report on Central-Provincial Government Relations* (Tordoff-Watts Report) 1974. Their

terms of reference required them to outline options and make recommendations:

... bearing in mind the [CPC's] firm commitment to the development of a strong form of provincial government (which is a decentralised form of government within a unitary system, subject to political control at the district [i.e. provincial] level). (1974:i)

And amongst a number of premises which Tordoff and Watts listed before proceeding to the body of their report, the first was that:

The form of decentralisation advocated by the C.P.C. is a fully decentralised system within a unitary state rather than a federal system. Under the proposed system it is intended... that provincial governments would enjoy considerable autonomy, but that they would not have coordinate authority with that of the central government (a characteristic of the federal principle). Provincial government would remain subject to final overall policy direction and control from the central government. They would be subordinate governments and the supremacy of the National Parliament would be unimpaired (*ibid.*:1/3-1/4).

Tordoff and Watts considered three alternative types of decentralised political systems: unitary, federal and confederal. Having dismissed the last two of these ('no-one has advocated a confederal scheme'; 'a federal system would be inappropriate') (*ibid.*:3/1-3/2), they distinguished three broad types of unitary system: completely centralised unitary system; unitary systems with administrative devolution and limited political devolution; and unitary systems with moderate or full political devolution. After considering the relative advantages and disadvantages of these alternative types of unitary system the consultants recommended:

... that a fully decentralised system of unitary government should

be constitutionally assured as an ultimate goal, but that it evolve by stages, with each province beginning at that stage most consistent with provincial capacity (ibid.:3/9).

The recommendations of the CPC are set out in chapter 10 of its *Final Report* (1974), which also contains a schedule of proposed national, provincial and concurrent powers. It noted:

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. [1974:10]

The government's 'white paper' (*Proposals on Constitutional Principles and Explanatory Notes* [Papua New Guinea, 1974]) which challenged the CPC recommendations on several points, expressed some reservations about the proposals on provincial government, but 'strongly supported' the principle.

Following the conclusion in March 1975 of the House of Assembly debate on the provincial government proposals, an interparty Follow-up Committee was established to draw up an organic law. The committee was assisted by consultants Watts and W.R. Lederman, who presented a rough draft of the Organic Law in July 1975. The Watts-Lederman draft was intended, in the words of its authors:

To put the relations of the national government and the provincial governments on a flexible but definite basis that provides a strong central national government along with significantly autonomous provincial governments (ibid.).

The sequence of events concerning provincial government between 1975 and 1977 is well-known and has been documented elsewhere (Conyers 1976; Conyers and Westcott 1979; Standish 1979; General Constitutional Commission 1980; Ballard 1981). There was: the decision of the Constituent Assembly in July 1975 to exclude the provincial government provisions from the Con-

stitution; the preparations, nonetheless, for the introduction of provincial government, including the establishment of the Bougainville Interim Provincial Government in July 1974 and the creation of constituent assemblies in other provinces; the Bougainville negotiations, culminating in the Bougainville Agreement of August 1976; and the eventual decision to reinstate the provincial government provisions through amendment to the Constitution and the passage of the Organic Law.

As I read it, the Organic Law which was passed in 1977 differed from the Tordoff-Watts/CPC recommendations in some significant respects (reflecting some of the differences which emerged between the government and the Nationalist Pressure Group during 1974 to 1975 – already partially taken into account in the draft Organic Law prepared by Watts and Lederman – and some of the particular circumstances of the Bougainville negotiations and agreement); but it retained the broad features of the fully-decentralised-unitary-system model put forward in 1974.

It might be noted, however, that Goldring sees the situation differently:

The structure of provincial government recommended by the CPC was quite different from that which has emerged in the Constitutional provisions of the Organic Law. [1977:253]

The latter he describes as '*Bulsit bilong mekim bel isf*':

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 (*ibid.*:283).

The political circumstances in which provincial government was proposed, planned, rejected, revived and then haltingly implemented obviously had much to do with people's reasons for rejecting federalism, and opting for what the Tordoff-Watts Report described as 'a fully decentralised system of unitary gov-

ernment', but these circumstances will not concern me here. Nor will I attempt (except by way of an indulgent footnote<sup>2</sup>) the fruitless task of trying to locate Papua New Guinea's Organic Law on Provincial Government on a continuum from confederation to centralised unitary state. The important thing is that the CPC, and subsequently the National Parliament, specifically rejected federalism for a unitary system, and the Organic Law on Provincial Government was intended to give expression to this decision.

What, then, are the essential elements of the relationship between the national government and the Provinces as defined by the Constitution and the Organic Law? The essential elements are to be found in the provisions concerning: the status of the provincial governments; the division of powers between the national and provincial governments; procedures for settling disputes between the two levels of government; intergovernmental financial relations; and administrative relations. The following paragraphs will attempt to sketch briefly what I see as the more important provisions in these five areas. (For a more thorough examination of the constitutional structure of provincial government in Papua New Guinea see Goldring 1977.)

### *Status of provincial governments*

The subordinate status of the provincial governments in Papua New Guinea's constitutional arrangements seems to be clearly reflected in several provisions of the Constitution and Organic Law: e.g., s.187D of the Constitution (inconsistency and justiciability of provincial laws); 55, 28, 29 and 37 of the Organic Law (which respectively secure the power of the National Parliament to make laws for the peace, order and good government of Papua New Guinea; restrict the 'concurrent' legislative powers of provincial governments where there is existing national legislation or in matters of 'national interest', and enable the

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<sup>2</sup> For a general critique of attempts to 'define' federalism, see May (1969:10-11). Also see Riker (1969, 1970) on 'the triviality of federalism'.

National Parliament to disallow a provincial law 'if in its opinion the disallowance is in the public interest'; s.187E of the Constitution and ss.86-98 of the Organic Law (suspension of provincial governments), and, as Goldring notes, in relation to the public service and fiscal matters. It is these which identify Papua New Guinea's system of government as unitary.

As against this constitutional statement, however, it might be noted that the Bougainville Charter states that: 'the relationship between Provincial and Central authorities, are [*sic*] founded on principles of complementarity, [and that] one is not inferior in its nature to the other' which, as Goldring comments, 'asserts even more than federalism' (1977:251n) – and that in a submission to the third Premier's Council (PC) conference in 1980 it was stated (by a provincial government – apparently without challenge) that: 'the most important and fundamental principle that both national and provincial governments should bear in mind . . . [is that] both governments are equal partners in the Process of Governing the Country' (PC 3/3/80).

### *Division of powers*

As early as November 1973, when cabinet agreed in principle to interim district government, a Task Force on Interim District government was established to make recommendations on the powers and functions which might be devolved upon or delegated to interim district governments. The Task Force presented, in March 1974, a proposed *Division of Functions Between Central and District governments* which distinguished functions which should remain with the central government (A functions), those which should be concurrent (B functions), and those which could be handed over to the province (C functions). This list was incorporated in the CPC's *Final Report* as the 'Second Schedule'. The philosophy underlying the division is explained in the *Report*:

The 'A' list provides a minimum framework for development within a unitary state. The 'C' list guarantees a minimal autonomy

to provincial governments. The 'B' list is as accurate an approximation of the outstanding powers and functions of government in Papua New Guinea as we have been able to secure . . . It is, in intention, a residual list. [1974:10/10]

But while the CPC recommended that final responsibility for all of the powers and functions on the 'B' list be vested in the national government, it expressed the view 'That responsibility should be delegated to, or devolved upon, provincial governments to the maximum practicable extent'.

Commenting on the proposed division Diana Conyers said:

The list was useful as a preliminary attempt to analyse the present functions of the Central government but as a basis for planning the transfer of functions to provincial governments it had some deficiencies. In particular, it did not consider the implications of transferring these functions, for example, the changes in national laws and departmental procedures which would be necessary, the financial implications and the effects on the relationship between public servants working in the Districts and their headquarters in Port Moresby. Another problem was that it is relatively easy to distinguish between different functions on paper but much more difficult to do so in reality. [1976:44]

Between the proposals of 1974 and the arrangements embodied in Part VI of the Organic Law there is a subtle change of emphasis: Div.3 lists those subjects which are 'primarily "provincial"', within which – subject to s.19 – provincial governments have exclusive legislative power (taxation is covered separately); Div.4 lists 'concurrent' subjects, within which provinces may legislate, provided that such laws are 'not inconsistent with any Act of the [National] Parliament' (s.28) (though s.29 limits the legislative powers of the national government under this division to matters of 'national interest'); Div.5 provides that in "unoccupied" legislative fields' if the National Parliament has not made exhaustive laws, on any subject, provincial governments may

make laws not inconsistent with any national legislation. There is also specific provision for the delegation of powers (Part VIII). However, under s.37: 'The National Parliament may, by a two-thirds absolute majority vote, by resolution disallow any provincial law, if in its opinion the disallowance is in the public interest.'

The Organic Law provisions concerning legislative powers would thus seem to give the provinces potentially wide scope for initiating policy, yet at the same time – subject to the interpretation given to 'national interest' and 'the public interest' – to grant the national government extensive power to overrule provincial legislation. Moreover, although the passage of the Organic Law went some way towards resolving fundamental questions about the division of powers – and a January 1977 decision of the National Executive Council (NEC) which provided a detailed listing of administrative functions divided into national and provincial 'spheres of interest' (NEC 19/77) further clarified the situation – most of the uncertainties listed by Conyers, concerning the question of how to implement provincial government, remained. This, together with a suspicion that some public servants were fighting a rearguard action against decentralisation, resulted in the government's decision to employ the consulting firm of McKinsey and Co. to draw up a programme for the implementation of administrative decentralisation. A programme based on the recommendations of the McKinsey team was accepted by the NEC in September 1977 and an Office of Implementation was created to carry out the programme, which involved a transfer of functions, uniformly for all provinces, in three stages between January 1978 and January 1979. Those functions designated 'provincial' within the Departments of Provincial Affairs, Primary Industry, Education and Commerce were transferred to the provinces in January 1978; those within Health and Information were transferred in July 1978, and in January 1979 the Bureau of Management Services (BMS) was placed under provincial control. (Commencing 1977, all provinces had as-

sumed responsibility for provincial works and maintenance and the Rural Integrated Plan as well as for provincial legislatures and secretariats.) Functions of other departments were expected to be transferred subsequently, but as far as I am aware no coherent programme for further devolution has emerged.

I have argued elsewhere:

The situation which now exists is . . . one in which the real distribution of policy making powers is essentially a political (rather than – as characterises federal systems – a constitutional/judicial) process. Provinces have not legislated in all the areas in which they have authority, but they have used political muscle to achieve policy objectives even in areas in which they do not have a clear competence. [May 1981:18]

The development of an essentially *political* system of decentralised government – in which governments have so far been reluctant to litigate and in which the ability of the national government to discipline the provinces, short of suspension, is in any case limited – is presumably what the former minister for Decentralisation had in mind when in a Ministerial Statement on provincial government, he spoke of ‘a concrete implementation of the concept of sharing’ (Momis 1979:6). The virtues of such arrangements, in a historical context, have been argued in a *Review of the Constitutional Laws on provincial government* by Yash Ghai and Mani Isana:

. . . it was considered inappropriate, when the Law on provincial government was enacted, to set out much detail, either on the structure of provincial governments, or the relationship between provincial government and the national government. The Organic Law intended to lay down a broad framework for provincial government and the establishment and further evolution of the system was, in large measure, left for consultation between the Provincial and the national governments . . . we consider that the Organic Law sets out an essentially flexible system for the decen-

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tralisation of political and administrative powers . . . The Organic Law is therefore concerned, in a very large measure, with the relationship of different political authorities and many of the provisions of the Organic Law are concerned, not with narrow legal questions, but with broad fundamental political questions. [1978b:3-4]

Elsewhere, however, Ghal and Isana describe the Organic Law as 'complex, legalistic and difficult to operate' (1978a:1) and comment that:

The Constitutional amendments to accommodate provincial government, the Organic Law on provincial government and the provincial constitutions, do not add up to a very coherent picture of the status of provincial governments and their place in the overall national system (*ibid.*:4).

*Settlement of disputes*

The question of conflict resolution was discussed in a general way in the Tordoff-Watts Report (*op. cit.*:8/1-8/8). Having observed that, in any system in which there are two or more levels of government, inter-governmental conflicts are bound to arise, the consultants suggested five possible procedures for conflict resolution. These were: an arrangement whereby in any case of conflict the decision of the national government prevails; requirements for consultation between governments; requirements for consent between governments; judicial review; a special commission; a Premiers' Council. The report recommended a combination of the first three and the last procedures and gave qualified support to a special commission. Interestingly, however, it specifically rejected judicial review: 'In our view, the rigidity and legalism involved in such a procedure for settling central-provincial conflicts is for most aspects of a unitary system totally inappropriate' (*ibid.*:812).

With specific reference to the allocation of grants to provinces,

Tordoff and Watts also recommended the appointment of an advisory expert financial commission (*ibid.* 7/33-7/34). The CPC *Report* of 1974 broadly followed these recommendations including one for an expert National Fiscal Commission (NFC).

Following these recommendations, the Organic Law on Provincial Government includes four principal provisions for settling disputes: s.30(2) requires the Minister for Decentralisation, if requested, to consult with a provincial executive on proposed legislation in a concurrent field; s.85 requires consultation between the national and provincial governments concerning any major investment; ss.75-78 establish and list the functions of the NFC; and ss.82-84 establish and list the functions of the Premier's Council.

The emphasis which the Organic Law places on 'consultation' reflects the intention of its framers 'that provincial government should embody a spirit of friendly cooperation between the levels of government' (Goldring 1977:256) an intention which is made explicit in s.187D(3) of the Constitution. Goldring expressed the opinion that 'consultation would be regarded as a real consideration by the court', but added: 'Whether or not the consultation must be effective or meaningful is deemed to be a political, rather than a legal question' (*ibid.*:257).

The body set up under the Organic Law and the *National Fiscal Commission Act* is rather different from that recommended earlier, both in its composition and its functions. Under s.78 it has the functions:

- (a) to consider, and to report to the National Parliament and to the provincial assembly concerned on, any alleged discrimination or unreasonableness in provincial taxation and any proposals by the national government to remove or correct it; and
- (b) in accordance with Section 79 [principles of allocation of unconditional grants], to consider, and to make recommendations to the National Executive Council on, the allocation of unconditional grants under Section 64

to provincial governments and as between provincial governments; and

- (c) to consider, and to make recommendations to the national government and provincial governments on, other fiscal matters relating to provincial government referred to it by the national government or a provincial government.

The NFC has been described as a 'buffer' between the national government and the provincial governments. In introducing the National Fiscal Commission Bill 1977 the minister for Finance said: 'It will mean that a lot of politics is taken out of . . . disputes (between the central government and the provinces) and that solutions will be more readily found'.

Section 187H of the Constitution provides for the establishment of the Premiers' Council (PC) and states that: 'A major function of the Council . . . shall be to avoid legal proceedings between governments by providing a forum for the non-judicial settlements of intergovernmental disputes' (s.187H(S)).

Section 187H(6) provides that an organic law may vest in the PC 'mediatory or arbitral powers or functions in relation to inter-governmental disputes'. Sections 82-84 of the Organic Law provide for the setting up of the PC.

At its first meeting, in Kavieng in 1978, the Council resolved: 'That a Working Committee be established to prepare a report proposing an Organic Law to grant Mediatorial or Arbitral Powers to the premiers' Council, and enabling Legislation' (Resolution No.1/78). Draft legislation was submitted to the PC conference in Wewak in 1979 and the subject was raised again in Port Moresby in 1980.

Finally, the *Provincial Governments (Mediation and Arbitration Procedures) Act* was passed early in 1981. It lays down procedures for the non-judicial settlement of disputes, but specifically 'applies to a dispute . . . which is not eligible for reference to the National Fiscal Commission' (s.3(d)).

*Intergovernmental financial relations*

Notwithstanding the CPC's rejection of federalism, the financial provisions of the Organic Law – which *broadly* follow the recommendations of the Tordoff-Watts Report – are for the most part those of a federal system (indeed the discussion of the principles of fiscal allocation in that Report might have been taken from, say, May 1969). There is provision (rather more generous than that recommended in 1974) for exclusive provincial taxes (ss.56-60); there is provision for conditional and unconditional (including 'derivation') grants, and for the transfer of proceeds of certain national taxation; and provinces are empowered to borrow and to guarantee loans on short-term.

There are, however, at least two significant restrictions on the formal fiscal powers of the provinces. Section 59(4) enables the national finance minister, 'after consultation with the provincial government', to exempt from provincial land taxes, other than taxes on unimproved land value, any mining or industrial activity. Section 61 enables the National Parliament to 'remove or correct' provincial tax laws which it considers to be discriminatory or unreasonable. Before doing so it must refer the matter to the NFC (see above), but its recommendation is not binding and the decision of the National Parliament is non-justiciable.

Also, provinces are required to submit annually to the minister responsible for provincial affairs a full statement of their financial position and of the affairs of the province (s.73), and provinces (but not provincial business enterprises) are subject to inspection and audit by the auditor-general (and incidentally to review by the Joint Committee of Public Accounts of the National Parliament).

Before leaving the subject of financial relations a brief word on the subject of financial autonomy.<sup>3</sup> Between January and July 1978 three provinces – North Solomons, East New Britain and New Ireland – assumed full financial responsibility for the func-

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<sup>3</sup> The terms 'financial autonomy', 'full financial autonomy', 'full finan-

tions transferred in 1978-1979. In May 1978 (on the initiative of the Department of Finance) the question of criteria for granting such responsibility was discussed at the PC meeting in Kavieng. The meeting passed a resolution (Resolution No.4/78) which set seven criteria to be met by provinces before full financial responsibility would be devolved (see May 1981:31). It was anticipated that all provincial governments should attain full provincial government status before early 1981. In fact, however, although Eastern Highlands joined the 'club' in July 1979, there was no further grant of full financial autonomy (despite five applications) until 1982 (when it was announced, another four provinces would graduate). Pending the achievement of full financial autonomy, the financial allocation to these provincial functions forms part of the national budget in Div.248. The levels of expenditure are determined after consultation between the provincial and national governments and the former have some authority to reallocate funds between the divisional subheads. However budgetary and financial control over such funds is exercised by the Department of Finance for the minister for Decentralisation. Meanwhile, the present level of Div.248 expenditures relative to the projected level of formula grants has created a situation in which, unless the formula is changed, a number of provinces stand to lose – some substantially – by shifting to fully autonomous status.

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cial responsibility', 'full financial control' have been used interchangeably. The minister for Decentralisation has given the following definition: 'Full financial control means that the provincial government controls all funds available to the province including public service administrative funds under Division 248, any funds at the end of the financial year which would in the past have returned to Consolidated Revenue would remain with the provincial government. Budgeting would have to come from the provincial government, and the monitoring of expenditure would be done on the financial report under Section 73 of the Organic Law' (Momis, Ministerial Statement on provincial government, 1979:23).

*Administrative relations*

Section 48 of the Organic Law authorises a province to employ a provincial secretariat of up to six persons, over whom the national government has no power of direction or control. Apart from this secretariat, all provincial administrative staff are members of the national public service; the costs of their employment are borne by the national government, but 'except as provided by any law relating to the National Public Service' (s.47), they are subject to the direction and control of the provincial government.

The picture which emerges from this selective and superficial summary is one of a system which indeed retains many of the essential features of a unitary state but which nevertheless makes substantial provision for devolution of powers to provincial government. Further, the flexibility embodied in the Organic Law, or perhaps its lack of 'coherence' (see Ghai and Isana 1978a, 1978b), and the emphasis placed on consultation rather than litigation as a means of resolving differences between the two levels of government, has produced, as I have already suggested above, a very *political* system of decentralisation.

**The reality**

Obviously one cannot portray the political reality of provincial government in contemporary Papua New Guinea in the space of a few pages – even assuming that there is a single, objective 'reality' (and that it can be understood by non Melanesians). The intent of this section is simply to offer some comments on the way in which provincial government had developed, and is developing, in a number of areas, particularly those whose constitutional provisions have been discussed above.

Before doing so, however, I would like to suggest that there are several historical reasons why in Papua New Guinea 'politics', as opposed to 'constitutionalism', have been so important in determining the form of provincial government. For one, the whole disjointed and uncertain history of decentralisation from

1973 encouraged provincial governments (at least the more progressive of them, who provided a model for others) to formulate their ideas of what they wanted to do without much regard to the constantly shifting parameters imposed (or not imposed) as the result of successive reports and committee decisions. This was particularly so in those provinces (such as North Solomons, East New Britain, West New Britain, East Sepik, Manus, New Ireland, Simbu and Central) in which experienced public servants or articulate students returned to their provinces to help plan the establishment of provincial government, and in those few (such as Eastern Highlands) where national politicians played a similar role. Second, frustration caused by lack of firm direction on decentralisation before 1977 and frequent lack of cooperation from national departments persuaded some provinces to act unilaterally and negotiate later (e.g. in relation to the provincial secretariat). This tradition has become part of the system; indeed I have the impression that there is a growing antipathy between the provinces and the centre (and particularly between some national politicians and some provincial politicians), which could magnify this tendency. Third, although there appears to be a growing revisionist tendency to play down the role of North Solomons separatism in the process of institutionalising decentralisation, the decision in 1973 that any agreement with Bougainville must be within a legislative framework applicable to the country as a whole ensured that the ultimate form of provincial government reflected strongly the demands of that province which was the most ardent supporter of decentralisation and had the greatest capacity for financial autonomy. Finally (and perhaps most important), with the establishment of provincial assemblies, provinces became politicised, and Papua New Guinea politics became provincialised, to an extent that few people anticipated even as late as 1977, and this appears to have been associated with a similarly unexpected shift of political weight and administrative initiative from the centre to the provinces (May 1981:17).

*Status of provincial governments*

The first general observation to be made under this heading is that although there has been no formal challenge to the concept of the unitary state, and the implicit dominance of the national government, the rhetoric of provincial politicians and officials seems to reflect a widely accepted view that, as expressed in the submission to the 1980 Premiers' Council (quoted above), the national and provincial governments 'are *equal* partners in process of governing the country', that, in the words of the Bougainville Charter, 'one is not inferior . . . to the other'. This view is put, for example, in arguing for amendment to or ignoring of the Organic Law when it inhibits provincial action (for example, in relation to overseas investment, or taxation) or is simply seen as an affront to provincial autonomy (for example, in relation to measures designed to ensure financial accountability). At a more abstract level I have heard provincial officials argue that the national government has no right to revenue from, for example, coffee, because coffee is grown '*in the provinces*'.

A second general observation is that there have been tendencies to both centralisation and decentralisation in this area. Thus, for example: on the one hand, the declaration of states of emergency in the highlands provinces, the introduction of sectoral programme funding, and pressure on provincial governments (with the implied threat of resort to s.61 of the Organic Law on Provincial Government) to reduce certain provincial tax rates, have all been quoted as evidence of a lack of real provincial autonomy; on the other hand, the realisation that few requirements of provinces (e.g. in relation to financial reporting) carry any effective provisions for enforcement, and the discovery that the original provisions for suspending provincial governments were so complex as to be ineffective, suggest serious weaknesses in the powers of the national government vis-à-vis the provinces. On balance, however, I feel that evolution has favoured the provinces.

*Division of powers*

The division of legislative powers set out in Part VI of the Organic Law (plus the delegation to provincial governments of executive responsibility in areas in which they do not have legislative power) gives the provinces a potentially wider field of operation than the states or provinces enjoy in most federal systems. At the same time, the fluidity of the provisions by which powers are divided has created uncertainty and confusion over where powers reside in relation to certain administrative decisions taken at the provincial level. To cite two recent examples: in 1978 Simbu provincial government refused to reimburse the national Department of Works and Supply (DWS) in the province for certain works undertaken in Simbu, because, it alleged, DWS had not adequately consulted with the provincial government; in another province the provincial government declined to commit funds to a high school whose construction was said not to reflect provincial priorities.

To date [1982] provinces have not rushed to exercise responsibility in all areas available to them, though most provinces are currently exercising a good deal of autonomy in policy-making and administration. More interesting are the demands expressed by provincial premiers and secretaries at Premiers' Council conferences, in submissions to the General Constitutional Commission, and recently to the committee appointed to review the financial provisions of the Organic Law on Provincial Government. These demands for additional powers to provinces have covered such 'naturally' national responsibilities as foreign investment, overseas borrowing, and aid, not to mention police (in 1979 the East New Britain premier was sentenced to goal for maintaining what was in effect a provincial police force). On the positive side, such demands are, I believe, evidence of a growing shift of policy initiative (and to a certain extent, expertise) from the centre to the provinces; as against this there seems to be an emerging propensity for provincial governments (and their busi-

ness arms) to act, out of frustration with central government, in areas in which they clearly do not have constitutional or administrative competence.

*Settlement of disputes*

A distinctive feature of the Papua New Guinea system is the emphasis which is placed, in the Constitution and the Organic Law, on the settlement of disputes through consultation. However, of the three mechanisms provided to this end, none has worked particularly satisfactorily. Of the Constitutional provisions for consultation the General Constitutional Commission has commented:

Although there has been some consultation between national government and provincial governments the extent to which this has been carried out has been extremely poor. Our experience has shown that there has been no meaningful consultation by national government in a lot of areas in the concurrent field. [1980:31]

And neither the NFC nor the PC has assumed the role apparently intended for it.

In the case of the NFC, to date no question relating to (a) or (c) of its functions (see above) has been referred to it by national or provincial governments, and in allocating the small amount of money made available to it by the national government for unconditional grants it would appear that the NFC has been 'led' by the Department of Finance (which provides its secretariat). This is not necessarily to be condemned. If issues of potential dispute can be negotiated on a government-to-government basis, and if questions of grant allocation can be settled without arousing 'provincial and regional jealousies' (Manning 1979:9) so much the better. However, I see two major problems in the situation which has developed. First, s.79 directs the NFC to base its decision on allocation on equal per capita payments, but allowing also for 'the location and physical nature of a province', 'the lack of development of a province', or 'any other relevant

factor'. In practice, the NFC – following submissions from the Department of Finance – has allocated part of the available amount to reducing inequalities between provinces, part to supplement the cost of provincial government (i.e. the 'costs of running the assembly and essential supporting services'), and part to supplement maintenance of capital assets. And funds that might otherwise have been allocated to the NFC have been diverted to the NPEP. This would seem to be in contravention of the spirit, and probably the letter, of the Organic Law. Second, in several instances where provinces might have been expected to refer matters to the NFC (e.g. in cases where the national government has opposed provincial tax increases, and on the question of 're-centralising' sectoral programme funds), they have not done so. In submissions to the Committee to Review the Financial Provisions of the Organic Law on Provincial Government several provinces expressed the view that the NFC is 'in the pocket' of the Department of Finance, and more than one submission called for its abolition.

The PC, on the other hand, has served as a useful forum, and a review of agendas and resolutions of the PC conferences held to date shows that it has dealt with a number of significant issues and has passed important resolutions. There are, however, major questions concerning the extent of follow-up to PC resolutions, and the capacity of the PC secretariat. Few resolutions from the first three conferences have yet been implemented. The minister for Decentralisation has recorded that provinces have:

. . . expressed disappointment with the attitude of national departments towards these conferences, as reflected in the poor attendance and non-implementation of resolutions passed at these conferences. [Momis 1980:8]

However, provinces also are guilty of non-implementation of resolutions. For example, in an important resolution of the second conference in 1979, the premiers called on the national government to set up a Provincial Finance Inspectorate and under-

took to amend provincial finance legislation to give the proposed inspectorate access to all provincial accounts and records: to date, however, only a small number of provinces has made the necessary amendments. The lack of action on resolutions is emerging as a major source of frustration and eventually antagonism in the relations between the national government and the provinces, and, taken with the generally poor service available from the small secretariat, threatens to undermine the effectiveness of the institution. (In this context an interesting recent development is the emergence of four informal regional premiers' conferences.)

*Intergovernmental financial relations*

The financial arrangements of provincial government are complex, and in 1982 were under review by an interdepartmental/national-provincial committee. (For a more detailed discussion of the subject see the reports of the two consultants to this committee – May (1981) and Chelliah (1981) – and Manning (1979).) I will restrict myself here to three broad comments.

First, provincial governments are, and will continue to be (the recent introduction of provincial retail taxes notwithstanding), heavily dependent for their revenue on grants from the national government. Chelliah (1981:9) calculates provinces' own tax and non-tax revenues in 1980 as constituting one per cent of their total revenues. This situation seems inevitable given the structure of the taxation system (e.g. the critical role of import duties and taxes on a small number of foreign companies, and the fact that the bulk of income taxation is collected in two provinces – National Capital and Morobe) and the very considerable inequalities in taxable capacity between provinces. Nor is it particularly remarkable; it is a situation which, for a number of good reasons, characterises most federal systems. Nevertheless, the heavy dependence on revenue transfers does underline the importance of the methods employed, particularly the distribution as between the richer provinces and the poorer.

Second, in several respects the financial provisions of the

Organic Law either have not worked as intended or have been misinterpreted. The major element of the revenue transfer to provinces comprises a minimum unconditional grant, provided for by s.64 of the Organic Law according to a formula set out in Sch.1. Essentially, the formula gives to each province a base amount equal to the level of expenditure on transferred functions in 1976/77, adjusted annually for variations in the cost of living or in the level of national revenue, whichever yields the smaller amount. An apparently unforeseen aspect of this formula is that it embodies a downward ratchet effect in the payments to provinces. In practice, however, this has not been significant, because the Department of Finance has chosen (consciously or unconsciously) to ignore the 'whichever is less' provision. Another aspect of the grant formula, as we have already noted is that for those non-fully-financially-autonomous provinces funded through Div.248 payments, a number are now receiving larger allocations than would be indicated by application of the formula – such that several provinces stand to lose by achieving autonomy. (I understand that the provinces recently granted autonomy have been guaranteed that they will not lose by doing so; this is a sensible policy decision – which apparently dates back to 1978 (Manning 1979:10) – though the constitutional basis for it is not clear.) We have already commented on the discrepancy between what the Organic Law says about the allocation of grants through the NFC and what actually happens. Referring to the *formal* provisions for NFC grants Manning wrote in 1979:

This principle [equal per capita grants] will gradually reduce the inequalities between provinces . . . Other government policies, particularly the N.P.E.P. are also working to remove inequalities. [ibid.10]

In fact, however, there is to date no evidence for such a conclusion. Neither the scale nor the distribution of payments through the NFC has done anything to reduce inequalities, and there has been no significant correlation between per capita

NPEP expenditure by provinces and provincial development indicators. Indeed Berry and Jackson (1981) conclude their survey of inter-provincial inequalities and decentralisation with the comment:

All in all . . . the financial arrangements for provincial government in Papua New Guinea seem likely to entrench existing inter-provincial inequalities. [ibid.:74; see also Hinchliffe 1980]

A third comment on the subject of financial relations is that financial management and control by some provinces has left a lot to be desired. In several instances where a provincial government has appeared to be in financial difficulties the national government has sought to consult with the province but has been refused access to provincial accounts. In one case national officers were invited in to the province only to have the invitation withdrawn when they arrived. Two provinces have actually run out of money through gross mismanagement and have been rescued by conditional loans from the national government.

Yet although it seems to me that the Organic Law *intended* to provide for national oversight of provincial finances, in fact the national government has been often unable, and sometimes, it would seem, reluctant, to exercise such oversight (see May 1981:33-39). With regard to financial reporting, for example, the Organic Law simply says that provincial governments will submit statements 'as soon as practicable after the end of the fiscal year' (s.73), and carries no penalty for non-compliance. The form in which provinces are required to report has been laid down in provincial government Finance Circulars. However in his 'Statement on the Financial Activities of Provincial Governments', presented to the National Parliament in May 1979, the minister for Decentralisation observed that four provinces had failed to submit their reports for 1978, and in his 1980 report he stated that three provinces had failed to submit their reports 'despite repeated warnings' 15 had submitted their reports after the deadline, and that the remaining province had submitted a

report which did not comply with the requirements (Momis 1980:1). He also commented that reports contained a variety of errors and many were simply not put into the correct format (ibid.:10). Problems in this area are likely to be exacerbated as more provinces attain full financial responsibility.

#### *Administrative relations*

Administrative relations have been, predictably, another complex issue. However, it would appear that in the effort to reconcile the decision for a single national public service with the demand for provincial autonomy at least three mechanisms have operated in favour of the provinces: an unexpectedly large number of senior public servants have chosen to pursue careers in the provinces rather than in Port Moresby; there has been a strong tendency for provinces (especially the more 'developed' provinces) to recruit public servants from their own province, and several provinces have chosen to ignore the constitutional limitations on the size of the provincial secretariat.

#### **Conclusion**

To suggest that constitutional structure does not provide an explanation of the workings of a political system (though it is an element of the system) is not to say anything novel (cf. e.g. May 1966, 1969). Yet in the growing literature about provincial government in Papua New Guinea few writers get far beyond the institutional aspects of the system (the notable exception being Standish 1979). I would argue that in Papua New Guinea more than in most countries it is impossible to understand provincial government without understanding the developing political processes within which it operates. Further I would suggest that recent political developments have tended, on balance, to shift the political weight of the system in favour of the provinces.

Finally, bearing in mind that this paper was written for a legal workshop, I would like to draw attention to the comments

above concerning dispute settlement. If in fact the mechanisms provided for consultation cannot be employed effectively to resolve differences between the national and provincial governments as provincial government evolves, there may be an increasing tendency for provincial governments to turn to litigation. In this context, the recent legal challenge over fishing licences in Milne Bay may mark the emergence of a new trend.