

# 15. CONSTITUTIONS AS LIMITS ON THE STATE IN MELANESIA: COMPARATIVE PERSPECTIVES ON CONSTITUTIONALISM, PARTICIPATION AND CIVIL SOCIETY\*

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## KEY TERMS AND PHRASES

### **Authoritarian**

A government system based on an established system of authority rather than on the express or implied consent of the governed. The term is also applied to situations where established power is regarded as having an absolute right to assert itself.

### **Bourgeois/bourgeoisie**

A French word meaning ‘town dwellers’ and the upper class of such persons. As used by Karl Marx (see ‘Marxist’ below) it refers to the class of property owners who rose with and developed the capitalist system of production, taking power from the feudal aristocracy. (Also see ‘middle class’).

### **Clientilism**

A term describing informal and unequal power relations based on exchange of benefits. It is found in many forms, including some small-scale traditional societies where a high status person uses his or her authority and resources to offer protection to others who in return provide support and services.

### **Dictatorial**

Dictatorship is a form of government in which a single person, office, faction or party has complete political power. The term is often used in a less precise way to describe someone who has enormous political power or influence even though they are acting within the legal restrictions of a democracy.

### **Marxist**

A Marxist is a person who adheres to any of the versions of social theory that derive from the works of Karl Marx (1818–83). The central part of his complex theories is the view that history must be explained in materialistic terms. Each person exists as a member of an economic class with all classes always in competition with others.

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## INTRODUCTION

Human societies have to balance two apparently contradictory needs. While ‘rulers’ are needed to manage the society, at the same time there is a need to limit the tendency of those with power to abuse it. The potential for abuse is particularly acute in complex modern societies where coercive power is great. Hence the discussion of the control of rulers in the present day tends to be about limiting state action.

Constitutionalism — the acceptance by government of limits on its actions set by constitutional rules — was anticipated as an outcome of adoption of ‘Western’ style independence constitutions for most post-colonial states. In much of Asia and Africa, these hopes were not fulfilled, with most independence constitutions being short-lived and limits on the state increasingly being ignored by those in power. But following the 1989 fall of the Berlin Wall, expectations were raised that the efficacy of constitutions as restraints on the state might be bolstered by democratic change, and especially by popular participation in government associated with democratisation and by the development of civil society, and not just in Eastern Europe, but also in Africa and Asia.

In the post-colonial states of the Pacific constitution-makers embraced the need for limits on government. Popular participation in government was expected to assist acceptance of constitutional limits by governments. By contrast with Africa and Asia, hopes for independence constitutions in the Pacific initially seemed to be fulfilled. Adherence to constitutional provisions on succession of government in the immediate post-independence era was seen as evidence of support for constitutionalism.<sup>1</sup> But since at least the late 1980s, the position has become less clear, especially in the four turbulent states of Melanesia (Fiji Islands, Papua New Guinea, Solomon Islands and Vanuatu). Not only was the Fiji independence constitution overthrown in the first of two coups in 1987, but there has been a further coup in Fiji Islands (May 2000) and a coup in Solomon Islands (June 2000). More generally, as discussed elsewhere in this chapter, there seems to be growing evidence of reduced acceptance of constitutional limits on government, so that constitutionalism increasingly seems problematic in Melanesia. As with other parts of the post-colonial world, some see possibilities that civil society will assist in a resurgence of constitutionalism.

This chapter examines the record of and prospects for constitutionalism in Melanesia with particular reference to acceptance of limits on the state in the form of constitutional rules on succession of government, accountability and human rights. It also examines the possibility that popular participation and civil society might offer hopes of increased acceptance of limits on the state in Melanesia in the future. The chapter does not purport to examine the full range of factors relevant to understanding the persistence or otherwise of constitutionalism, factors which now include various forms of pressure from the international community, as for example, with the conditionalities in both bilateral and multilateral aid associated with governance-related goals.

## CONSTITUTIONALISM, PARTICIPATION AND CIVIL SOCIETY

### Constitutionalism

Constitutionalism is the imposition of effective limits on state action through the rule of law under constitutional government. It is “a constitutional system in which the powers of the government and the legislature are defined and limited by the constitution, which enjoys the status of fundamental law, and by which the courts are authorised to enforce these limitations”.<sup>2</sup>

De Smith emphasised the distinction between the “formal sense” of constitutionalism — rules intended to limit government action — and its operation as a “living reality”.<sup>3</sup> Constitutionalism really lives only when “these rules curb the arbitrariness of discretion and are in fact observed by the wielders of power, and to the extent that within the forbidden zones upon which authority may not trespass there is significant room for the enjoyment of individual liberty”.<sup>4</sup>

Critics of post-colonial states often forget that constitutionalism became a ‘living reality’ in Europe comparatively recently, at the time of the bourgeois revolutions, when its ‘constituent elements’ of secularisation, nationalisation, separation and limitation of public powers developed.<sup>5</sup> Secularisation was part of efforts by national monarchies to escape papal authority. Nationalisation of public powers was sought by the bourgeoisie as it pursued mercantilism from the 16th to the 18th centuries. Capitalism’s needs were served by constitutionalism, as the bourgeoisie sought limits on arbitrary or discretionary powers of either the monarchy or the centralised state in relation to property or contractual matters, general legal rules enforced by increasingly independent judges being well suited to such aims.<sup>6</sup> Hence constitutionalism did not emerge as part of a grand design, but rather as a slowly developing product of complex political and economic forces.

Constitutionalism is basically a description of a desirable outcome. The description alone does not help us understand how the outcome is achieved. The more important question for the purposes of this chapter is what is it that makes constitutionalism a ‘living reality’, especially in the post-colonial states of Melanesia, where the political and economic forces at work are very different from those of 16th to 18th century Europe?

### Participation

Participation of the populace in political matters — through the ballot box, political parties, interest groups seeking to influence government, *et cetera*<sup>7</sup> — is almost universally accepted as essential to the accountability of government. Regular elections are seen to contribute to the legitimacy of constitutional government and to keeping it accountable (as policies of rulers subject to the real threat of replacement in elections need to exhibit some sensitivity to the needs of the society). Popular participation in sub-national governments — both directly and through elections — is said by many commentators on decentralisation and on autonomy

arrangements to create centres of power able to check dictatorial tendencies of the central state and to make the local state responsive and accountable. Finally, popular participation in local level government is seen as vital to the strengthening of civil society, as discussed below.<sup>8</sup>

Popular participation was a goal of Melanesian constitution-makers, especially (but not only) Papua New Guinea's Constitutional Planning Committee (CPC), whose 1974 Final Report<sup>9</sup> provided the basis for much of Papua New Guinea's 1975 independence constitution. With a jaundiced view of the state based on experience of colonial rule, the CPC was concerned that constitutional law alone might not be a sufficient restraint on the state, and envisaged popular participation making the state more accountable. Its recommendations on constitutionally entrenched sub-national (provincial) government were intended to encourage political forces that could act as checks on authoritarian tendencies at the centre.<sup>10</sup>

### Civil Society

Civil society in the 'developed' industrial states can be seen as the range of interests in society distinct from government, which in various ways combine and place limits on government. There is little consensus, however, about either exactly what the term 'civil society' means or how it acts to limit the state, even in relation to the industrialised democracies of Europe. An analysis by Woods<sup>11</sup> comparing civil society in Europe and Africa is helpful.

The concept springs from a differentiation between public and private interests that began to be made at the time of the emergence of the middle class two to three hundred years ago, and the idealisation of this separation as the monarchy and semi-feudal institutions were gradually restricted from treating the political and governmental arenas as private domains. As patrimonial rule<sup>12</sup> diminished, the notion developed that political authorities should be accountable to the public.<sup>13</sup> As to the manner in which civil society acts to limit state action, Woods emphasises the significance of the involvement of individuals in the public sphere through "articulated associational groups which could rely on an informed leadership to shape public opinion".<sup>14</sup> Civil society articulates "a set of norms which affect the way the state functions and how other groups will interact".<sup>15</sup> In other words, the contributions of groups and networks of private individuals to public debate helps shape values and standards of behaviour that become so widely accepted that they cannot be ignored, even by the state. So, for example, the higher degree of adherence to such things as democratic norms and limits on corruption in industrialised countries than in post colonial states is often explained in terms of a more 'developed' civil society.

Links are made between civil society and popular participation, it being claimed that civil society is strengthened by participation in local level government:

Civil society provides an especially strong foundation for democracy when it generates opportunities for participation and influence at all levels of governance, not least the local level. For it is at the local level that the historically marginalized

are most likely to be able to affect public policy and to develop a sense of efficacy as well as actual political skills. The democratization of local government thus goes hand in hand with the development of civil society as an important condition for the deepening of democracy and the “transition from clientelism to citizenship” in Latin America, as well as elsewhere in the developing and post-communist worlds.<sup>16</sup>

Interest in civil society in the context of debate on limits on the post-colonial state originates with the role of popular protest in the fall of the Eastern European ‘Marxist’ regimes. This was widely seen as evidence of the emergence of a potentially powerful civil society, and the move to a free market economy in those states since 1989 as likely to strengthen civil society as an effective limit on the state. As discussed later in this chapter, many observers debate whether or not there is evidence for similar trends in Africa<sup>17</sup> and other areas of the post-colonial world, including Melanesia.

Perhaps the most striking instance of speculation about the potential for civil society to limit state action in Melanesia arose from events in Papua New Guinea in early 1997 in relation to the Sandline affair. In the wake of action by army elements to oust mercenaries engaged under a government contract with United Kingdom company Sandline International, popular unrest in the main cities, much of it led by the same army elements and also involving some non-governmental organisations (NGOs), led to the standing aside of Prime Minister Chan.<sup>18</sup>

Before considering whether the expectations of popular participation and civil society as limits on government in Melanesia are realistic, it is helpful first to discuss the effectiveness of more than 25 years of post-independence experience of constitutional limits on state action in Melanesia.

## CONSTITUTIONAL LIMITS – SUCCESSION OF GOVERNMENT, ACCOUNTABILITY AND HUMAN RIGHTS

Among the central sets of rules in constitutions intended to set limits on state action are those on: succession of governments; accountability of politicians and public servants for use of state resources; and protection of human rights. One way to evaluate constitutionalism is by reference to the extent to which these rules have been effective restraints on the state.

### **The Rules in the Melanesian Constitutions**

In relation to succession, three of the four Melanesian constitutions provide for variants of the Westminster system, with prime ministers taking office as a result of election by the legislature.<sup>19</sup> The exception is the 1997 Fiji Islands *Constitution*, where the situation is closer to the original Westminster system, with a (largely ceremonial) President appointing as Prime Minister a member of the lower house of the legislature who in the opinion of the President can form a government with the confidence of the legislature.<sup>20</sup> In general, prime ministers and governments can only

be removed following a general election or through votes of no confidence<sup>21</sup> (again the President of Fiji Islands has limited discretionary powers in this area).

Concerning accountability, the four constitutions place unusual emphasis on the issue in that they:

- carefully codify variants of the principles of parliamentary control of the executive in various ways, including provision for collective responsibility of the political executive (often called the ‘Cabinet’),<sup>22</sup> removal through votes of no confidence,<sup>23</sup> scrutiny of public finance,<sup>24</sup> and committee systems;<sup>25</sup>
- all provide for both ombudsman institutions and codes of conduct for leaders.<sup>26</sup>
- all provide for offices of the auditor general<sup>27</sup> and of the public prosecutor,<sup>28</sup> each independent from direction and control;
- all provide for independent judicial arms,<sup>29</sup> with extensive powers of judicial review and to interpret and apply the constitutions;<sup>30</sup>
- all provide for constitutional offices with roles concerning accountability of the main arms of government (especially of the executive) and that are independent from direction and control, the constitutions of Fiji Islands and Papua New Guinea containing especially elaborate arrangements in this regard.<sup>31</sup>

As for human rights, the four constitutions contain elaborate bills of rights that guarantee protection of the standard political rights<sup>32</sup> and enforcement in case of breach of rights.<sup>33</sup> In addition, the constitutions of Papua New Guinea and Fiji Islands are unusual in that they make provision directed to securing some aspects of economic, social and cultural rights, although those provisions are limited in extent in Fiji Islands and largely unenforceable in Papua New Guinea.<sup>34</sup>

### **Rules Versus ‘Living Reality’**

It is clear then, that de Smith’s ‘formal sense’ of constitutionalism is well established in Melanesia. But what of the ‘living reality’? Do rules limiting government action really curb the actions of the rulers? Are the zones of activity forbidden to those in power leaving increasing room for the exercise of liberty in Melanesian states?

The post-independence record of adherence to constitutional limits by the Melanesian states contrasts favourably with Ghai’s 1993 assessment of the Third World generally. Not only did just a handful of post-colonial states retain their independence constitutions,<sup>35</sup> but in addition:

Overwhelming evidence of the gross violations of law on the part of government officials; arbitrary and capricious exercises of power are frequent; there are many detentions without trial (and occasionally torture of detainees); massive direct or indirect censorship is obtained and it is difficult to exercise the right of association if the government does not like the officials or the purposes of the association; succession to office is seldom the result of elections; judiciaries are weak and some are compliant. One person or one party rule dominates the political system of most of these countries.<sup>36</sup>

A starting point for contrasting the situation in the Melanesian states is that all save Fiji Islands retain their independence constitutions. The picture with regard to democratic rule is also different, there being no instance of sustained one person or one party rule. Further, where coups have occurred (Fiji Islands in 1987 and 2000, and Solomon Islands in 2000) there have been popular pressures for restoration of constitutional rule and the holding of elections.

In relation to rules on succession of government, until the 1987 coups in Fiji Islands the record was remarkable compared to most other post-colonial states (and hence the early 1980s suggestion of new hope for constitutionalism on the basis of experience in the then ten post-colonial states of the Pacific).<sup>37</sup> Provisions for accountability generally operated reasonably well, especially in Papua New Guinea, where the Ombudsman Commission and the Leadership Code were generally regarded as having achieved much.<sup>38</sup> The position concerning human rights was well regarded in all states until the late 1980s.<sup>39</sup>

It would appear, however, that if there ever was a ready acceptance of constitutional limits in Melanesia it has been reducing since at least the late 1980s. The evidence includes the overthrow of the independence constitution in Fiji Islands in 1987, the attempted overthrow of the 1997 Fiji Islands *Constitution* in 2000, and the severe undermining of the Solomon Islands *Constitution* by and following the 2000 coup.<sup>40</sup> Each of these cases has involved attempts to take control of the state in large part related to ethnic conflict.

Rules on succession of government have been challenged in various ways, most notably in the Fiji Islands and Solomon Islands coups. In Papua New Guinea there has been: an inept coup attempt by the Police Commissioner in 1990; the attempted manipulation of constitutional provisions by the Prime Minister in 1993 in order to gain 18 months in office free from motions of no confidence;<sup>41</sup> the adjournment of Parliament for periods of seven to eight months in order to escape motions of no confidence (the Skate Government from December 1998 to July 1999 and the Morauta Government from November 2000 to July 2001); and the standing aside of the Prime Minister in April 1997 forced by urban unrest following the Sandline affair.<sup>42</sup> In Vanuatu in 1995 and in 2001 the constitutional rules on succession have been bent or ignored by members of Parliament until court decisions have resolved the problems.<sup>43</sup>

Even adherence to rules on succession of government prior to 1987 may not tell us much about the effectiveness of constitutional limits generally. Indeed, as discussed later, the more likely explanation is that managed competition for power within the constitutional framework suits the political and economic interests of the segments of the elite competing for political power.

Concerning the rules on accountability of government, their impact seems to be reducing as corruption in government and bureaucracy increases. The reports of the Vanuatu Ombudsman and the Papua New Guinea Ombudsman Commission and the decisions of leadership tribunals in Papua New Guinea dealing with prosecutions for misconduct in office by leaders provide powerful support for the proposition that



state powers and resources are increasingly being used almost routinely for the personal enrichment of those with access to state power.<sup>44</sup> There seems little doubt that only a fraction of those involved in such activities are ever dealt with under the criminal law and the Leadership Codes. Those cases that do get dealt with suggest generalised patterns of abuse of office, from misappropriation of government funds to the soliciting of bribes and favours from interests seeking to extract natural resources wealth. There is increasing pressure on ombudsmen (for example, constant public criticism of the Papua New Guinea Ombudsman Commission suggesting it is too harsh in dealing with political leaders under the Papua New Guinea Leadership Code) and other accountability institutions, some of which have achieved little,<sup>45</sup> and a growing sense that the standards they seek to enforce are not consistent with those of a large proportion of public office-holders.

As for the record concerning human rights, there had been a generally poor human rights record in the colonial period in Melanesia, and much interest in changing this situation at the time of the de-colonising constitution-making exercises. For much of the post-independence period Melanesian countries have had a good record of respect for most civil and political rights. Since the late 1980s, however, there has been increasing evidence of a reduction in standards. The post-coup situation in Fiji Islands both in 1987 and 2000 has given rise to many abuses of rights.<sup>46</sup> In the Bougainville conflict in Papua New Guinea terrible abuses have occurred on all sides, including hundreds of extra-judicial killings, torture, rape and destruction of property.<sup>47</sup> The ethnic conflict occurring in Solomon Islands since late 1998 has resulted in appalling breaches of rights.

The situation in Papua New Guinea is of special concern, going well beyond the problems of the Bougainville conflict. A few examples drawn from a July 1995 report on Papua New Guinea by the United Nations Centre for Human Rights (UNCHR) illustrate the nature and scope of the problems. Police beatings and rapes of persons held in connection with investigation of criminal offences and their violent raids on villages in search of suspects, evidence and retribution were noted. Common violations of rights of prisoners by personnel of the Correctional Institutions Service included severe overcrowding, and routine rough treatment and confiscation of belongings.<sup>48</sup> The institutions that could have been expected to redress human rights abuses (the legal profession, the Public Solicitor, the Public Prosecutor, the Ombudsman Commission and the courts) had had a limited impact on human rights problems, not a single case relating to breaches of human rights arising from the Bougainville conflict having been conducted to completion.<sup>49</sup>

Additional, seldom highlighted but yet important facets of the human rights picture in the region were identified by the UNCHR report. First, it suggested that the severe law and order problems in Papua New Guinea involve violations of “the most fundamental rights of people — to life, to liberty and to security of the person”.<sup>50</sup> Secondly, the right of citizens to equality was seen as “far from being a living reality, and there is no real evidence of, or apparent support for affirmative action”, despite “severe and growing disparities among various social groups, and between various



areas of the country”. The “social, economic and political disadvantages” of women and the “widespread evidence of violence” against them suggested they suffered particular problems in this regard.<sup>51</sup> Thirdly, there was a “general failure to secure economic, social and cultural rights”, suggesting “a failure of policies or of management or both”.<sup>52</sup> Although they are intended to be to some degree enforceable through the National Goals and Directive Principles in the Preamble to the Papua New Guinea *Constitution*, there was little evidence of post-independence progress towards making those rights effective.<sup>53</sup>

While there is evidence of reducing acceptance of constitutional limits since the late 1980s, the record in Melanesia since then has been mixed. For example, even in the post-coup situations in Fiji Islands and Solomon Islands there have been serious attempts to restore constitutional rule. This is most notable in Fiji Islands, where court rulings early in 2001 on the continued applicability of the 1997 *Constitution* were accepted by the interim government installed after the coup of May 2000 in that instead of continuing to develop a new constitution, fresh elections were conducted under the 1997 *Constitution* as a result of the rulings.<sup>54</sup> Courts have resolved crises or conflicts on the succession rules in Papua New Guinea and Solomon Islands.<sup>55</sup> The fact that ombudsman institutions, public prosecutors and courts continue to take action in support of accountability offers hope to many concerned about the trends. Despite growing human rights problems, abuses by the state probably continue to be less serious and fewer in number than in many other post-colonial states, and are still capable of being dealt with under the law by independent courts, at least in Papua New Guinea, Vanuatu and Fiji Islands (although access problems remain severe).

For the purposes of this chapter, two major questions arise from this assessment of the record of constitutional limits in Melanesia. First, why has the record of constitutionalism in the Pacific apparently been relatively better than that of so many other post-colonial states, and especially, until recently, in relation to succession of government? Secondly, why has the effectiveness of restraints on state action apparently reduced since the late 1980s?

Insights into these questions may be gained by considering the factors that influence the roles of constitutions in both the industrialised ‘democracies’ and post-colonial states. In the space available, only a selective analysis is possible, highlighting just a few salient factors.

### SOME FACTORS INFLUENCING EFFECTIVENESS OF CONSTITUTIONAL LIMITS

At the time of independence in most post-colonial states, there was a tendency to assume that the passing of constitutions on the model of those of the colonial powers would produce outcomes similar to those generally assumed to flow from the constitutions of the metropolitan powers.<sup>56</sup> In other words, it tends to be assumed that the ‘living reality’ of constitutionalism automatically flows from the formal rules set out in a constitution.

In fact, however, there is little consensus about what it is that makes the rule of law apparently a strong force in Western industrialised countries,<sup>57</sup> or what makes its effectiveness lesser in so many post-colonial countries. Most theories of both politics and law would now accept that the totality of the impacts of law in any society is likely to be a factor of the relationship between law and numerous forces at work in the society where it operates. The differing consequences of constitutions in post-colonial societies compared to the colonising countries suggest that there are distinct forces at work in the two sets of countries. Those that support the rule of law in the former colonisers may not be present, or may work differently, in post-colonial states. Similarly, the record of better adherence to constitutional norms in the Melanesian states than in many other post-colonial states suggests that again there are different forces at work in the two sets of states.

Ghai argues that it is the coinciding of economic and political power in the ‘West’ that makes the rule of law possible there. The constitution supports the forces that dominate in civil society, especially those with economic power. Because they can achieve their economic and other interests through a wide range of means, they do not have to rely openly on political or state power; the coercive power of the state seldom needs to be deployed on their behalf. Hence the outward forms of state neutrality and impartiality in accordance with constitutional and legal norms (for example, in the shape of an apparently neutral and impartial judicial system) can be preserved.<sup>58</sup>

By contrast, where economic and political power do not coincide in the same way as in the West, and especially in countries where the private sector is relatively ‘undeveloped’, as has been the situation in most former colonies both at and after independence, politicians have little independent economic base. They instead tend to use their access to the state to accumulate both wealth and the further power associated with it. Corruption flows from both personal interests of politicians and “the imperatives of political survival, since the primary basis of a politician’s support is generally not the party or another political platform, but clientelism, sustained by regular favours to one’s followers”.<sup>59</sup> Popular control and accountability tend to be contrary to the fundamental interests of those in control of the state, and opposition can only be dealt with by coercion, the state tending to become authoritarian.

This analysis tells us much about the factors underlying the different roles of law in industrial and post-colonial states. It also provides us with insights into the reasons for the declining adherence to rules about accountability and human rights in Melanesia, suggesting that there are some important similarities between the forces at work in the Pacific and other post-colonial states. The analysis does not address, however, the reasons for the apparently better record of constitutionalism in Melanesia than, for example, in much of Africa. Comparing the operation of constitutions in Africa and Melanesia should provide some insights in this regard.

### **The State and the Constitution in Africa**

Much of the vast literature on the state in Africa argues that while the state is immensely powerful compared to any other single force in society, it is also relatively weak. So although it dominates aspects of the economy and controls considerable coercive force, it has a limited impact on the lives of the majority who are rural dwellers. Such people organise their lives through rapidly adapting but nevertheless resilient pre-state social structures with considerable autonomy from the state.

On the other hand, among the few ‘uniting’ factors beyond clan and tribe in many African countries are major ethnic/regional and religious identities. Sections of the elite have tended to mobilise people around such identities in struggles for state power. They have exploited fears as to what will happen if ‘representatives’ of another group gain, or are not removed from, power. In the process, existing divisions have often been exacerbated and new ones created. There have been few pressures on the elite to stay within constitutional frameworks in their competition for state power. In deeply divided countries, there has been strong pressure for the section of the elite in control of the state to use any means at hand to retain power. Such measures have included seeking control of an expanding repressive apparatus of the state (intelligence services and security forces).

In the 1960s and 1970s such tendencies were often bolstered by state ideologies of development, which emphasised the need for stability. Super-power competition provided financial resources and legitimacy to weak regimes, and often contributed to development and increased capacity of repressive apparatus. Patronage and subsidies (for example, of urban food prices) were used to shore up support from client groups and to reduce the likelihood of potentially destabilising urban dissent.

Constitutions became little more than legitimating devices in many countries. They were ignored, overthrown or replaced where they were obstacles to the accumulation of power and wealth by those in control. Abuses of rights on an appalling scale occurred in the struggles for power between sections of the elite.

### **The State and the Constitution in Melanesia**

There are parallels between the situations in Melanesia and Africa, especially concerning the prevalence of the weak state and strong localised society based on resilient pre-state social structures. In Melanesia, however, the state is perhaps even weaker than in Africa, due to factors such as the limited sustainable capacity developed during the colonial era, as well as others, discussed below, which inhibit co-ordination of both policy and agencies of the state.

Linguistic, cultural and ethnic groups in Melanesia tend to be both small and multiple. These factors help to explain the absence of attempts on behalf of any ethnic group to control the state in the post-independence period prior to the 1987 coups in Fiji Islands. Of course, the large Indo-Fijian population in Fiji Islands enabled observers to treat that situation as an exceptional case in the Pacific. However, the increasing complexity and intensity of divisions among indigenous Fijians, the ethnic

element in the conflict in Bougainville since 1988,<sup>60</sup> and the development of significant ethnic conflict in Solomon Islands since 1998 all point to the potential for ethnic tensions to become central to struggles for control of the state in Melanesia in a manner similar to Africa.

It is the absence of significant ethnic divides in national politics anywhere other than Fiji Islands that is the basic explanation for the good record of Melanesia (before the Solomon Islands coup of June 2000) in relation to adherence to rules on succession of government. Where such divides do not exist there is room for political competition between a wide range of sections of the elite. None is either subject to strong pressure to take exclusive control of the state or capable of doing so if it wishes to. (They are all unable to capture control of the repressive apparatus by ethnic stacking of positions, as in Africa.) Without a cohesive force controlling the state, needing always to fend off or destabilise competing claims on power, the stakes of political competition are not nearly as high as in many cases in Africa.

In the absence of class and other interests which cut across the multiple and fractured clan interests, no political party or ideology promotes cohesive interests at the national level. The first-past-the-post electoral system also works against development of such interests. As a result, the state is controlled by ever-changing bands of sections of the elite. Unable to control the whole, each element of the band in government for the time being tends to attempt to extract what it can from whatever part of the state apparatus and resources it can get access to. The societies from which the politicians (and even senior) officials originate also tend to apply pressure to them to extract state resources on their behalf. In the process, the weakness of the state is reinforced, but a kind of equilibrium is maintained.

There is little capacity to develop a coherent policy or to integrate the operations of state agencies. Indeed, coherent policy or integrated operations could limit the ability to extract resources from the state. Accordingly each agency tends to operate with a great deal of independence. Prime ministers might like to assert control over all parts of the state apparatus but, having no means of enforcing discipline over their coalition partners, they have little capacity to control the state agencies under particular ministers.

As a result of such factors, all factions tend to accept the constitutional framework for managing political succession. More correctly, the constitution is accepted as the arena for management of elite competition. But acceptance of the arena does not reflect acceptance of all constitutional limits. As already discussed, there is evidence that the constitutional norms concerning accountability and human rights have limited acceptance. They tend to stand in the way of accumulation of wealth by those in power. Further, the limited cohesion and co-ordination of state agencies encourages, or at least puts few obstacles in the way of, breach of such norms.

Without co-ordination and constructive policy, the pressures of rapid social and economic change tend to produce crises that the state has little capacity to analyse or manage. Semi-autonomous state agencies have little capacity to analyse and deal with

such crises, and their responses tend to be poorly judged, often exacerbating the original problems. Abuses of human rights tend to occur in such circumstances, not because the state desires them, but precisely because there is ineffective co-ordination and control of weak and under-resourced state agencies. The way in which the Bougainville conflict in Papua New Guinea escalated from late 1988 is the most obvious example of this pattern of response by the state. Poorly judged and undisciplined responses by police riot squads helped transform a localised landowner conflict to a province-wide rebellion. Harsh responses by the initially better disciplined Defence Force to Bougainville Revolutionary Army action added to the problem.<sup>61</sup>

It is also true, however, that the absence of pressure to take exclusive control on behalf of any ethnic or other interest means there is little focussed effort to use the coercive power of the state against particular opponents. Hence, human rights abuses by security forces have in most cases been less systematic and less severe than has often been the case in Africa. They are most often products of the random and uncoordinated actions by disjointed and poorly trained elements of the state apparatus, rather than of organised state action.

Consequently we can say that some constitutional limits are accepted by those in power whereas protection from the constitution is largely an irrelevance for the vast majority of the population — the rural dwellers and the urban poor.

This is not to say that constitutions have not played, and do not continue to play, a significant role in Melanesia generally. Independence mythology (the debate and stories about independence that have given special meaning and status to events of the time) combined with longevity have given them legitimacy and status that have enabled them to have a degree of autonomy and therefore to have some significant impacts.<sup>62</sup> Thus, for example, independent institutions created by constitutions with accountability functions benefit from the protection of the constitution (even if, in some cases, their positions have tended to be weakened as more elements of the elite find it in their interests to evade the restrictions of constitutional limits).

## PARTICIPATION AND CIVIL SOCIETY: SUPPORT FOR CONSTITUTIONALISM?

In the light of the preceding analysis of factors which may help to determine the differing roles of law in various post-colonial societies, the extent to which support for the rule of law may be offered by popular participation and civil society can be examined more realistically.

### **Popular Participation**

As already discussed, participation in government is widely regarded as contributing to constitutionalism. Its importance tends to be assumed in the industrialised 'democracies'. However, there is limited consensus on the factors which result in the

rule of law being accepted in such countries. Further, there is little reason to believe that governmental arrangements for popular participation that might have particular results in such countries will necessarily have the same outcomes in post-colonial societies.

Debate in Africa from the early 1990s about the possible consequences of popular participation in government arises from moves away from the highly centralised one-party states that emerged in many countries in the 1960s. Popular participation even in the form of national elections either did not occur at all or was tightly controlled. There was almost no experience of elected sub-national government of any kind. The question is whether the experience of multi-party elections and political decentralisation helps to restrict executive action.

In fact what can only be described as tentative moves towards democratisation in Africa since the late 1980s were sparked not so much by popular pressures as by the impact of several closely related factors. These were the end of the Cold War, the general fiscal crisis facing most states and the ascendancy of a global economy. With the Cold War over, the global economy reduced the significance of national borders for the flow of capital. Grossly unfair patterns of world trade and poor domestic management contributed to the fiscal crisis of the state, itself exacerbated by cessation of the Cold War super-power competition that had subsidised authoritarian but otherwise poorly managed and unsustainable regimes. Forced to turn to international financial institutions, African governments had little choice but to meet the conditions attached to aid informed by a new orthodoxy about good governance and a reduced role for the state being pre-conditions for economic development. The possibilities for state patronage and subsidies reduced as the size of the public sector shrank rapidly. Loyalty of security force members was often undermined by lack of pay. Urban dissent emerged.

Governments no longer capable of crushing or buying off dissent called national constitutional conventions (or were forced to accept them), or amended constitutions or were overthrown. A few — such as Zaire and Kenya — initially resisted change, but at the cost of interminable chaos. The result was a wave of ‘democratisation’. It is far from certain, however, that the long-term outcomes will include effective constitutional limits on those in power.

A survey of popular protest and political reform in African countries after the Berlin Wall fell found little evidence of emergence of effective forces “aggregated across the full breadth of civil society”. Based in the urban bourgeoisie, protest sought to “protect corporate privilege”, being “a conservative reaction against economic austerity. The opportunism of opposition political leaders, their patronage followings, and their links with current elites all suggest that a change of leadership would probably perpetuate a clientilistic pattern of ‘politics as usual’”.<sup>63</sup>

When the dust of popular protest had settled new elite groups had taken control under multi-party political systems introduced by constitutional amendment (as in Zambia, Malawi and Tanzania) or under new constitutions, as in several francophone countries (Senegal, Mali etc.). Astute managers of reform, such as President Moi of



Kenya, managed the transition. Exploiting differences in the opposition he was returned to power in the first — and flawed — multi-party election in almost 30 years and thereafter continued to rule in much the same dictatorial manner as before under the new and supposedly democratic system.

Concerning popular participation in government in Melanesia there is limited evidence that the operation of the parliamentary democracy at the national level counters the pressures towards abuse of rules on accountability and human rights, as discussed already. Regular national elections in Westminster system variants have produced national legislative and executive institutions that tend to be unaccountable to the electors. Contributing to the outcome have been the lack of effective political parties, the first-past-the-post electoral system, small traditional societies (clans and sub-clans), the continuing strength of clan loyalties and the lack of class and other interests which cut across them.<sup>64</sup> There was some evidence that the provincial government system operating in Papua New Guinea until 1995 did have an impact in terms of acting as a check on power at the centre.<sup>65</sup> However, the reforms of the system in 1995 provided for in amendments to the *Constitution* and the *Organic Law on Provincial and Local-level Governments* 1995 has given members of the national legislature control of provincial governments. There is little evidence of sub-national governments elsewhere in Melanesia being effective checks on the national government.<sup>66</sup>

### Civil Society

In like manner to the debate on democratisation, the lack of clarity in debate on civil society in industrialised countries has not prevented many assuming that emergence in post-colonial countries of a ‘developed’ civil society on the model of the former countries will necessarily result in support for constitutional limits on the state. Yet the evidence for the emergence of such a civil society in post-colonial countries is far from clear, and the role of civil society in such countries remains problematic.

The evidence for civil society in Africa is supposedly seen in the largely urban-based social unrest that has contributed to the fall or destabilisation of some one-party regimes since the late 1980s. The dominant notion of civil society in this discourse has been described as:

...civic organisations of professionals, workers, women and others which not only lobby the State but also seek to humanise society. A particular species of them, the NGOs, have achieved prominence in recent years, seen as champions of rights and democracy, and giving voice to the underprivileged.<sup>67</sup>

This notion is in the tradition of civil society in the model of the industrialised ‘democracies’, of associations which shape public opinion and establish norms affecting the way the state operates. As discussed already, there are supposed to be links between civil society and popular participation, especially through sub-national government.<sup>68</sup>

Many observers (including foreign donors — both foreign governments and aid organisations) of post-colonial states in Africa and elsewhere tend to believe that encouragement of local level NGOs and local level governments will not only assist in controlling the executive, but may also contribute to maintaining and restoring basic order in developing states where economic and other pressures are tending to undermine “the basic structures of nation states”.<sup>69</sup>

Key strands of thought about the evidence for the emergence of civil society in post-colonial states can be criticised. First, as to social unrest since the late 1980s, rather than evidence of civil society, it may be better understood as a conservative reaction to economic austerity.<sup>70</sup> Secondly as to the role of NGOs, there is a need for caution in assessing their potential role, “as they proliferate under encouragement of or incentives from foreign donors, operate increasingly as consulting firms, and lose touch with, or accountability to, in local constituencies”.<sup>71</sup> Thirdly, as to the role of local government in strengthening civil society, there is little experience of long-term political decentralisation in Africa. Deconcentration of administrative capacity — ‘administrative decentralisation’ — rather than political decentralisation has been the pattern since the end of the colonial era. In the Pacific and elsewhere in post-colonial countries, the uneven experience of political decentralisation<sup>72</sup> suggests the need for care in making assumptions about sustainability and outcomes of political decentralisation.

Little is understood about the way in which civil society might develop to the point where it supports constitutionalism in a significant way in either Africa or the Pacific. If, as Woods argues, the principal indicator of a ‘developed’ civil society is the manner in which individuals and groups “articulate a set of norms which effect the way the state functions and how other groups will interact”,<sup>73</sup> then civil society in Africa “is still threatened by the particularism of ethnicity and atomistic actions”.<sup>74</sup> The “relatively unarticulated character of economic differentiation on the continent” is a significant factor, for while the economic base “does not determine whether a civil society exists... it does influence the rate and manner in which class interests will intersect with normative claims in the Western European tradition”.<sup>75</sup> In other words, in the absence of the economic conditions of Europe, civil society will probably not limit state action in the same way it may do in Europe.

Even Woods’ interesting analysis tends to assume that the goal for African civil society is something on the model of Western Europe. The views of Woods and commentators with similar analyses have been criticised by Kasfir. He points out that most notions of civil society in Africa are based too much on idealised Western experience, do not incorporate much of the rich web of political activity which goes on in Africa, and are unrealistic about the extent of the problems likely to be involved in developing civil society organisations to the point where they are powerful enough to act as limits on the state. In Kasfir’s view, it is not possible to exclude ethnic or religious associations from civil society. Such associations, if strong and democratically based, could in fact weaken the state, undermining its ability to reconcile conflicting interests in society.<sup>76</sup>

If civil society is to become more important in Africa or the Pacific, factors such as ethnic divisions, the limited economic base, the limited linkages between traditional society and the modern economy<sup>77</sup> and the still relatively pervasive role of the state, will tend to shape distinctive African and Pacific island forms of civil society. These may also work in different ways and have quite distinct consequences from civil society in Western Europe.

In particular, civil society in Africa and the Pacific may not necessarily limit state power on the model of civil society in the ‘developed’ world. Experience in Asia should warn against what Ghai terms “over-romanticisation of civil society”, for it is not only the state that abuses human rights:

...massive violations also take place in and through civil society, sometimes with the connivance of the state, and frequently reflecting feudalistic and patriarchal dimensions of culture. Social conflicts, particularly those stemming from ethnic or caste differences, have politicised and militarised civil society in many states.<sup>78</sup>

There is, of course, civil society in Melanesia. But with the exception of Fiji Islands, the vast majority of the population in Melanesia live in rural areas and in pre-state social structures with limited engagement with the modern state. As a result, there is little in society to make it meet the criteria of ‘civil’ society. Society has limited cohesion, little which aggregates multifarious local interests in a way that can influence the state. Even in the few large urban centres, there is limited aggregation of interests. There are media organisations, trade unions, NGOs and — especially — churches, all of which seek to influence the state, but each on their own has a limited impact, and their concerns seldom coincide. These characteristics of civil society help to explain the lack of fulfilment of the hopes of some Papua New Guinea observers that the March 1997 popular protests against the Chan Government’s role in Sandline signalled the emergence of civil society as a powerful force in Melanesia.

The emergence of a ‘developed’ civil society in Melanesia may occur at the expense of traditional society, for it would be likely to involve development of such things as class and other interests which cut across clan loyalties. On the other hand, growing social pressures arising from overlapping factors such as economic change associated with globalisation, increasing social stratification, land shortages, law and order problems are resulting in increased popular dissatisfaction being expressed in government. The popular protests associated with Sandline provide an example from PNG. As dissatisfaction spreads more widely it will probably tend to be mobilised by populist leaders. Depending on the leadership, the basis might be laid for emergence of new political forces. In the process, aggregations of interests powerful enough to influence the state may occur. There are, however, many possible alternative futures. For example, the struggles for power and control of resources likely to be involved could contribute to emergence of new ethnic identities. As in Fiji Islands and Solomon Islands, these may be manipulated in the course of such struggles and ultimately contribute to undermining of constitutional rule as in both of those countries or at least undermine the ability of the state to reconcile conflicting interests in society.<sup>79</sup>

## CONCLUSIONS

The constitutions of Melanesia are impressive examples of the ‘formal sense’ of constitutionalism. While the record of the ‘living reality’ of constitutionalism may be less remarkable, it nevertheless compares more than favourably with that of much of the rest of the post-colonial world. While there may be some evidence of commitment to constitutionalism in Melanesia in the immediate post-colonial era, the analysis in this chapter would suggest that such commitment was always limited. In particular, the apparent commitment to constitutional rules of succession suited the interests of sections of the elite. Moreover, such rules are readily jettisoned, particularly as significant ethnic conflict becomes a factor in national politics. The effectiveness of rules on accountability and human rights also appears to be waning.

Just as it was assumed at the time of de-colonisation — in the Pacific as much as in other parts of the world — that the rule of law would be a consequence of acceptance of ‘Western’ constitutional models, there is a similar tendency to assume the efficacy of the model of the ‘West’ in the debates about the ability of popular participation and civil society to support constitutionalism in post-colonial states. There is little evidence, however, to suggest that the popular participation provided for under the post-independence Melanesian constitutions has had a significant impact on constitutionalism there, and little evidence so far for significant impact in that regard from a Melanesian civil society.

It seems likely that the particular political and economic forces at work in Europe in the last few hundred years were critical to the emergence of constitutionalism. If civil society is in fact a major factor in maintaining constitutionalism in the West, it is important to remember that it was probably a product of much the same economic and political forces as contributed to constitutionalism. Those forces do not exist in Melanesia. In particular, there is no developed private sector. Nor is there the same set of nationalising pressures as existed in Europe, and which contributed to the notion of nationalisation of power (one of the “constituent elements” of constitutionalism identified by Ghai).<sup>80</sup> Rather, in Melanesia, small pre-state structures with their own norms are the primary sources of identity and the main centre of loyalties of most individuals, often undercutting national identity and support for the state.<sup>81</sup> With such different political and economic forces at work, it is most unlikely that either constitutionalism or civil society will develop in the same way in the Melanesian countries as they have in the West.

The reasonably positive record of acceptance of constitutional limits in Melanesia up until the late 1980s can be related to particular factors in the post-independence situations, and especially the limited competition for control of the state by large ethnic and other interests. On the other hand, the same factors have contributed to the longevity of independence constitutions, thereby increasing their legitimacy and autonomy. These qualities have probably been factors in the popular pressure for return to constitutional order in post-coup situations, especially in Fiji Islands. It is also, in part, a response to expressions of concern from the international community,

something that is likely to become an increasingly important factor in support for constitutionalism in post-colonial states. All of these factors can be expected to continue to operate, although developments since the 1980s suggest that their impact will not necessarily be enough to change existing trends towards a weakening of constitutionalism.

This is not to say that constitutionalism is a dead issue in Melanesia. Nor should it be concluded that there is no role at all for increased participation in government or for civil society in enhancing constitutionalism. Rather, the point is that they — and indeed constitutions generally — can be expected to operate differently from their equivalents in the West. Despite the absence of the same conditions that contributed to the development of both civil society and constitutionalism in the West, people in Melanesia can nevertheless be expected to find their own paths to constitutionalism. After all, they, like people everywhere, have a deep interest in ensuring that there are limits on those with access to state power.

Finally, not only can it be expected that the paths to constitutionalism will take account of the particular situation of each Melanesian state, but the process could also be slow and gradual. If constitutionalism in Europe was a slowly developing product of complex political and economic forces, much the same will probably be true if it is to become more of a ‘living reality’ in the Melanesian states.

## ENDNOTES

- 1 Fry, G. 1983. Succession of Government in the Post-colonial States of the South Pacific: New Support for Constitutionalism? *Politics* 18:48–60.
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- 3 DeSmith, S.A. 1962. Constitutionalism in the Commonwealth Today. *Malaya Law Review* 4(2):205–20, at 205.
- 4 DeSmith, S.A. 1962. Above, n 3.
- 5 Ghai, Y.P. 1993. Above, n 2.
- 6 Ghai, Y.P. 1993. Above, n 2.
- 7 See, for example, Hague, R. Harrop, M. and Breslin, S. 1998. *Comparative Government and Politics: An Introduction Fourth Edition*. London: MacMillan, chs 5–10.
- 8 Diamond, L. 1994. Rethinking Civil Society: Towards Democratic Consolidation. *Journal of Democracy* 5(3):4–17. For an example of discussion of the connections between popular participation through decentralisation and the development of civil society in Africa (in this case, Uganda) in the 1990s see Regan, A.J. 1998. Decentralization Policy: Reshaping State and Society. In Hansen, H.B. and Twaddle, M. (eds.) *Developing Uganda*. Oxford: James Currey.
- 9 Constitutional Planning Committee. 1974. Final Report of the Constitutional Planning Committee 1974: Part I. Port Moresby: Papua New Guinea Government Printer.
- 10 See analysis of the CPC views in Ghai, Y.P. and Regan, A.J. 1992. *The Law, Politics and Administration of Decentralisation in Papua New Guinea*. Monograph 30. Port Moresby: Papua New Guinea Research Institute at p 11, and pp 49–53. For a discussion of decentralisation as an issue during constitution making in other Melanesian states, see Ghai, Y.P. 1988. Constitution Making and Decolonisation. In Y.P. Ghai (ed.) *Law, Politics and Government in the Pacific Island States*. Suva: Institute of Pacific Studies University of the South Pacific at pp 30–32.
- 11 Woods, D. 1992. Civil Society in Europe and Africa: Limiting State Power Through a Public Sphere. *African Studies Review* 35(2): 77–100. Criticisms of aspects of Woods’ analysis by Nelson Kasfir are discussed later (Kasfir, N. 1998. Civil Society, the State and Democracy in Africa. *Commonwealth and Comparative Politics* 36(2).)
- 12 Personal and discretionary rule, as opposed to rule based on legal-rational norms that limit the ruler’s powers.
- 13 Woods, D. 1992. Above, n 11 at pp 78–79.
- 14 Woods, D. 1992. Above, n 11 at p 84.
- 15 Woods, D. 1992. Above, n 11 at p 97.
- 16 See above, Diamond, L. 1994. At pp.8–9.
- 17 For a discussion of links between decentralisation policy and the development of civil society in Uganda, see Regan, A.J. 1998. Above, n 8.



- 18 For detailed discussion of the Sandline affair and its aftermath, see Dinnen, S., May, R. and Regan, A.J. (eds) 1997. *Challenging the State: The Sandline Affair in Papua New Guinea*. Canberra: Research School of Pacific and Asian Studies, The Australian National University; Dorney, S. 1998. *The Sandline Affair: Politics and Mercenaries and the Bougainville Crisis*. Sydney: ABC Books; Ivarature, H. 1998. The Sandline International Controversy in Papua New Guinea. In P. Larmour (ed.) *Governance and Reform in the South Pacific*. Canberra: The Australian National University, NCDS and SSGM; O'Callaghan, M.L. 1999. *Enemies Within: Papua New Guinea, Australia, and the Sandline Crisis: the Inside Story*. Sydney: Doubleday.
- 19 *Constitution of the Independent State of Papua New Guinea* s 142; *Constitution of Solomon Islands* s 33 and Sch 2; *Constitution of Vanuatu* art 39 and Sch 2.
- 20 *Constitution of the Republic of Fiji Islands* 1997 s 98.
- 21 *Constitution of the Republic of Fiji Islands* 1997 ss 107–9; *Constitution of the Independent State of Papua New Guinea* s 145; *Constitution of Solomon Islands* s 34; *Constitution of the Republic of Vanuatu* art 41 (hereafter *Fiji, Papua New Guinea, Solomon Islands, and Vanuatu*).
- 22 *Fiji* ss 98 and 107–9; *Papua New Guinea* s 141; *Solomon Islands* s 34; *Vanuatu* art 41.
- 23 See above, n 21.
- 24 *Fiji* ss 175–182; *Papua New Guinea* ss 209–216; *Solomon Islands* ss 100–109; *Vanuatu* art 23.
- 25 *Papua New Guinea* ss 118–123; *Vanuatu* art 21.
- 26 *Fiji* ss 156–165; *Papua New Guinea* ss 26–28 and 217–220; *Solomon Islands* ss 93–98; *Vanuatu* arts 59–66.
- 27 *Fiji* ss 166–8; *Papua New Guinea* ss 213–4; *Solomon Islands* s 108; *Vanuatu* art 23.
- 28 *Fiji* s 114; *Papua New Guinea* ss 176–7; *Solomon Islands* s 91; *Vanuatu* art 53.
- 29 *Fiji* ss 117–139; *Papua New Guinea* ss 168–183; *Solomon Islands* ss 77–88 ; *Vanuatu* arts 45–7.
- 30 *Fiji* ss 2, 120(4) & 128; *Papua New Guinea* ss 18–24; *Solomon Islands* s 83; *Vanuatu* art 51.
- 31 *Fiji* ss 169–173; *Papua New Guinea* ss 221–225. For a discussion of the Papua New Guinea provisions, see Regan, A.J. 2001 Protection of Independence of Constitutional Office-holders in Regan, A.J. Jessep, O. and Kwa, E. (eds) *Twenty Years of the Papua New Guinea Constitution*. Sydney: Law Book Co.
- 32 *Fiji* ss 21–38 & 40; *Papua New Guinea* ss 32–56; *Solomon Islands* ss 3–15; *Vanuatu* art 5.
- 33 *Fiji* ss 41–43; *Papua New Guinea* ss 57–8; *Solomon Islands* ss 17–18; *Vanuatu* art 6.
- 34 *Fiji* ss 39 & 44; *Papua New Guinea* s 25.
- 35 Ghai, Y.P. 1993. Above, n 2 at p 190.
- 36 Ghai, Y.P. 1993. Above, n 2 at p 187.
- 37 Fry, G. 1983. Above, n 1.
- 38 Canning D. 2001. The Ombudsman Commission; and Toop, G. 2001. The Leadership Code; both in Regan, A.J. Jessep, O. and Kwa, E. (eds). *Twenty Years of the Papua New Guinea Constitution* Law Book Co: Sydney.

- 39 In the case of Papua New Guinea, for example, compare the assessment for 1979 made by the United States Department of State for the US Congress (Department of State. 1980. Papua New Guinea. In *Country Reports on Human Rights Practices for 1979*, US Government Printing Office: Washington) with that for 1999 (website [www://dosfan.lib.uic.edu:70/00ftp%3A...%20Pacific%3A%20Papua\\_New\\_Guinea\\_%2832k%29](http://dosfan.lib.uic.edu:70/00ftp%3A...%20Pacific%3A%20Papua_New_Guinea_%2832k%29) accessed 24/11/2000).
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- 42 See above, n 18.
- 43 Ambrose, D. 1996. A Coup that Failed? Recent Political Events in Vanuatu. *State, Society and Governance in Melanesia Discussion Paper* 96/3. Canberra: The Australian National University; Bohane, B. 2001. New Vanuatu Government Hanging by a Thread. *Sydney Morning Herald*. 18th April 2001 p 8.
- 44 Crossland, K.J. 2000. The Ombudsman Role: Vanuatu’s Experiment. *State, Society and Governance in Melanesia Discussion Paper* 00/5. Canberra: The Australian National University. See also Toop, G. 2001. Above, n 38. For discussion of aspects of corruption in the Pacific, see Larmour, P. 1997. Corruption and Governance in the South Pacific. *State, Society and Governance in Melanesia Discussion Paper* 97/5. Canberra: The Australian National University.
- 45 An assessment made for the Asian Development Bank of accountability in Solomon Islands summarised the record of the Solomon Islands Ombudsman and Leadership Code Commission as having tended “to act on behalf of public servants, and political leaders, rather than as a means of making them accountable to the public” Larmour, P. 2000. Issues and mechanisms of Accountability: Examples from Solomon Islands. *State, Society and Governance in Melanesia Discussion Paper* 00/1. Canberra: The Australian National University at p 13.
- 46 Information on specific human rights abuses related to the 2000 coup can be found on the Amnesty International website at <http://web.amnesty.org/ai.nsf/countries/fiji> (Accessed 27/11/01) and in the U.S. Department of State Human Rights Report 2000, <http://www.humanrights-usa.net/reports/fiji.html> (Accessed 27/1/01) Both sites also contain more general information on human rights abuses during the 1987 coups.
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- 48 UNCHR. 1995. United Nations Centre for Human Rights Technical Cooperation Programme. Report of a Needs Assessment Mission to Papua New Guinea 28th May–6 June 1995 at pp 12–16.
- 49 UNCHR. 1995. Above, n 48 at pp 18–20.

- 50 UNCHR. 1995. Above, n 48 at p 14.
- 51 UNCHR. 1995. Above, n 48 at p 14.
- 52 UNCHR. 1995. Above, n 48 at p 14.
- 53 UNCHR. 1995. Above, n 48 at p 14.
- 54 See *Republic of Fiji v Prasad* (Court of Appeal of Fiji, Civil Appeal No. ABU0078/20005 1 March 2001) and *Prasad v Republic of Fiji* [2001] NZAR 21. These decisions are analysed in Williams, G. 2001. The Case that Stopped a Coup? The Rule of Law and Constitutionalism in Fiji. *Oxford University Commonwealth Law Journal* 73–93. The Journal of South Pacific Law Special Interest Section “Fiji Islands Crisis 2000–2001” contains various judgments and comments on this topic.  
[http://www.vanuatu.usp.ac.fj/journal\\_splaw/Special\\_Interest/Fiji\\_2000/Fiji\\_Main.html](http://www.vanuatu.usp.ac.fj/journal_splaw/Special_Interest/Fiji_2000/Fiji_Main.html) (Accessed 29/11/01)
- 55 In Papua New Guinea, see, for example, *Haiveta v Wingti* (No.1) [1994] PNGLR 160, and *Haiveta v Wingti* (No.3) [1994] PNGLR 197. In Solomon Islands, see, for example, *Ulufa’alu v Attorney-General and ors*, Unreported, High Court of Solomon Islands, HC-CC No.195 of 2000, Nov 2001.
- 56 This tendency continues. While working as a constitutional adviser to the Government of Uganda in the early 1990s, I listened to a succession of visiting experts extol the virtues of the United States Constitution. The clear implication was that a presidential executive, a short constitution, federal arrangements and so on would all produce results in Uganda similar to those the US Constitution was believed to have produced for the US.
- 57 The record of such countries is, of course, far from uniform. Not only have there been coups and extremely authoritarian governments in various European countries, continuing into the 1970s, but human rights abuses on the part of the state occur in all countries.
- 58 Ghai, Y.P. 1993. Above, n 2 at p 189. For a discussion of such issues in the Pacific context, see Ghai, Y.P. 2001. Establishing a Liberal Political Order Through a Constitution: The Papua New Guinea Experience. In Regan, A.J. Jessep, O. and Kwa, E. *Twenty Years of the Papua New Guinea Constitution*. Sydney: Law Book Co.
- 59 Ghai, Y.P. 2001. Above, n 58 at p 44.
- 60 See Ghai, Y.P. and Regan, A.J. 2000. Bougainville and the Dialectics of Ethnicity, Autonomy and Separation. In Ghai, Y.P. (ed.) *Autonomy and Ethnicity: Negotiating Competing Claims in Multi-ethnic States*. Cambridge: Cambridge University Press and the sources cited therein.
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- 62 In relation to the legitimacy of the Papua New Guinea *Constitution*, see Ghai, Y.P. 2001. Above, n 58.
- 63 Bratton, M. and van de Walle, N. 1992. Popular Protest and Political Reform in Africa. *Comparative Politics* 419–442 at p 440. See also Bratton, M. and van de Walle, N. 1997. *Democratic Experiments in Africa: Regime Transitions in Comparative Perspective*. Cambridge: Cambridge University Press.

- 64 For analysis of the issues in the Papua New Guinea context, see Ghai, Y.P. 2001. Above, n 58. and Regan, A.J. 1997. The Papua New Guinea Policy-making Environment as a Window on the Sandline Controversy. In Dinnen, S. May, R. and Regan, A.J. (eds.) *Challenging the State: The Sandline Affair in Papua New Guinea*. Canberra: Research School of Pacific and Asian Studies, The Australian National University.
- 65 Ghai, Y.P. and Regan, A.J. 1992. Above, n 10 at chapters 8 and 9.
- 66 Larmour, P. and Qalo, R. 1985. *Decentralisation in the South Pacific*. Suva: University of the South Pacific.
- 67 Ghai, Y.P. 1994. Human Rights and Governance: The Asia Debate. *The Australian Yearbook of International Law* 15:1–34 at p 32.
- 68 Diamond, L. 1994. Above, n 8 at pp 8–9.
- 69 See, for example, Kilby, P. 1994. Human Rights and Participatory Development: Stemming the rise of the “New Anarchy”. *Development Bulletin* 32:20–22 at p 20.
- 70 Bratton, M. and van de Walle, N. 1992. Above, n 63.
- 71 Ghai, Y.P. 1994. Above, n 76 at p 32. In other words, they manifest at least the same degree of fragmentation and factionalism as the wider society in which they operate.
- 72 Rondinelli, D.A., Nellis, J.R. and Cheema, G.S. 1983. Decentralisation in Developing Countries: A Review of Recent Experience. *World Bank Staff Working Paper No. 581*: Washington; Larmour, P. and Qalo, R. 1985. Above, n 66; Ghai, Y.P. and Regan, A.J. 1992. Above, n 10; Regan, A.J. 1998. Above, n 8.
- 73 Woods, D. 1992. Above, n 11 at p 97.
- 74 Woods, D. 1992. Above, n 11 at p 97.
- 75 Woods, D. 1992. Above, n 11 at p 97.
- 76 Kasfir, N. 1998. Above, n 11 at pp 123–149.
- 77 Woods, D. 1992. Above, n 11.
- 78 Ghai, Y.P. 1994. Above, n 67 at p 22.
- 79 Kasfir, N. 1998. Above, n 11.
- 80 Ghai, Y.P. 1993. Above, n 2 at p 188.
- 81 For a personal account, in the Papua New Guinea context, of issues involved here, see Nonggorr, J. 2000. The Sandline Affair: a Papua New Guinean Perspective. In Bocha, B. and McFarlane, J. (eds.) *Australia and Papua New Guinea; Crime and the Bilateral Relationship*. Canberra: Australian Defence Studies Centre.