IASER DISCUSSION PAPER

THE CONSTITUTIONAL ARRANGEMENTS FOR DECENTRALISATION IN PAPUA NEW GUINEA

An Overview

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I. INTRODUCTION

This paper examines the assumptions underlying some of the central constitutional provisions on decentralisation in Papua New Guinea. The debate on decentralisation dominated the pre-independence discussions of the country’s proposed Constitution, and decentralisation continues to be a controversial issue, particularly with Members of the National Parliament. We do not propose to discuss the complex history of the establishment of the provincial government system which has been ably documented elsewhere (Conyers 1976; Ballard 1981), nor do we examine in detail the arguments for and against decentralisation (Premdas and Pokawin 1979). Our discussion assumes some knowledge of this history. Nevertheless, as the constitutional provisions must be understood in the context of the wider debates, we shall make brief references to them.

The legal provisions on decentralisation are complex and are spread through numerous laws -- the national Constitution, the Organic Law on Provincial Boundaries, the Organic Law on Provincial Government (OLPG), the 19 provincial constitutions, numerous 'ordinary' Acts of the National Parliament and Acts of provincial legislatures. Those of central importance are the national Constitution and the OLPG. These are difficult and complex laws, resulting from the complexity of what they set out to do. The complexity is also due, in part, to the somewhat disorderly and uneven path to decentralisation, the multiplicity of consultants and reports on the subject in the period 1973–1976 and the pressures in 1975 and 1976 to reach a quick and comprehensive settlement to the attempted secession of Bougainville. An understanding of the philosophy and controversies that underlie particular provisions of the laws can elucidate the meaning of those provisions and assist an understanding of the provincial government system as a whole.

It is well known that Papua New Guinea was ruled in the colonial period through a highly centralised administration which was not particularly responsive to local pressures or accountable to public opinion. One of the major concerns of the Constitutional Planning Committee (CPC) set up in June 1972 to advise on the constitution for self-government was to break the mould of this colonial state. An essential aspect of its strategy for the democratisation of the state was the decentralisation of a significant measure of political and administrative powers to provinces (which were known as districts during the colonial administration). The national government accepted the principle of provincial government but rejected the proposal that there should be any exclusive provincial powers or that the system of provincial government should be entrenched in the Constitution.

A compromise between the views of the CPC and the government was reached whereby only the broad framework of decentralisation
would be established in the Constitution. Agreement on many detailed points had been secured through a committee on the structure and powers of provincial governments, but when the matter came up for approval by the Constituent Assembly, the government unexpectedly but successfully moved a motion for the deletion of all references to decentralisation. The representatives of Bougainville, the province most committed to decentralisation, responded by boycotting the Constituent Assembly. Shortly before Papua New Guinea became formally independent, the Bougainville Interim Provincial Government declared its secession from Papua New Guinea and the unilateral independence of the province. Relations between the governments of Papua New Guinea and Bougainville remained tense, but some rapprochement was reached in February 1976. In return for Bougainville renouncing secession, the national government agreed to reinstate the constitutional provisions on provincial government and to negotiate the details of the system. Long and protracted negotiations culminated in the signing of the Bougainville Agreement on 17 August 1976. The constitutional amendments were passed in December 1976 and the OLPG containing the detailed provisions on decentralisation, in March 1977.

Although the 1976 negotiations between the Bougainville leaders and the national government were conducted in a tense atmosphere and a number of documents prepared at different times were used as background materials, certain clear philosophical and 'political' assumptions underlie the Bougainville Agreement and the subsequent OLPG. First of all, it was understood, that the new provisions were intended to redefine the political system in fundamental ways involving a radical redistribution of power. By establishing representative bodies at the provincial level and vesting the provincial governments with financial and staffing resources, a dynamic move was initiated towards that redefinition.

Second, the constitutional framework was such that it would both promote and accommodate that dynamic move. It had enough structure and substance to ensure that the dynamics would not be scattered, and enough flexibility to accommodate the unfolding of the dynamics. Recognising the plurality and diversity of the country, it neither attempted a definitive allocation of powers nor established a common mould into which all provinces had to fit. It struck a balance between systems of federalism and local

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Under the Bougainville Agreement, it was accepted that the provincial government for Bougainville Province should be called the 'North Solomons Provincial Government'. For the sake of consistency, the name of the province, as provided in the Organic Law on Provincial Boundaries, should then have been amended from Bougainville to North Solomons. Although no such amendment has ever been made, the province is generally known as North Solomons, and is so described henceforth in this paper.
government, so avoiding the rigidity and legalism of the former and the insecurity and subordination of the latter. It struck that balance in large part by the emphasis on procedures for consultation as safeguards and by the mechanisms of cooperation between the two levels of government.

2. SPECIAL RELATIONSHIP OR A GENERAL PRINCIPLE

The successful conclusion of the Bougainville negotiations and the substantial support for it in National Parliament was strong endorsement of the proposition that the road to unity lay through the recognition of diversity. The strength of local loyalties, the unequal penetration of central authority, the scattered nature of the territory (for example, North Solomons is separated by 1,000 kilometres of sea from the capital), and the limited armed force at the disposal of the centre led inexorably to this conclusion. This was reinforced by the traditional Melanesian preference for governance through consensus. There was recognition that only if a community did not feel threatened by domination from other groups in the state could it develop loyalty to the state.

Many of the communities have undergone rapid changes in the recent past, and are on the threshold of even greater social and economic transformations. While these changes have opened up new opportunities, social structures and communal discipline have been undermined. Torn between the wish for their full share of new opportunities and the desire to preserve their traditional and cultural solidarity, and uncertain of the implications of independence, the communities are anxious to maintain local autonomy both to extract resources from the centre and to mediate the impact of external forces.

Consequently, it was not surprising that the Bougainville formula – as set out in the Bougainville Agreement (1976) – was generalised. At one point the North Solomons delegation had wanted the new legal provisions to recognise their province’s special relationship with the centre (and the Agreement mentions the arrangements as ‘unique and special’ for North Solomons; Point 2). Anxious that similar options might be demanded by other provinces, the government became alarmed at the implications of generalising the concessions it had made to North Solomons. (Some provisions of the Bougainville Agreement made proper sense only if generalised, for example, the Premiers’ Council or the Fiscal Commission.) However, under interim legislation for the establishment of their governments, several other provinces had already set machinery in motion and Cabinet would probably have failed to persuade the Parliament to enact the necessary legislation to implement the Agreement if it was restricted to North Solomons. Moreover, the case for decentralisation was tied not only to ethnicity but also to social and political values which were central to the Constitutional Planning Committee’s overall proposals.
The boundaries of the provinces (essentially those of the 19 pre-independence administrative districts) are set by the Organic Law on Provincial Boundaries which came into force at independence. The OLPG enables the national Minister for Provincial Affairs to recognise any body in a province as a constituent assembly, for the purpose of consulting the body on the constitution of the province and the grant of provincial government (s.3). The Minister may then move a motion in the Parliament (which must be passed by an absolute majority) to authorise the grant of provincial government (s.4). The law does not specify the criteria that should guide the Minister's decision on a recommendation to the Parliament. Presumably he can withhold a recommendation in his discretion. He could use his power to compel a province to reconsider its proposed constitution if he disapproved of it. In conjunction with the Parliament's veto, the ministerial discretion means that a province does not have a right to provincial government, merely eligibility. In fact, the political pressures were such that all the provinces were granted provincial government status under the OLPG, the first in May 1977 and the last in November 1978.2

The Constitution and the OLPG do not, however, require that all provincial governments should be cast in the same mould. Some provinces were more eager than others to assume powers and some had greater political and administrative competence than others to do so. The Constitution provides for gradations in provincial governments and for powers and functions to be granted in stages (s.187G). The OLPG does not, however, give the central government any authority to withhold full government status and powers from any recognised provincial government which wants it. In fact, the general thrust of the OLPG is against gradations (in the implementation of the law, the national government has transferred powers by stages -- particularly financial powers -- although the OLPG does not expressly provide for such stages). However, the OLPG leaves open the option for a provincial government to have less than full powers but places considerable procedural obstacles in the exercise of that option. A province may receive less than the full powers provided under the OLPG (presumably in the primarily 'provincial' legislative powers or 'exclusively provincial' taxation powers under ss.24-26 and ss.56-60). To do so, provision to that effect must be made in the constitution of the province and such provision needs the approval of the National Parliament expressed by a two-thirds absolute majority (s.100). In practice, a two-thirds absolute majority is not easy to obtain, if only because of the normally low attendance in the Parliament.

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2 In 12 of the 19 provinces, provincial government bodies established under the Provincial Governments (Preparatory Arrangements) Act 1974 had been given recognition prior to the OLPG coming into force. See Note 4.
The reason for requiring this majority is not self-evident. It certainly does not exist to protect a province, because the procedures seem to be normally applicable only when a province is seeking limited powers; though it may also apply if the national government amends a provincial constitution using s.11 of the OLPG or (in the case of suspension of a province) using s.97 of the OLPG. It could protect the central government, as it may prefer for political and administrative reasons to have a uniform relationship with all the provinces. (As we shall see, after advice from a team of management consultants, the government has adopted the policy of uniform devolution throughout the country and s.100 has never been used).

The second factor which may produce variations among the provinces is their freedom as regards their internal constitutional and administrative arrangements, matters which we discuss in Part 5 of this paper.

3. THE CONSTITUTIONAL FRAMEWORK

The 'Constitutional Laws' of Papua New Guinea are defined to consist of the Constitution and the Organic Laws (Schedule 1.2.). These laws are designated the supreme law of Papua New Guinea and all Acts (whether legislative, executive or judicial) inconsistent with them, are invalid and ineffective (s.14). As between themselves, the Constitution enjoys a higher status than the Organic Laws so that the latter have to be read and construed subject to the Constitution.

The idea of an Organic Law was proposed by the government in its comments on the CPC Report in August 1974 (Papua New Guinea 1974:1-2). The proposal stemmed from two considerations:

- that a constitution which tried to give effect to all the recommendations of the CPC would be too long (the national government estimated that it would run to 300 printed pages - ibid.); and

- that such a long constitution would produce rigidity at a time when circumstances were likely to change greatly.

The CPC had anticipated this criticism and had suggested that some of its recommendations might well go into ordinary legislation and that others might be accorded a lesser degree of entrenchment than under the ordinary rules of amendment (CPC 1974:6-8, 53).

Both the House of Assembly and the National Constituent Assembly accepted the government's proposals and provisions were inserted into the Constitution for Organic Laws to set out the detail of many matters which were dealt with only in the broadest terms. (A more detailed discussion of the origins and purposes of Organic Laws can be found in an article by the provincial
draftsman of the constitutional laws (Lynch 19780: pp.178 and 191-193)).

Most provisions of Organic Laws are 'entrenched' to a similar degree as the national Constitution itself and require for their change, advance notice and normally a two-thirds absolute majority of votes of the Parliament, on two separate occasions, separated by a least two months (Constitution ss.12(2), 14 and 17).

To qualify as an Organic Law, a law must be made by the Parliament, be expressed to be an organic law, be consistent with the national Constitution and deal with matters which the Constitution has 'expressly authorised' to be dealt with by way of Organic Law (s.12(1)).

The source of authority for the OLPG is Part VIA of the Constitution, which provides that most details of the provincial government system should be dealt with in an Organic Law. Very brief provisions in the Constitution have been used as the authorisation for long and complex provisions in the OLPG. For example, four short subsections dealing with legislative powers (sub-ss.187C(6) and 187D(1)-(3)) are the main legal basis for the very complex provisions of ss.18-41 of the OLPG. Assuming that the provisions of the OLPG are all consistent with and 'expressly

Organic laws can make provision for matters not expressly authorised by the Constitution, provided the provision concerns matters that can be dealt with by an ordinary Act of the Parliament. However, such provision is not entrenched to the same extent as provisions "expressly authorised", because they can be "altered by the same majority that is required for any other Act of the Parliament" (s.12(3)). However, in a 1982 constitutional reference, the Supreme Court interpreted s.12(3) to mean that such provisions are partially entrenched, as it ruled that all of the stringent provisions of the Constitution concerning amendment of organic laws apply to such provisions other than those concerning the majority required. In particular, the provisions concerning notice and two separate votes apply. See SCR No.2 of 1982; Re Organic Law [1982] PNGLR 214 at pp. 223-224.

There have been 19 Organic Laws passed by the Parliament, dealing with a wide range of matters. They include Organic Laws on National Elections; Judicial and Legal Services Commission; Ombudsman Commission; Guarantee of the Rights and Independence of Constitutional Office Holders; and Nomination of the Governor-General. In general, they provide details connected with the organisation of essential government institutions. Many of them are very brief, the Organic Laws on National Elections and Provincial Government being the longest.
authorised' by the Constitution, the legislative foundations of the provincial government system enjoy a very high degree of protection from alteration or repeal by the Parliament. This satisfies one of the major concerns of both the CPC and the 1976 Bougainvillean leaders.

4. THE CONSTITUTIONAL STATUS OF DECENTRALISATION

At the beginning of the negotiations between the national government and North Solomons, there was considerable controversy as to the status that would be accorded to provincial governments. Prime Minister Somare had offered the North Solomon leaders the choice of confederate, federal or unitary status at their first meeting after the secession, and for a time the latter wanted nothing less than a confederate arrangement. Terminological debates slowed progress (especially after the central government realised the full implications of the 'confederate' offer). It was proposed that instead, the negotiations should focus upon the division and allocation of powers and the relationship between the centre and provinces, acceptable to both sides, without worrying about classifications. It was also proposed that the central government should undertake to promote the necessary constitutional amendments once an agreement on the points had been reached.

Perhaps this proposal shifted some advantage to the national government side; as did the decision to use the proposals of the Follow-Up Committee — which were 'unitary' in their orientation — as a starting point for the discussions. (The Follow-Up Committee was a committee of the House of Assembly established on the recommendation of the CPC to make proposals on many of the details of the provincial government system. It was assisted by two consultants, Watts and Lederman, who produced a report in July 1975 which contained the first detailed proposals about the contents of an Organic Law on Provincial Government — Watts and Lederman 1975.)

Once the negotiations were resumed, it appeared that the majority of the Bougainvillean delegation were not really asking for the loose relationship implied in a confederate arrangement. They were committed to a united Papua New Guinea. The national government negotiators, the most influential of whom were unconnected with the earlier government hostility to provinces, were sensitive to the aspirations and expectations of North Solomons and were generally sympathetic to provincial autonomy.

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The meaning of the expression 'expressly authorised', as used in s.12(1) of the Constitution, has not received detailed judicial attention. Examination of organic laws generally suggests that the Parliament regards brief and general provisions of the Constitution as express authorisation for long and detailed provisions in organic laws.
Nevertheless, they were subject to constraints emanating both from the bureaucracy and the Parliament, which circumscribed the limits of devolution.

A further consideration that weighed with the negotiators was the danger of rigidity in the division of powers concerning institutional relationships. Since few people thought that suitable arrangements could be built on the basis of the existing local government councils, the proposals were untried and it was difficult in the abstract to devise arrangements that would represent an optimum, or even a workable, division of powers. This constituted a strong argument for flexibility in the new system and consequently against its over-entrenchment in constitutional instruments. On the other hand, the relations between the centre and the provinces, particularly Bougainville, in the period leading up to the negotiations, pointed to the inappropriateness of the local government mould whereby the central Minister could veto provincial legislation or suspend provincial government in his discretion. This experience pointed to the need for some safeguards to protect provincial autonomy. To a large extent, the answer to this dilemma was found in the entrenchment not so much of substance as of procedure. Some general examples are discussed here, while the role of procedure in relation to the division of powers is discussed later.

For example, take the controversy that arose during the Bougainville negotiations about the limits on the taxing powers of the provinces. While it was agreed that some areas of taxation should be reserved to the provinces, the national government wanted a veto over any provincial tax which it regarded as discriminatory (particularly against residents or products of other provinces) or excessive (because it might affect the taxpayers capacity to pay central taxes). The solution set out in the OLPG was to give the central authorities the power to repeal such a provincial tax, but the power is hedged around with several safeguards (s.61). In the first instance, the tax cannot be repealed as an exercise of executive power by the central government. Rather, repeal can only be effected on the passage of the necessary legislation by the National Parliament. The Parliament itself is prevented from acting unless the matter has been first referred by the national government to the National Fiscal Commission (NFC). The NFC then has thirty days to consider the matter. If it fails to report within that time, the Parliament may proceed to legislation, but if a report is produced, the Parliament is enjoined to consider it before passing the legislation (s.62). The OLPG does not impose any substantive fetters upon the power of the Parliament, but it ensures that it will give proper consideration to the assessment by an expert and impartial body on whether the tax is discriminatory or excessive. Thus both the Parliament and the NFC act as safeguards against arbitrary central executive action, and the procedure ensures openness and public debate on the merits of the government's contention.
The same point is illustrated by the national government's power to suspend a provincial government. In a true federation, the suspension of a constituent state by the centre would not arise. In a local government model, on the other hand, the central government would have wide powers in its discretion to abolish or suspend a local authority. The provisions of the Constitution as originally passed in December 1976 (they were amended in 1983) provided that a provincial government could be suspended only by the Parliament acting by an absolute majority vote, except when, because of war or a national emergency, a provincial government could not carry out its functions effectively (s.187E), when the central executive has the power to suspend. The Parliament could suspend a government only in specified circumstances relating to widespread corruption, mismanagement of finances, breakdown of administration pursuant to the Constitution (s.187E(2)) or disregard of lawful directions of the national government. Section 90 of the OLPG provided, until it was amended in 1983, that a motion for the suspension of a provincial government (which could only be moved by a Minister) could not be moved unless the National Executive Council reported, with reasons, to the Speaker, that it had consulted or attempted to consult with the provincial government and was satisfied that constitutional grounds for suspension existed, that the matter could not be corrected without suspension and that the provincial government ought, in the national interest or those of the people of the province, to be suspended. Reasons for the opinion were required in the report to the Speaker.

As soon as a motion was introduced, it was to be referred automatically to the Commission on Proposed Suspensions of Provincial Governments. That Commission (which was to be established under an Act of Parliament) was to consist of four permanent members (including at least two non-ministerial Members of Parliament) and an ad hoc member to represent the province. The Commission was to investigate the proposed suspension, with particular reference to the allegations of the National Executive Council. The Parliament could not take further action until the Commission had reported or failed to report (within 21 days or such longer period as the Parliament may specify - s.94). The motion for suspension was valid only if it was carried by an absolute majority vote on two occasions after an opportunity for debate on the merits of the suspension (s.91).

The procedure ensured that the national government would enter into negotiations with the provincial authorities and present a reasoned case to the Parliament, that the province would have an opportunity to present its case and that the Parliament would act, with due deliberation, only after considering the report of an independent investigation. However, these procedural safeguards provided in the OLPG as originally passed have been considerably reduced by amendments passed in November 1983. The National Executive Council now has the power to provisionally suspend provincial governments without reference to any other body. This power is open to abuse and there is little doubt it has been used for largely political reasons on a
number of occasions. The assumptions underlying the original provisions provided a better balance between the interests of the centre and the provinces.

5. THE CONSTITUTION AND STRUCTURE OF PROVINCIAL GOVERNMENTS

The provisions on the constitutions of provinces again illustrate the difficulty of classifying the Papua New Guinean system. In a federation, the constitution of a province or state is its own business (as in the United States of America or Australia). In some countries which are usually classified as federal, the constitution of a province or state is established through the national constitution (for example, India and Nigeria), and so no scope is permitted to it to determine its own internal structures. In other federal systems, the national constitution prescribes the minimum conditions that the state constitutions must meet (as in Malaysia). In Papua New Guinea, the provinces have considerable freedom to decide on their own constitutions -- more in fact than was envisaged in the pre-independence discussions. The Constitution merely requires that for each province, there should be an elective or mainly elective legislature, a provincial executive and an office of the head of the provincial executive. It also requires the OLPG to provide a minimum number of members of the legislature, and the maximum number who may be nominated thereto (s.187C(2) and (3)).

The OLPG deals somewhat more extensively with provincial constitutions, but much is left to be decided by the provinces. The OLPG requires a province, before it can obtain the grant of provincial government, to establish a constituent assembly (although the mode of its constitution is unspecified) with whom the national Minister is to consult on the provincial constitution (s.3). It is for this constituent assembly to adopt the proposals for the province’s constitution (s.8), but presumably unless the Minister is satisfied with the proposals, he will not move a motion in the Parliament for the grant of provincial government (s.4).

In practice, the provinces have engaged in elaborate constitution-making processes, involving the travel of committees round the province, questionnaires and so on. This has been an important factor in the consolidation of 'provincial' consciousness, but has not, by and large, resulted in substantial variations in the general patterns of provincial structures. However, there is considerable variation in the detail of provisions about how those structures operate. In most instances, the constituent assemblies were the transformation of other broadly representative bodies (for example, Area Authorities) rather than elected. (The exceptions were North Solomons and East New Britain, where Area Authorities were never established. Instead, interim bodies were established under the pre-independence Provisional Governments (Preparatory
The provincial constitution comes into effect upon the grant of the charter of provincial government (which the national government has to grant once the Parliament has approved a resolution for it — s.7). The OLPG provides that the constitution of a province takes effect as if it were an Organic Law (s.13). This provision protects a provincial constitution from indirect amendment or repeal by means of an inconsistent Act of Parliament (SCR No.2 of 1987 (1987) (Unreported) SC300). Specific provision is also made for the Parliament to be able to amend or repeal provincial constitutions (s.11). As already discussed, Organic Laws are as difficult to amend as the national Constitution itself, and hence to restrict the Parliament to amending provincial constitutions through Organic Laws is a major restriction. By providing that the National Parliament can only amend or repeal a provincial constitution, both directly and indirectly, by means of an Organic Law, the OLPG gives them a high degree of entrenchment, and a unique place in the hierarchy of laws. Any provincial constitution can also be altered by a provincial legislature in accordance with the provisions for its amendment contained in the constitution itself (a matter which is left for the determination of each province).

Provincial constitutions do not, however, prescribe the powers of the provinces. Those powers and the relationship of the provinces with the centre, are determined by the national constitutional laws. The most important determinations to be

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5 The elected provincial governments in North Solomons and East New Britain had originally been established through the work of unelected constituent assemblies. In ten other provinces, constituent assemblies had also been established and recognised as provincial government bodies under the 1974 Act. Because these bodies had already been through the stages of establishing constituent assemblies, carrying out public consultations and preparing constitutions (under the 1974 Act), they were subsequently recognised as constituent assemblies under transitional provisions of the OLPG. Once their constitutions met the basic requirements of the OLPG, they were given full provincial government status under the OLPG (ss.107-111).

6 There are obvious questions about the validity of the restriction on the Parliament contained in s.11 which are beyond the scope of this paper. They will be examined in detail in a subsequent IASER Monograph. However, in summary, our view is that s.11 is probably authorised by s.187D(1) of the Constitution. It may also be authorised by s.12(3) of the Constitution as interpreted by the Supreme Court in SCR No.2 of 1982 [1982] PNGLR 214.
made by provincial constitutions are the structure of government. A province can decide for itself whether it wants a parliamentary, 'presidential' or committee executive system, and resolve upon the electoral process (although in view of s.50 of the Constitution, it is questionable whether a province can validly impose major restrictions on the right to vote and to stand for elections in the province, notwithstanding the attempts of some provinces to do so).

A province can also determine procedures for law-making and the appropriation and expenditure of public funds and prescribe the immunities and privileges of the members of the provincial legislatures. A provincial constitution may also provide for the powers of and composition of institutions below the provincial level. These are matters of considerable importance and some of the key objectives of decentralisation, like democratisation, popular participation, and the political accountability of government institutions to the people, would depend greatly upon these structures. Papua New Guinea, while committed to certain specific goals in its policy of decentralisation, chose not to prescribe norms and standards for them in national legislation. Explicit in the autonomy of the provinces was their power to resolve these matters for themselves. Inherent in this paradox were possibilities of contradictions.

The autonomy of the provinces to determine their own structures was central to an underlying assumption of decentralisation. The legislative provisions did not attempt a definitive division of powers and competences. Decentralisation was seen essentially as unfreezing the colonial structures and setting in motion a new political process of dialectics between the centre and the provinces. It was expected that once political institutions were established at the provincial level and provincial consciousness mobilised (because this did not exist everywhere), the pressures on the centre to share power with the provinces would mount. The division of powers between the centre and provinces would shift as the result of bargains struck between the parties. The powers of the provinces would be secured as much by their collective political will and clout as by legal instruments.

6. LEGISLATIVE POWERS OF THE PROVINCES

A number of considerations underlie the division of legislative powers. After considerable debate, it was agreed that the provinces should have substantial law-making powers, thus countering the earlier emphasis — even on the part of the CPC — on the delegation of administrative powers. This consensus is reflected in the Constitution, which requires on Organic Law to "make provisions for the devolution and delegation to each provincial government of substantial powers of decision making... in respect of matters of direct concern to the province" (s.187C(5)), and to provide for the legislative powers of the province (s.187C(6)). The Constitution does not itself specify any powers of the province, leaving this to be done by an Organic
Law (s.187C(1)).

The OLPC establishes legislative lists; one is called 'primarily provincial' subjects (s.24), the second is the 'concurrent' subjects (s.27) and the third is the list of 'exclusively provincial' taxes (s.57). While the primarily provincial list is not necessarily exclusive to the provinces, the understanding was that only provinces would legislate in this area; and in any case a provincial law prevails over a conflicting national law. On the concurrent list, both the national and provincial legislatures can legislate but the national law prevails over the provincial law. As the name implies, the list of "exclusively provincial" taxes is reserved solely to provincial laws.

The significant items on the primarily provincial list are primary schools and primary education (excluding curriculum), housing, sale and distribution of liquor, village courts, public entertainment and local government. The concurrent list is much longer and includes most of the important domestic concerns such as community and rural development, agriculture, education, land, forestry, transport, labour and communications. In addition, a province may, with some exceptions, make laws in other areas (which are normally within the competence of the centre) in so far as those areas are unoccupied by national legislation (s.33). The only matters that cannot be dealt with by provincial laws in the unoccupied field are matters that can be dealt with only in an Organic Law — emergencies and the implementation of the Constitution (s.32). It is also possible, under a specific law, for the national government or provincial governments to delegate to the other any of its legislative powers (other than those relating to the judiciary), except that the centre cannot delegate matters related to the Constitution or emergencies (s.43). So in a sense, there is also a list of "exclusively national" legislative powers.

Underlying this division of legislative powers, there were several considerations. First, as already discussed, a consensus had emerged that the provinces should have substantial law and policy-making powers rather than delegated administrative powers. Second, in relation to the method of providing for provincial powers, the CPC had wanted certain exclusive powers to be vested in the provinces and for these powers to be entrenched in the Constitution. Further discussion on these issues tended against exclusive provincial power and the Follow-Up Committee appeared to have reached agreement that there should only be one list; that of concurrent powers. The Follow-Up Committee's concurrent list would cover important matters, with national legislation prevailing over all conflicting provincial laws. There was also agreement that the list(s) would not be included in the Constitution, but in an Organic Law, which nevertheless would provide some measure of entrenchment. If there was only a concurrent list (with the residue vested in the centre), entrenchment would not be of any particular significance (since central legislation would in any case override provincial). In
the Bougainville negotiations, however, the centre had to concede certain exclusive provincial powers, although the ultimate 'primarily provincial' list was shorter than Bougainville had originally asked for, and, except for local government and primary education, did not contain matters of major importance. In fact, the significance of the list was largely symbolic, attesting as it did in a political, rather than a legal sense, the sharing of sovereign powers.

The third consideration was the accommodation of some exclusive provincial legislative powers within an essentially unitary state framework. On one view, the existence of such a constitutionally—protected list did not compromise the unitary character of the state so long as the list could be amended or repealed by the Parliament without the consent of the provinces. There were few suggestions that the provinces should participate in the amendment process. On another view, an exclusive list, however secured, introduces elements of federalism. In addition, there was s.100(3) of the Constitution which provides that: "Nothing in any constitutional law enables or may enable the Parliament to transfer permanently, or divest itself of, legislative power".

It has been argued (Goldring, for example, 1978: 84 and 86) that the provisions of the OLPG which purport to vest potentially exclusive legislative powers in the provinces are inconsistent with s.100(3). In our view, Goldring (ibid.) is incorrect because, first, the Parliament can always amend or repeal the OLPG, and hence there has been no permanent transfer or divesting of powers. Second, s.100(2) explicitly envisages other laws (including Organic Laws) delegating legislative powers to authorities other than the Parliament. But even if the provisions of the OLPG were inconsistent with the Constitution, they are also 'expressly authorised' by s.187D(1) of the Constitution, which is portion of Part IVA of the Constitution. Those provisions were passed at a later time than s.100(3) and on normal principles of statutory interpretation, the later provisions prevail should there be any inconsistency between provisions within a law. In any event, little attention was paid to s.100(3) during the Bougainville negotiations as the national government had undertaken to introduce whatever constitutional amendments were necessary to implement the agreement.

The fourth consideration was, while acknowledging the ultimate supremacy of the Parliament, to enable the exercise of real power by the provinces. The primarily and exclusively provincial lists ensure there are areas where provincial initiatives dominate. Apart from the important subject of local government, the s.24 list includes the establishment and administration of village courts, community schools and community school education (other than curriculum matters), sale and distribution of liquor, housing, sports and cultural activities. Exclusive taxes include land and retail sales taxes. Although the centre can veto or repeal legislation in these areas, its ability to do so is seriously circumscribed by procedural
requirements. The power to disallow provincial laws, which must be exercised by the Parliament, exists only if the disallowance is in the public interest (s.37(1)). The Parliament must first resolve, by a simple majority vote, to consider disallowance. The resolution for the disallowance cannot be voted on until two months thereafter. The vote cannot be taken unless the Minister for Provincial Affairs has at least 30 days previously consulted with the provincial executive on the issues involved in the disallowance. The disallowance takes place only if the resolution is carried by a two-thirds absolute majority vote (which in normal circumstances is sufficient for a constitutional amendment). As already discussed, there are similar limits on the national government's powers to veto provincial tax laws.

The most significant legislative powers (for example, those relating to agriculture, health, fisheries, public works, communications and education), however, are those contained in the concurrent list where the centre is supreme. It would have been possible to disaggregate the subjects in the list (since agriculture is not one but many subjects) and include some items in the provincial list (in line with the approach taken by the CPC). The extensive concurrent list, was, however, adopted because it seemed unwise to break up subjects where the need for integrated policies was high, and there appeared to be no general agreement on the division of a subject for legislative (as opposed to administrative) purposes. There was also a desire to emphasise the 'cooperative' as opposed to the 'confrontationist' aspect of decentralisation.

A further advantage of the concurrent list is that it facilitates the shifts of competence between the centre and the provinces, as circumstances change and the ability of provinces increases (although a system for delegation of functions could also facilitate such adjustments). The scheme also allows the transfer of different powers and functions to different provinces. It enables the centre to establish standards and norms on a particular subject, leaving the mode of implementation to the provinces.

Finally, it is easier to vest considerable powers in a province through a concurrent list rather than a provincial list, because the centre ultimately controls provincial exercise of these powers (and for this reason the power may not be very secure). There is a particular disadvantage to provinces of a concurrent list (as opposed to the primarily provincial list) in a 'disaggregating' devolution; that is, devolution which results from the grant of powers to provinces previously administered from the centre, as opposed to a federal system where independent units get together and surrender part of their sovereignty to a centre. In the case of a 'disaggregating devolution' there is already an extensive body of national government legislation covering the concurrent list, and there may be little scope for the legislative initiative of provinces unless the national government is prepared to make room for provincial laws by repealing parts of its existing body of legislation.
Within the framework of a concurrent list, the Constitution and the OLGPG attempt to establish room for provincial initiatives. Through a non-justiciable section, the Constitution requires an Organic Law to provide for devolution and delegation of substantial powers of decision making and for legislative powers of provincial governments (s.187C(5) and (6)). The OLGPG discharges this mandate not only by instituting provincial and concurrent lists but also by prescribing norms restricting legislation by the centre on the concurrent lists.

First, the general (non-justiciable) principle, stated in s.29, is that the Parliament shall not legislate on the concurrent list except:

'(a) in relation to a matter that is of national interest; and
(b) to the extent that the matter is of national interest'.

Second, s.114(3) requires the National Executive Council, on a request from a province regarding a law within the concurrent list, to "take whatever action is in its power to secure the repeal of the law in relation to the province, to the extent it does not concern matters of national interest".

Section 114(3) implements in an attenuated form the obligations of the national government undertaken in the Bougainville Agreement not only to respond positively to a request for the repeal of national laws but also that "existing national legislation covering subjects on the concurrent list of legislative powers shall be repealed by the national government if such legislation does not concern matters of national interest" (Part I, Clause 13; Schedule A, Clause 3). Significantly, s.114(3) is not made non-justiciable, nor is its wording such as to leave the final determination of what is 'national interest' to the subjective assessment of the NEC. Consequently, a province desiring to edge out national law by its own legislation, can seek the assistance of the courts.

Third, the national government must send notice of a proposed Act on the concurrent list to the provinces, at least two months before its enactment by the Parliament (s.31(4)). The section does not specify whether the text of the Bill must be sent. However, unless it is, the purpose of the section may not be fulfilled — the purpose being to give any province a chance to comment on the proposed law and to seek to persuade the government to modify or withdraw it, if the interests of the province so require. The Minister for Provincial Affairs has to enter into consultation with the province if it so requests, although non-compliance with this requirement does not invalidate the law (s.30). The OLGPG, however, does not resolve the effect of non-compliance with the provision for the giving of notice by the national government. It does, however, provide that the question of non-compliance is not justiciable except at the instance of the provincial government (s.31(5)), which suggests
that non-compliance affects the validity of the legislation. This interpretation is not inconsistent with the intention of the Bougainville Agreement that notice and consultation be an essential part of the legislative process.

The provisions for notice and consultation are intended not only to allow scope for provincial influence on national legislation on concurrent subjects, but also to facilitate cooperation between the centre and the province on matters of common interest. Likewise, a province is required to send copies of proposed laws (s.35) to the national government. With the exception of taxation legislation, provincial laws do not come into force until a month after the Minister for Provincial Affairs has been forwarded a text of the law (s.36), or notified of the enactment if it is in terms of the text already forwarded to him under s.35.7

The OLPG did not seek to lay down any definitive division of the legislative powers of the centre and the provinces. The long list of concurrent powers and the provisions for consultations were intended to help arrive at the appropriate division as circumstances changed, to enable the national government to influence policy in the provinces and vice versa, and to facilitate joint policy making. The centre could establish broad national policy after consultation with the provinces, leaving details and implementation to the latter. The Premiers' Council was envisaged as a national forum for consultation and policy making.

The cooperative and consultative nature of the intergovernmental relations (as well as the wish to avoid the legalism of federal-type arrangements) is emphasised by the exclusions of judicial review from certain determinations of the validity of legislation. The Constitution declares non-justiciable the question as to whether the legislation implementing provincial government has provided for 'substantial' legislative and executive or 'reasonable' taxing powers to the provinces (s.187C(7)). The OLPG provides that the question as to whether national legislation on the concurrent list is 'in the national interest' (s.29(2)), is non-justiciable, as is also the question as to whether the national government has given the requisite notice to a province of a proposed law on a concurrent subject, except at the instance of the province (s.31(5)).

Through an Organic Law, the Constitution permits the possibility of declaring non-justiciable, completely or partially, questions of the conflict between national and

7 "Law" for the purposes of provinces notifying the national government is defined very broadly, and includes subordinate enactments (OLPG s.1). This is wider than was agreed to in the Bougainville Agreement and has given rise to considerable administrative problems.
provincial law, except when the proceedings are between governments (s.187D(3)). Advantage has been taken of this option to provide that questions as to whether a provincial law is in fact on a subject covered in the concurrent list or whether it is in conflict with a national Act are non-justiciable except at the instance of the national government or of a provincial government (OLPG s.28(2)). The result of this provision, although procedural, is that provincial legislation which may exceed provincial competence will be enforced by the court.

7. EXECUTIVE POWERS OF THE PROVINCES

Although the question of executive powers was not as controversial as that of the division of legislative powers, there were several important considerations underlying the OLPG provisions on the topic. Although the CPC had been unclear on the distinction between legislative and executive powers, the Watts-Lederman Report (1975) had helped the Follow-Up Committee to resolve the matter so that by the time of the Bougainville negotiations, it was accepted that in the long term, provinces should derive most of their executive powers from provincial legislation. By being so derived, executive powers would be exercised on a far more secure basis than would have been the case if the national government could simply have delegated powers and functions at will. Further, a provincial legislative base for executive powers would help to ensure that a democratically elected provincial legislature would not be dominated by the executive; the executive would have to answer, ultimately, to the legislature. While it was desirable to exercise as many powers as possible under provincial laws, flexibility was also important, because it was envisaged there would be circumstances where provinces would need to operate under national laws. Hence a dual system was provided to exercise executive powers.

The first way for a province to exercise executive functions is under its laws, as provided in s.17(1) of the OLPG, which states:

'The executive power of a province, and the execution of the provincial laws, shall, subject to this Organic Law, be vested in the provincial executive'.

This provision derives from the Bougainville Agreement which states that when a provincial legislature has duly enacted a provincial law, the original executive authority respecting that law is vested in the provincial executive (Schedule A, Clause 18).

The second way in which the province may acquire an executive function is by delegation from the central authorities. This is provided for in s.43(1)(d) of the OLPG which says that an Act of Parliament may make provision for, or in relation to the
exercise and performance in, or in relation to a province, of any power or function of the national government. The intended supremacy of the provincial legislature over the executive is evident here because executive (or legislative) powers under national Acts can only be exercised by the provincial executive 'as provided by a provincial law'. The aim of s.43 is to provide for delegations of executive functions of the national government so that policy functions in the areas delegated would remain vested in the central government. Section 43 also provides for the delegation of law-making powers to the provinces, by the central government. In any area where the power to make law has been delegated to the provincial government and the provincial government has made a law, the provincial government would also acquire executive power.

The OLPG clearly envisaged the enactment of either specific laws authorising the delegation of specific executive functions or some broad-enabling legislation under which the central government would transfer executive functions. The qualifications on the party which delegates executive or legislative powers are worth noting. Neither the national government nor any provincial government can delegate any powers in respect of judicial powers or functions (s.42(a)). The intended primacy of the provincial legislature over the executive is again evident, because neither the national government nor any provincial government can divest a legislative body of its primary responsibility in relation to the raising and expenditure of finance. This is the effect of s.42(b) which prevents delegation of any powers under s.209 of the national Constitution (in the case of the National Parliament) or of any equivalent provision in any provincial constitution.

The OLPG also provides that the functions which have been delegated may be recalled but the recall shall not come into operation until reasonable notice of the intention to recall the power has been given by notification in the National Gazette. The question as to whether reasonable notice of the intention had been given, was made a non-justiciable matter, except in the Supreme Court at the instance of the delegate government.

The OLPG also made provisions for the delegation of executive and law-making powers from the provinces to the centre. It was assumed that there could well be certain matters where the primary responsibility rests with the provinces, but the functions in certain circumstances could best be discharged by the central government on behalf of the province. For example, it could well be that in certain areas of agriculture, it would be important to establish uniform standards over the entire country. In these circumstances, uniform standards are best established through central legislation. Alternatively, it could be that there are areas where a province might make legislation, as it is authorised to do, but it may for the time being lack the capacity to implement that legislation and need to rely on the central authority. Therefore the mechanism for delegation from the province to the centre would fill the gap.
It is clear that a government can recall the powers that it has delegated after reasonable notice, even though the government to which the powers have been delegated does not approve. However, it would appear that powers can only be delegated subject to the agreement of both the parties. This is not expressly provided for in either the Constitution or the OLPG but it was clearly the intention during the negotiations on the Bougainville Agreement that this would be the case.

The main rationale behind the twofold system of administrative powers of the provincial executive was that in relation to a large number of matters, what was important for a province was to have the power to carry out that particular power or function. In the large number of areas there was no particular quarrel with the policy behind the legislation or the powers as laid down in national legislation. The problems arose from the manner in which these powers were exercised. It was felt that if the public servants responsible for carrying out these functions were made responsible to the provincial authorities, then it would be possible for the province to carry out these policies and powers in a way which would respond to the circumstances of the province. It was envisaged that a large number of central government powers would be so delegated to the provinces with the central government retaining the broad part of making policy and the implementation becoming the responsibility of the provincial government.

It was assumed that even in those areas where the OLPG would vest exclusive law-making powers in the provinces, the provinces might not, for the foreseeable future, wish to enact any legislation. In those circumstances the existing national legislation would prevail and therefore the provinces would not have any executive functions in relation to those areas. It was assumed that in any of those areas where the provinces did wish to act, the national central government would delegate the necessary executive authority. Therefore the system of delegating administrative functions was expected to be an extremely important aspect of the system of decentralisation, at least in the short term. It was likely to be some time before the provincial governments acquired the capacity to make their own laws, but it was important that they begin to exercise certain executive functions immediately and hence the importance of delegated administrative powers.

Clearly, however, the importance of the devolved legislative powers was recognised. As each province increased the capacity for its own planning and the expenditure of revenue, it might find certain constraints in working within policies laid down in the national legislation. Therefore as a result of exercising delegated administrative powers, it would find that it could not do particular things and carry out particular policies of its own without having additional powers. Hence it was expected that provinces would gradually move to exercising more and more executive authority under their own laws. The provisions on both
'primarily provincial' and 'concurrent' legislative subjects were expected to facilitate this process.

8. FINANCIAL AND ADMINISTRATIVE RESOURCES OF THE PROVINCES

It was generally recognised that the powers and functions of the provinces, however extensive they might be under the law, would be of little consequence unless the provinces had the resources to exercise them. It was this consideration which had provoked most of the controversy about provincial government.

The CPC's view that resources must match the functions is reflected in the provision in the Constitution that an Organic Law must ensure financial resources to provinces "to an extent reasonably adequate for the performance of their functions" (s.1870(4)). The dispute therefore was not so much about this principle but the method by which the resources would be made available. On the one hand, the provinces argued that the resources should be vested in them and be under their control (echoing the CPC's statement that "unless they have adequate funds at their disposal, provincial governments will be ineffective. Without final control over certain sources of revenue, they will be powerless" -- 10/12, para.111).

On the other hand, the view of the national government concerning the overall management and equitable allocation of national resources was that it must retain the responsibility to determine the resources a province needed and to make these available to it. The following discussion sets out how these conflicts were resolved by examining the arrangements in the crucial areas of administrative staff and finance.

The basic principle in regard to staffing was that there should be a single public service to staff both national and provincial bureaucracies. Since that public service came under the jurisdiction of the national Public Services Commission (PSC), in terms of recruitment, transfers and promotions, the responsiveness of staff working within a province, especially in areas within the competence of the province, had to be ensured by a number of provisions. The PSC is to assign officers to a province only after consultation with the provincial government (s.49), and, although the OLPG does not incorporate the settlement in the Bougainville Agreement in this regard, presumably similar consultations must take place on transfer or promotion. Officers assigned to the provincial governments are subject to provincial direction and control (s.47(2)).

Funding needed to pay the salaries of the assigned public servants is deducted from the main national government grant (the Minimum Unconditional Grant) to each province before it is paid each year. If provinces wish to increase the number of public servants under their control, they can do so subject to PSC willingness to assign more staff. Once assigned, provinces have some freedom to decide upon the structure of, and the level and
extent of the size of different sections of the establishment (see SCR No.1 of 1984: Morobe Provincial Government v. Independent State of Papua New Guinea and M.T. Somare [1984] PNGLR 212). Close consultation with the provinces is therefore necessary if the PSC is to coordinate the needs of the various provinces and effectively manage the service. There are no specific provisions for this purpose in the OLPG, although the Bougainville Agreement required the province to give advance notice of its intentions to change the size of particular divisions (Schedule B, Part 1, p.6).

Under s.47(2) the person exercising the powers of a departmental head over the assigned public servants in a province is subject to provincial direction in the discharge of his functions (for example, promotion, disciplinary action and so on, as the 'deemed' departmental head) (s.50(4)). However, the real significance of these two provisions is unclear, since they are subject to the general provision that the provincial powers of direction exist only in so far as the national law on public service makes it possible for such direction over public servants. The reason for this formulation lies not only in uneasy and ambiguous compromises made during the negotiations for the Bougainville Agreement and the process of drafting the OLPG, but also in the uncertainty as to precisely what powers of political direction over public servants did exist under national legislation. The formulation was intended to vest in the provincial government any rights of political direction that might exist.

The provincial government's powers of direction and control under OLPG s.47(2) are subject to the provisions of any Act of the Parliament concerning the national public service. Under the Public Service Act ch 67 and also its 1986 replacement, the Public Services (Management) Act 1986 (as originally passed), there were no limits on the power under s.47(2). But in March 1987, an attempt was made by the national government to limit the provincial governments' powers under s.47(2). An amendment to the 1986 Act (the Public Services (Management) (Amendment) Act 1987 -- Act No.13 of 1987) provided that members of the public service assigned to a province under s.49 of the OLPG are not subject to provincial direction and control on 'personnel matters'. Section 1 of the Public Services (Management) Act 1986 defines 'personnel matters' as -- in essence -- decisions about an individual's progress within the service. But as it is the 'deemed' departmental head who, by virtue of OLPG s.50, has power over assigned public servants in respect of 'personnel matters' it seems that the amendment may not have effectively limited the provincial governments' powers as they may still be able to direct and control the 'deemed' department head in the exercise of his or her powers in respect of personnel matters affecting the assigned public servants.
In order to enable the provincial governments to direct and cope with public servants who it was thought would not initially be very sympathetic to provincial governments, the OLPG authorises provincial governments to establish a policy secretariat of up to six officers whose appointment and tenure are within the sole responsibility of the provincial government (ss.48 and 51). The provision of a policy secretariat had various roots:

- a compromise between a single national service and 19 provincial public services;
- an extension to the provinces of the system of the personal staff of national Ministers; and
- the formal recognition of the staff which had been established by the Bougainville Provisional Provincial Government in 1974 and by the East New Britain Provincial Government in mid-1976.

The relationship of the secretariat to the public servants is left unclear in the OLPG (s.50(4)). Both the provincial government and the secretariat certainly have much greater powers over members of the national public service than do the staff of national Ministers. A provincial government's powers of direction and control over its assigned public servants can be exercised by the secretariat if the provincial constitution so provides (s.48). Provincial governments can also employ consultants on short-term contracts (s.46(3)) and set up statutory authorities or commercial enterprises (which can employ their own staff -- s.46(2)). The provincial secretariat is financed by money transferred to the province by the national government (s.51), the salary of the assigned staff is paid by the national government but debited to the province (s.49 and Schedule 1.3.), while the province has to pay directly for its consultants and the staff of its authorities or commercial enterprises (s.46). The provisions for provincial staffing -- which conceded few of the demands of the Bougainvilleans -- show the powerful position then enjoyed by the Public Services Commission, reflecting Papua New Guinea's pre-independence character as an administrative state par excellence.

Somewhat parallel arrangements -- a national pool to serve national and provincial needs -- were established for finance. Bougainville's initial demands for substantial taxing powers were strenuously resisted, until only a handful were assigned to provinces (and an important one of those, that on liquor, was seen more as an instrument of social policy than revenue). The basic scheme of the OLPG is that the bulk of the country's revenue is raised by the national government through taxation (and foreign aid) but the disbursement of the revenue (particularly the share of the provinces) is determined in part by the OLPG itself and in part by the national government in its discretion. Various considerations underlie this scheme:
maintenance of coherent national economic policies;

- avoidance of the multiplication of tax collecting bodies; and

- ensuring equity in the distribution of revenues, particularly to safeguard the less developed provinces (with their own weak tax bases).

The basic device for ensuring finance to the provinces is the automatic appropriation to them of a sum of money, called the Minimum Unconditional Grant (MUG) (s.64), according to the formula specified in Schedule 1 of the OLPF. This ensures to each province in respect of functions transferred to it the sums of money which were spent on them in the 1976-77 fiscal year, adjusted annually, through a complex formula, for either inflation or changes in overall national revenue. A province is free to decide on the expenditure of the grant. To ensure that provinces did not suffer a loss of services by achieving provincial government status, the amount of the grant was broadly tied to the expenditure incurred in respect of the transferred functions in each province at the time the OLPF was passed. But in doing this, the formula favours the provinces which then had more schools, roads, hospitals and so on. The more developed provinces were also favoured by provisions for provincial taxes (as having a wider tax base), the transfer of certain national taxes to provinces, and the derivation grants and royalties (since these are related to current economic activities in the province).

Those provisions with a tendency towards the accentuation of provincial disparities were intended to be balanced by the broad discretion given to the national government regarding the distribution of the remaining national revenues (part of which go towards expenses of central institutions). The formula for the MUG is such that the amounts going to provinces under it would gradually reduce as a proportion of the national revenue and so make more funds available for redistributive purposes. The national government may give out of these, conditional as well as additional unconditional grants to provinces. The effectiveness of these as a means of redistribution of resources to the poorer provinces depends on the amount of revenue left after the MUG and the expenses of national government have been met, its division between conditional and unconditional grants, and the economic policies of the government.

The OLPF prescribes criteria for only the unconditional grants. The NFC -- an independent body -- advises the government on the allocation among the provinces of the money for unconditional grants additional to the MUG and its advice is to be based, in principle, on equal per capita distribution. The NFC may depart from that principle especially to transfer a larger proportion of the funds to the poorer provinces (s.79). This provision was then seen as the primary instrument for equalisation of development among provinces as it was assumed that the bulk of the 'surplus' money would be so distributed.
However, how far it is so used is left ultimately to the decision of the national government. It may choose to allocate the surplus through conditional grants (over which the NFC has no power to make recommendations, as indeed it does not concerning how much of the surplus would be allocated to provincial governments as opposed to national purposes or how much is allocated between conditional and unconditional grants). Conditional grants may serve to equalise but similarly they might not, depending on the policies with which they are integrated.

9. INTERGOVERNMENTAL RELATIONS: CONSULTATION AND COOPERATION

The CPC had envisaged the relationship between the centre and the provinces as marked by cooperation, consultation and coordination (10/21, para. 183) and was anxious to keep the courts out of intergovernmental disputes. This view is faithfully reflected in the Constitution and the OLPG. This may seem surprising in the light of the acrimony and bitterness which attended the concluding stages of the negotiations on provincial government, because goodwill on the part of some key negotiators was singularly lacking.

The primacy of consultation and cooperation is, however, basic to the scheme of decentralisation. Intergovernmental relations are to be conducted on the basis of consultation and disputes are to be settled through negotiations. Failing this, settlement would be through mediation and arbitration. For this purpose a key role is assigned to the Premiers' Council, which has broad functions of making recommendations and decisions, as well as of settling disputes. In some instances, the law interposes conciliatory, mediating or independent bodies between governments. For example, as already discussed, the NFC mediates on fiscal matters, the CPC on suspensions, and the Parliament, for instance, on disallowance of provincial laws.

The emphasis on political and consultative mechanisms flows from the scheme of decentralisation. As we have discussed, the constitutional laws seldom lay down precise criteria -- the consultative machinery acts as a substitute for firm divisions of powers and targets under the law. It is designed also to avoid the legalisms and rigidities that can arise if the primary role of dispute settling is given to the courts. It seeks to encourage integrated national policy and uniform standards when necessary. Independent institutions are interposed between the centre and the province as a substitute for federal-type protection. Above all, the machinery emphasises the political rather than the legal dimensions of decentralisation.

10. CONCLUSIONS

The OLPG is the result of torturous negotiations, with representatives of parties and even the parties often changing during the course of the negotiations. It reflects compromises
over numerous points. Yet the philosophy -- democratic structures, consultation and cooperation and the accommodation of a process -- remains remarkably clear, even if the overall coherence of structures, procedures and relationships suffered somewhat. The final constitutional arrangements are not easy to classify in terms of traditional categories of decentralisation. While the ultimate supremacy of the National Parliament disqualifies them from being designated as federal, the extensive safeguards provided from the provinces both by the Constitution and the OLPG give them a character higher than local government, or even a simple devolution.

If one looks at the formal structure of the OLPG it gets very close to being a federal system. There are the coordinate governments -- central and provincial -- and the Constitution, not the national government, protects the rights of the provinces to make laws in certain areas, to the exclusion of the national government. (Constitution s.187C(6) and s.187D(1)). This is a very important characteristic of a federal system. The Constitution also protects the exclusive executive functions of the provinces and it even talks of the rights of provinces to set up judicial institutions. The provinces have exclusive taxation and fiscal powers and even have a limited right to employ some public servants. These are all characteristics which one finds in a developed federal system.

However, if one looks at the substance of the powers which are guaranteed to the provinces, they are rather small, as for example, are the powers that the provinces have to raise their own revenue. Provinces would not be able to do very much if they had to rely entirely on their own revenue. It is true that Schedule 1 of the OLPG does set out a very clear formula guaranteeing a certain minimum revenue for a province, in the form of a transfer from the national government revenue. This amount, in turn, depends upon the functions transferred, which is largely a matter for the national government.

There are also various provisions which the national government can invoke to interfere in provincial affairs. The very coming into existence of a provincial government depends on an act of consent on the part of the national government, since the province has to receive a charter authorised by the national government. The abolition or suspension of a provincial government can also be brought about by the national government. The OLPG and the constitutional amendments set out the grounds on which provincial governments can be suspended or abolished. There are some safeguards against arbitrary use of this power by the national government, but, nevertheless, unlike a federal system, the provincial governments can be suspended by the national government if certain procedures are not followed and certain working requirements not met. Moreover, one of the grounds for suspension is failure to carry out the lawful instructions of the national government. The national authorities also have the power to disallow provincial laws and that again is not characteristic of a federal system.
The value of categorisation of decentralised systems is, in any case, limited. Nevertheless, while little purpose is served by this form of pigeonholing, some notion of the relationship that the constitutional laws intended to establish between the centre and the provinces and the appropriate allocation of powers between them is necessary for the proper implementation and interpretation of the law. This is especially important because the real significance of the OLPG lies less in its substantive provisions than in the process it initiated. The unfolding of the process must be informed by an understanding of its dynamics and direction. It is clear, both from the exhortations in the OLPG and the history of the negotiations, that a steady transfer of powers to the provinces was intended so that, in due course, the provinces would enjoy significant political and administrative powers, and while not coordinate with the centre, at least would not be subordinated to it.

The analysis of the OLPG demonstrates its complexity. The complexity arises not only from the style of drafting (a characteristic it shares with the rest of the constitutional laws) but also from the scheme of decentralisation. The elements of this scheme have already been discussed — diverse status of provinces, avoidance of legalism, flexibility, cooperation between levels of government, phased transfer of power and so on. It may be that, in a paradoxical way, the flexibility has been achieved at the expense of complexity.

Although complexity is not to be confused with rigidity, as it often has been, it is true that the purposes which the OLPG hoped to serve will not be achieved unless the OLPG is well understood, because only then can the options and mechanisms it provides, be used. In this paper, it has not been possible to discuss the question of how well the OLPG has been understood by those who have to work with it, but it is obvious that an understanding of it does not come easily.

As we have remarked already, the constitutional laws provide limited substantive guarantees for the provinces. The Bougainville Agreement had provided for the necessary steps in the implementation of the scheme of provincial government, but the OLPG provides little security for it. The success of the OLPG therefore depends on the goodwill of the parties, especially the national government, and through a number of institutions and procedures that have been provided for intergovernmental cooperation and negotiations. But even more fundamentally, the success of the OLPG depends on the political pressures and procedures. The OLPG establishes representative institutions in the provinces and guarantees a minimum of powers, finances and personnel to give them some life. The political process in the establishment of these institutions was intended to promote a consciousness of provincial identity and it was hoped that this mobilisation of opinion would enable the provincial authorities to bargain with the centre (and frustrate the centre's activities in the provinces if their views are disregarded).
11. REFERENCES


Bougainville Agreement. 1976: 'Agreement Between the National Government and the Province of Bougainville'. 7 August 1976.


