Pacific Constitutions

Proceedings of the Canberra Law Workshop VI

Edited by Peter Sack
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PREFACE

This volume contains more or less amended and abbreviated versions of most of the papers prepared for the sixth Canberra Law Workshop in April 1982.

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Peter Sack
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* The information provided in this table is mainly based on Powles 1981:23-28
1. CONSTITUTIONALISM AND 'HOMEGROWN' CONSTITUTIONS

P.G. Sack

The islands of the Pacific represent the last major section of the globe where constitution-making entered its heyday. In view of the increasing scepticism with which constitutions are being seen in the West and in view also of the unhappy fate of constitutions in other parts of the Third World, the eagerness with which the Pacific Islands keep on demanding constitutions upon independence is remarkable. In the light of the central role the assertion of Pacific ways and values plays in the accompanying rhetoric, the conventionality of the product they usually adopt is, perhaps, even more surprising. The bells of autochthony have a hollow ring in the Pacific. The cycle which started two hundred years ago in North America and France seems to be reaching its mechanical completion instead of giving way to much needed new departures.

Why is it that the truly 'homegrown' Pacific constitution - a constitution expressing Pacific values and adopting Pacific forms of socio/political organisation - remains a utopian dream, although everyone claims to want it and no-one seems to be satisfied with what takes its place? This paper suggests that the crucial reasons may be technological and ideological rather than economic or political. It argues that:

1. the 'constitutionalist' legal technology available in the Pacific at present is designed to produce 'conventional' constitutions, irrespective of the intentions of the individual users; and

2. that coherent and viable alternative forms of legal technology will only emerge if the Pacific Islands (and the rest of the world) manage to escape from the bureaucracy/economic development vice which constitutionalism has proved unable to control.

Despite these assertions it is not my intention either to attack constitutionalism or to present a case for 'homegrown' Pacific constitutions. I am merely trying to identify some of the problems and choices which must be faced if the wish to adopt such constitutions is taken seriously and I am doing this by emphasising certain technological limitations of constitutionalism and their ideological roots. I am not advocating that Pacific Islands should do without conventional 'constitutionalist' constitutions. Nor do I claim that it was pointless to try to make these constitutions more responsive to Pacific ways and values. What I am arguing is that while there may be compelling international reasons against the former approach, the latter course can merely provide stop-gap measures which are by themselves insufficient and
which may, with the best will in the world, in the long run do more harm than good. The decisive battle for 'homegrown' Pacific constitutions must be fought with different weapons - if it is to be fought at all - and lawyers are at present ill-equipped to perform the role which law should play in it.

* * * * * *

Ben Nwabueze, then Dean of Zambia Law School, published Constitutionalism in the Emergent States in 1973. There is nothing accidental about the title of his book. Nwabueze did not want to write about constitutional developments in the Third World, but about the role of constitutionalism in the formation of new states. This, I suggest, was not so much the result of his personal ideological commitment to constitutionalism, as due to the fact that he found it, as a Western-trained lawyer, impossible to discuss constitutional problems outside the theoretical framework provided by constitutionalism.

The opening paragraph of his first chapter sets the stage accordingly:

Government is universally accepted to be a necessity, since man cannot fully realize himself - his creativity, his dignity and his whole personality - except within an ordered society. Yet the necessity for government creates its own problem for man, the problem of how to limit the arbitrariness inherent in government, and to ensure that its powers are to be used for the good of society. It is this limiting of the arbitrariness of political power that is expressed in the concept of constitutionalism. Constitutionalism recognises the necessity for government but insists upon a limitation being placed upon its powers. It connotes in essence therefore a 'limitation on government; it is the antithesis of arbitrary rule; its opposite is despotic government, the government of will instead of law' (ibid.:1).

A framework which treats 'constitution' as synonymous with 'the limitation of governmental power by law' certainly turns the discussion of African constitutional reality into a manageable task. The question is whether it also permits an adequate understanding of the problems (and promises) it poses.

Nwabueze's version of the history of constitutionalism and its extension to the Third World is equally straightforward:

From the eighteenth century onwards, as a result of armed rebellion against the arbitrariness of monarchial absolutism, inspired in many cases by the revolutionary teachings of doctrinaire philosophers, proclaiming the message of liberty, equality and fraternity, unwritten constitutions, with their corollary of absolute, unlimited sovereignty of the government, have become discredited and have given
place to written constitutions consciously framed by
the people as a supreme law, creating, defining and
limiting governments ... This development has been
given new boost by the emergence from colonialism of a
host of new nations in Africa and Asia which needed
written constitutions to launch them into their new,
independent existence and to impose checks against
majority power in the interests of tribal, racial or
religious minorities (ibid.:5).

The central message is a sense of inevitability: emergence from
colonialism must mean the creation of nation states which must have written
constitutions of a certain type.

If this were true the task of constitutional development would indeed
require no more than the implementation of the obvious solution to a single
problem - as Nwabueze (with some help from a friend) tries to make us believe:

The limitation of government by the various techniques
outlined above creates a dilemma - that of ensuring
that government is not thereby so weakened as to be
incapable of governing effectively to solve the complex
problems of modern society ... The problem is to
maintain a proper balance between power and law. As
Professor Cowen has put it, 'although there is a deep
chasm between unfettered power and law, power must be
reconciled with law; for there can be neither
government nor law without the exercise of power. And
freedom, too, must be under law; for otherwise it
degenerates into licence and confusion. In short,
unfettered power is despotism or tyranny; unfettered
freedom is licence or anarchy. But between these two
extremes there is a middle way, where power tamed by
law guarantees true freedom' (ibid.:21).

This is one side of Nwabueze. The other can best be illustrated by
his description of the glorious dawn of peace after the failed 'secession
attempt' in Nigeria:

Out of the bitterness and suffering of the experience
has been born a new society in which, it is hoped, the
bigotry and prejudices of the past will gradually die
away, and be replaced by a broadened outlook and a new
spirit of mutual tolerance and fraternity. The
reintegration of the Ibos into the new Nigerian nation
has been greatly facilitated by the enlightened and
benevolent policies of General Gowan's Federal military
government ... Never before in history has an armed
conflict, fought with so much brutality and unbridled
vituperation, ended with no reprisals, no trials and no
shootings. But almost overnight in Nigeria former
enemies mingle together again with apparent cordiality,
as if nothing had happened (ibid.:299-300).
It would be pointless to dismiss passages such as this as legally irrelevant propaganda. They are - at least in part - the expression of a widespread feeling among academic lawyers in Africa that it is simply not good enough for them to be competent technicians but that they must get involved in much broader social and political issues. However, the question is again whether the approach chosen by Nwabueze - a combination of conventional legal technology with naive political journalism - is likely to be productive.

Nwabueze bases his approach on the following assumption:

The new states in Africa have definitely come to stay. They are colonialism's great legacy to the continent. They must be nurtured to maturity, for they provide the best hope of salvation (ibid.:300).

He therefore must reinterpret his examination of African constitutional reality, suggesting that he had been unduly pessimistic in presenting constitutionalism as a failure:

Does not failure connote a more or less permanent state of affairs, and is the present state of constitutionalism in these countries not a manifestation of the normal teething trouble associated with infancy? (ibid.:300-1).

He cautiously admits that there has been an "erosion of the foundations and principles of constitutionalism", but mainly because of the constitutions' "lack of legitimacy for the masses, and perhaps more disastrous, for the ruling politicians":

Politicians in developing countries are yet to develop the right attitude towards the constitution ... The constitution lacks sanctity because the values and ideas which it enshrines are different and opposed to those of the rulers and society alike. While a constitution is meant to be a check upon power, a limitation upon the arbitrariness of discretion, the politicians' orientation is authoritarian. They tend to be impatient with, and want to break away from all, constitutional restraints; and if the constitution proves an obstacle, then it must be bypassed or be made to bend to their desires (ibid.:301).

Ergo, the basic problem constitutionalism faces in 'emergent states' is human rather than institutional. Moreover, it is primarily caused by the African politicians who - unlike their legal brethren - have not yet attained the required height of moral perfection. Nwabueze continues:

[T]he motivation for the politicians' authoritarian tendencies is power together with its wealth and prestige. Disproportionate premium is attached to wealth in a community where poverty is the general condition for the overwhelming majority of the population. The ability to help one's friends and
CONSTITUTIONALISM

relatives with jobs and contracts is highly prized in a country in which unemployment is widespread, and in which the government is the main employer of labour (ibid.).

Yet, the ultimate victory of constitutionalism in Africa is assured:

Poverty and unemployment cannot remain a permanent condition of the emergent states. Development has been launched upon its difficult and desultory course, yet no matter how long-drawn it is going to be, the experience of the developed societies gives ground for an optimistic future. When the new states have attained a sufficient degree of development in education, technology and industrialisation, the craze for power and wealth should diminish, and political power would then be cut to its proper dimensions (ibid.).

Although constitutional law is largely a facade in Africa's present situation, there is thus no need for basic (theoretical or practical) legal reforms. Constitutionalism is an eternal and universal ideal, a given shape into which African reality will and must grow.

* * * * * *

Nwabueze borrowed quite legitimately a simplified model of constitutionalism. To appreciate the hold it has acquired over lawyers, including those in Third World countries, it must be examined more closely.

One of the most prominent among the recent prophets of constitutionalism was Carl Joachim Friedrich, for many decades Professor of Political Science at Harvard University. In the 1950s and 1960s he took a special interest in constitutional developments in the Third World and published in 1967 a handy summary of his views as Some Reflections on Constitutionalism for Emergent Political Orders.

The paper shows Friedrich as torn between the conviction that constitutionalism is the unique product of a unique process in Western history and the desire to declare that the type of political order it produced is nonetheless not only universally applicable but also universally desirable. His conclusions for the Third World are thus ambiguous. They are made even vaguer by the wisdom of old age, in this case a resigned acceptance of the futility of political revolutions as well as the impossibility of those in the intellectual sphere:

tout ça change, tout c'est la même chose. The new countries need governments that will function effectively in solving their problems by suitable public policies. These governments ought to be constitutional, but cannot be, because the prerequisites of constitutional government are lacking and will have to be developed. This is a slow process involving all the basic tasks which general political theory has
identified ... There is little sense in insisting that the only yardstick is government in Britain or in the United States - as if one thought that all was working satisfactorily here - but there is equally little sense in treating the "new world" as so new that no past political and constitutional experience applies to its operations. The middle road is, as so often in life, the one which men with their limited means will be well advised to travel both in theory and practice (ibid.:33).

His belief in the historical uniqueness of (Western) constitutionalism notwithstanding, Friedrich thus must take a stand against those who claim that in consequence Western political theory is inapplicable to non-Western politics:

Such a complete relativism ... is incompatible with the spirit of science and the fundamental premise of all genuine theory [namely, that there is only one truth] (ibid.:11).

The expression of this noble sentiment is followed by a more practical (albeit circular) assertion:

The numerous striking propositions which political theory offers concerning power, rule and influence are, of course, applicable to developing countries; if they were not, they would not be true generalizations (ibid.).

It does not come as a surprise that he turns to Max Weber (the Liberals' answer to Marx) in search of examples:

Surely Max Weber's celebrated threefold division of legitimacy into a traditional, a rational-legal, and a charismatic one is meant to be applicable and is in fact quite meaningful in dealing with the political orders of emergent countries (ibid.:11-12).

But Friedrich is anxious to switch back from the universal applicability of Western political theory to the uniqueness of Western constitutionalism. The latter problem, he now realises, is but an aspect "of the more general problem of what distinguishes the Western from other cultures" (ibid.:16). Again, he finds that Max Weber has provided a, generally speaking, satisfactory solution in his variations on the theme of Western rationality and cultural dynamism. Of the five key factors Friedrich identifies in Weber's work he singles one out for comment:

Weber's stress on bureaucracy, while very sound in itself, is misleading when it is not linked with the growth of constitutionalism. To be sure, such constitutionalizing presupposes the establishment of a bureaucracy, the core of the modern state, but the modern state is not fully developed until that bureaucracy has been made "responsible," i.e.,
The long line of thinkers from Machiavelli through Bodin and Hobbes to Montesquieu, Kant, and Hegel in fact were all more concerned, theoretically, with the problem of constitutionalism and its relation to the state than with the activities of the bureaucracy which was growing up all around them. The challenge of "sovereignty" was essentially born of these concerns with the state and its constitution. "The state" Bodin had described as the government of an association of families, and to be well ordered he thought it required a single sovereign, that is to say, a person or group of persons who possess supreme legislative power. The focus of attention, hence, was on legislation rather than administration. While the bureaucracy had the decisive hand in legislation under monarchical absolutism, the sanctity of the law and the halo surrounding all law-giving greatly reinforced association of the rational with the legal and the consequent rise of constitutionalism. Sanctioned by general propositions of Greek philosophy and Roman law, the conviction became predominant that government itself must be conducted according to law, and that such law must be embodied in a constitution (ibid.:16-17).

Without developing any of these points, Friedrich moves straight on to individual rights and their enforcement vis-à-vis the state as the main weapon of constitutionalism, treating them as a separate matter, closely connected with the (of course, uniquely Western) "Christian belief in the dignity of every human person" (ibid.:17). This is unfortunate since Friedrich was within reach of a key to understanding the ideological base of constitutionalism - as well as its technological limitations.

While Friedrich deserves praise for accepting the probably not altogether welcome (historical as well as logical) links between constitutionalism and bureaucracy, their significance can only be understood if it is appreciated that it is, in fact, absolutism - to which constitutionalism was the (historical but not logically necessary) response - rather than constitutionalism itself which presupposes bureaucracy, since only bureaucracy (if defined sufficiently broadly) has the administrative capacity for absolute government. Furthermore, constitutionalism understood as the control of the bureaucracy through law, can only work because bureaucracy is already rule-governed administration. Constitutionalism may have, historically, contributed to a legal domestication of government; seen as a technological system, it presupposes administration according to the law.

This has important implications for the ways in which constitutionalism can or cannot control the bureaucracy. It also explains why the constitutionalists were primarily concerned with the control of the legislature. Since bureaucracy is administration in accordance with rules, he who makes the rules - so they thought - would control the bureaucracy. Constitutionalism was not concerned with a change in administrative methods but with a change in the control of political power, especially legislative power. Constitutionalism (as a historical movement) aimed at the
expropriation of the legislative powers from the king, not at replacing traditional forms of government with modern rational forms: constitutionalism is the result not the cause of modern rational government.

This is why the early theorists of constitutionalism were not interested in devising a rational system of government but in working out an ideology which was able to control the bureaucracy (although it obviously had to be institutionalised to be effective). Looking at the thinkers listed by Friedrich it is also clear that the ideology of constitutionalism was by no means uniform. Compare, for instance, Kant's individualised, critical rationalism and Hegel's public-oriented idealisation of the state - but then Hegel is hardly the prototype of a constitutionalist theorist in the sense in which constitutionalism is commonly understood today.

The main link between constitutionalism and philosophy is critical individualism and not the idealisation of the state - although the latter link is of considerable indirect importance because it connects constitutionalism with nationalism, which in turn provides a legitimation for the territorial state. On the other hand, practically speaking, constitutionalism was more concerned with controlling than with legitimating the monopolisation of political power by the territorial state. In this context the rights of the individual were indeed its main legal as well as ideological weapons - and, to complete the picture, it should be added that an individual rights approach presupposes the existence of a modern (territorial) state, or, put negatively, the destruction of the sovereign (personal) group.

Bureaucracy and individualism are the two key elements in Friedrich's vision of constitutionalism. A third, equally important element is missing: constitutionalism is not only linked with bureaucracy and individualism but also - and again logically as well as historically - with the idea of economic progress. Constitutionalism in its classical form presupposes not only a bureaucratic administration but also a market economy: 'laissez-faire' is the economic aspect of individualism, and the notion of general economic development - which will ultimately benefit the public good - its ideological justification.

The state is there to protect the individual from other individuals (and other states) and the constitution is there to protect the individual from the state. The notion of a central sphere of individual freedom surrounded by a double layer of protection - from the state and by the state - is the core of classical constitutionalism. From this perspective it matters little that the legal controls of the bureaucracy are limited to the protection of individual rights. This is all that really counts, the market economy and the ideology of constitutionalism take care of the rest.

For classical constitutionalism, government is, by definition, limited government and its control devices are designed to control the government within these limits and not to limit the growth of government - just as it is unable to control the growth of the economy (although the latter is also seen as ideologically desirable).
Because of this, constitutionalism is in the end neither technically nor ideologically equipped to control the growth of the bureaucracy when economic development produces the needs and the means for such a growth. Hence the strained relations between constitutionalism and the welfare state which uses the technology of constitutionalism without being responsive to its ideological controls.

However, this is still not the crucial aspect of constitutionalism. While it is important to understand that constitutionalism began as an ideology aimed at rationalising and legitimating as well as controlling fundamental, social, economic, political and cultural changes, it is even more important to recognise that, in the process, it became locked into a systematic, institutionalised technology, which made it incapable of fundamental change and thus also incapable of fulfilling its ideological control functions in the face of new problems. Today, constitutionalism is primarily a self-legitimating technology, a kind of institutionalised systems theory, which predetermines the moves of those operating within its framework even if they are opposed to its ideological foundations or social and political implications.

* * * * * *

While Friedrich still saw nothing wrong in investigating the relevance of Western constitutionalism for the - very different - political reality in the Third World, other 'constitutionalists' tried to travel in the opposite direction, as we shall see, with similar results.

In the early 1960s Richard Lowenthal, Professor of Political Science at the Free University in Berlin, was asked to contribute a paper on developing countries to a symposium on 'Democracy in a Changing Society'. Instead of discussing the future of imported Western democratic institutions and values in the Third World, he had the good sense to adopt a different perspective:

If our political science is to avoid rash ideological generalizations on the value of different forms of government, it must above all bear in mind that ... [they] are not simply different answers to one and the same need, but that they represent attempts to meet a great variety of needs, to fulfill [sic] quite different functions according to the historical context, to the cultural characteristics, and the stage of development of the society in which we find them. As soon as the political analyst ventures beyond the confines of his native culture and period - as he can not help doing when dealing with developing countries - he must therefore begin by asking which are the specific tasks whose solution constitutes the yardstick for the effectiveness of political institutions in those countries (1964:178-79).

Despite this functional plan Lowenthal is immediately drawn back into an evolutionist, historical current. He starts by distancing himself from the unilineal interpretation of historical development to which Rostow had
just given new currency in *The Stages of Economic Growth* and finishes by proposing an (equally naive) bilineal scheme of development, contrasting the unique West with the undifferentiated Third World:

> Neither the traditional societies of the despotic Asian empires nor the traditional societies of Africa have tended to generate that dynamism of development which created the first modern industrial countries in the West. The different levels of development we observe in present-day societies can be explained neither by colonial exploitation nor by differences in biological substance, but by the differences in the structure of the premodern, traditional societies from which they have sprung - in the historical starting point *(ibid.:181)*.

Hence:

> A "developing country" is a country with a non-dynamic traditional social order in which dynamic aspirations have been aroused by its clash with the outside world *(ibid.:184–5)*.

The first result of the impact of the dynamic West on traditional societies - which proceeds (miraculously) in all of them along the same line - is generally the decay of the traditional, non-dynamic social order of those countries *(ibid.:185)*. This social and political crisis turns into a crisis of ultimate beliefs, and a sense of meaninglessness appears as the basic inherited values are called into question. As this second crisis is not part of a self-generated intellectual development toward the emancipation of reason and the critical individual, it does not affect the people's traditional hunger for authority 'for their psychic structure is socially conditioned to require it'.

This psychological demand/social supply crisis determines the course of political development in the Third World and requires a reversal of the roles played by state and society in Western history. Instead of being moved along by a culturally secure capitalist middle-class, political development in the Third World must be artificially created by the state which is run by a schizophrenic, power-hungry intelligentsia.

This intelligentsia:

> can only react with a violently ambivalent attitude toward the West - with the desire to equal its skill in producing wealth and acquiring military and political power, yet to protect the independence and distinctiveness of their own culture against its alien influence *(ibid.:188)*.

Nevertheless, the course of action is clear. The intelligentsia reacts with a "will to development"; it:

> conceives the task of creating a new "political superstructure" as an instrument for transforming the
nondynamic "social basis." They assign to political action and to state power a creative, revolutionary function that differs fundamentally from the role played by these factors in the development of the dynamic societies of the West (ibid.:190).

Lowenthal uses this scenario for establishing the functions of government in developing countries: they must procure the necessary capital funds for material development and take the responsibility of distributing them in accordance with the goal of development. But it is not realistic to expect them to follow the classical Western road of a liberal market economy: if it "could do the job in countries with this type of social structure, they would not have remained under-developed in the first place" (ibid.:192).

Economic development must be supported by cultural development, although subordinating culture to economic goals: a struggle against magical beliefs to break the resistance against changes in the traditional methods of production, a struggle against forms of social life which are incompatible with the rational (!) organisation of production — in short, the aim is the creation of a Protestant Work Ethic (ibid.:192-93).

Since the "political factors" which must accomplish this combined task (the state and the political movements) will usually first have to be created, and since the people's emotional identification with the new state and their will to participate in its affairs are usually also lacking, a political revolution is a precondition for both these developments:

It is revolutionary, not necessarily in the sense of a violent overthrow of the constitutional order but in the sense of a clearly marked break in the continuity of the elites running the state, of the principles by which they legitimize their rule, and of the tasks they set themselves. Whether the break is constituted by emancipation from a colonial regime or from indirect forms of dependence or by the overthrow of an indigenous traditionalist form of government, the victory of a "regime of development" is the precondition for a comprehensive attempt to tackle the tasks we have enumerated (ibid.:195).

By identifying the government of a developing country with a "regime of development", Lowenthal has not only answered his question as to the function of government, but also provided the yardstick for measuring the appropriateness of its form:

How effective have various forms of government proved in accomplishing the tasks of a "regime of development"? (ibid.).

The first stage of his answer remains cryptic because he is trying to kill too many birds with one stone. His immediate aim is to establish "the practically relevant range of possible regimes of development". For this purpose he constructs an (exclusive) alternative between "democratic
"legitimation" and "traditional authority" (which is always "by the Grace of God").

Lowenthal tries to justify this construction - as well as the exclusion of the traditional alternative as impractical - with reference to the "Japanese model" (being careful not to label it as a "regime of development", although it obviously fulfilled the same task and, as it looks at present, with even greater success than the United States).

Attempts to repeat the "Japanese road" of modernization from above under an autocracy legitimated by traditional authority seem to become exceptional and to have much smaller prospects of success than their nineteenth-century model. Probably the principal reason is that the stratum whose active cooperation is crucial for the creation of a modern state and the execution of a program of development is no longer prepared to obey a traditional authority and to act in its name: the nationalism of this stratum today means to them not only an obligation to serve their own people, but a need to be legitimated by the people's will (ibid.:197).

The "practically relevant range" is thus limited to "governments of revolutionary origin claiming to represent the will of the people".

It extends from a development-orientated democracy of the Indian type at one extreme via the various forms of one-party predominance, military dictatorship, and one-party dictatorship, to the ideological dictatorship of a Communist Party regime at the other extreme (ibid.:198).

A comparison of the actual performance of governments within this range culminates in an impressive pseudo-truisms: these countries have, within certain limits, a:

choice between the extent of pluralistic freedom they can afford and the pace of development they can achieve (ibid.:204).

This is, of course, not a "dilemma of absolutes", but:

every degree of increased freedom has to be paid for by some slowing down of development, every degree of acceleration by some loss of freedom. In the nature of the process of state-directed development this seems inevitable (ibid.).

To see Lowenthal's views in their proper perspective, we must appreciate the lesson they hold, in his opinion, for the developed West:

If we remain conscious of the dilemma of choice between the pace of development and the degree of freedom, we shall not try in those countries to oppose Communist
dogmatism by ultra-liberal dogmatism. Rather, we shall seek to serve the long-term prospects of a liberal-democratic evolution by promoting in each particular case what appears as the most promising alternative to stagnation on one side and to totalitarian dictatorship on the other — whether this alternative turns out to be an imperfect democracy or an undoctinaire, open-minded "dictatorship of development." For in those countries, maximum approximation to a pluralistic democracy under the rule of law, as we know it in the West, can only be the result of a process of development successfully completed: It can never be its precondition (ibid.:210).

Lowenthal is prepared to sacrifice constitutionalism in the Third World for the time being because he believes that developmentalism will eventually bring it back into the fold. Constitutionalism has become a luxury which only affluent societies can afford and for whose ideals no-one should any longer expect anyone to die on the barricades. Affluence has become the main pillar of constitutionalism. The trail to freedom must be blazed by greed.

Perhaps this conclusion should be elaborated upon to avoid misunderstandings. Lowenthal accepts that there is little hope of an immediate implementation of the ideology of constitutionalism in the Third World: economic development must come first. This, however does not mean that the technology of constitutionalism, its basic forms of political, administrative and legal organisation, should be abandoned. On the contrary, Lowenthal — like Nwabueze — envisages the retention (or adoption) and the strengthening of the technological aspect of constitutionalism as an instrument for achieving economic development — the necessary and sufficient precondition for freedom. The attainment of a truly constitutionalist technology combined with a developmentalist ideology will create affluence and, through it, constitutionalist freedom.

In other words, although the veil hiding the forces moving constitutionalism becomes almost transparent, the illusion is maintained: The bureaucratisation of society in the interest of economic development is still presented as the only way of ultimately achieving individual freedom.

Lowenthal is prepared to sacrifice not constitutionalism but the 'market' economy. In his hands, constitutionalism develops into an updated counterpart of Marxism, including the same kind of ambiguities. Just as Marx reluctantly accepted, in principle, that mankind had to pass through a capitalist phase in order to reach its communist destination, Lowenthal is prepared to accept that the non-Western part of the world must pass through a socialist phase to arrive at its liberal goal. The main difference between these respective utopias is that Marxism, at least in its primitive ideological form, sees the state and the law 'whither away' whereas the fully legalised (constitutionalist) and hence bureaucratised state remains forever the liberalist's guarantor of individual freedom. While primitive Marxism wants to overcome the bureaucracy and economic developmentalism — entering instead into a curious state of historical suspension — constitutionalism accepts both (together with individualism) as its base.
In practice, as we all know, Marxism has not, at least not yet, succeeded in doing without the state, the law and the bureaucracy - and it tends to be just as much preoccupied with economic development as capitalism. It is also doubtful whether Marxism or neo-Marxism can, even in theoretical terms, offer a basic alternative to the political and administrative technology produced by constitutionalism. These doubts are well illustrated by Peter Fitzpatrick's recent *Law and State in Papua New Guinea*.

Fitzpatrick, it appears, is led by frustration rather than conviction to try out Marxism as a "substantial alternative". He rushes through the political and legal history of Papua New Guinea (PNG), sticking Marxist labels onto every puzzle, watching with obvious delight how they give predictable meaning to everything - meaning, of course, which PNG reality derives from Marxist theory and not *vice versa*. Lack of a positive political identification with Marxism, he feels no need to justify the adequacy of its analytical framework in terms of the consequences it will (or must?) have for the political or legal future of PNG. There is a vague impression that it too is subject to Marxist determinism, that the proletarian revolution will eventually come, but there is no attempt to design even the preliminaries for a political - let alone legal - strategy which would speed up this necessary development or minimise the birth pains connected with it.

Because of this approach, Fitzpatrick can also afford to adopt an orthodox (that is, fundamentally uncritical) Marxist view of 'law' and 'state'. Both are for him exclusively creatures of capitalism, instruments of class-domination - though tempered by the (not merely decorative) notion of "bourgeois legality". Thus traditional law and traditional society are - by themselves - outside his scope, they only enter the picture as an ingredient of the colonial scene: the "new imperialism" was based on subsidising foreign capitalist exploitation by maintaining the local traditional mode of production in a subservient role. Thus Fitzpatrick detects an unholy alliance between capitalism and traditionalism. Moreover, in his Marxist scheme of things, tradition is, in any case, a retarding force, a major stumbling block in the way of the proletarian revolution, objectively more evil even than capitalism, since the latter, at least, pushes history in the right direction.

Despite his forceful criticism of the liberal/conservative 'law and development' or, more broadly, 'modernisation' theories, Fitzpatrick appears to be unconcerned that Marx is, intellectually speaking, part of the same litter as the sires of these theories. Marxism is as much part of nineteenth century Europe as constitutionalism - certainly more radical but just as 'ethnocentric' and more openly dogmatic. Someone who, like Fitzpatrick, criticises the PNG Constitution from a Marxist point of view for its "persistent ordinariness" (1980:209) therefore puts himself unwittingly in a most vulnerable position. For Marxism has neither developed an original legal technology of its own nor has it an impressive record in understanding non-Western societies and cultures or in fostering the values inherent in them.
This does not matter if Marxism is basically right, that is to say, if its determinist view of history is correct (but then very little else matters). It becomes crucial, however, if Marxism is just another of the 'ethnocentric' Western pseudo-sciences which tries to prove itself by fulfilling its own predictions through political action.

To say this does not mean to deny the important critical insights provided by Marx or Fitzpatrick. It simply underlines what Fitzpatrick himself demonstrates: that Marxism can be of no direct help in devising 'homegrown' Pacific constitutions. It is certainly useful for Pacific Island countries to employ the services of (inter alia) Marxist consultants to advise them on means which can be employed to control (partly and temporarily) the impact of capitalism and capitalist imperialism. Marxism, however, fails them even more abysmally than constitutionalism in providing help in controlling the bureaucracy, simply because it too subscribes to a view of human society geared towards economic development. As far as the bureaucracy is concerned, Marxism is in the same position as constitutionalism minus the weapons of "bourgeois legality" (which is in practice replaced by - increasingly bureaucratised - party control).

* * * * *

Constitution-making in the Pacific does not take place in a vacuum. In addition to the theoretical difficulties in devising alternatives to conventional constitutions of the Western type - on which this paper has concentrated - there are obviously strong practical forces working against such an approach.

First of all, constitution-making in the Pacific is part of a 'decolonisation' process, designed as a 'transfer of powers'. Constitutionalism notwithstanding, Western states do not transfer sovereignty to the people of their former colonies. Instead, independence comes about as 'state succession', effected by a transfer of specific state powers of the Western-type from one government to another. Independence thus presupposes the existence of a government in the former colony, as well as the (if only fictitious) existence of a territorial state. Moreover, the 'transfer of powers' is accompanied by the handing over of the actual colonial state machinery. The 'great legacy' of colonialism in the Pacific is not the nation state but a territorial bureaucracy - as we saw, the first of the pillars of constitutionalism.

At independence the recognised 'political system' in the Pacific Islands consists of a government to which Western-type state powers have been transferred, backed (if only institutionally) by a more or less developed Western-type legislature and judiciary (usually manned by expatriates), which are more or less eager to control its activities.

The position of Pacific Islands which have acquired independence through a 'transfer of powers' has little in common with the 'great revolution' situation in France in the late eighteenth century. Their constitutions cannot be charters of national revolutions aimed at changing the structure of society by taking over the government of a fully-fledged, (absolutist) nation state. Independence governments in the Pacific - even if duly elected - lack a revolutionary mandate. They also have no mandate
from the people to continue operating the ex-colonial state machinery on which their own political survival depends.

In this situation the adoption of a developmentalist ideology - the second pillar of constitutionalism - as an alternative base of legitimacy may seem the only realistic choice. If not the will of the people, the promise of development by the government must justify the existence of the new (skeleton) state. After the marriage between bureaucratic government and developmentism the adoption of a constitutionalist constitution is merely a formality. 1

When the French discussed their revolutionary constitutions 200 years ago, the reaction of the outside world was of comparatively little concern to them. While setting an example which - they thought - other countries ought to follow, they also knew that those in power in the countries around them would oppose this new constitution. Yet, they made no attempt to minimise opposition. They expected to have to fight to retain their new liberty and had no intention of conforming to internationally accepted constitutional standards, since the destruction of those standards - in France - was the aim of the revolution.

On the other hand, while conscious that the new constitutional order for which they had revolted brought with it the risk of external military intervention, the French were not hampered by international economic considerations. They did not dream of receiving foreign aid to subsidise the new order they wanted to establish. In short, the international economic and political environment was essentially different. The Pacific Islands today are part of a global system of a kind which did not exist at the time of the French Revolution but developed in response to it - a system with almost compulsory membership, exerting previously unknown conformist pressures. Nevertheless, nothing short of a withdrawal from the system - or its global overthrow - is needed, before truly 'homegrown' Pacific constitutions can be implemented.

It is important, in this context, to appreciate that the hold of the system over its parts is primarily ideological and not economic as is commonly claimed. This applies especially to the 'aid dependence' of the Pacific Islands. Few critical observers doubt any longer that at least for some time to come more rather than fewer people will go hungry in the Pacific as a result of foreign aid, foreign investment, and even increased export earnings. The justification for the scramble for funds is 'development', although an immediate need is created by the continued existence of a salaried state bureaucracy which, however, is in turn justified by the needs of 'development'.

Let us finally look at the other side of the coin: the practical forces working in favour of 'homegrown' Pacific constitutions. We are all familiar with the frustratingly vague and repetitive discussions about Pacific ways and values. We are told again and again that Pacific cultures are less individualistic and less materialistic than Western civilisation, that they are more community-oriented and prefer a consensual rather than adversary approach - but this does not amount to a coherent ideology which could serve as a guide for political action. Attempts have been made to fill this ideological vacuum by national goals, but, quite apart from the fact that they are, in form as well as in substance, 'Westernised' and
'Developmentalist', they contain fundamental contradictions and, most important of all, they do not supply a motivation for achieving them. Initially, the most active forces working for a departure from a conventional Western-type constitution tend to be negative: anti-colonial and anti-Western feelings. However, these feelings rarely grow into a positive, cultural nationalism and they are certainly no match for developmentalism.

Although a Marxist perspective suggests that there may be strong external and internal economic forces supporting traditionalism, they have never shown themselves during the constitution-making process in the Pacific. As regards political forces, the chiefs in many parts of Polynesia and Micronesia were obviously a factor to be reckoned with, and different ways were tried of incorporating them into the constitutional framework. Yet, in no case was the political power of the traditional chiefs strong enough to determine the shape of the constitution as a whole. In other words, the future of 'homegrown' Pacific constitutions depends on more diffuse, social and cultural forces. That they are still alive, we all know. We know also that they become most visible in the field of land tenure - although they, naturally, reach much further. Land is the hub of traditional Pacific Island constitutions and land tenure rather than the constitution will be the arena where the decisive constitutional battles in the Pacific will be fought.

It is, perhaps, necessary to remind ourselves at this point, that constitutions are not an invention of constitutionalism or of the ancient Greeks, but that every society since the beginning of human history has had its constitution, its politics and its ways of controlling political power. However, the constitutions of traditional societies in the Pacific, in particular in Melanesia, were defined by ideals and processes rather than by rules and institutions. Traditional societies were held together by a network of personal relations rather than a framework of institutionalised structures. It is no wonder, therefore, that the traditional forces in the Pacific do not assert themselves by offering alternative rules and institutions, but by trying either to manipulate or to ignore the imported Western products. While this process may produce some fascinating variations on the conventional constitutionalist themes, it is likely to bring out the worst of both worlds instead of leading to a meaningful and workable synthesis. To be sure, Western political and judicial procedures could well do with a hefty dose of consensualism, but to run a bureaucracy the Pacific way is courting disaster.

The search for 'homegrown' Pacific constitutions must begin with the formulation of Pacific ideologies, ideologies which - if they are based on traditional Pacific ways and values - are necessarily non-bureaucratic and non-developmental. Such ideologies would be of great significance for the rest of the world as well, since people everywhere are looking for viable alternatives to bureaucratic developmentalism - so far in vain. Perhaps Pacific Islanders have a better change of success than people in either the West or the East. After all, was not modern Western constitutionalism, and the improvements it represents over ancient oriental despotism, the product of many hundreds of years of European 'underdevelopment' which allowed a new start when the time was ripe? Maybe the extra 2000 'static' years the Pacific enjoyed can be turned to similar advantage. Even so it is bound to be a long and messy business - but then
a slowing down of the hectic pace of mechanical, developmentalist history might be the first goal. Pacific constitutions do not grow on trees, certainly not on transplanted English oaks however drastically they have been pruned. Wilhelm von Humboldt's 1791 version of the Denning comparison may not be closer to the truth, but it shows, at least, greater patience:

Constitutions cannot be grafted on people like shoots on trees. If time and nature have not prepared the ground it is like tying flowers to them with strings: they wilt in the first midday sun.  

NOTES

1 I do not even dispute the need to give prominence to what may be called 'defensive provisions', for instance relating to citizenship and foreign investment.

2 Quite apart from identifying self-realisation with order and order with government.

3 Shortly afterwards, Nwabueze returns to "a systematic perversion of the institutions and processes of government coupled with a spate of amendments to the constitution where it is thought necessary to maintain some facade of legality" (ibid.).

4 A despot without a bureaucracy at his command may be able to kill single subjects with impunity if he dislikes the colour of their hair, but he cannot, however much he wants to, govern all his subjects absolutely.

5 If there were a non-rule governed form of administration of comparable efficiency it would not be nearly as responsive to legal controls as a bureaucracy to which constitutionalism speaks in its own language.

6 The identification of constitutionalism with a 'market' economy - instead of the idea of economic progress - is misleading. It hides the fact that constitutionalism itself is development-oriented. The fact that it identifies with a 'market' economy as the only legitimate means of achieving economic development is part of a strategy designed to limit the bureaucracy. As a technology, constitutionalism fits just as well - if not better - with a bureaucratic economy.

7 Just as the 'market' ideology was unable to control the bureaucratisation of the private sector in the economic field.

8 Friedrich, naturally, does not dwell on this aspect of the scenery. Nor does he point out that the early English champions of constitutionalism were to a large extent the same members of the nobility who were behind the enclosure movement - in the interests of economic development and greater personal wealth and power - and opposed to the public welfare moves of the embryonic royal bureaucracy, or that the bankers and industrialists were perhaps the decisive force behind the constitution-
alist movements during the nineteenth century - in the interests of international political stability and economic growth rather than in the interests of individual freedom or in order to make the state bureaucracy more responsible.

9"It is not true that the underdeveloped countries ever set out on the same road, from the same starting point, as the old industrial countries, yet inexplicably lagged behind them. The truth is that they set out from utterly different starting points — that the traditional, premodern, preindustrial social structures of these countries were utterly different from the premodern social order from which modern Europe and its overseas settlements have emerged" (ibid.:180-81).

10The Third World, as we can see, operates in accordance with Pavlov and not with Weber.

11Lowenthal recognises a similar (though milder) process in the 'under-developed' countries of Europe: mid eighteenth century France in relation to England, late eighteenth century Germany in relation to France and nineteenth century Russia in relation to 'the West'. He has special reasons for this observation: both Germany and Russia, where these developments got out of hand, left, at least temporarily, the path of liberal virtue and turned totalitarian. Lowenthal does not discuss the relations of the British intelligentsia to America in the early twentieth century. He was, of course, at the time of writing, unable to take the various crises of the Western intelligentsia since 1960 into account (see also below).

12For Lowenthal the future of the Third World is intimately linked with that of the Communist, Second World. While it is inevitable that the Third World will, for a time, follow a parallel course to that of the Second World, it is also inevitable that the Second World (together with the Third) will, in the long run, return to the path of Western liberal virtues. He therefore treats all communist countries as developing countries, and sees all totalitarian regimes in developed countries, including German Fascism, as momentary aberrations. For Lowenthal, every affluent person (or state) becomes automatically liberal. He refuses to see that developmentalism as such might be linked with totalitarianism, thus presenting a constant danger to civil liberties in the First World as well.

13From a determinist point of view history must appear as a series of conspiracies.

14The 'autochthony debate' is largely an attempt to act out a ritual, legal pseudo-revolution.

Constitution-making in the Pacific during the nineteenth century was a Polynesian phenomenon. Fiji is included in Polynesia here for the reasons given by the prominent Fijian anthropologist, the late Ruciate Nyacakalou, that while the Fijians were Melanesian in their physical appearance, they were definitely Polynesian in their cultures (personal communication). This constitution-making was a product of centralised governments, particularly kingdoms, and it was only in Polynesia that they emerged in the nineteenth century. Micronesia and Melanesia were not yet in a position to establish centralised governments of their own. It was left to the colonialists to do that for them. Nor was the position in Polynesia uniform.

The Kingdom of Tahiti, for example, had not existed long enough to produce a constitution before France declared a Protectorate over it in 1842 (see Morrell 1960:76-8). The neighbouring Cook Islands never managed to produce one either, mainly because no centralised government emerged in the group before Britain declared it a Protectorate in 1888 (see Gilson 1980:59-60). In both areas however, codes of laws had been drawn up, promulgated and enforced, at times with great enthusiasm prompted by the excessive missionary zeal of their producers. Samoa established her central Government rather late in the century, and managed to produce three short-lived Constitutions: 1873, 1875 and 1887. The Kingdom of Bau and the Lau Confederation, Fiji, produced one each in 1867. Hawaii had the distinction of producing the most Constitutions; in fact five of them in 1840, 1852, 1864, 1887 and 1894. Tonga produced only one Constitution in 1875, and it is the only one that has survived - with amendments - to the twentieth century and to the present.

The aim of this paper is to examine the reasons for the promulgation of these Constitutions, for their collapse, and for the survival of the Tongan Constitution.

Several reasons appear to have accounted for the production of these nineteenth century Constitutions in Polynesia: there was a general desire among certain leaders and their European constitutional advisers to make the newly-emerged central governments of kingdoms modern and more democratic in their structures, policies and functions; there was a desire among these new nations to maintain their independent sovereignty against increasing pressures from the Western powers for annexation; there was a determination among some conservative rulers to restore some of their lost powers and to guard against what they regarded as extreme liberalism and
power-sharing which their people could not understand or were unable to handle properly; and finally there was the determination among the rapidly growing numbers of economically powerful foreign settlers to devise constitutions which would primarily serve their own interests.

When Kamehameha I united Hawaii into a kingdom in 1795 he established an almost absolute monarchy. One writer refers to his Government as "a feudal autocracy" in which his power was almost absolute (Kuykendall 1968:157). There was a council of chiefs which he often consulted on important matters, but this council was a purely advisory body. The final decision on anything was made by the king himself. Because of his outstanding qualities he managed, in general, to maintain internal law and order and to promote external trade and political relations quite satisfactorily, but his autocratic rule allowed no place in the decision-making for his people, chiefs and commoners alike. There was very little room either for any change in the traditional way commoners were treated. Nevertheless, several factors emerged to stimulate social changes which in turn necessitated constitutional change that led to the Bill of Rights in 1839 and the first Constitution in 1840.

Conscious of the weakness of his son and heir, Liholiho, who later became his successor as Kamehameha II, Kamehameha I made his favourite and remarkably able wife, Kaahumanu, a kuhina-nui, a co-ruler with the King. Kuhina-nui is often translated into English as 'prime minister' or 'premier' but this is misleading. The office was later defined in the 1840 Constitution in the following way:

All business connected with the special interests of the kingdom, which the King wishes to transact. Shall be done by the Kuhina-nui under the authority of the King. All documents and business of the kingdom executed by the Kuhina-nui shall be considered as executed by the King's authority ... The Kuhina-nui shall be the King's special counsellor in the great business of the kingdom. The King shall not act without the knowledge of the Kuhina-nui, nor shall the Kuhina-nui act without the knowledge of the King, and the veto of the King on the acts of the Kuhina-nui shall arrest the business. All important business of the kingdom which the King chooses to transact in person, he may do it but not without the approbation of the Kuhina-nui (Kuykendall 1968:64).

Thus emerged a unique dual rulership which under the weak leadership of Kamehameha II and the long period during which his successor Kamehameha III remained a minor, became a significant means by which the absolute powers of the King were modified. The council of chiefs also gradually began to evolve a legislative role.

The coming of the protestant missionaries of the American Board of Commissioners for Foreign Missions (ABCFM) in 1820, a year after the death of Kamehameha I, contributed significantly to these changes. The ABCFM was a non-denominational, but predominantly Congregational and Presbyterian body, founded in Boston in 1810. The missionaries of Hawaii shared the new liberal Calvanism which harmonised well and, in fact, as one writer points
out, "reinforced the growing American spirit of self-reliance and growing movements both in England and America for social reform" (Judd 1961:40-1). They naturally tried to transfer these democratic changes to their converts in Hawaii, for they came to Hawaii not only to save souls but to civilise (i.e., to Westernise) the Hawaiians. They shared with their English counterparts, the London Missionary Society, Wesleyans and Anglican missionaries, the firm belief that only by civilising the people of the Pacific would they be enabled to understand Christianity. The missionaries were obviously unhappy with the undemocratic and oppressive nature of the Hawaiian Government, and in spite of mission policy of strict non-involvement in politics, they found that they were inevitably drawn into the political arena because of the very nature of their work. One missionary wrote:

There is much agitation on the public mind. The influence of the missionaries, especially those lately arrived, is very decided against the ancient system of government. The 'rights of men', 'oppression', 'blood and sinews' are much talked of, and a sort of impatience is perceptible that changes are made so slow. The probable consequence is that the people and the chiefs will not come up to our expectations as to reform and we, at least some of us, will be looked on with suspicion (quoted in Kuykendall 1968:158).

The missionaries' discontentment was, as expected, reflected in many of the early and more able converts. Among these was the first kuhina-nui herself as well as her successor, Kinau, a daughter of Kamehameha I and half-sister of both Pomare II and Pomare III, and other prominent young men who later became close friends and influential advisers to the monarchy, such as Daniel and John Ii, David Malo, Boaz Mahune and Timothy Haalilio.

The latter became the private secretary and business manager for Kamehameha III for many years. According to one observer:

Besides acquaintance with mercantile transactions, he also acquired a very full knowledge of the political relations of the country. He was a strenuous advocate for a constitutional and representative government, and aided not a little in effecting those changes by which the rights of the lower classes have been secured. He was well acquainted with the practical influence of the former system of government, and considered change necessary to the welfare of the nation (quoted in ibid.:158).

Rebelling against the liberal and moral influence of the missionaries and their ardent converts the young King Kamehameha III, who was then nineteen years old, gave the following address to an assembly of the people on 15 March 1833:

These are my thoughts to all ye chiefs, classes of subjects and foreigners respecting this country which by the victory of Mokuohai was conquered by my Father and his chiefs - it has descended to us as his and
their posterity. This is more—all that is within it, the living and the dead, the good and the bad, the agreeable and the unpleasant—all are mine. I shall rule with justice over all the land, make and promulgate all laws: neither the chiefs nor the foreigners have any voice in making laws for this country. I alone am the one. Those three laws which were given out formerly remain still in force, viz. not to murder, not to steal, not commit adultery; therefore govern yourselves accordingly (quoted in *ibid.*:135).

Kinau, the *kuhina-nui* at the time, who was the King's own elder half-sister, and the chiefs, had no intention of giving up the constitutional advantages and responsibilities that they had then gained, and vigorously resisted this attempt to return to the former autocratic rule of the King. The King, who did not possess the powerful and autocratic personality of his father, eventually gave up the attempt, and in 1836, the British Consul wrote:

Kauikeaouli (or Kamehameha) is now about twenty-three years of age and is possessed of more talent than almost any other native, but being of very indolent habits and excessively fond of pleasures he does not attend to the affairs of Government, but trusts Kinau his half sister with the reins, she is entirely governed by the American Missionaries who through her govern the Islands with unlimited sway (quoted in *ibid.*:136).

This liberal trend in constitutional development led to the declaration of rights in 1839. It has been claimed that among the influences that led to the declaration of this Bill of Rights, which has been hailed as the Hawaiian Magna Carta, were letters published by graduate and under-graduate students of the missionary training institution at Lahainaluna in 1838 (see *ibid.*:158). The Bill affirms that God has bestowed certain rights on all men regardless of their rank and nationality and that people and chiefs alike are given "life, limb, liberty, the labour of his hands, and the productions of his mind". It goes on to declare:

God has also established governments and rule for the purposes of peace, but in making laws for a nation it is by no means proper to enact laws for the protection of rulers only, without also providing protection for their subjects; neither is it proper to enact laws to enrich the chiefs only, without regard to the enriching of their subjects also; and hereafter, there shall by no means be any law enacted which is inconsistent with what is above expressed, neither shall any tax be assessed, nor any service or labor required of any man in a manner at variance with the above sentiments (quoted in *ibid.*:160).

In its concluding section it states that any chief who violates this Constitution "shall no longer remain a chief of the Sandwich Islands, and
the same shall be true of the governors, officers, and all land agents" (quoted in *ibid.*:161). The language and sentiment used in this declaration reflect undoubted missionary influence which must have been greatly enhanced by the employment in 1839 of William Richards, one of the missionaries, in the service of the King (see Blackman 1906:105-6).

In 1840, a year after the declaration of the Bill of Rights, the first written fully-fledged constitution in the Pacific was promulgated by the King and the chiefs of Hawaii. The Bill of Rights was slightly modified and made the preamble of the new Constitution. It stated a plan of government and defined the duties and powers of various officials. It also contained important innovations. In addition to the House of Nobles which was composed of the King, the *kuhina-nui* and fourteen nobles, a House of Representatives was also created, to be chosen annually by the people, as part of the legislative body. For the first time, the commoners were given a place in government and decision-making. Another important innovation was the creation of the Supreme Court, comprising the King, the *kuhina-nui*, and four other judges appointed by the House of Representatives. The Executive was made up of the King, the *kuhina-nui*, the four Governors of the main islands (who appointed the district court judges) and the tax collectors (who were also in charge of public works, as well as acting as judges in all cases arising under the tax law). One authority rightly pointed out that:

The Constitution of 1840 was a crude affair, its phraseology vague and provocative of abundant misapprehension, its differentiation of the legislative, judicial, and executive functions wanting in precision, and its spirit curiously compounded of customary and feudal, biblical, British and American elements; but it was a long step onward (Blackman 1906:109).

With rapid advances in education among the Hawaiians themselves, and through the involvement of American ex-missionaries such as W. Richards, Richard Armstrong and Dr G.P. Judd, and the first lawyer to come to Hawaii, John Ricord of New York, who arrived in 1843 and was made the first Attorney-General in the Government of Hawaii, the deficiencies of the Constitution of 1840 became more and more obvious. Efforts were then taken to remedy the situation. Between 1845 and 1847 three important amendments were made to the Constitution, but they were called Organic Acts. The first which was passed in October 1845 divided the Executive into five departments: Finance, Foreign Relations, Interior, Law and Public Instruction. The Ministers of these Departments formed the Cabinet, and they, the four Governors, and certain honorary members appointed by the King, formed the Privy Council. The second Organic Act which was passed in April 1846 laid down in great detail the functions of various departments and established a Land Commission to settle land titles. The third Organic Act passed in September 1847 dealt with the judiciary, making the judges independent of the Executive, organised fully the various courts and defined their respective jurisdictions.

The next important step in this development came in 1850 when the House of Representatives was enlarged from seven to twenty-four, and authority was given to the Ministers to sit in the House of Nobles. Most importantly, a committee was set up to prepare a new constitution. Drafted
mainly by Chief Justice William L. Lee, a brilliant and strong-minded lawyer from New York, who called in to Honolulu in 1846 and was persuaded by Dr Judd and Ricord to enter the Government service as a judge, the new Constitution was adopted by the Legislature and was promulgated in December 1852. It embodied the spirit of the 1840 Constitution and the various political reforms initiated by the three Organic Acts of 1845 to 1847. One authority sums up the 1852 Constitution in this manner:

It marks a great advance upon the Constitution of 1840 in clearness of conception and precision of statement. It incorporates the principles of the Organic Acts of 1845-7; differentiates more fully the legislative, executive and judicial functions of the government; continues for sentimental reasons the curious office of Kuhina-Nui, or Premier; provides for universal suffrage, without qualifications either for representatives or voters; and places important checks on the arbitrary powers of the king (Blackman 1906:132).

In other parts of Polynesia the impact of the missionaries was similarly reflected in some of the constitutional provisions in the codes of laws they helped to draw up for their chiefly converts and their people. In Tonga, for example, the 1862 Code of Laws included provisions which were constitutional in nature, in that they furnished a framework of government. Clauses I, III and V, for instance, were concerned with the powers and duties of the King and his assembly, the judges and governors respectively. The most important provision in this Code was the declaration of emancipation for all people in Tonga. Clause XXXIV, 2 reads:

All chiefs and people are to all intents and purposes set at liberty from servitude, and all vassalage, from the institution of this law; and it shall not be lawful for any chief or person, to seize, or take by force, or beg authoritatively, in Tongan fashion, any thing from any one (quoted in Lätukefu 1974:247).

The other important factor influencing constitution-making in Polynesia was the desire among the leaders and their advisers to maintain their independent sovereignty in the face of strong pressures from foreigners and their respective governments, who were then steeped in complicated and often very bitter international rivalry for spheres of influence in Africa, Asia, the Caribbean and the Pacific.

The coming of Europeans to the Pacific brought mixed blessings to the Islanders, particularly with regard to economic and religious issues which, of course, greatly influenced political development and, for the interest of this paper, constitution-making in the Pacific. The exploration of the Pacific by Europeans led to interest in trade, (particularly) in the initial stages, in items needed for the profitable China trade, and later, raw materials for the factories in the Western countries, and markets for their manufactured goods. The frequent call of trading and whaling ships in certain ports in the Pacific led to the emergence of European settlements - the beach communities in Honolulu, Papeete, Apia, Bay of Islands, Levuka and Noumea where merchants and traders decided to settle to trade with the Islanders and, in particular, provide for the needs of
foreign ships. The civil war in the United States (US) from 1861 to 1865 stopped the supply of cotton and other tropical products from the south to northern US and Europe. This and the discovery by scientists in the 1840s that coconut oil could be used in the manufacture of soap, and the discovery in the 1860s of copra production, led to the influx of Europeans to the Pacific to exploit cheap land and cheap labour, which, they hoped, would make them wealthy quickly so they could return home in glory. Professionals such as doctors, lawyers and teachers, and skilled tradesmen in a variety of occupations followed as needs for their professions and skills arose. As Europeans' business interests increased they felt that they needed security. Where there was no central government they established their own municipal government, e.g., in Apia. In places where indigenous central governments existed such as Hawaii and Tonga, the settlers despised them and looked to their own home governments for protection. Representatives of the main powers were appointed to the Islands to look after the interests of their respective nationals living there and most of these shared the attitudes of the settlers towards indigenous governments, which was one of utmost contempt. Usually through their misrepresentations of events and shameless fabrications, naval warships called frequently to settle disputes between their nationals and Pacific Islanders, including religious disputes between the established Protestants and the newly arrived Roman Catholics, mostly, of course, in favour of their own nationals.

In 1839 Captain C.P.T. Laplace of the French frigate *Artemise* arrived in Hawaii. He complained about discrimination against Roman Catholic missionaries and their converts, and the ban on the import of French brandy by the Hawaiian Government. He then "threatened war unless the Hawaiian government tolerated Catholicism and paid $20,000 as a surety of good conduct". He also forced the King to sign a treaty agreeing:

that accused Frenchmen should be tried by a jury of foreigners selected by the French Consul, and the French commodities, especially wine and brandy, should pay no more than 5 per cent duty (Judd 1961:57).

In August 1842 another French warship commanded by Captain S. Mallet arrived at Honolulu. He accused the Hawaiian Government of violating the Laplace treaty of 1839, and:

made a number of over-bearing demands, of which one would have given to French Catholic priests in Hawaii the power to appoint several officials in the Hawaiian Administration (ibid.:61).

In the following year, 1843, a young over-enthusiastic British Commander, Lord George Paulet, through gross misrepresentation from the then Acting British Consul in Hawaii, Alexander Simpson, forced the King to cede Hawaii to Great Britain, a cession that lasted only for five months when the British Government declared the seizure of the Hawaiian Islands to be completely unauthorised (see Kuykendall and Day 1966:65-8). These and many other similar episodes brought home quite vividly to Hawaiian leaders and their advisers the need for a sound constitution which would prescribe a structure of government, policies and functions which would be acceptable to the main powers, and help to bring about a recognition of their
independent sovereignty. This conviction played a very important role in the creation of the 1840 Constitution and the much more refined 1852 Constitution which later became the model for other constitutions in the Pacific.

In Samoa, Apia began as a small beach community in the 1840s. With the influx of European settlers into the Pacific in the 1860s and 1870s, it grew into a large settler community, and quickly became the strongest centre for trade and commerce in the South Pacific. During the civil war over the Malietoa title which lasted from 1869 to 1873, the Samoans unwittingly sold a lot of their land to Europeans for guns to win the war. By 1873 they suddenly realised that they had sold most of their best agricultural lands to foreigners. This shocked them into dropping their differences and uniting to form a central Government in an effort to counter the encroachment of Europeans (see Davidson 1967:45-8). A crude Constitution was drawn up and promulgated in August 1873, laying down the structure of the Government, a bicameral Legislature, Ta'ūima (Upper House) and Faipule (Lower House) was established. As Guy Powles points out it "reflects the Hawaiian model of House of Nobles and of Representatives which St. Julian and others had diligently advocated" (1979:91). The Executive was made up of the Ta'ūima, judges, district Governors and other officials.

A much more refined Constitution was promulgated in May 1875 by the Steinberger regime. The Head of State was to be King who "was to hold office only for a four year term; and the holder was to be chosen, alternately from Sā Malietōa and Sā Tūpua" (Davidson 1967:53), and Malietoa Laupepa was appointed King. The number of Ta'ūima was increased from seven to fourteen and the number of Faipule reduced from about 200 to twenty. The Head of the Executive was to be a Premier appointed by the King, and in each district there was to be a Governor and other officials responsible to the Premier. Judges were also to be appointed. Steinberger was appointed Premier and Chief Judge, and was also granted the right to speak in both Ta'ūima, and Faipule. The Samoans accepted all this without question. They trusted Steinberger. The Constitution was regarded by them as an admirable attempt to solve internal problems, to unite the country against the tide of European encroachment, and to maintain Samoa's much treasured independent sovereignty.

In Tonga, King George received rough treatment from French officials and naval captains as his counterparts in Hawaii and Tahiti had done. In 1855 a treaty, similar to those imposed on Hawaiian and Tahitian leaders, was forced on him by the French Governor of Tahiti. A French naval captain, at the request of French priests in Tonga, arrived in Tonga in 1858, and forced King George and his chiefs to provide land for the French priests in Ha'apai, and have houses built for them equal to those owned by the Wesleyan missionaries. In 1860 another naval captain threatened to carry King George off to New Caledonia, if the King would not dismiss the Governor of Ha'apai who offended the French priest there. The King had no alternative but to accept all these demands.

The settlers also gave the King and his Government a difficult time. They regarded it as unthinkable that they, who belonged to the civilised 'Anglo-Australian' race, should be governed by laws produced by a
half-civilised King and his chiefs, assisted by ignorant missionaries. One of them wrote to the Fiji Times in 1870:

They will find their efforts to stay the tide of immigration useless ... and England, being aware of the justice and importance of protecting, if not actually governing her subjects in these seas, the Anglo-Australian race will settle and find a living in the Friendly Islands, in spite of all the laws passed by Kings and chiefs (quoted in Latukefu 1974:184).

These people obviously resented the restrictions placed by the Government on certain aspects of their trading ventures, such as the strict prohibition of the sale of land under any circumstances, and the severe restrictions placed on the sale of spirituous liquors. The principal traders sent a petition to the Governor of New South Wales a few years later, requesting him to "define a limit to the arbitrary authority of a government which to say the least, is and only can be semi-civilised" (Rutherford 1971:50).

All these influences pressed home most vigorously to the King and his chiefs the need to establish an efficient constitutional government which the main powers would recognise. In one of his letters to King George, St. Julian, a law reporter for the Sydney Morning Herald, and later Hawaiian Consul in Sydney, pointed out that in order to achieve such a government it was essential that:

such fundamental principles should be laid down as would form what is termed a constitution and all subsequent legislation should be in strict accordance with these principles (quoted in Latukefu 1974:191).

King George eventually decided to grant a constitution and in 1872 he asked the Reverend Shirley Baker, the then Chairman of the Wesleyan Mission and a close adviser, to draft it. The work was completed in 1875, and at the opening of the Parliament that year at which the Constitution was discussed and passed, the King gave a highly emotionally charged speech in which he said:

You are called upon to meet and deliberate on the new work to be done by the Government, to pass the Constitution, and to govern the land and to have the law of the country in accordance with it. The form of our Government in the days past was that my rule was absolute, and that my wish was law and that I chose who should belong to the Parliament and that I could please myself to create chiefs and alter titles. But that, it appears to me, was a sign of darkness and now a new era has come to Tonga - an era of light - and it is my wish to grant a Constitution and to carry on my duties in accordance with it and those that come after me shall do the same and the Constitution shall be as a firm rock in Tonga for ever. When the Constitution has been passed it shall be a palladium of freedom to all Tongans for ever. It is quite clear now that they are
free; and let this be the most valuable privilege of the country, for by the passing of the Constitution a Tongan can boast that he is as free as were the Romans of former days and as the British are now (quoted in Neill 1955:101).

The Tongan Constitution was a long document of 132 articles divided into three main divisions: Declaration of Rights, Form of Government, and The Lands. The first two sections followed closely the 1852 Constitution of Hawaii, a copy of which was sent by St. Julian to the Reverend Thomas West of the Wesleyan Mission in Tonga towards the end of 1854 with a request to translate it, and was accordingly translated and presented to the King (see Latukefu 1974:163). It was the third section of the Constitution — The Lands — which was unique. All land in Tonga was declared to belong to the King who could grant estates known as tofi'a to the twenty nobles appointed by him. The titles and the tofi'a were to be hereditary, and the laws of inheritance for the throne and these titles were set out in this section. The nobles were to lease portions of their tofi'a to the people. The Constitution made it unlawful for anyone, whether he was King, chief or commoner, "to sell one part of a foot of the ground of the Kingdom of Tonga, but only to lease it in accordance with this Constitution" (cl.109), and only leases approved by the Cabinet were to be recognised.

In his closing address to Parliament after the draft Constitution was discussed, amended and passed, King George spoke with obvious deep satisfaction and pride:

here is the Constitution of Tonga, written on parchment, to be kept in the Parliament of Tonga, a document to commemorate and to testify to the work that we are doing to-day. This day I have added my name to it and so it becomes the Law of Tonga. May you and your descendants, you the people of Tonga be blessed now and for ever while you follow the Constitution. May the day never dawn for Tonga when someone, or anyone, will alter the basic principles of the Constitution. Let it become the Foundation stone of our country for ever...May each of you inscribe on your hearts — TONGA FOR THE TONGANS (quoted in Lātūkefu 1975:42).

The Tongan people shared the sentiments expressed by their King and the Constitution came to be looked upon by everyone as the key to political stability, economic prosperity and independent sovereignty.

Another reason for constitution-making in the Pacific during the nineteenth century was the determination by some reactionary groups to restore to the monarchy some, if not all, of its lost powers. It only succeeded once, and that was during the reign of Kamehameha V who reigned from 1863 to 1872. The efforts made by his younger brother, Alexander Kamehameha IV discussed above, and by David Kalakaua (1874 to 1891) and his ill-fated sister, Queen Liliuokalani (1891 to 1893) to do the same failed miserably as we shall see later.
Lot Kamehameha V was a well-educated, widely experienced (in matters of government), knowledgeable (in world affairs), large bachelor, with an extremely reactionary streak. He believed in the divine rights of kings, loathed Kamehameha III's benevolent liberalism, and wanted to return to the system of government of his illustrious grandfather, Kamehameha I. He was convinced "that the people were not fitted for the exercise of political rights, and he was jealous of foreign influence in affairs of state" (Blackman 1906:122). He therefore refused to take the oath to uphold the liberal 1852 Constitution. He later summoned a convention to revise the Constitution, and when members reached a deadlock he dissolved the convention and simply declared that he himself would give the country a constitution, and on 20 August 1864 he proclaimed the new Constitution:

It omitted the clause found in the preceding Bill of Rights, guaranteeing elections by ballot; it abolished the office of Kuhina Nui; it reduced the maximum number of Nobles; it diminished the powers of the Privy Council, and correspondingly increased those of the king; it threatened the independence of the judiciary; it provided that Nobles and representatives should sit together in one house; and it established a property qualification for representatives, and a property and - in the case of those born since 1840 - an educational qualification for the suffrage (ibid.:123).

There is an obvious swing in this Constitution from the American tendency of the 1852 Constitution to a more British system. The reasons for this trend are not hard to find. From 1849 to 1850 Dr Judd took the two young princes, Alexander, who later became Kamehameha IV (1854-1863), and Lot who later became Kamehameha V (1863 to 1872), on an almost year-long diplomatic trip to US and Europe. Apparently Dr Judd, an ex-missionary, imposed a strict control over the youths during the trip, and this turned them later against the missionaries who were, of course, Americans. In England the princes were accorded royal treatment, but this was not so in US, and to make matters worse, a conductor in Washington mistook Alexander for a Negro and ordered him out of the train (see Judd 1961:79). This insult was never forgotten. During this time also, several British subjects including Robert C. Wyllie, "one of the three or four most important figures in the History of the Hawaiian Kingdom" (ibid.:72), entered the service of the King. Wyllie was a Scottish surgeon and "an ardent admirer of the British constitution" (Kuykendall 1966:115). King Kamehameha IV, encouraged by his Queen, Emma, and Wyllie, established the Anglican Church in Hawaii in 1862. He died the following year, but his elder brother, Lot, who succeeded him:

shared his brother's antimissionary feelings and continued his pro-British policy. A portly and positive bachelor, he showed his distaste for puritanism of the American mission by reviving ancient Hawaiian practices... In addition, and in further repudiation of American principles, he revived the despotism of the ancient Hawaiian Kings. He was a grandson of Kamehameha I (the Great), whom he resembled in physique and disposition (Judd 1961:89).
In addition to all this, there was a genuine fear of an eventual annexation of the islands by the US. Both Kamehameha IV and Kamehameha V, Wyllie and his non-American colleagues in the ministry (Wyllie having become Minister for Foreign Affairs), as well as the British and French representatives in Hawaii, shared the belief that the only serious threat to Hawaiian independence would come from the Americans. Consequently they worked together very closely in order to save Hawaii from the designs of American annexationists, believing that any annexation by the US would destroy the independent sovereignty of Hawaii and the monarchical system they valued.

The final reason for composing constitutions was the determination by the increasingly economically powerful European settlers to achieve a political system that would serve their own interests best. One evidence of this is the so-called 'Bayonet Constitution' of Hawaii, which came into effect in 1887 as the Fourth Constitution of the Kingdom of Hawaii (see Liliuokalani 1971:177-84). This occurred during the reign of King David Kalakaua who reigned from 1874 to 1891. Kalakaua had an attractive and charming personality, but he:

was wanting in the intellectual ability, the sanity of judgement, the moral fibre, the chiefly dignity, and sense of responsibility, which characterized more or less fully all the monarchs of the Kamehameha line (Blackman 1906:125).

He started his reign well, but unfortunately it deteriorated into the most corrupt and most irresponsible regime in the history of the Kingdom. In 1881 the King, and a royal party, set out on a ten months grand world tour during which he visited Japan, Hong Kong, Singapore, Burma, India, Italy, England, Belgium, Germany, Austria, France, Spain, Portugal and US, earning thereby the distinction of being the first monarch to circumnavigate the world. He met the Pope, and he and his party were lavishly entertained by royal houses and by officials throughout the countries they visited. While in Paris he bought two jewelled crowns, one for himself and one for the queen for $10,000 each. Scandals and irresponsible activities continued to increase as one historian noted:

The scandals were large and juicy. Spreckels [a sugar magnate on Maui] received 24,000 acres of crown land on Maui for only $10,000. The legislature of 1882 appropriated $10,000 for a Board of Genealogy and $30,000 for coronation expenses. The legislature of 1886 gave the government the right to sell a monopoly on the opium traffic in Hawaii for $30,000. In time the national debt soared to well over $2,000,000. Other abuses included the sale of government offices, repeal of the liquor laws, illegal land leases, and even the sale of exemptions to lepers so that they might avoid being sent to the settlement at Kalaupapa (Judd 1961:99).

The climax came in 1887 when it became known that the King was involved in a secret opium deal. At the same time the King and his Prime Minister, Walter M. Gibson, a highly unscrupulous opportunist, whipped up strong anti-European feelings among the Hawaiians. The leaders of a secret
political organisation, the Hawaiian League, which was mainly recruited among foreigners and non-native Hawaiians, decided it was time to act to stop the rot in the Government and to make the country safe, as their leader pointed out rather bluntly at one of their meetings:

We meet to plan the destruction of King David Kalakaua and to make the country safe for ourselves and our children (quoted in Burns 1955:281).

These leaders backed by their well-armed European supporters forced the King to dismiss Gibson and his Cabinet, appoint a new Cabinet and to proclaim a new Constitution. It severely:

restricted the power of the king. He could no longer dismiss his ministers without the consent of the legislature, and the cabinet had to ratify each of his official acts. In addition, a two-thirds vote of the legislature could override a royal veto, and the nobles, previously appointed by the king, were henceforth to be elected by voters with a comparatively high property qualification. This last provision added to the political weight of the wealthier foreigners (Judd 1961:100).

Kalakaua died in 1891, and his sister, Queen Liliuokalani, the last Hawaiian Monarch, succeeded him and inherited from his reign tremendous political discontent and economic disaster. Unfortunately she failed to learn from history and continued to follow rather closely in her late brother's footsteps. She decided to issue a new reactionary and authoritarian Constitution similar to the 1864 Constitution, but the Cabinet refused to endorse it. When it was rumoured early in January 1893 that the Queen and her supporters planned to expel the reform Cabinet, her opponents decided that it was time to act. A 'Citizens' Committee of Safety' dominated by members of a recently established secret organisation, the Annexation Club, was organised. This Committee with the help of the US representative in Hawaii, and a large group of marines from the US ship, Boston, deposed the Queen and established a Provisional Government with the object of ultimate annexation to the US. Hawaii was declared a Republic the following year, 1894, and a new Constitution, the fifth in Hawaii during the nineteenth century was adopted. Its notable features were:

1. The election of the President by the Legislature as in the French Republic; 2. the admittance of aliens to a qualified citizenship by means of letters of denization...  3. The ownership of property as a condition of naturalization; 4. the requirement at several points of the English or Hawaiian language, bearing chiefly against Asiatics; 5. a property qualification for membership in either branch of the legislature, and for the franchise in the election of Senators; 6. membership of the Cabinet in both Houses of the legislature; 7. the system of cumulative voting for Representatives; and 8. The Council of State (Blackman 1906:142).
Like its immediate predecessor, the 'Bayonet Constitution' of 1877, this Constitution was drawn up by Europeans, primarily for the promotion and protection of their own interests. Their ultimate aim of American annexation was achieved four years later when on 12 August 1898 sovereignty of the Republic of Hawaii was transferred to US.

The Constitution of the Kingdom of Bau in Fiji in 1867 falls into the category of constitutions drawn up by foreigners. It was drawn up by Cakobau's secretary, S.A. St. John, and was discussed and passed by a meeting of 60 to 70 settlers. Under its terms:

Supreme power was vested in the King [Cakobau] who was commander-in-chief of all military forces, and might declare war, convene councils, make treaties, and appoint governors over the several districts. The Executive Officers [all Europeans], to be chosen by the King, were a Secretary of State, a Treasurer, a Minister of War, a Collector-General of Revenue, and a Minister of Police; and together they constituted the Cabinet Council. The Judiciary comprised a Chief Justice, and magistrates to preside over district courts. "Every privilege consistent with equity and order" was promised to the white residents; native lands were to be thrown open to them for selection, and the engagement of labourers was to be facilitated. A royalty of one shilling an acre was to be paid on all land purchased from Viti Levu natives, and a capitation of 5 dollars (£1) a year was required for all native labourers employed (Derrick 1963:164).

In this set-up Cakobau was only used as a puppet and the real feelings of most of the settlers towards him are reflected in the reaction of one of them when Cakobau was appointed to head the Government in 1871:

Was it not [demanded a planter] an insult ... to every white man in the country to have an old nigger like the King set up, as he is being set up? King indeed... he would be more in his place digging or weeding a white man's garden, when he would be turned to profitable account (quoted in Scarr 1967:19).

With one exception, all these Constitutions which emerged in Polynesia in the nineteenth century fell into disuse before the turn of the century. Several reasons accounted for that. Some died a natural death as a result of growth in general sophistication, brought about by improvement in education, and wider contact with the outside world, particularly with Europeans, either through Pacific Islanders visiting foreign countries or, more importantly, through Europeans coming to the Pacific. Many stayed, such as missionaries and settlers, while others, such as naval personnel and government officials, only remained for a short time. Many of them made it their duty to give Pacific Islands leaders advice on economic and political matters. Some even helped to draw up port regulations, while others preferred to teach the natives through punitive measures.
The establishment of special training institutions by the missionaries, such as the Lahaina College (established in 1831) and the Royal School for Chief's Children (established in 1839) in Hawaii; Malua College (established in 1845) in Samoa; and the Tupou College, (established in 1866) in Tonga, helped to train Pacific leaders both in religious and secular matters. With the improvement in their knowledge of world affairs, they naturally wanted to improve constitutional matters in their country. The replacement of the 1840 Constitution of Hawaii by the 1852 Constitution, and the 1873 Constitution of Samoa by that of 1875 was part of this natural process of growth.

The other factors which played an important role in this were the responses of reactionary monarchs and their supporters, among whom were a certain number of Europeans who stood to gain from supporting them against moves towards more liberal and democratic constitutions. This occurred, e.g., when the 1852 Constitution of Hawaii was replaced by Kamehameha V in 1864.

The final and most important factor in this process was the encroachment of European interests, first through immigrants and finally through the impact of Western colonialism. Professor J.W. Davidson sums this up beautifully when he refers to the collapse of the Steinberger regime in Samoa and, of course, the termination of the then promising 1875 Constitution. He wrote:

Steinberger's failure was not primarily of his own making, nor had the inexperience of the Samoans contributed significantly to it. Even Captain Stevens and his associates had been no more than agents of causes that they only vaguely understood. The failure was, indeed, an almost inevitable consequence of the Western impact upon Samoa. Much earlier, in the 1830s, the Tahitian kingdom had become a mockery of sovereign independence when the French had first used threats of force against it. Since the 1850s the Hawaiian government had been forced increasingly to pursue policies that advanced the interests of immigrant planters and merchants, often to the detriment of the Hawaiians themselves. When a unified Fijian government had been formed in 1871, under the nominal headship of King Cakobau, settler interests had attempted to use it quite blatantly as an instrument for the establishment of their own supremacy. Only in Tonga, where European interests were minimal, had a modern form of government emerged and remained effective and relatively uncorrupted (1967:58).

This brings us to the question of why the Tongan Constitution alone, survives to the twentieth century. There is of course some truth in what Davidson mentions in the above quotation, but it is clearly an over-simplification of the issues involved. True, European interests were minimal in Tonga, but this was due mainly to King George Tupou I's wise and far-sighted land policy. Land alienation was absolutely prohibited by him, saying that Tonga was only small and if land were permitted to be sold the people would not have a place to live in. In contrast, Kamehameha I
rewarded his European advisers with huge land grants, and permitted alienation of land to Europeans. When some of his successors tried to control land alienation it was too late. The same applied in Samoa, Fiji and other Pacific Islands.

The other important reason was the reluctance of Great Britain to annex Tonga because of the expense that the running of colonial administration there would have incurred to British taxpayers. New Zealand (NZ) leaders wanted Britain to annex Tonga to NZ to make up for the loss of Samoa to Germany and US in 1899. Fortunately for Tonga, the officers of the British High Commission for the Western Pacific in Suva could not stand NZ imperialist ambitions. They argued that the Tongans would not tolerate any annexation to NZ. If there was to be an annexation of Tonga it should be to Great Britain herself. However, Britain wanted Tonga to maintain her internal self-government as long as the country was governed according to her Constitution.

The other reason was that all Tongans eventually regarded their Constitution as a sacred document, and insisted that the principles contained therein must never be changed by anyone, as King George said in his closing speech at the 1875 Parliament. Even to-day many Tongans would not tolerate any suggestion to amend the Constitution. This has helped to maintain political stability, which in turn enabled Britain to allow Tonga to escape the devastating effects of colonialism on the nineteenth century Pacific constitutions.
3. RITUALS, RHETORIC AND REALITY: DECOLONISATION AND ASSOCIATED PHENOMENA

J.M. Herlihy

INTRODUCTION

The 1980s mark the drawing to a close of approximately fifty years of what could be called the 'decolonisation era'. From the 1920s, when Britain realised that nationalism was a "significant force" in India and Ceylon (Fieldhouse 1966:397), to the 1970s, when she pulled out of many remaining territories with what can only be termed unseemly haste, this era has been one of high idealism, opportunism, good intentions, misunderstandings and confusion. For countries which decolonised in the early years of the era, the achievement of independence was a struggle against a colonial power reluctant to relinquish its hold. But it was not long before the 'struggle for independence' was more rhetorical than real. Even in the 1960s - at the peak of the international drive for self-determination for dependent territories - opinion polls and parliamentary debates in some Third World countries revealed marked ambivalence about the prospect of independence. For countries like the small Pacific nations, most of which reached independence in the final years of the era, the struggle usually was against being left, unprepared and ill-equipped, to build a viable nation.

Already the 1980s have seen a revival of concern for the hard reality of nation-building, rather than for its ideological base. Whereas decolonisation previously was almost synonymous with a need for rapid and highly visible changes, and a gradualist approach was "seldom practicable" and "politically unacceptable" (Fisk 1975:4-5), the developed and developing worlds are realising that incremental change may be the only option. Some Third World countries are now questioning the long-term relevance of policies, programmes and, in particular, constitutional clauses drawn up during a time when political expediency dictated general support for certain decolonisation rituals and rhetorical gestures. Other countries have already discarded or modified them by constitutional reforms, revolutions or a gradual breakdown in 'law and order'.

In one sense, to say that decolonisation should be analysed as a phenomenon with its own unique matrix of characteristics seems equivalent to rediscovering the wheel. Clearly it is a unique stage in any nation's history; and the themes of elite nationalism, the decline of empire and the struggle at independence for post-colonial power are well-worn ones in the literature of Asian and African political development (Low 1977:5-8). In most accounts, however, the emphasis has been on the transitional period which preceded formal transfer of power, or on decolonisation as the final stage of colonial rule. This echoed the British model of constitution-
building, which entailed a progressive series of pre-independence constitutions, culminating in a definitive and hypothetically inviolate independence constitution. Yet official independence was often little more than one focal point in the decolonisation continuum. The characteristics which distinguish the whole decolonisation period usually were dominant for some time after independence although it could be argued that the values and premises that they represent are specific to an abnormal situation, and are not appropriate to established nationhood.

Prior to and after formal transfer of power, political actions and attitudes in many Third World countries displayed similarities which cut across differences in culture, location, physical and historical factors and the actual time of decolonisation. Though some related primarily to the experience of one country, they became common rituals or rhetorical gestures, often the apparent *sine qua non* for solemnising the separation from colonial authority. This paper suggests that such rituals and gestures were transferred from the experience of one new nation to the next as tried and tested macro-level mechanisms for the establishment of legislative legitimacy and of a strong bargaining position *vis-a-vis* the developed world. Where they were modified, the changes tended to compensate for problems of previous experience rather than for the situation of the recipient new nation - a pattern particularly evident in Pacific decolonisation. It is argued that these characteristics of the 'decolonisation era' are as distinctive as those ascribed to the previous era of colonialism; and that this has significant long-term implications for the post-colonial state.

THE END OF COLONIALISM

In the Pacific, as in many other new nations, much of the rhetoric of decolonisation contains stereotypes of imperialist exploitation or colonial suppression which derive largely from the eighteenth and nineteenth centuries. Yet the age of imperialist expansion was drawing to a close elsewhere by the time the great powers became seriously involved in Pacific affairs, and colonial rule had a relatively brief period of unquestioned supremacy. By the first half of the nineteenth century, the value of the empire to Britain was continually questioned at home. Critics of government policy demanded to know, as they did in relation to Third World colonies over a century later, why Britain should:

> spend money and risk war by supporting ungrateful colonies that apparently longed for independence and no longer conferred commercial advantages on Britain (Ward 1966:6).

With the exception of France, other foreign powers seemed unlikely to contest British supremacy in the Pacific or, even more important, to make compensatory moves elsewhere as long as Britain maintained a low profile in the region. It was in Britain's interests, therefore, not to formalise her Pacific influence.

The nineteenth century brought increasing contact with Pacific Islanders through the growth of the whaling, beche-de-mer and trochus shell trades. German influence in the region expanded, as did settlement of
casual traders of European, or Asian origin. Christian missions spread across the Pacific in the early 1800s. Nonetheless, for most Islanders this was a period in which essentially egalitarian trading relationships with the outside world predominated. Although some of the items acquired then represented a major technological advance, in the subsistence pattern of experimentation and "cultural borrowing" (Salisbury 1962:2-3) the process was basically a substitution. In general the effects of contact were:

perhaps not entirely detrimental .... It is possible the islanders were net beneficiaries (Amarshi 1979: 5-6).

Pressures for more formal involvement by Britain came largely from her own colonies, notably Australia, and from increasing rivalry between the European powers. In the Pacific, the problem of 'blackbirding' was added to the increasingly complex contact situation. In Australia the 1852 gold rush marked the end of transportation of British convicts to the east coast (Gunther 1972:36), and initiated a labour shortage. The American Civil War in 1861 caused Britain to consider Fiji and Queensland as possible alternatives for cotton and, later, for sugar (Gutch 1971:162-64). Within a few years the demand for Pacific labour resulted in kidnapping, coercion and other abuses which, combined with the growing demands of resident Europeans for protection for themselves and their adopted Pacific communities, led finally to the imposition - largely reluctant - of colonial rule.

For the majority of Pacific communities, colonial rule represented an entirely new concept - that of modern macro-level government. This came with, and operated within, a set of markedly different parameters from those which regulated traditional activities. During the colonial period the inherent conflict of structure and scale between macro-level and micro-level usually was masked by the Islanders' perception of national government as a foreign enclave and part of the organisation of another country. These stereotypes often persisted through decolonisation, especially in Melanesia, with the result that new national governments were perceived not as representative of the country, but as a symbol of colonial oppression and an exploitable resource (Herlihy 1979:2). In fact, the isolated colonial governments of the Pacific faced many of the same problems that new national governments later addressed with their decolonisation rituals. Much colonial effort in the early years in particular was devoted to legitimising the concept of macro-level government and to establishing the economic base which would reduce the colony's dependence on an overseas treasury and parliament.

The colonial situation changed dramatically after World War II. The mid-1940s saw the beginning of a phase in which "administrative idealism" was high (Allan 1950:58) and "a tremendous effort was made to make up the earlier years of neglect" (Toogood 1971:47). Though this effort was often severely constrained by problems of funding for post-war reconstruction, overall the post-war period saw considerable resource flows into colonial territories, and vigorous attempts to improve welfare services, economic opportunities and indigenous participation in them. In addition, the decolonisation of Asian and African territories released many experienced officials, some of whom moved to the Pacific. Towards the end of the
colonial period, at least for the recently independent countries, the contact situation had stabilised and some benefits of modernisation, however few, had been spread through the village communities of the region.

Coterminous with this was an attitudinal swing in Western countries during the post-war years, against colonialism per se. It was taken up by and through the United Nations (UN), one of the main outlets for Third World grievances against colonial rule. The word 'colonialism' lost its earlier connotations of law and order, impartial justice, even-handed administration and protection of unsophisticated races, and became a pejorative term to denote "the oppression, humiliation, or exploitation of indigenous peoples" (Nadel and Curtis 1964:3). By the 1960s, it was clear to most Western powers that the colonial administrator was:

damned if he did and damned if he didn't: to undertake the reform of the society was wantonly to impose alien idiosyncrasies on a rounded and living culture, whereas to refrain was to protect the very backwardness which had justified intervention in the first place (Emerson 1962:40).

After UN Resolution 1514 demanded the "bringing to a speedy and unconditional end colonialism in all its forms and manifestations", most colonial powers saw little political advantage in delaying independence until a country was politically and economically ready for it, or until it was demanded by a majority.

The 'decolonisation era' was thus one of disorientation and conflicting values for responsible colonial administrators, as it was for many Third World communities. Actual performance as a colonial power was a relatively insignificant variable in the international power relationships that determined global values. Western guilt and Third World resentment over colonial experience, both of which frequently were expressed in the credo that "the expatriate cannot really grasp the inner workings and nuances of indigenous societies" (Lasaga 1973:309), caused widespread uncertainty in Western thinking about Western involvement in Third World development. This was exacerbated by the rapidly expanding body of radical diagnostic or other critical analyses of post-colonial trends, which were taken up by Third World nationalist elites with little appreciation of the crucial significance of time factors and global patterns to their decolonisation experience. The conflict between colonial responsibilities and the need to avoid even the appearance of colonial or neo-colonial intervention resulted in the concentration of Western effort for some time on 'value-neutral' forms of development assistance, notably financial aid and promotion of capital accumulation. This led to the development of a ritualised belief, common to developed and developing country alike, that Third World countries:

were entitled to foreign subsidies to compensate them for the alleged indignity of long periods of servitude (Fieldhouse 1966:379).
THE RITUALS OF DECOLONISATION

Of the rituals and gestures which have been common to many Third World countries, the one which probably had the greatest long-term impact was the rejection of any views or courses of action associated, however peripherally, with colonialism. Correlated to a greater or lesser extent with this was a second important factor, Third World nationalism. Several subsidiary characteristics of the decolonisation era emerged as expressions of nationalist anti-colonialism. Among them were a tendency for Third World leaders to rely on emotive rhetoric rather than on relevant policies and programmes for electoral support; a disproportionate emphasis on 'reverse racism' and race-related issues such as citizenship, control of the economy and the replacement of foreigners with nationals in the workforce; a preoccupation with the trappings and visible symbols of national sovereignty; and a concentration of financial and manpower resources on the macro-level aspects of the transfer of power. One of these was the preparation of the independence constitution.

The tendency for independence constitutions to be conservative highlights another important characteristic, often glossed over at the time: the widespread inexperience of new national leaders. As Nwabueze points out (1973:303), the colonial approach discouraged co-operation between the government and the governed, and new nationalist leaders frequently were ignorant of the intricate mechanisms of the system they inherited. Most were therefore acutely sensitive to possible criticism from the colonial power, the bureaucracy, the parliamentary opposition or the general public. One consequence of this combination of inexperience and sensitivity was to swing away from the colonial power where possible in economic relationships, and to seek needed expatriate personnel from other countries. Many cases of nepotism, electoral corruption, rivalries for the role of spokesman for popular grievances, pork-barrelling and displacement of complaints against government onto the colonial power can be seen as attempts to compensate for inexperience. Another compensatory mechanism was the emphasis by new national leaders on traditional values and culture, grass-roots consultation and mass participation in decision-making. In constitution-building the inexperience of new leaders often resulted in heavy reliance on technical expertise and models from elsewhere and in a relative lack of concern for the long-term implications of constitutional clauses.

Whereas independence constitutions usually were the product of collaboration between the colonial power and the new nation, many decolonisation rituals demonstrated that the over-riding priority after the transfer of power was "to do always the opposite to what the colonial powers had done" (Streeten 1972:60). If the racist behaviour of colonial officials was the most visible aspect of colonial rule, their replacement by nationals was the priority at independence. Where colonialism meant an administrative oligarchy, decolonisation was represented as a change to mass participation, often with the introduction of a multiplicity of indigenous political organisations to control the bureaucracy. If colonialism meant primary production and exports, independence came to stand for secondary production and import substitution (see Streeten 1972:60). Opposition to colonial promotion of large-scale, capital intensive or foreign-investment-based development was expressed as support for indigenous modes of production, low-level technology, labour intensive
projects and Schumacher's "small is beautiful" (1974) concept. Where the centralisation of colonial administration was the issue, decentralisation of political or administrative authority was assumed to be the solution. Where the colonial government had imposed a forced unity on disparate or antagonistic groups, sessionalist movements often emerged as a decolonisation problem. The tendency to regard the major issues in a simple binary framework, and to substitute value-judgement antonyms for optimal decision-making in the promotion of reforms, resulted often in abrupt pendulum swings in national policy and development administration. In this situation constitutional change after independence frequently became a political imperative, and constitutional stability was seen as a concession to colonialism.

THE PACIFIC SITUATION

By the time most Pacific states approached independence, the decolonisation process was itself of a mixed inheritance. From Latin America, where most countries were decolonised in the early nineteenth century, came an emphasis on imperialist penetration, structural constraints, dependency and "the development of underdevelopment" (Frank 1969, 1970; Griffin 1969; Furtado 1970). The next major region to decolonise was Asia, a century later, when capitalist expansion had given way to the 'moral supremacy' approach of the British raj. From this period the main legacy was the concept of nationalism based on indigenous modes and values, and active or passive resistance to foreign domination. These concepts were developed in the decolonisation of African territories in the 1960s, when disengagement was becoming a political and economic necessity for most Western powers; and the lessons of Africa were then transferred, largely by the colonial powers, to the Pacific.

By the 1970s, however, most Western powers realised that they would be condemned as a matter of political expediency by their ex-territories, whether they had been harsh or protective rulers and regardless of how generous or conciliatory they were in post-independence relations. The increasing political pressure to be free of the 'tag-end of empire' was reinforced by the effects of the 1974 oil crisis on the global economy and the subsequent economic recession. Many Western countries faced problems of unemployment, inflation and political instability at home, and were less prepared than they had been to concede Third World assertions about colonial mismanagement and the consequent "moral obligations and responsibilities which fall on former Western Colonial powers" (Harries et al. 1979:116). The colonial powers in the Pacific became more rigorous in the definition and pursuit of their own interests in relation to their territories. The British Government saw its interests as best served by rapid disengagement, and its policy changed from allowing the dependent territory to set the pace to active promotion of independence. France, by comparison, felt a need to retain a Pacific presence. Such factors meant that the Pacific countries which approached independence in the 1970s needed to evaluate their options with a different perspective from that of countries which decolonised in the earlier years.

In addition to their temporal position vis-à-vis most newly independent countries, the majority of Pacific nations were spatially and structurally in a different situation. Most were small and, unlike most of
the other small new nations, they were internally fragmented and very isolated. In per capita terms the costs of government were relatively high, and governmental ability to disperse its services evenly was limited. Culturally the Pacific region displayed considerable heterogeneity; few Pacific states had the strong unifying forces which national religion or political ideology provided in other countries. Nationalism was no longer the driving force that it had been and, as Furnivall perceived in the then Netherlands India in the 1930s (1939:468), in fact tended in plural societies to be disruptive of the social order.

Possibly even more important in relation to constitutional development was the simple issue of scale. The political and administrative systems introduced by the colonial powers in the Pacific usually were 'scaled down' versions of systems originally designed for much larger states. They made little or no concession, apart from a numerical reduction, to the peculiar strengths and weaknesses of small nations. The personalised nature of many Pacific polities (see Selwyn 1975; May and Tupounia 1979) for example, gave greater scope for informal checks and balances than in larger countries. Formal definition of rights and responsibilities in this situation often acted to the detriment of the informal system, and allowed individuals to exploit the system under the umbrella of red-tape. Similarly, the relatively high mobility of the small educated cadre between politics and administration inhibited development of the deep cleavages in legislative-executive relations which occurred in some larger new states. Though this, conversely, vitiated provisions for the separation of powers on which the Westminster system was based (see Singham 1967), most Pacific constitutions endorsed the separation of legislative and executive powers. In this situation improvisations which were administratively constructive under Pacific conditions often were at variance with constitutional clauses, and ipso facto were classified as deviant or "bad" administration (see Murray 1981). Much of the esprit de corps of senior Pacific officials, however, derived from precisely such informal expertise in manipulation of an arcane system. The result was that:

in truth, it has not been for many decades 'the British' or 'the French' or 'the Dutch' system of administration; it is now fundamentally the national system (Moris 1977:77).

Rigid adherence to constitutional provisions for impersonalised Westminster structures at times was detrimental to good government; so that constitutional amendment often was administratively as well as politically necessary after independence.

A final consideration in relation to scale is that, due to their small size, the micro-states attracted little attention either from the colonial powers or from militant Third World nations at the peak of the drive for decolonisation. By the time their turn had come to decolonise, nationalist anti-colonialism - which previously had been a valuable mechanism for the transfer of resources from the developed to the developing world and which had helped to establish the right of new national governments to rule - had limited effectiveness. Several of the popular anti-colonial rituals, such as decentralisation, had become conventional wisdoms disseminated to colonial and post-colonial governments alike through international networks and aid agencies. The result was that colonial governments and anti-
colonial nationalists in the Pacific often promulgated essentially the same goals.

DECOLONISATION AND CONSTITUTION-BUILDING IN THE PACIFIC

In the Pacific, as elsewhere, departing colonial powers as well as new national governments often concentrated their efforts during decolonisation on the visible symbols of the transfer of power. Because opposing interests found mutual advantage and a starting point for conflict resolution in these symbols, the criterion of visibility tended to dictate priorities rather than national needs, where interpretations were more likely to be at variance. Over the decolonisation period this emphasis on what were predominantly macro-level concerns in effect reversed the late colonial trend towards an outward spread of modernisation. National attention and resources were drawn back around the centre and the formal transfer of power, frequently to the detriment of peripheral communities.

One of the most visible and central symbols of the formal separation from colonial authority throughout the decolonisation era has been the constitution. In the Pacific, however, the ritual of constitution-building had a different rationale. African constitutions of the 1960s, e.g., often reflected the turbulence of their decolonisation experience. Relatively little importance was assigned to the specific circumstances of the country, and the constitution frequently became primarily a mechanism to inhibit or contain the breakdowns in law and order which were anticipated from, and often consequent on, rampant nationalism. The main problem in most Pacific states was not instability, but the difficulty of mobilising popular support for rapid disengagement. Consequently an important element in Pacific constitution-building was the promotion of a sense of national identity. In some cases considerable time, effort and financial resources were expended to achieve maximum internal visibility and public support for the independence constitution. Papua New Guinea (PNG) and Kiribati mounted major public relations or political education campaigns to ensure that the constitution was recognised as 'home-grown'. Whether an independence constitution in fact did, or could, accurately reflect the wishes of communities whose survival traditionally depended on small-scale autonomy was less important in the event than the legitimising effect of popular consultation and, by implication, mass participation.

In any case, the communities consulted usually benefitted far less from the ritual of constitution-building than the departing colonial power and the new national government. Frequently consultation was a device whereby politicians and government officials who were unwilling to commit themselves passed the responsibility for a difficult or potentially divisive decision to villagers. Even where the intention was genuine, the initiative was easily aborted by a lack of knowledge among villagers about the issues or, as in the Solomon Islands (SI) and Vanuatu, by political rivalries. Many villagers doubted their own capacity to make the optimal decision on esoteric constitutional matters, and were reluctant to take a responsibility that they had allocated to their parliamentarian. Moreover attendance at constitutional consultations, to which villagers at times were summoned from considerable distances, were expensive in terms of time and occasionally even money or food factors, rarely taken into account by government officials. The result was that 'grass-roots consultation',
whether a genuine investigation or an *ex post* justification for constitutional provisions which to all practical purposes had already been decided, was often resented by those whom it purported to involve.

At macro-level, the ritual of constitution-building had more immediate significance. New national parliaments frequently saw it as an opportunity to entrench their position, to demonstrate the validity of party or group policies, to constrain political rivals or to promote their personal interests. In PNG, SI and Vanuatu in turn, the form of the constitution became for some time the main focus of the struggle for power between individuals and groups who were contending for national leadership. For example, the constitutional provision in SI for a "Leader of the Independent Members" (SI 1978:178-79), which in effect institutionalised a tripartite system of government (Herlihy 1979), was a direct concession to the political influence of one parliamentary group during the constitutional negotiations. In some cases such constitutional manipulation prolonged the life of a weak, unpopular or minority government, so that the post-independence period was one of superficially stable government but of considerable political tension.

Possibly even more important was the role of the constitution in distancing the departing colonial power from its erstwhile colony, and therefore from any vestigial responsibility for a post-colonial collapse of democratic norms. The independence constitution provided this 'buffer effect' in several ways. First, as the parliamentary debates in Britain over SI citizenship demonstrated (Her Majesty's Government, Hansard, May 1978:1011-28), the constitution was documentary evidence that the colonial power had discharged its responsibilities honourably and in accordance with international codes of conduct. In addition, it provided - as far as was consistent with the ethic of non-intervention - for a period of stable government after independence. This was done by the separation of constitutional decision-making from the normal format of Westminster binary debate, and the promotion of a unified parliamentary stance on the constitution; by concessions to the demands of the parliament which would take the country through independence; by financial and technical assistance to the government in power at independence; and, it could be argued, by more subtle means such as the judicious distribution of colonial honours, awards and the new impediments of metropolitan status and acceptance.

Some Pacific constitutions contained specific provisions which protected the political interests of the transitional government. Requirements for more than absolute majority support to pass a vote of no confidence, for a certain number of signatories to such a motion, or the PNG requirement for nomination of the proposed successor to the Prime Minister in a motion of no confidence, usually gave the government the advantage. Finally, most constitutions made elaborate provision for established institutions, notably the public service, police and judiciary, and thereby vitiated post-colonial attempts at structural reform. Implementation of reformist policies was also handicapped by the reluctance of the colonial power to allow provisions which were potentially contentious or which could be interpreted as unwarranted colonial intervention in post-independence internal matters. This caused the omission from some Pacific constitutions of adequate guidelines on major policy issues of the decolonisation period, notably decentralisation and
land rights. These factors meant that constitution-building in the Pacific, on the whole, tended to reinforce colonial structures, to promote colonial interests, and to place the onus for the lack of significant changes on the post-independence national government.

CONSTITUTIONAL ISSUES AND RELATED RITUALS

By the 1970s it had become generally accepted that the transfer of power had to be completed by the adoption of a definite constitution. In PNG the then Chief Minister's suggestion that Independence be carried through before the Constitution was finalised was overwhelmingly rejected by his otherwise deeply divided Parliament. Nonetheless, constitution-building was not the only major ritual of the Pacific decolonisation experience nor, perhaps, the most significant in the long term. As many Pacific politicians knew from their colonial experience, constitutions could easily be changed by parliamentary vote but economic conditions, national living standards and many other factors which affected their political survival and effectiveness could not. Due to the highly centralised nature of much colonial administration in the Pacific, constitutionalism at independence was still largely an imposed, macro-level concern. The highly personalised nature of many Pacific systems meant that the abstract concept of constitutional primacy was only weakly internalised by the general public, and often was subordinate to respect for an authority figure. Pacific politicians therefore tended to concentrate on constitutional provisions which related to currently sensitive issues and directly or indirectly to their electoral credibility. As a result, the independence constitution was not only a ritual itself, but reflected other major rituals of the decolonisation period.

An important example is the development of a supposedly unique set of cultural characteristics, known as the 'Melanesian Way' or the 'Pacific Way'. Though this term, as originally coined by Ratu Sir Kamisese Mara of Fiji, emphasised the diversity of the region (Crocombe et. al. 1975:1), its main use has been as a stereotype of common cultural themes in the promotion of national identity. In general, the concept postulates a comfortable level of non-monetary subsistence or a "primitive affluence" (Fisk 1966:23) which allows villagers to enter the modern sector "from a point a number of steps above the poverty line" (Fisk 1971:378). Social organisation and land ownership are idealised as communal, co-operative and egalitarian. Decision-making for the society is attributed to a process of consensus, in which courtesy prevails and confrontations are minimised. Leadership status is said to be usually acquired by individual merit and even where it is hereditary it is said to be maintained by the successful manipulation of a network of societal and familial obligations, not only demonstrating superior achievement but also a high degree of social responsibility. Wealth in the model is exhibited by gift exchanges, distribution of largesse and patronage. Accumulation for individual gain is considered anti-social. Care for the young, security for the aged and weak, and assistance when in need are theoretically guaranteed by the one-talk system, which obliges members of a community or clan to respond to another's request for help. The dominant socio-economic unit is assumed to be an indefinitely extended family. Finally, the most romanticised element of the stereotype, is the belief that money is not necessary.
One problem with the emphasis on such cultural stereotypes, and with the incorporation of some of them in the constitution, is the rigidification of previously adaptable cultural mechanisms. A common example is the role of chiefs in new Pacific states. Chiefs were often reluctant to seek election under a democratic system, but they were equally unwilling to be left out of macro-level government. In some Pacific countries, notably Tonga and WS, the chiefly system was so powerful that its incorporation into constitutional arrangements was unavoidable. As the recent debate over human rights and the matai franchise in WS demonstrated, this tended to result in an ambiguous amalgam of traditional and modern precepts, with little regard to their long-term compatibility. Where more orthodox Westminster systems were adopted, different problems emerged. Chiefs usually held considerable power over the rural vote and, in particular, over the access of a national parliamentary candidate to the rural vote. Very few national parliamentarians could afford to ignore the wishes of their local chiefs. Weak legislatures especially tended to concede to the chiefs institutionalised powers which often they were ill-equipped to hold, with the result that both a flexible traditional system and a developing modern system were set, at decolonisation, in a transitional mode.

The issue of cultural identity in the Pacific emerged at decolonisation in many other ways. It was often a factor in the rhetoric of 'black power' groups, in the rejection of expatriate mission involvement in provision of basic services, in an upsurge of concern for land rights, and in a proliferation of spontaneous local movements differing in origins and specific objectives, but sharing a broad concern with the achievement of economic, social and political development through communal action (May 1978:185).

By the 1970s, however, very few local movements were in a position to compete with government bodies in service or economic activities, or to maintain their momentum through exclusively traditional means. In some Pacific countries educational standards suffered through the national emphasis on cultural identity. In PNG, SI, Vanuatu and Kiribati 'culturally relevant education' often meant the substitution of local culture for basic reading, writing and numeracy skills, and the use of school children as unpaid labour in school food gardens. Villagers complained that the system was designed to educate their children to be content with poverty. Many saw their 'cultural revival' either as a new government hobby with little practical application, or as a tacit admission that the new national government was unable to provide the benefits it had promised and was forced to fall back on previously discredited customs and values. Often the inherited legal system was also undermined. Complaints about the irrelevance of foreign codes and regulations to traditional culture, as well as modern developmental needs - frequently justified - led to moves for law reform at decolonisation if not to a general decline in public observance of legal controls. The collapse of fundamental principles of accountability and financial probity in many instances can be attributed to the apparent exoneration provided by decolonisation rhetoric for practices which were in defiance both of colonial and of traditional codes of conduct.
Though nationalism was a relatively insignificant element in Pacific constitution-building, it received tacit recognition in two other highly visible rituals of Pacific decolonisation: the localisation of public service posts and the redistribution of wealth and power from foreigners to nationals. As with the independence constitution, the advantages accrued in both cases mainly to central elites, while the costs were dispersed and fell heavily on the less developed areas. Due to their lack of development, these usually received the less experienced officers and suffered most from across-the-board financial stringencies. In addition, the leaders to whom power was transferred came largely from modern elites. Their perceptions of colonialism tended to derive from a relatively high level of education, lengthy and close contact with colonial enterprise, and overall developmental advantage. To this group, anti-colonialism usually meant rectification of problems which they identified from their own experience, and which tended to be problems of colonial 'overdevelopment'. This became evident in Melanesia in particular in relation to revenue-sharing between Central Government and the Provinces and to controls over foreign investment. The rapid transfer of service businesses from foreign to indigenous control, though an important – and visible – sign of the transfer of power, frequently left Pacific communities with a poorer service than they had received from their 'exploitative' foreign tradesmen (see Ward and Proctor 1980:413). One outcome of this combination of factors was the perpetuation of patterns of disadvantage which prevailed during the colonial period. In some cases the access of villages to government services declined markedly during the decolonisation period, and their position vis-à-vis the more developed areas became significantly worse. This in turn led to a situation of "cumulative causation" (Myrdal 1957:13) and further deterioration in the position of disadvantaged groups.

CONCLUSION

Despite concessions to cultural identity and popular consultation, constitution-building in the Pacific has been largely an esoteric exercise for a specific and primarily transitional purpose. The forces which shaped the independence constitution were those that shaped the entire decolonisation experience, and many of them were global in derivation and scope. Though constitution-building was a major decolonisation ritual, its significance was determined by other such rituals, by the chronological context, and by the relevance of the prevailing decolonisation rhetoric for the actual decolonisation process.

In some instances newly independent Pacific countries have been trapped by their own decolonisation rhetoric into a 'no win' situation, in which the expectations it aroused made the promotion of sub-optimal measures a political necessity. A significant factor in this was the emotive nature of much of the rhetoric, which made it unanswerable in terms of logic and risky to oppose politically. The result was that frequently realistic reservations about the practicability of ritual decolonisation programmes were not expressed or were discounted as manifestations of colonial or neo-colonial attitudes.

One consequence of the developmental dilemma in which many Third World countries found themselves as a result of their experience was a tendency to rely on exhortation. Leys and Marris pointed out:
the means often becomes an end in itself; people are urged to "work harder" for the sake of "national unity" or "progress" when there seems to be no good individual motive for doing so; they are told to sink their differences when these differences concern scarce resources - say land - which the government cannot make plentiful; they are urged to change their habits or ideas because it would be valuable to someone else if they did so (1971:275).

With the decline of decolonisation rituals and rhetoric, internal issues are now taking on a new significance. Governments are identifying some of the problems that were created by constitution-building at a time when values were ephemeral and often dictated by the personal objectives of individuals in temporary positions of power. One of the most important questions many governments face today is the relationship between the government and the governed. It is now necessary to ask how many problems in newly independent countries, usually ascribed to the pernicious influence of colonialism or neo-colonialist capitalism, should in fact be attributed to basic structural and attitudinal differences between macro-level and micro-level. On these questions the literature provides few guidelines, apart from the patronising and ethnocentric assumption of many conventional development theorists that development is achieved through government action; the equally patronising and ethnocentric conclusion of many in the radical school that the peoples of the Third World are no more than passive victims in their debasement by the forces of the developed world; and the questionable legal hypothesis that the answers lie in the relationship between policy, the law and the constitution.
Little hesitation has been detected in the willingness of consultants to lend their expertise in the aid of drafting the constituent documents of the various Pacific Island polities. This lack of reluctance applies not only to persons hailing from areas governed under formal constitutions but also to those whose countries have long functioned without placing the outline of their governmental structure and basic conventions within the constraints of a single document. Coming as he does from an area which has pioneered in the exercise of reducing national fundamental law to written compass, the author suspects that some of his countrymen have considered themselves particularly qualified for assisting in the delivery of new constitutions. This was early evidenced in the Pacific by the Hawaiian Constitution of 1840, drawn up by the American advisers of Kamehameha III, who came as close as they dared to marrying a republican system of government to a monarchy, and in Fiji a decade later, when the American confidant of Ratu Cakobau prepared a constitution for the Bau Kingdom. Albert Steinberger, who travelled to Samoa (WS) as a 'special agent' of the American State Department was not alone in proposing a reshaped Samoan Constitution, but some of his solutions anticipated the provisions adopted nearly a century later in the present Constitution of WS.

In view of the thesis which is to be developed in this paper, the author trusts that any small part which he may have played in a comparable enterprise during the latter half of the twentieth century may charitably be as much attributed to the irresistible pull of this national ethos as to the expression of individual ego.

Succinctly put, the author suggests that fundamental political values are culture-bound, and only persons conditioned by a particular culture are truly capable of participating in policy decisions respecting the values which are both to constitute the foundation and to provide the interlocking mechanisms for what is to be the Organic Law to serve the polity of that culture. As a statement about values this is disarmingly simplistic. Actually, what it subsumes is that the very form of expression as well as the content of value is always culturally relevant, as indeed is all knowledge — including the rational processes for arriving at and ordering that knowledge — and that ultimately recourse must be had to cultural meanings to determine the proper valences for the reaching of decisions among competing value choices. This, then, seriously questions the saliency of the consultant, and reduces his legitimate role to a very
narrow orbit whenever his cultural antecedents are not those of the polity he is serving.

One general illustration before exploring the dimensions of constitutional consultancy and considering the situations where such service may be regarded as appropriate: lawyers are trained to appreciate that there are different systems of law, even if they become skilled in the practice of only one. However, to the Australian jurist who ventured into stateless Papua or New Guinea, devoid of any political structure, adjudicating internal disputes, he was encountering cultures without law (see Berndt and Lawrence 1971:3). True, while it was recognised that various forms of limited force (family feuds and even generalised warfare) could decide matters, these were 'a-legal' phenomena. However, while Australia was administering both areas, at first separately and then joined in administrative union, extra-legally the indigenous inhabitants were applying customary law among themselves, as is today acknowledged in both the modification of the Australian-introduced jurisprudence and the establishment of local courts structured to reflect these communal values. To now say, as would Pospisil (1971:Ch.4) that there are levels of law, fails to remove the constraining blinkers of the Western-trained consultant. He comes into the Pacific Island polities equipped with his cultural baggage assigning to the state and its governing institutions the highest and controlling function, within externally or internally imposed limitations, and assumes the law so administered to be impartial. To some of the Pacific Islanders, other centres of authority, such as the clan or family, are clothed with this character, while their law is personal, so that the paramount role of the state is but part of a Western facade.

For the sake of analysis, the work of constitution-making will be divided here into process and product. The former normally is conceived of in somewhat mechanical terms, embodying a pragmatic 'right' or 'wrong' way to proceed, and, as such, value-free, other than in an engineering sense of efficiency. (This, of course, ignores that 'pragmatic' is a value-laden conception.) In fact, this conventional wisdom is erroneous, not only in that process materially helps shape product while the potential product a priori influences the course of process, but the very categorisation is alien to those Pacific cultures which would regard all such enterprise as comprising an integral whole. Who acts may be indistinguishable from how he acts or with what objective. Contemplate undertaking constitution-making in the Tonga of today, a polity whose Finance Minister, Mahe Tupouniua, at the request of King Taufa'ahau, has just submitted his resignation after he had the temerity to inform the Monarch that the latter's request for travel funds exceeded the sums allotted in the national budget for that purpose. But be that as it may, the author having been conditioned by his Western training to think heuristically in the categories of process and product, has no qualms in applying that training to efforts directed to analysing the drafting of Pacific Island constitutions. The objective will be to demonstrate the value context of that involvement and how it may - innocently enough - fail to coincide or even conflict with those of Pacific cultures.
THE CONSULTANT'S ROLE

PROCESS

The exact point at which the consultant may first become engaged will vary from polity to polity. Does he advise on the criteria for and method of selection of the delegates who are to prepare, or at least, ratify the constitutional draft? To pose the question is but to phrase the answer that any such participation is loaded with policy. It is not difficult to demonstrate that the inclusion of incumbent legislators may materially affect both convention process and product (see Meller 1971:138 et. seq.), but should the former concern the consultant? The experience in the Pacific Islands has not only been not to exclude legislators but in many cases to enlist the services of the entire legislature sitting as a constituent body in adopting the constitution - as in Papua New Guinea (PNG), although the House of Assembly sat as a Constituent Assembly.

Should the hierarchial political structure traditional to much of the Pacific be recognised by allocating place to the chiefs? When the British Government announced that all eighteen unofficial members of the Fijian Legislative Council would travel to London in 1965 as constitutional conference, apparently this included only two Fijians nominated by the Council of Chiefs, but actually the entire Fijian component was composed either of chiefs or of those who bore the endorsement of the Council of Chiefs (see Meller and Anthony 1968:97 et. seq.). A decade later, by amendment to the statutory enabling legislation for the Micronesian Constitutional Convention of 1975 (MCC), the Micronesian chiefs were granted voting rights in the Convention after they had already been co-opted from each administrative district by their fellow chiefs. To this ex post facto empowerment may be traced the pivotal position occupied by the Micronesian chiefs in the Convention, and their short-lived 'walkout' which threatened to bring the Convention to an abrupt close. It may be argued that in Fiji, given the colonial context, there was no alternative but for the administering authorities in London to make some decision, and they took a course they believed would minimise procedural difficulties. But the latter case solely involved Micronesians legislating on their fellow Micronesians' participation. What would have equipped a non-Pacific Islander with the cultural sensitivity and technical training to develop the expertise sufficient to serve as consultant on this type of issue other than in the most pedestrian of ways?

If it be asserted that this falls outside the scope of normal consultancy, what, then, about serving as adviser on whether the constitutional delegates certified as elected meet the statutory criteria? A purely technical matter, surely. But in 1974 the Nitiqela (District Legislature) and many of the iroj (chiefs) of the Marshall Islands District of the Trust Territory (MI) advocated a boycott of the constitutional convention elections, so that only about 15 per cent of the registered voters repaired to the polls. In each of four delegate districts (out of nine) only one candidate filed for election, and there were no candidates at all in three. Should the candidates elected without contest be seated? Were the twenty ballots on which the name of one Marshallese was written, or the comparable eight in another delegate district, sufficient to qualify these persons to sit as constitutional delegates, since they had received the highest number of votes tallied in their respective delegate districts? Recourse to the judicial opinions of other jurisdictions in similar cases might have offered both legal logic
and precedent, but only served to conceal the basic policy decision before the Convention: was the MI District to be represented in the molding of a constitution for all Micronesia, even if only by a minority faction within the District? The Convention adopted the affirmative course, ultimately only for the completed Federated States of Micronesia (FSM) Constitution to be overwhelmingly rejected in MI.2

Seemingly, what could be more innocuous than professing advice on the place where the technical action of sitting down to draft the constitution ought take place. But should mechanical considerations such as the adequacy of housing for Convention delegates and staff, or ready access to data sources and basic support services take precedence over the ethos of in-country performance of politically so symbolic an undertaking as the actual conception of a polity's basic charter? And what if the only 'logical' place appears to be an area where the inhabitants by their designated representatives have already indicated they disapprove of being incorporated within the rubric of any constitution which might evolve, and may even be hostile to the very constitutional exercise occurring on their soil? Precisely that combination of circumstances surrounded the holding of the 1975 MCC on the island of Saipan in the Marianas District. Previous to the meeting of the Convention, a covenant calling for Commonwealth status had been signed by Marianas and American negotiators, and was overwhelmingly ratified by the voters of the Marianas District.3 However, it yet remained unknown whether the United States (US) Congress would approve of this executive-negotiated Commonwealth Covenant. To the Micronesian leaders this uncertainty provided the determining element warranting the holding of the Convention on Saipan, proceeding on both the probability that the Marianas delegates-elect4 would attend as insurance against the risk of unfavourable action in Washington and the possibility that the District's people might even ratify the Constitution at some future date should the US Congress reject the proposed Commonwealth status. Strongly expressed opposition in the Senate to the Covenant did serve to manifest the soundness of the appraisal by the leaders of their fellow Micronesians, at least in so far as it saw the Marianas delegates-elect become involved in the day-to-day work of the Convention.5 About the only justifiable contribution by a non-Micronesian consultant to this type of decision was to raise cautionary warnings on the procedural difficulties to be encountered in meeting the quorum and majority requirements enjoined by the Convention's enabling legislation for taking action in plenary session should the Marianas delegates absent themselves.

Even the configuration to be used in seating the delegates on the floor of the convention hall involves concealed policy elements with potential Pacific cultural antecedents beyond the ken of the expatriate consultant. It may be accepted as a concomitant of Westernisation that just as the introduced legislatures have ignored the formal trappings of traditional law-making, so may the even more alien implant of the constitutional convention. The tulafale (talking chief) was not separated from, nor did he purport to limit himself as speaking in the name of his ali'i (chief) in the Samoan constitutional conventions of the 1950s; similarly it was not thought necessary by Micronesians to differentiate the role of the namken delegate from that of the namwarki of Ponape.6 But as the delegates consisted of both co-opted chiefs and commoners, were the former to be grouped apart, or afforded any credenda - material or procedural - of status? This seemingly superficial matter potentially had
linkage with one of the most divisive issues the Convention would face, that of whether the Constitution as it evolved would recognise and make provision for the status of Micronesia's traditional leaders. When the delegates assembled informally for the workshop which preceded the organising of the Convention, they failed to provide the staff with any instructions for making seating arrangements. To the Western frame of mind which assumes the need for ordering phenomena to facilitate rational action, some seating configuration was required to avoid complete confusion. To the engineer controlling the Convention's public address system, and cuing the name of each speaker into the recorded debate, it was essential. In the attempt to reach a neutral solution, staff assigned delegates to seats on a purely random basis. Upon reflection this apparently innocuous decision becomes the physical embodiment of the equality of chief and commoner, just as did the original granting of voting rights to the traditional leaders symbolise the lack of legal differentiation.

All preparations are not of physical accommodations which occur before embarking upon the project of limning a constitution. Also anticipated is the mode to be adopted in aggregating and agreeing upon the contents of the constituent document. From observation of the process in the Pacific, the alternatives fall between two poles, one characterised by the work of a convention starting with the examination and reshaping of a draft, around which for the most part all subsequent negotiations turn. The other pole has the delegates assembling with a tabula rasa and, bit by bit, co-operatively piecing together the contents of what becomes the completed constitutional document, adopted or rejected upon being submitted for ratification in the manner prescribed by law. As the former frequently incorporates the practice of employing a pre-convention group to put together the draft proposal for the entire convention, the process of accretion observed in this preparatory stage may not differ materially from that of a convention working without the lodestone of any proposed draft to which all decision-making is attracted. And it ought to be mentioned in passing that for those conventions nominally setting to work without preliminary drafts before them, not only do many delegates bring considerable preconditioning as to what constitutes the 'complete' constitution but they may also have the assistance of pre-convention informal formulations, so that their tablets are never truly blank.

In both polar categories of constitution-making, and irrespective of particular variations encountered, the expert consultant has almost universally played a prominent role, one which prompts critical examination from the perspective of his cultural competence so to serve. It matters little in such analysis that the constitution on which he advised is not autochthonous, but depends upon an administering nation's breathing life into the existence of the new polity, so that from the viewpoint of the granting country his involvement is essential as one of its nationals. From the inception of the new polity, to which the document both attests and embellishes, his adequacy is to be evaluated only by its own set of measures. Politically, of course, the entire matter is resolved both by the power leverage enjoyed by the administering nation in its act of granting independence and by the degree of legitimacy enjoyed by the consultant-draftsman within the polity aborning, even though hailing from the administering nation.
Constitutional illustrations inevitably tend to drift over into treatment of product rather than limiting themselves solely to inquiry into process, the subject under consideration. Nevertheless, examples of both polar categories of drafting ought be introduced here to clarify the influence of consultation in this aspect of process.

Almost simultaneously two decades ago, the form of constitution-making which utilises a pre-convention group to prepare advance drafts occurred within roughly the same cultural (but not political) settings in adjoining polities whose capitols are separated by only about 77 miles of ocean. Of the 1960 Constitution in American Samoa, Chief Judge Morrow who was a member of that American possession's committee, along with the US-appointed Attorney-General and seven Samoans, wrote:

The Attorney General was supposed to assist in the drafting, but he was too busy with his regular duties [so] that he did not do any drafting and attended only a very few meetings of the Committee.

It was my practice to write out ... [three or four sections at a time] .... I took ... [them] before the Committee and they were usually adopted verbatim after my explanation of the sections.

Fortunately, I had taught the course in Constitutional law two or three times while I was dean of Drake University Law School and was familiar with the provisions of the Federal Constitution. Being an Iowa lawyer, I was familiar with the Constitution of Iowa (1974:25).

The draft constitution prepared by the committee was then adopted by the Constitutional Convention in the space of but four days and with only one change (see ibid.:26).

In WS, as reported to an inquiring American Senate Sub-Committee by its staff:

The working committee on self-government commenced deliberations on the constitutional problems involved in the transition to independence early in 1959; the convention which met subsequent to the preparation of a constitutional draft in August 1960, labored almost 2 1/2 months before finalizing its work. Samoan and New Zealand officials had the assistance of their own technical experts. As a consequence, except for the possible objection on the part of the taulele'a [untitled Samoans] who were represented at the convention only through their matai [titled Samoans], grounds for dissatisfaction present in American Samoa are absent (Meller 1961:118).

The part played by the Samoan and New Zealand (NZ) consultants in the drafting of the WS Constitution is described at length in the account of one of them, the late Professor Jim Davidson:
Like most political groups, the Working Committee was heavily dependent on professional assistance in bringing its experience to bear with precision on many of the problems that came before it. It needed help in the preliminary analysis of its field of responsibility, in the elucidation of problems raised in discussion, and in the final embodiment of its decisions in constitutional drafts and detailed recommendations. As Constitutional Adviser, I was expected to provide a large part of that help, in cooperation with the Research Secretary. The relationship to the committee of the New Zealand Constitutional Adviser, C.C. Aikman, was more complex. At first his advice tended to be received with caution and some doubt. But, when the committee became satisfied that he spoke from personal conviction and from knowledge of local circumstances, and not as a mere spokesman for New Zealand, it gave him its confidence; and, as a constitutional lawyer of wide experience, he was able to make a major contribution to its work (1967:357-58).

While it would seem that Davidson brought a wider acquaintance with world experience in constitutional drafting to his task than did his American counterpart across the waters, and probably a more sympathetic understanding of Samoan cultural values as well, nevertheless he apparently had little tolerance for Samoan procedural constraints which hold "that silence or equivocation is wisest while significant differences of opinion remain" (ibid. :358). For the 1960 Constitution, rather than:

the calculated incompleteness of some of its [the 1954 Convention's] resolutions ... it was necessary to reach decisions in respect of these unresolved problems (ibid.).

In short, he emphasised the need for acceptable and clear-cut decisions, or to rephrase this within the thesis of this paper, his culturally-conditioned precepts of how constitution-shaping ought to proceed and his requisite of definitive content took precedence over indigenous alternatives more congenial to at least some of the Samoan principals. Beyond that, as Davidson admitted in describing the explanations he was called upon to furnish to the full Convention on the proposed draft:

Although the explanations were factual, I did not entirely eschew - on some occasions - the role of advocate, since the rejection of a key provision would often have involved a far more radical recasting of the Constitution than members realized (ibid. :386).

Only the Samoans can say whether their Constitution would not be serving them better if at gestation such 'radical recasting' had occurred or if it had been written with greater constructive ambiguity.

The MCC of 1975 provides an illuminative insight into the process observed in the other polar form of constitution-writing, the piecing together of the constituent contents without any pre-fabricated draft.
Despite the avowed intent of the author and his staff\textsuperscript{14} to remain outside all determinations of constitutional policy, it is now his belief that their collective influence on process inevitably had a contrary effect. The situation existing in the Trust Territory just prior to the convening of the delegates counter-indicated any attempt to even limning portions of a model, risky as was recognised to be the alternative gamble of drafting an entire constitutional document of a new polity within an allotted time-span of but ninety calendar days.\textsuperscript{15} Uncertainty over attendance of some or all of the delegates from three of the six Districts of the Trust Territory – threatening to foreclose the attaining of a quorum – persisted up to the very time all delegates assembled on Saipan, while their continued daily attendance remained precarious until the final moment when they affixed their signatures to the completed constitutional document.

Underlying the whole constitutional effort was the tension of nearly a decade of inconclusive negotiations between Micronesians and US representatives over the unresolved future status of Micronesia. The Congress of Micronesia in calling the Convention, sought to move the status talks out of their stalemate, but except in the Marianas, the Micronesians in the Trust Territory were themselves divided between the alternatives of seeking complete independence and becoming an associated state of the US.\textsuperscript{16} Should the delegates first address themselves to this issue, based on the very sound (Western) logic that they could not shape a government until they had decided on the nature of the polity which it was to serve, the whole life of the Convention could easily be consumed in debate on this one matter alone. To overcome this obstacle, at the workshop which preceded the Convention the author counselled that like clay in the potter's hands the shape of future political status would emerge as the powers and structures of the new Micronesian Government were decided upon and the polity took shape. The favourable reception of this suggestion was probably premised as much upon necessity as upon its compatibility with the widespread Micronesian tendency to temporise when confronted with matters of moment, relying upon the passage of time as an element of itself to contribute to their mitigation if not solution.

One final matter, publicly unvoiced, sustained the decision to forego a pre-convention draft: in undertaking any such effort, there was good probability either that the Constitution would be captured in advance by spokesmen for the Palauan District, so that all debate in the Convention would thereafter be channelled in a pre-determined course, or at least that the Convention would be polarised before it had even reached the first formal stage of organisation. In fact, after the delegates commenced meeting, the Palauan delegation attempted to achieve these very objectives, initially by announcing seven "non-negotiable" demands, each multiple in content, and shortly thereafter presenting an entire constitutional proposal incorporating them.\textsuperscript{17} The 'Palauan Ploy' succeeded in causing the delegates to tread warily in the various areas labelled "non-negotiable" by that District's delegation. Although much of the language finally included in the proposed FSM Constitution concords with – when not echoing in \textit{haec verba} – the content of the Palauan Constitution, careful analysis discloses that the thrust of the Palauan demands was turned.\textsuperscript{18} The approach of starting uninstructed and incrementally amassing and weaving constitutional content into a cohesive whole, complemented by the structuring of the Convention which was designed to facilitate this objective, afforded far wider opportunity for internal manoeuvring, and the reaching of a
Micronesian consensus, than would have been permitted had the Convention adopted the other polar style of constitution-drafting.

The crucial key to success in the use of the 'incremental style' of constitution-writing, if this polar type may be so labelled, lies in the competence of the Convention's committees, with most responsibility for specific subject-matter areas and at least one administrative committee charged with the technical chore of bringing everything agreed upon in plenary session together into a meaningful whole, incorporating a unity of style, and all at least sufficient, technically, to thwart future effort bent upon disclosing ambiguity or incongruity. The Micronesian Convention utilised but five substantive standing committees, and divided among them was the entire range of subjects which a constitution might conceivably treat. Their number was purposely kept small in the formative stage to focus the delegates' attention sharply on but a single constitutional segment while simultaneously seeking to minimise the dysfunctional attenuation which occurs when numerous committees with narrowly-drawn agendas clamour for the attention which they derive from the adoption of their respective proposals. As a result, the jurisdiction of some committees encompassed a number of topics only vaguely related. The Public Finance Committee may be viewed as an exception, as its area of responsibility was deliberately shaped to permit it to treat the very difficult monetary issues which had slowly been eroding the internal amity of the Trust Territory. Flying in the teeth of structural-functional theory, to one major committee was delegated all responsibility for identifying the functions to be enjoined, allowed, or denied government, as well as designation of the appropriate level at which each power would be lodged. To another was allotted the duty of sketching the entire governmental framework, both mandated and permitted, which would implement the Constitution's empowerments and directions.

To the initiate, it was apparent that this unusual separation was deliberately designed to avoid all pre-set parameters concealed in the rules which might constrict the Convention's freedom of action, just as the enabling legislation - possibly unwittingly - had avoided most of the phraseology which in other polities has served as directions pre-determining the course to be taken in constitution-drafting. President or parliamentary system might be adopted, preference for single or plural executive remained unfettered, etc., etc. And yet, in suggesting this 'neutral' configuration of committees, the author was just as certainly interjecting his cultural values as had the contributions of the consultants to the Samoan constitutional effort, as previously noted. To delegates from a culture comfortable with holistic forms of problem-solving, the author had jarringly proposed the use of differentiation and specialisation to the same end.

By placing the subjects of civil liberties as well as customary and traditional rights under a single committee's jurisdiction, the friction engendered by their interface was potentially contained through engineering the opportunity for consensus-reaching within committee rather than airing the full gamut of this fundamental disagreement on the Convention floor. Traditional leaders from mid-Micronesia, whose appropriate role by custom is to seek community harmony through resolution of contending forces, were placed in the 'foreign' position of championing not only their own rights but those of chiefs throughout the Territory, the latter just because they
had traditional status. And consonant with the over-arching frame of the enabling legislation, the author's approach undeniably was biased toward the facilitating of Territorial unity, so he had counselled postponing Convention consideration of the one disputatious constitutional issue of which practically every citizen throughout the Territory was aware even if not wholly cognisant, that of future political status.

From the vantage point of hindsight, the author now questions the ethics of his interjection into the affairs of the MCC:

It was the Micronesians, and they alone, who had to resolve the dimensions of their own nationality, and the basic questions of whether and how they could bridge their distinctive differences to form a union .... The concepts I used—any concepts—for all I know, narrowed or expanded those which their different cultures could have mustered. The logic I employed—I look back now and wryly smile at placing the delegates in a situation requiring mutually exclusive, seriatim decisions of 'yes or no,' Aristotelian logic they unconsciously abandoned for more culturally compatible modes as critical questions were reached,21—was not necessarily theirs. Even the position of the diverse Micronesians acting as one, their very meeting to consider the prospect, was culturally incongruous (Meller, forthcoming op. cit.:Introduction).

Before quitting the subject of process, one final matter. The language for constitution-making in most of the Pacific Islands has not been that of the indigenous inhabitants but an exogenous tongue. Interpreters may have facilitated its use when all participants were not skilled in that language, and occasionally a lingua franca has been employed. Regardless, almost universally the language of the last colonial administration has been employed to concrete concurrence in final written form. To the extent that the indigenous languages have retained their virility, and despite the bilingual (or frequently, multilingual) capabilities of the delegates, the dual (or even multiple) language context has furnished ample opportunity for conceptual misunderstanding. Aside from the competence of a consultant to function adequately in the arena of alien Pacific Island values, when he attempts to do so, he may be entirely unaware of the communication slippage occurring. Adding further complication, all of this constitutional effort takes place within the rubric of an introduced legal system which assigns to words a penumbra of meaning beyond the ken of almost all of the indigenous inhabitants, even those familiar with the general usage of the language employed for drafting. If 'murder' is the taking of life with malice aforethought, what is a 'taking', and in PNG is a 'pay back' killing with 'malice'? In WS, for acts classed as criminal, does an ifoga (ceremonial apology) serve to expunge all scienter, or apply only to mitigation, so that the process of criminal justice continues to run undisturbed? In short, the wider the net and the deeper the probe of inquiry into the process of constitution-making, the more suspect becomes the assumed transferability of the consultants' expertise.
Examination of constitution-making to identify the specific substantive contributions of the consultant opens up an intriguing area so broad in compass as to extend this paper far beyond its permissible length. One simple illustration: there would appear to be no objection to acquainting the persons charged with responsibility for constitution-making with an understanding of how the traditional leaders have formally been structured into the newly created governments of the various Pacific Islands. Should the consultant also include reference to the political strategy observed in meeting this problem, as pointing up the deft succinctness of Solomons in side-stepping the issue and contrasting it with the more elaborate treatment to the same end in Micronesia? But once beyond sketching the historical decline of traditional political power in the Pacific, and the long-term trend relegating traditional leaders, at best, to symbolic positions of authority, where next may the consultant venture? Almost any evaluation he may furnish of how well the variants identified function within their respective polities will bear the imprint of his own cultural perspectives of adequacy and not theirs. And any advice he may tender generally on the provision the constitution-drafting ought to make with respect to traditional chiefs would be only leading him further into a substantive area where his technical competence may properly be regarded with suspicion. And should he next delve into specific treatment of classes of chiefs? All this merely serves to demonstrate why a foray into the subject of constitutional product must be foregone in the interest of brevity.

At this point the author finds himself as though arrested in mid-air, much like one of the arrows in Zeno's paradox, about which it is possible to argue that once released from the bow it can never traverse the remaining half of the distance necessary to hit its target. If the work of the consultant is always to remain culturally constrained, what services may he perform outside his own society without running foul of this objection? Just as through observation it can be proven that the arrow does fly its full course, despite Zeno's logic, so can it be shown that there is a whole range of expertise which the consultant can defensibly employ even though he serves in a cross-cultural situation. Included would be all of the problem situations which may arise from the interface of one polity with another as they may be affected by the contents of a proposed constitution. The description and analysis of experience and practice elsewhere, even admitting the cultural boundaries of any taxonomic system, retains utility to the extent it provides some order to external phenomena. Remaining to the consultant is also the burdensome responsibility for assuring that knowledge of non-Island concepts is correctly — as viewed from his perspective — transferred across cultural boundaries. At the MCC, a delegate invoked the Marxian maxim "from each according to his ability, to each according to his need" in support of his opposition to the Palauan delegation's demand that the costs of the proposed central government be equally shared by all of the proposed states. Without question the informed consultant would be qualified to identify this as mere symbol manipulation, empty of any supportive ideology.
1 The author discusses the MCC of 1975 in detail in a manuscript, provisionally entitled *Farewell Micronesia, Fare Well* which is to be published shortly.

2 It should be added that the rejection by MI of the FSM Constitution at the 1978 plebiscite was premised upon many factors, and is not to be attributed solely to the seating of their delegates.

3 78.9 per cent approval. Adding further complication to the sitting decision, a court contest between claimants to the physical premises contracted for the holding of the Convention daily threatened to bar the Convention delegates from further access, and abruptly to force the Convention to look for other quarters. Constituting a law suit before an American jurist, following the rules of normal American jurisprudence, this aspect of the Micronesian constitutional effort represented one of the few instances where technical consulting advice—this of a narrowly legal character—could be tendered without running afoul of cross-cultural presumptiveness.

4 The Marianas' delegates had publicly announced that they would not participate in the Convention if the Commonwealth Covenant were approved by the District voters at the plebiscite.

5 The Northern Marianas never voted on the FSM Constitution, as the submission of the completed Constitution to the people of the Trust Territory for ratification was delayed by the High Commissioner for nearly three years, by which time the Northern Marianas had been removed from his jurisdiction and placed under separate administration. Instead, a Constitution was drawn up by a Northern Marianas convention, ratified by the people of the District, and also certified by the US President.

6 In each of the 'kingdoms' of Ponape the two parallel lines of chiefs are headed, respectively, by namwarki and naniken, with the latter speaking for the former who traditionally remained concealed from the public in formal settings.

7 Once the MCC was underway, the delegates voluntarily regrouped themselves by delegation, each group informally resolving for itself the placement of its chiefly members. However, the original seating continued to control the order of roll-call throughout the Convention, and occasionally contributed to delegations splitting their votes under circumstances where this would probably not have occurred if the members of an entire delegation had been polled separately.

8 The amendment by the Congress of Micronesia of the enabling legislation to afford voting rights to the chiefly delegates may in fact have reduced their influence, for the weight of their votes was now legally established. As delegates without vote, the threat of their boycott when crossed in their demands would have been cloaked with greater ambiguity and probably weightier significance in Micronesian terms.
9The pre-convention group is sometimes drawn from the body which will serve as the constituent assembly, e.g., the Constitutional Planning Committee (CPC) in PNG. At other times it is of wider composition, e.g., the Special Committee of the Solomons Legislative Assembly consisting of legislators, local council nominees and nominees of private organisations.

10But not always, as when the unofficial members of the Fiji Legislative Council, when repairing to London in 1965, were provided with "a basic paper on 'constitutional change' prepared by the Colonial Office [which] presented alternative proposals in the various fields, without getting down to any very specific proposals, and set the frame for discussion" (Meller and Anthony 1968:119).

11E.g., Hawaii's Constitution, adopted in 1950, which did not become effective for nearly a decade thereafter, had been preceded by a draft proposed by a group assembled under the auspices of the Statehood Commission in aid of Hawaii's statehood drive (see Meller 1971:17).

12In the case of the Solomons (SI), involving as it did both the future relations between relocated Gilbertese and Solomon Islanders and the British sense of responsibility for the former, three sets of cultural values were interfaced. To the task of advising on resolution of such complexity, it may be argued that greater cultural neutrality, even if not legitimacy, would have been brought by enlisting the services of a non-British national from a third country.

13See, e.g., his relation of indigenous conception of government to the change made by the preceding WS Constitutional Convention of 1954 in the language governing the selection and direction of the Public Service Commissioner (ibid.:326).

14The author of this paper acted both as consultant to the Convention and director of its Research and Drafting Section, the latter numbering in total some twenty-six different persons, although not all served simultaneously.

15In addition, up to thirty days of recess could be taken by the Convention without the hiatus being charged against the ninety day maximum. This amendment by the Congress of Micronesia to the enabling legislation was adopted on the importuning of the author, and technically became legally effective only after the organising of the Convention. The proximate cause for taking a recess of twenty-three days was not to afford a greater time-span to the constitutional effort, but for the convenience of the Palauan delegation whose head had announced its members' intention to leave the Convention hall in the midst of its deliberations to engage in a crucial District Legislature election back home.

16The advisory plebiscite held on 8 July 1975, a few days before the Convention met, because of a number of technical defects and political reasons, succeeded at best only in confirming that in five of the six Districts, closer relationship with the US (as in statehood, commonwealth, or territorial status) was not preferred.
Both non-negotiable demands and the "Palauan Constitution" were formulated on Saipan after the Convention got under way. The latter was promptly split, and parts assigned to various appropriate committees for consideration along with all other delegate proposals received, much to the voiced chagrin of the delegates from Palau who continued to manoeuvre to have their proposal brought on the Convention floor as a unit for debate.

Undoubtedly, the failure of the Palauan delegation to achieve its objective to reduce the central government to near impotence internally, except as permitted by the new states, each with an equal voice, contributed to the defeat of the proposed FSM Constitution in the Palau District when it was voted upon in 1978.

See, e.g., the instructions to the SI Constitutional Committee according to which it was expected to include advice on the appointment of a Head of State; and the Executive (or Cabinet) (SI CCR 1976:App.1, 2-3). These instructions at the very least pointed the preparatory committee in the direction of adopting a parliamentary system, for in a presidential form, the Head of State would not be differentiated nor would there be need to consider the method of his "appointment".

Although most chiefly delegates opted to become members of the Civil Liberties Committee, the dynamics of the Convention nevertheless caused disagreement over the introduced-versus-traditional rights-issue to erupt on the Convention floor.

As towards the end of the Convention, with amendments back-logging, the Micronesian delegates ignored the dictates of parliamentary procedure which required them to consider and dispose, separately, of one amendment after another. Instead, reflective of traditional decision-making, they discussed all related amendments simultaneously, quickly eliminated those considered untenable, considered the remainder informally without attempting to limit debate to any one, and then through consensus eventually narrowed decision down to the amendment finally prevailing.

"Parliament shall make provision for the government of provinces established under this section and consider the role of traditional chiefs therein (s.114(2)) (emphasis added).

Article V of the FSM Constitution is entirely on "Traditional Rights", with s.3 empowering the Congress to establish "when needed" a Chamber of Chiefs and declaring that the Constitution of each state having traditional leaders "may provide for an active, functional role for them".

See Davidson (1967) for his treatment of the two fautua, the accommodation of the four tuama'ataiga, and truncating the role of the pule and tumua.
5. THE INTERNATIONAL LEGAL ORDER AND THE DOMESTIC LEGAL ORDER: THE LAW OF STATE SUCCESSION IN THE PACIFIC ISLAND

I.A. Shearer

INTRODUCTION

The thesis of this paper will be that newly independent states are born into an existing international legal order, and that this order imposes certain constraints upon the freedom of national decision-making. It will be argued further that national self-determination is not a principle opposed to, or at variance with, the international legal order but is part of that order. Doubts or disputes certainly exist, however, about the content of this or that particular rule of international law, or this or that institution of the international legal system. An analysis of some of the more important of these will be the main object of the paper.

The Belgian jurist C. de Visscher espouses a pessimistic view of the reality of the maxim ubi societas ibi jus:

It is therefore pure illusion to expect from the mere arrangement of inter-State relations the establishment of a community order; this can find a solid foundation only in the development of the true international spirit in men ... There will be no international community so long as the political ends of the State overshadow the human ends of power (see de Visscher 1968).

But might not the same be said even more cogently about every national legal system? Until love triumphs, we shall continue to have murder, rape, burglary and all manner of anti-social activity as part of the reality of life. Law nevertheless plays important restraining and liberating roles in the domestic as well as the international order.

Accepting, then, that there is an international legal order into which new states are born, are those states necessarily bound by the norms and particular rules of international law in force at the time of their birth, and in the shape and content of which they played no part? The theoretical debates of the 1950s and 1960s (see Syatauw 1961 and Henkin 1968), prompted in part by the precedent of the Soviet Union's refusal to be bound by 'reactionary norms' of international law after 1917 (see Tunkin 1958), now assume an air of increasing practical irrelevance. For not only does the Third World now have the numerical strength to ensure that the law creating processes reflect their interests (as e.g., in the current United Nations (UN) Conference on the Law of the Sea) but the focus of the law is changing
away from issues of sovereignty to issues of co-operation. As the late Director of the International Labour Office, Wilfred Jenks, has put it:

The emphasis of the law is increasingly shifting from the formal structure of the relationship between States and the delimitation of their jurisdiction to the development of substantive rules on matters of common concern vital to the growth of an international community and to the individual well-being of the citizens of its member States. We shall also find that as a result of this change of emphasis the subject-matter of the law increasingly includes cross-frontier relationships of individuals, organizations and corporate bodies which call for appropriate legal regulation on an international basis (1958:17).

Since Jenks wrote, the most spectacular advance in the content of international law has occurred in the field of human rights.

NEW STATES AND CUSTOMARY INTERNATIONAL LAW

Despite the trend rightly predicted by Jenks, there are nevertheless some fundamental problems of jurisdictional delimitation still to be resolved. One of these, of particular concern to developed countries, is the extra-territorial reach of anti-trust legislation as illustrated by the protective and retaliatory action taken by Australia and other countries in the wake of the Westinghouse litigation in the United States (US). Of concern to developed and developing countries alike is the resolution of jurisdictional boundaries in the sea and seabed. If the UN Third Conference on the Law of the Sea (UNCLOS III) succeeds in overcoming the present impasse over the administration of the international deep seabed area by its deadline of 30 April 1982, then there will be an agreed International Convention on the Law of the Sea codifying a body of principles by which such jurisdictional questions may be resolved. If no convention results, the matter will fall to be determined by the evolutionary processes of customary international law (i.e., the law brought about by the practice of the great majority of states accompanied by the conviction that it is, or ought to be, the law).

Customary international law, although perhaps more likely in the long term to produce legally authentic and congruent rules, is too slow and uncertain in the shorter term to satisfy the needs of both state and private operators for security of tenure in their exploration and exploitation of the resources of the sea. An example of this uncertainty is provided by comparing the majority and minority opinions of the International Court of Justice in the (Icelandic) Fisheries Jurisdiction Case ICJ Reps. 1974. The majority opinion, in holding that the unilateral extension by Iceland in 1971 of its claim to exclusive fishery rights off its coasts from twelve to 50 miles, was not opposable to the United Kingdom (UK) by reason of the latter's historic rights, indicated clearly that such an exclusive claim (as distinct from a preferential claim) would be invalid universally; moves towards a 200-mile exclusive economic zone, then as now being pursued at the Law of the Sea Conference, were 'proposals only' and did not invalidate existing norms of international law. The minority
opinion, subscribed to by judges from some Latin American and Third World countries, by contrast, held that the *opinio juris* and practice, evidenced and prompted by the Law of the Sea Conference, had deprived previously applicable customary norms of the degree of support necessary to sustain them; consequently it could not be held that Iceland's claims were invalid *erga omnes*, only that they were invalid as against a country which could rest its rights on the different and undisputed principle of historic rights.

The implications of the minority opinion are profound; if this view gains acceptance it means that a customary rule may collapse before another rule clearly supplants it. Newly independent states, or indeed any relatively cohesive or numerically significant group of states, can, through practice initially contrary to established rules of international law, bring about a collapse of those rules. It may be that, in most instances, the processes of filling the vacuum are operating more or less contemporaneously, as in the supplanting of the 'full, prompt and effective' standard of compensation for expropriated foreign property by the national standard of the expropriating state; but gaps will remain. For example, at the Law of the Sea Conference there is already an overwhelming consensus allowing states to regulate and license access to the resources of their 200-mile economic zones, but no such consensus on highly migratory species such as tuna. The recent arrest of an American tuna fishing boat in Papua New Guinea (PNG) waters, and the threatened retaliation against PNG under the mandatory provisions of the US 'Magnuson' Act of 1976 illustrates the problem. Another example is the determination of some developed countries not to allow a vacuum to occur in the law relating to the deep seabed in the event of a collapse of present negotiations towards an agreed regime; the US, the UK, France, West Germany and (very recently) the Soviet Union have all legislated to regulate and legitimate their own operators in the proposed 'International Area'.

**THE NEW INTERNATIONAL ECONOMIC ORDER (NIEO)**

The Charter of Economic Rights and Duties of States, 1974 (see 14 *International Legal Materials* (1975) 251) was prepared by UNCTAD and endorsed by the General Assembly of the UN. It was warmly supported by the developing countries, but opposed by Belgium, Denmark, the Federal Republic of Germany, Luxembourg, the UK and the US. Ten countries, including Canada, France and Japan abstained from the vote. With these negative votes and abstentions, therefore, there is no likelihood of the Charter becoming customary international law in the near future.

The main proposition of the Charter (called in popular usage 'the NIEO' because of its association with the General Assembly's Declaration on the Establishment of a New International Economic Order) is contained in Art.1:

> Every State has the sovereign and inalienable right to choose its economic system as well as its political, social and cultural systems in accordance with the will of its people, without outside interference, coercion or threat in any form whatsoever.
Article 2 reaffirms the UN Resolution on Permanent Sovereignty over Natural Resources, 1962, by stating that each state has the free right to use and dispose of its wealth, natural resources and economic activities, but goes on to assert that:

Each State has the right ... (c) to nationalize, expropriate or transfer ownership of foreign property, in which case appropriate compensation should be paid by the State adopting such measures, taking into account its relevant laws and regulations and all circumstances that the State considers pertinent (emphasis added).

Most capital-exporting countries opposed (or at least abstained from) these provisions since they represented a radical departure from the previously established standard of 'prompt adequate and effective compensation in accordance with international law'. The reference to 'relevant circumstances' was also feared to represent a view that negative or even 'reverse compensation' might be claimed for past profit taking or 'economic imperialism'.

Despite the failure of the Charter to receive that degree of support from a sufficient number and range of countries (having regard to the interests affected) necessary to satisfy the criteria laid down by the International Court of Justice in the North Sea Continental Shelf Case (1969) for the emergence of a new norm of customary international law, the Charter has aspirational significance. Even in its controverted parts, such as those dealing with expropriation, the Charter may have already succeeded in undermining previously established rules, in the way indicated by the minority opinion in the Fisheries Jurisdiction Case (see above).

THE PRINCIPLE OF NATIONAL SELF-DETERMINATION

Self-determination is referred to in Arts.1(2) and 55 of the UN Charter as a 'principle', although it is not one of the principles enshrined in Art.2. An elaboration of this principle is contained in the General Assembly Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the UN of 24 October 1970. The International Court of Justice, in its advisory opinion in the Western Sahara Case ICJR Reps., 1974, 12, confirmed that the principle was one of international law, at least in-so-far as it related to political independence.

For the reasons discussed earlier, it would be an extreme view of the principle of self-determination to assert that a newly independent state was not bound by any existing principle or rule of international law. Indeed, if self-determination is itself a principle of international law, there is an obvious contradiction in such a view. The principle of self-determination was, however, asserted as the major justification of the International Law Commission's Draft Articles on State Succession in relation to Treaties, of which Ambassador Bedjaoui of Algeria was the rapporteur. Impelled by this principle, the Commission proposed the general rule that a new state should not be bound by any treaty applied prior to independence to its territory by the administering power, by
reason only of that previous application. This is known as the 'clean-slate doctrine'. The doctrine has plausibility as an aspect or consequence of self-determination, but not necessarily cogency on closer examination.

THE LAW OF STATE SUCCESSION

In order to consider the validity of the 'clean-slate doctrine' it is necessary to consider briefly the doctrinal history of state succession.

In the early period of international law, dominated by the classical writers and the practice of a handful of European powers, state succession was seen as resembling the domestic law institution of succession; the burdens of territory passed with the benefits, and one sovereign replaced another as the bearer of the rights and obligations attaching to the territory in question. Many obligations of sovereigns, however, were regarded as personal to that sovereign rather than attaching to territory (e.g., treaties of alliance) and would not automatically pass to the new sovereign if a cession or conquest of the territory in question occurred. The classical law of state succession thus came to deny inheritance to purely personal obligations and rights but to insist on inheritance of such territorially attached obligations as boundary treaties and treaties establishing transit rights across territory. Only the latter category of treaties was inherited by the US from the UK in 1776, and the same doctrine was accepted in the cases of the independence of the Spanish American Empire in the 1820s.

Already in the nineteenth century doubts began to be expressed as to the utility of such a sharp distinction between 'personal' and 'dispositive' or 'real' treaties. As treaties began to deal more and more with matters of mutual co-operation at the administrative level rather than at the high political level, the question arose whether these should automatically disappear on a change of sovereignty. Treaties of commerce, extradition of fugitive criminals, recognition of tonnage certificates, postal arrangements and so on, while in the formal sense 'personal' were hardly personal in any other sense. The matter came to a head in 1931 with the independence of Iraq from the British Mandate, granted by the League of Nations in 1920. During the period of the Mandate, Britain was responsible for the external affairs of Iraq, including the conclusion of all treaties necessary to the welfare of Iraq. Should all these treaties (other than those of a dispositive nature) suddenly lapse on the attainment of independence, leaving a yawning gap to be filled by the incoming administration? The League of Nations thought not, and approved a formal transfer of all international rights and obligations, deriving from treaties negotiated by UK on behalf of Iraq to the newly independent state of Iraq. This was the ancestor of the 'inheritance agreements' which the UK later concluded with India, Pakistan, Ceylon, Malaysia, Ghana and many other former colonies on their attainment of independence.

Of course it might be objected that Iraq is not necessarily an apt precedent for Fiji, Kiribati or Vanuatu. Iraq was a territory under international supervision; treaties which were applied to it, like other acts of administration, came under the scrutiny of the Permanent Mandates Commission and ultimately of the League itself. More modern examples include Nauru, Micronesia and PNG where the UN Trusteeship Council played a
similar role. There was no such international scrutiny in the case of colonies or protectorates, which constituted the former status of most newly independent states. Might not the treaties applied to those territories be rather for the benefit of the colonial power than for the subject population and therefore invidious or at least unwelcome in post-independence circumstances?

It was something of a Furphy, put about by protagonists of the 'clean-slate doctrine' in the 1960s, that the treaty cupboards of former colonies were rattling with skeletons from the bad old days, and that the practice of full succession encouraged (but not enforced) by the UK, French and other governments in relation to their former territories, was a neo-colonialist plot. The cupboards are indeed much better stocked than in the days when the 'clean-slate doctrine' took shape. Along with the tea, the American colonists dumped some two or three score of British treaties into Boston Harbor. The number of treaties that a British colony approaching independence in the 1970s has is about 500. On closer examination it will be revealed that the bilateral treaties available for inheritance embrace such subjects as trade, commodities, air transport, extradition, service of legal documents, and visa abolition. These treaties operate reciprocally, and they have been found in practice to be of continuing benefit to the newly independent country. To replace them literally overnight (which the 'clean-slate doctrine' would require) is an impossible task. Indeed, the main problem in practice has often been to persuade third parties (i.e., the non-colonialist treaty partner) to recognise the newly independent state as a successor to the treaty.

The absurdity of the 'neo-colonialist' jibe is even more apparent in the instance of the many multilateral instruments of a law-making kind that have proliferated since the late nineteenth century, and especially since the establishment of international organisations. The treaties applied to colonies included such instruments as the Conventions of the International Labour Organisation, health conventions, the 1966 Covenants on human rights, the basic instruments on international civil aviation and shipping, and many hundreds of others. If all these too were to be regarded as ceasing from the moment the colonial power's flag was hauled down at midnight, the work of decades would be undone.

The truth of the matter is undoubtedly that objections to the presumption of succession have been based more on prejudice or sentiment than on material evidence. As Jenks put it (1952:105) there were some who viewed succession to treaties as the badges of continuing servitude rather than as the hall-marks of maturity. A concerted effort was made by the UN, the Specialised Agencies and other international organisations from the late 1950s onwards to encourage newly independent states to make declarations of succession to the multilateral conventions which they administered as soon as possible after independence day, and in such a form as to be retroactive to that day, so that no hiatus in the continuity of these instruments would result. Many newly independent countries used the facilities of the UN Secretary-General to circulate a general declaration of succession, applicable to bilateral as well as multi-lateral treaties, among all member states of the UN as an earnest expression of their intention to abide by all treaties pending later individual examination and confirmation, revision or termination where desired. These unilateral
declarations of succession came to replace the bilateral inheritance agreements of the Iraq model.

While the majority of new states followed this pattern, some did not. Burma was the first former British colony to adopt a 'clean-slate approach', to be followed shortly afterwards by Israel (though the latter's circumstances of independence were exceptional). Algeria broke the pattern for former French colonies (hence the possible significance of the personalities involved in the International Law Commission's treatment of the subject in the 1970s, see above).

In view of the strong preponderance of pro-succession practice among former colonial territories, it was surprising that the Vienna Convention on Succession of States in respect of Treaties, prepared by the International Law Commission, and signed in 1978, reverted to a 'clean-slate approach'. Admittedly the Convention had to address itself not only to the cases of independence from colonial rule, but also to cases of federation and dismemberment of federations, secession and forms of partial succession. These are beyond the scope of this paper. But in taking a 'clean-slate approach' towards newly independent states, the Convention has applied the principle of self-determination in a way that tends to defeat rather than advance that principle. For a presumption of non-succession tends to lead to a disruption of the treaty relations that are to the benefit of a newly independent state. A presumption of succession, on the other hand, would not have compromised self-determination even in the rare instances where a treaty thus succeeded to were found to be not in the interests of the newly independent state because: (1) the treaty may be terminated in accordance with its termination clause; (2) since independence is now planned in advance, notice of termination can be given in advance of independence so that the treaty will come to an end before or at that time; (3) even if there is no termination clause (as is the case with some very old treaties), the Vienna Convention on the Law of Treaties provides for termination of such treaties upon reasonable notice.

In any event, the impact of the Vienna Convention on State Succession, 1978, is likely to be slight in practical terms, since most former colonial territories have achieved independence, and disposed of their treaty succession questions, prior to its entry into force. Even in cases of succession yet to be regulated (e.g., Vanuatu) the Convention acknowledges the effectiveness of unilateral declarations of succession in relation to multilateral treaties.

INTERNATIONAL LAW AND THE DOMESTIC LEGAL ORDER

Irrespective of questions of state succession, international law forms part of the domestic legal order of newly independent states and may therefore be a determinant of national action. In countries of the common law inheritance, customary international law applies within the domestic legal order unless inconsistent with the clear terms of a statute (see Polites v. The Commonwealth (1945) 70 CLR 60). For some time it has been uncertain whether, apart from statute, a customary rule required express adoption judicially (and hence would become the subject of the rule of stare decisis), but the English Court of Appeal in Trendtex v. Central Bank
of Nigeria [1977] QB 529, has indicated its preference for the 'incorporation' over the 'adoption' theory of the relationship between international law and domestic law. Lord Denning MR in that case also expressed the view that English courts should apply a newly emerged rule of international law notwithstanding that earlier decisions of higher courts (which normally would be binding) had applied a different rule. Although the House of Lords had an opportunity to do so in the case of I Congreso del Partido [1981] 2 Lloyds Reps. 367, it did not dissent from the ratio or dicta in Trendtex. It is thought that these propositions will be found persuasive by courts inclined to look towards the English courts for authority.

Treaties affecting individual rights or duties do not form part of the domestic legal order in British constitutional doctrine unless implemented by statute (see e.g., Attorney-General for Canada v. Attorney-General for Ontario [1937] AC 326 and Bradley v. Commonwealth (1975) 128 CLR 557). The direct incorporation of particular treaties by statute is comparatively infrequent, but examples such as the Australian legislation on crimes in relation to aircraft and on racial discrimination may be cited. More frequently treaties are incorporated by way of subordinate legislation (e.g., the regulations made by the Australian Governor-General promulgating extradition treaties under the Extradition (Foreign States) Act, or by way of administrative order (e.g., visa abolition agreements). The most common form of incorporation is by way of standard setting; i.e., a particular standard or objective is set by an international treaty or recommendation which is then incorporated with or without modification within a larger legislative design. There are too many examples to be set out here; reference should be made to James Crawford's illuminating article "The international law standard in the statutes of Australia and the U.K." (1979).

An examination of the received statute law and local ordinances of newly independent countries in the Pacific and elsewhere will reveal a pattern similar to that of Australia and the UK. The point to be made is that much international law, whether deriving from custom or treaty, survives independence as part of the domestic legal order. Like any other part of the legal order it becomes subject to national self-determination as expressed by statute; but in legislating contrary to international customary law or treaties, the newly independent state must be conscious of the consequences for the international community of which it is part.

In this last respect, the patient analysis of each treaty, or group of treaties, to which it is desired to succeed, modify or terminate, has had an educative effect upon the ministers and civil servants of newly independent countries. In Fiji, Tonga, PNG, Nauru and Kiribati, for example, the Cabinet has considered each group of treaties for succession, and has ensured that all relevant departments of government have been consulted before a decision as to succession has been taken. The impact on local legislation is also taken into account. The restraints of international law thus come to be seen as a consequence of living in an international community with all the liberating possibilities that this in turn opens up.
INTRODUCTION

The island of Nauru became an independent republic on 31 January 1968. Its constitutional developments have received less attention than those of more populous Pacific countries; yet the arrangements for this small Pacific island are rich with intrinsic interest. This paper attempts to explain those arrangements by reference to some of the historical, political, economic and other factors influencing moves towards Independence.

HISTORICAL FACTORS

Nauru was first sighted by Europeans in 1798. Under the Anglo-German Convention of 1886 the island fell within the German sphere of influence and from 1888 until 1914 it was administered by Germany as part of the Marshall Island (MI) Group. During this period the value of Nauru's phosphate deposits was discovered and the Pacific Phosphate Company was formed to exploit them.

In November 1914 the Germans surrendered Nauru to an Australian Expeditionary Force and in 1919 the League of Nations conferred a mandate over Nauru on the British Empire. Britain, Australia and New Zealand (NZ) during the same year concluded an agreement which provided that the administration of the Island should be vested initially in Australia. The tripartite agreement also provided that the right, title and interest in the phosphate deposits which were purchased from the Pacific Phosphate Company should be vested in and sold under the management of a board of three commissioners called the British Phosphate Commissioners. One Commissioner was appointed by each of the three Governments. In 1920 the terms of mandate were drawn up and became operative from 17 November 1920. A supplementary agreement was concluded in 1923 between the three Governments formalising procedures for the legislative functions of the Administrator.

During World War II, Nauru was occupied by the Japanese and 1,200 of the indigenous population were deported to Truk Atoll in the Caroline Island Group. In 1945 the island was reoccupied by Australian forces, and a Trusteeship was declared over the Territory by the United Nations (UN) in 1947. The Trusteeship Agreement designated the Governments of Australia, NZ and the United Kingdom (UK) as the Joint Administering Authority, with Australia continuing to exercise full powers of legislation, administration
and jurisdiction in and over the Territory. Australian administration continued until 1968 when on 31 January, Nauru attained Independence.

The historical factors show Nauru to be a pawn in Great Power struggles for dominance in the Pacific — a similar fate experienced by many of the Pacific Island countries. Nauru's valuable resource of phosphate made her a particularly desirable asset and her history of dominance and successive subjugation to foreign occupation inevitably conditioned the indigenous people towards a desire for complete and unfettered independence.

POLITICAL FACTORS

Nauru's small size (eight and one quarter square miles) and isolation (her nearest neighbour is Ocean Island, some 190 miles to the west) were important factors in political terms when possible future relationships with her former Administering Powers were considered prior to Independence.

In the early stages of discussions, Nauru had suggested a Treaty of Friendship with Australia (UN Trusteeship Council 1961-62:32); she later favoured complete Independence, without foreclosing the possibility of such a Treaty, but stated that this should be concluded, if at all, after independence was granted (Commonwealth Secretariat 1968:21). Doubts were held by Australia, NZ and the UK as to the feasibility of such a small and isolated community conducting its own external affairs and defence arrangements.¹ The three Governments consequently pressed for some form of association with Australia. They proposed that an Act should be passed by the Australian Parliament whereby Australia would assume responsibility for Nauru's external affairs and defence but would leave the constitutional arrangements to be determined by the Nauruan people. Alternatively, the Treaty of Friendship arrangement could be made ensuring that no other limitation was placed on the powers of the Nauruan Government. For example, external trade and the disposal of phosphate would not be included in the scope of the proposed Treaty and these matters would be left in the hands of the Nauruans.

Inevitably, in the course of discussions, the solutions of the two Pacific countries which had become independent or self-governing prior to Nauru were considered. Both countries had retained some links with their former colonial power: in the case of Western Samoa (WS), that link had taken the form of a Treaty of Friendship with NZ; in the Cook Islands (CI) self-government but not full Independence had been granted — without discounting the possibility of full Independence in the future. Both these countries were larger in terms of area and population than Nauru and there appeared some justification for the doubts held by Nauru's Administering Powers. However, both countries were clearly less viable than Nauru in terms of economic self-sufficiency and Nauru's special position had to be taken into account. Moreover, Australia's ability to provide defence for Nauru was to be questioned in view of her previous incapacity to prevent the Japanese occupation and the Nauruan deportation to Truk during World War II. And, as regards external affairs, time had tended to demonstrate that a larger country handling the external relations of a smaller country was not always proved successful. Difficulties could appear even with
stronger ethnic and cultural bonds than those existing between the peoples of Australia and Nauru.

The effects of the two major features of Nauru causing concern to the Administering Powers — her size and isolation — have, to a large extent, been overcome since Nauru's Independence. Her small size has not limited her ability to conduct external relations with larger nations of importance to Nauru and the combined effect of increased indigenous education and access to full profits and royalties of the phosphate industry have lessened difficulties which might otherwise have been experienced. The barriers of isolation have also been broken with the establishment of the Island's Air Nauru — now connecting the island to more than seventeen countries around the Pacific — and the Nauru Pacific Shipping Line. Increased communication systems have also assisted in this regard. With this increased wealth Nauru has been able to take her place in the community of nations and to wield an influence which would not have been envisaged prior to Independence.

ECONOMIC FACTORS

In Nauru's case, there is some doubt whether the principal reason for the Administering Powers' wish to retain responsibility was due to the Island's natural economic wealth (Vivian 1968:151-54). The phosphate deposits, used in the production of superphosphate, was (and is) important to the farming communities of Australia and NZ. The extent of the deposits in relation to the population of Nauru — some 3,000 at 1968 — made her a potentially wealthy country. Considerable attention consequently was given to the future of the phosphate industry during the pre-independence negotiations.

The essential question was whether this potential wealth did indeed belong to the indigenous population of Nauru, or to the external interests which claimed ownership of and which managed the industry.

The League of Nations Mandate had conferred wide powers of administration on the British Empire and it was upon this authority that the agreement had been made between the Administering Powers to vest the title in the deposits and "all land, buildings, plant and equipment on the island used in connection with the working of the deposits" in the British Phosphate Commissioners. The Trusteeship Agreement, substituted for the Mandate in 1947 by the UN, did not circumscribe or restrict the terms under which the Commissioners had operated. The Administering Powers believed accordingly that the Commissioners had legitimate rights to the exploitation of the deposits: the compensation and royalty payments were not seen to have been paid out of legal obligation but out of good will. The payments, therefore, were not required to be related to the costs of production and the price obtained for the phosphate, and were stated to be related to the needs of the Nauruans who "lived on coconuts, fish and sunshine" (Eric White 1968:10). The British Phosphate Commission was intended to be a non-profit-making organisation and benefits, it was claimed, accrued from the advantage of a guaranteed market at guaranteed prices. Behind all these arguments lay the general argument that without the input of capital and managerial and technical skills by the three Governments (in particular, by Australia) the phosphate resources would
never have been developed as they were, and hence the Nauruans would not have enjoyed one of the highest living standards in the world. Moreover, it was pointed out that these benefits had been obtained for the Nauruans with little recourse to the labour of the indigenous population since, to a large extent, indentured labour from the Gilbert (now Kiribati) and Ellice (now Tuvalu) Islands and from Hong Kong had worked the mines (Varsomy 1968:161-66).

By the 1960s, however, the Nauruans were well aware that the island's phosphates were of high quality and yet had been sold to Australian and NZ consumers at prices below those prevailing on the world market. The Nauruans argued that they had not received an equitable share of their heritage - from 1922 to 1955 they had received 694,354 pounds in cash and in funds as against a total value of phosphate extracted of nearly twenty-three million pounds (Eric White 1964:508-34). Their case was enhanced in 1964 when Dr Helen Hughes, an economic consultant, was able to show for the first time that a world price in phosphate existed (Hughes 1964:503-34). After this break-through the Nauruans engaged further professional advice to question the legal ownership of the phosphate by the British Phosphate Commissioners. Though it was difficult to prove that the Commissioners did not have legal ownership so much doubt was cast on the question that it never again was a real issue. Triumph for the Nauruans came when the British, Australian and NZ Governments admitted that Nauru's advisers had proved that a world phosphate price existed. From then on the advisers sought to get for the Nauruans the difference between actual production costs and the world price (Eric White 1968:23). Some difficult negotiating sessions were held in Canberra and in May 1967 the British Phosphate Commissioners agreed to hand over the industry to the Nauruans. An agreement was drawn up in June whereby the Nauruans agreed to purchase the assets of the Commissioners for twenty million dollars over three years.

The victory for the Nauruans was important, all the more so since the discovery in the 1950s that the life of the phosphate deposits was limited. There was, however, one outstanding point of contention. This concerned whether it was the Administering Powers' responsibility (as claimed by the Nauruans) to rehabilitate lands mined prior to 1 July 1967 - from which date the Nauruans obtained full net proceeds from the mining of the deposits and accordingly acknowledged responsibility for the lands mined after that date (see de Roburt 1967). The Administering Powers did not accept that it was their responsibility to rehabilitate those lands mined prior to the 1 July date. They claimed, on the basis of an Australian CSIRO Report, that full restoration of the land would be excessively expensive and uneconomic. As an alternative, proposals were made to resettle the Nauruans in Australia, NZ or UK. Various islands off the Australian coast were suggested in the early 1960s but the Nauruans' wish to retain full sovereignty and control of any area proposed posed difficulties (see Tate 1968:181-82, 186-88). By 1965 a stalemate had been reached, the Australian Government noting that it would continue to seek land suitable for the Nauruans.

By 1967 the Nauruans had abandoned the idea of resettlement although the subject continued to be placed on agendas of meetings for discussion. The important issue to the Nauruans by this stage had become Independence: after that, outstanding matters such as resettlement or rehabilitation
could be reconsidered, but any further discussion on those matters at that stage was likely to delay further the granting of Independence and plans for constitutional development.

It is something of a paradox that the industry which had in fact provided the stimulus for Independence became the complicating factor in the obtaining of that Independence and indeed served to divert attention from that goal. On the other hand the long battle for the ownership of the industry and the related issues involved served to equip the Nauruans with negotiating skills and techniques of self-government.

TIME FACTOR

The negotiations over the phosphate industry left little time for the formal preparation and adoption of the Nauru Constitution. The Nauruans had pressed for years for Independence by 31 January 1968, and this had been sanctioned by the UN as the latest date upon which the Nauruans should be granted Independence.

It was only in June 1967, however, after agreement had been reached on the future control of the industry, that serious thought was given to the framing of the document which would provide the governmental foundation for the new state.

Proposals for the constitutional and political changes were presented to the Administering Powers in May of 1967 (during the concluding sessions concerning the phosphate industry) and these were subsequently circulated in the UN Trusteeship Council. The proposals, which were acknowledged to be tentative only, included inter alia:

- that Nauru should become a Republic;

- that the form of government should be based on the British Parliamentary system, modified to suit local conditions;

- that the Constitution should provide fundamental rights, a President, an Executive, a Legislature, a Judiciary, and a Public Service;

- that the executive power should be vested in the President and a Cabinet of Ministers;

- that the President, who should be elected by the Legislative Assembly, should perform the formal duties of a Head of State, and also be the Head of Executive Government; his role in executive government would be a dual one - he should perform certain formal acts, such as assenting to orders and regulations made by the Cabinet or a Minister in accordance with the powers delegated to them by law; he should also be the Chief Minister, selecting other Ministers and presiding over meetings of Cabinet; and
that the other Ministers, who should be three or four in number, would be selected from members of the Legislative Assembly (UN Trusteeship Council 1967:14-15). 5

The Administering Powers responded with comments to the outline of government suggested but did not announce that they were prepared to "meet the Nauruan request for full and unqualified independence" 6 until 24 October 1967. Two days later the Nauru Independence Bill was introduced into the Australian House of Representatives. No date for Independence was included in the Bill and the Act simply stated that a date would be fixed by proclamation. On 1 November the Australian Senate was informed that 31 January 1968 had been agreed upon as the date of Independence.

On 10 November 1967 the Nauru Independence Bill received Royal Assent, bringing into operation the remaining provisions of the Bill: these empowered the Nauru Legislative Council to establish a Constitutional Convention "for the purpose of establishing a constitution for Nauru" (s.4 Nauru Independence Act (Cth) 1967). The Constitutional Convention was elected in December and met for the first time on 3 January 1968. It continued to meet until 29 January 1968 on which date the first Constitution of Nauru was adopted, to become operative on 31 January. Some parts of this Constitution were adopted as the final form of the Constitution of Nauru — for example those in Pt.II relating to the Fundamental Rights and Freedoms. Other parts, because of the lack of time for formal consideration by the Convention, were adopted as provisional only — until May 1968. The provisional parts included the powers intended to vest in the President and the Cabinet and, in the interim, these were exercised by a Council of State elected from the Nauru Legislative Assembly.

The election of a Council of State represents an unusual feature in the nature of constitutional planning. However, it was a measure necessary if Independence was to be achieved by the required date (important to the Nauruans as this was the twenty-second anniversary of their homcoming from Truk) and if the difficulties of working a ministerial system of government before the re-organisation of the administrative system could be completed were to be avoided.

That this was an extremely tight schedule was evidenced by the numerous draft timetables of "Arrangements for Independence on 31 January 1968" which can be found among the unpublished papers of Professor J.W. Davidson, 7 the Constitutional Adviser to the Nauruans. The apparent reluctance of the Administering Powers to relinquish control over Nauru appears only to have been overcome by the world support for the Island's independence (see below) but, again, the gaining of that support in itself eroded time from the preparations as Nauruan delegations flew to New York to state their case before the UN.

THE SAMOAN PRECEDENT

The Constitution of Nauru is autochthonous, that is, devised and given to the indigenous people of Nauru by the elected Nauruan representatives. This was the intent of the planners for constitutional development in Nauru — following from the precedent of WS which attained Independence six years
earlier. The clear advantage of an autochthonous constitution was the assurance that every provision in the Constitution would receive specific approval by the indigenous people and that, as a result, it would be regarded as their own and not as having been imposed by an external authority. The prospects of continued political stability would be enhanced and it would be less likely that the Constitution would require substantial amendment in future years. The alternative, that the Administering Powers pass legislation conferring autonomy and devising a Constitution for the people (cf. the Australian Constitution), was not viewed with favour by the Nauruans.

The claim to an autochthonous constitution in Nauru's case could, however, be challenged. Due to the pressure of time, it was unavoidable that much of the drafting had to be undertaken in Canberra by representatives and employees of the Australian Government, and decisions were made without consultation with the Nauruans, although in the hope that the effect of these decisions would accord with Nauruan wishes. The fact that when the Nauruan Constitutional Convention was presented with a complete first Constitution in January 1968, almost all of which was adopted without substantial amendment, also lends support to the argument that the Constitution cannot truly be regarded as 'autochthonous'. On the other hand it may be said that general Nauruan agreement with the document merely indicated that the decisions made on the Nauruans behalf were correct in the prediction that they would meet with their wishes. Moreover, it cannot be assessed whether or not the Constitution would have been any more 'autochthonous' in character had more time been available since lengthy discussions as to the effect of the provisions presented to the Convention were required. It may indeed be possible that a truly autochthonous constitution can be devised for a nation on the brink of independence but, generally, this would first entail the education in constitutional law of the people concerned.

However, in theoretical terms, it may nevertheless be said that the Constitution of Nauru is autochthonous - as far as circumstances permitted. And in practical terms also, the Constitution can be seen as autochthonous because, at the very least, it can be said that the method of procedure accorded with the wishes of the Nauruan people.

It should perhaps be mentioned that no referendum was held to ascertain the Nauruan viewpoint on the issue of independence. Once more the lack of time was a factor which contributed to the omission of this measure usually undertaken in the course of events leading to the granting of a country's independence. But it may be assumed that, as there was only one dissenting voice ascertainable, the granting of independence met with the approval of the majority of the indigenous population.

THE EFFECT OF FOREIGN EXPERTISE

That the first Constitution adopted by the Constitutional Convention was substantially drafted in Canberra highlights the importance of the foreign personnel concerned with the drawing-up of that first draft. Two people warrant particular note: Professor J.W. Davidson, the constitutional adviser to the Nauruans, and Miss Rowena Armstrong, a solicitor on the staff of the State of Victoria's Parliamentary Counsel. The latter was
seconded by the Australian Government to draft Nauru's Constitution; her salary was to be paid by the Australian Government but she was to act for the Nauruans.

Professor Davidson's influence on the shape of the Nauru Constitution was profound. His belief in the republican ideal, for example, resulted in Nauru adopting republican statehood. He was a man of considerable experience in the Pacific having been closely associated with the constitutional developments of both the Island countries which had entered the arena of self-governance/independence prior to Nauru. This experience was reflected in Nauru - and was an undoubted influence for the adherence to the patterns of independence followed in WS.

In Nauru, Professor Davidson's role was less constrained than it had been in his previous island associations where the presence of the Administering Power representatives had been more strongly felt. In WS, for example, much of the legal input into that nation's Constitution derived from Dr Colin Aikman who represented the NZ Government from the early stages of the discussions. By contrast, the assistance of Miss Armstrong was not formally approved by the Australian Government until 14 November 1967 - although she had been involved for some months prior to this in an informal capacity.

The difference of years' to months' work on a constitution must reflect in the final product. It is not within the scope of this paper to compare in detail the constitutions in which Professor Davidson had been involved nor to comment upon their style, except perhaps to note that Nauru's Constitution is considerably shorter and less detailed than, for example, that of WS. But, much of the length and detail in the latter Constitution may be explained by the more complex social structure and the individual characteristics of the existing tribal/political institutions. Nauru by contrast, as noted above, is small in area and in population, and her social structure was (and is) considerably less stratified, hence obviating the need to take into account the detail of some traditions which are reflected, for instance, in the electoral provisions in the WS Constitution. Also, as a general comment, a greater willingness to leave the working out of detail to the parliamentary forum rather than to entrench provisions in the constitutional document may be noted in the reading of the Nauru Constitution. This factor may indeed reflect the time constraint in the drafting of the Constitution, but on the other hand, there is no evidence to suggest that, even had no pressure of time been evident, the Nauru Constitution would have evolved in a different form. Hence the lesser detail may simply reflect an acknowledgement of the value of a compromised British/American approach to constitutional drafting.

What can be stated with some certainty is that the document finally adopted met with the full approval of the indigenous representatives; and if the success of a constitutional document can be measured by the amount of judicial review, by litigation based upon its provisions, or by the number of amendments passed to alter a constitution, Nauru's document has stood the test of time. In the fourteen years since the final document was adopted in May 1968 there have been few questions referred to the Supreme Court requesting an explanation or interpretation of the provisions, only one case has been brought before the Court based on an Article in the Constitution, and no amendments have been made by the Legislature. This is
not to say of course that some difficult questions will not arise in the future but in general the problems experienced with some constitutions have not as yet been found to exist in Nauru's Constitution.

THE INDIGENOUS INPUT

The calling-in of overseas expertise in the course of constitutional development is, of course, not unusual. It is imperative for constitutional success, however, that this expertise guides the final document into a shape which is the product of the will of the people concerned. Professor Davidson's sensitivity to Pacific societies was well-suited in this respect that he and Miss Armstrong worked in close consultation with the established indigenous institutions - the Nauru Local Government in the first instance, and, at the later stage, the Constitutional Convention. These bodies provided the authentic expression of the will of the Nauruan people.

The Local Government Council had struggled since its emergence out of the traditional Council of Chiefs in 1951 to assert real power and influence in the development of the Island but it was not until 1966 with the inauguration of the Legislative and Executive Councils that the indigenous leaders could fully leave behind the fledgling stage. The Local Government Council was first led by Head Chief Timothy Detudamo who has been described as "the father of independence" because he was first to raise the consciousness of the Nauruan people to the abuses of the Europeans (Petit-Skinner 1981:45). Detudamo died in 1953 and Raymond Gadabu headed the Council until 1955 when Hammer DeRoburt was elected as the Head Chief, a position which DeRoburt has held to the present day.

It is to DeRoburt that most of the work towards Independence must be accredited. His leadership qualities and dedication to work have been widely acknowledged (see, e.g., Davidson 1968:146) and, in 1966, led to his award of the O.B.E.

One of the unusual features in Nauru's development of her indigenous voice is that although it was envisaged at one stage that some at least of the local government functions would pass to the Administration on the coming into operation of the Legislative Council - and that the need for the Local Government Council might ultimately disappear (see Legislative Council Debs. Vol.1, No.1, 31 January 1966, at 8) - only part of this concept was realised. Even today two systems continue to operate - the Local Government Council, and, the Government of the Republic of Nauru. Their functions today are, for the most part, conducted in different but complementary fields of endeavour; in some areas, however, the functions merge and overlap - for example, in transportation: the Nauru Shipping Line is controlled by the Local Government Council; Air Nauru, on the other hand, falls within the Government jurisdiction. In investments and in financial matters making provision for the future of the Nauruan community, both bodies are involved. Moreover, Hammer de Roburt as well as holding the position of Head Chief of the Local Government Council, is also President of the Government of the Republic, and, as President, is also Head of State. Most of the leading Councillors are Members of Parliament and, for the most part, are also members of the Cabinet.
This overlapping of official personnel is not surprising in view of Nauru's size and population. What is surprising, perhaps, in view of the small population and area, is that two structures of government have continued to co-exist. The checks and balances exercised by the one upon the other do, however, hold advantages for this small community and, if for this reason only, it would be unlikely that the Nauru Local Government Council would be absorbed into the Government structure.

THE ROLE OF THE UNITED NATIONS

Undoubtedly the world climate of opinion away from colonialism towards the recognition of the rights of dependent countries to decide their political futures assisted in the constitutional development of Nauru. The final factor to be taken into account here is, accordingly, the influential and at times dominating role of the UN and its associated organs.

In 1945, Art.76(b) of the UN Charter had laid down, as a basic objective of trusteeship systems:

Progressive development towards self-government or independence as may be appropriate to the particular circumstances of each Territory, and its peoples, and the freely expressed wishes of the peoples concerned, and as may be provided by the terms of each Trusteeship Agreement ...

The Nauru Trusteeship Agreement of 1 November 1947 reaffirmed in its Art.5(2)(c) that the Administering Authority would:

assure the inhabitants of the Territory as may be appropriate to the particular circumstances of the Territory and its people a progressively increasing share in the administration and other services of the Territory, and take all appropriate measures with a view to the political advancement of the inhabitants in accordance with Article 76(b) of the Charter (Art.5 (2)(c)).

But by 1962 there was little evidence satisfactory to the UN Trusteeship Council that these undertakings were being fulfilled as rapidly as might be expected. The UN visiting mission that year directed "urgent attention" to the problem of the "uncertain and indeed alarming future facing the island because of the depletion of the phosphate resources", and recommended that "from now on" the Nauruan people should be given full participation in their own government and in all decisions of the British Phosphate Commissioners ... which affect Nauruan interests". The mission also expressed the belief that "it should be possible to formulate and decide upon detailed plans for the future and to be ready to put them into effect within a year from now" (see UN Visiting Mission 1962).

To a certain extent, the visiting mission's recommendations reflected the world opinion which had found expression in the 1960 General Assembly Resolution 1514 (XV) which contained the Declaration on the Granting of
Inde pende nce to Col onial Coun tr ies and peop les; Chapter 5 of the Declar ation had st ated:

Immediate steps shall be taken, in trust and on self-governing territories or all other territories which have not yet attained independence, to transfer all powers to the peoples of those territories, without any conditions or reservations, in accordance with their freely expressed will and desire, without any distinction as to race, creed or colour, in order to enable them to enjoy complete independence and freedom.

In 1960 the 'Special Committee of 24' (Special Committee on the Situation with Regard to the Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples) - which had been the organ of the General Assembly dealing with colonialism since 1961 - gave its opinion that the Declaration applied fully to the smaller territories, including those in the Pacific region. In 1965, the General Assembly requested the Committee to:

pay particular attention to the small territories, and to recommend to the General Assembly the most appropriate ways, as well as the steps to be taken, to enable the population of these territories to exercise fully their right to self-determination and independence (UN General Assembly Resolution 2105(XX) 1965).

A review of small territories was undertaken by the Committee and on 20 December 1966 the General Assembly reaffirmed:

the inalienable right of the people of Nauru to self-government and independence and, further, recommended that:

the Administering Authority should fix the earliest possible date, but not later than 31 January 1968, for the independence of the Nauruan people in accordance with their freely expressed wishes (UN General Assembly Resolution 2226(XXI)).

In 1967, the Research Committee of the Board of Trustees of the UN Institute for Training and Research (UNITAR) also produced a report on the "Status and Problems of Very Small States and Territories". The report drew attention to the plight of small countries and inter alia, reconfirmed the UN commitment to assist requests for self-determination; it emphasised once more the part the UN had, since its inception, played in supporting these territories. By this time, too, eight of the eleven Trust Territories of the UN had gained independence.

It was a small step then to the General Assembly Resolution 2347 (XXII) of 19 December 1967 which resolved, that, in agreement with the Administering Authority:
the Trusteeship Agreement for the Territory of Nauru approved by the General Assembly on 1 November 1947 shall cease to be in force upon the accession of Nauru to independence on 31 January 1968.

NOTES

1See, for example, Senator M.C. Cormack in Senate Debs. 15 October 1964, at 2014.

2Even by 1966 per capita income was estimated to be in excess of $US 1,800 — higher than that for Australia, and one of the highest in the world (see Current Notes on International Affairs (1967) 38:549, 552).

3Article 6, Agreement between Governments of UK, NZ and Australia, 2 July 1919 (see Nauru Island Agreement Act (Cmth) 1919).

4The intent to renew the call for support for Nauru's rehabilitation was repeated in 1973 (see Australian Foreign Affairs Record (1973) 44:117-121 at p.120).

5The statement from which these proposals are taken considers in some detail the Legislative Assembly, the Judiciary, and the Public Service. With regard to the Judiciary, a hope was expressed that appeals from the Supreme Court of Nauru would lie to the High Court of Australia. See, now, Nauru (High Court Appeals) Act (Cmth) 1976.


7Professor Davidson had intended writing about Nauru's Independence in a work similar to his book, Samoa, mo Samoa, in which he details the events leading to the Independence of WS and his role in the framing of that Constitution. His formal involvement in the framing of the Nauru Constitution dates from 11 May when he was retained by the Nauruans as their Constitutional Adviser. (See Maude 1973:5-9).

8Some forty Council employees were transferred to the Republic's Works Department on 1 July 1968. In addition, equipment used by the Local Government Works force were handed over to the Government Works Department. These arrangements transferred the responsibility for Nauruan housing to the Government, a function previously performed by the Local Government Council (Skinner 1976:107).

9The Nauruans considered that, because of the small size of the country, it was undesirable to create two separate offices where the duties of both could be performed by one person; see Rowena Armstrong, "The Constitution of the Independent Republic of Nauru", Parliamentarian 49:259-61 at p.260.
The problem of the separation of powers and overlapping jurisdictions is "further confused by the continuing administrative powers of the Nauru Phosphate Corporation, another statutory corporation of Nauru" (Connell 1974:9).

7. CONSTITUTIONAL DEVELOPMENTS IN THE COOK ISLANDS

C.C. Aikman

AN ASSOCIATED STATE

The United Nations (UN) resolution (General Assembly Resolution 1541 (XV)), which set out the circumstances in which non-self-governing territories might be said to have reached a full measure of self-government, provided three alternatives: emergence as a sovereign independent state; integration with an existing independent state; or free association with an independent state. The Cook Islands (CI) was the first territory to take advantage of the third alternative, and chose free association with New Zealand (NZ). The procedure followed in assuming that status, which involved UN participation, was carefully designed to establish that CI was in fact exercising a free choice. Thus it provided that the choice should be made at a moment of notional independence and that CI should be free to assume full independence in the future should it so choose (see Aikman et al. 1963).

This background brings out two points that have been central to more recent developments. First, NZ did ensure at the time that there was effective transfer of 'all powers to the peoples' of CI, including the grant of full legislative competence. Second, despite this transfer, the UN did not regard the free association as amounting to full independence. Thus the UN resolution recognising that CI was no longer a non-self-governing territory went on to reaffirm:

the responsibility of the United Nations ... to assist the people of the Cook Islands in the eventual achievement of full independence, if they so wish at a future date (General Assembly Resolution 2064(XX)).

The original text of the CI Constitution was set out as a schedule to an Act of the NZ Parliament, the Cook Islands Constitution Act (1964). Section 4 states that the Constitution is to be the supreme law of CI. Section 5 provides:

Nothing in this Act or in the Constitution shall affect the responsibilities of Her Majesty the Queen in right of New Zealand for the external affairs and defence of the Cook Islands, those responsibilities to be discharged after consultation by the Prime Minister of New Zealand with the Premier of the Cook Islands.
Under s.6 Cook Islanders who were already NZ citizens retained their citizenship.

For the purpose of the present discussion, the following were significant provisions in the original Constitution:

(1) Art.2: "Her Majesty the Queen in right of New Zealand shall be the Head of State of the Cook Islands";

(2) Art.3(1) established the position of a High Commissioner of CI who shall be "the representative of Her Majesty the Queen in the Cook Islands" and also "the representative of the Government of New Zealand in the Cook Islands". The High Commissioner was to be appointed by the NZ Governor-General, acting on the advice of a NZ Minister, after consultation with the Premier of CI (Art.3(2)). The High Commissioner in the performance of his functions as the representative of the Queen was to act on the advice of CI Ministers (Art.5);

(3) Art.12(1) vested the executive authority of CI in Her Majesty the Queen in right of NZ. It might be exercised on behalf of Her Majesty by the High Commissioner (Art.12(2));

(4) Art.13(1) established the position of Premier of CI and provided that Cabinet was to have general direction and control of the executive government of CI;

(5) Art.27 established the Legislative Assembly of CI;

(6) Art.46 retained the power of the NZ Parliament to pass legislation for CI and Art.88 authorised the NZ Governor-General to make regulations for CI in each case at the request and with the consent of CI;

(7) There was a High Court of CI, presided over by a Chief Judge (Arts.47 and 48) with a right of appeal to the NZ Supreme Court;

(8) Under Arts.55 and 56 appeals could in some circumstances lie from the Land Court of CI to Judges of the NZ Maori Land Court;

(9) Under Art.71 the NZ Audit Office was the auditor of CI accounts.

The effect of some of the above provisions of the *Cook Islands Constitution Act* (1964) and of the Constitution itself was to maintain legal ties between NZ and CI. Certain of them, like reliance for appeals on the NZ Supreme Court, were continued purely as a matter of convenience because of the limited resources, including the small number of qualified personnel, available in CI. There were also important economic ties. At the time free association was established NZ gave significant undertakings in the areas of trade and aid - NZ would continue to give financial aid to CI and CI products would be free of the NZ constraints of import licensing and customs duty (NZ Ministry of Foreign Affairs 1980).
A SEPARATE IDENTITY FOR THE COOK ISLANDS: CONSTITUTION AMENDMENT (NO.9) ACT (1980-81)

The present paper is mainly concerned with the increasing concern of the CI Government to establish a separate identity, short of full independence, in the international community. With this in mind changes of a cosmetic character were made by the CI Legislative Assembly in the Constitution Amendment (No.9) Act (1980-81). Thus the Premier of CI has assumed the designation "Prime Minister"; the Legislative Assembly of CI is now the Parliament of CI; the Chief Judge of the High Court has become the Chief Justice of CI; the High Court of CI has been given jurisdiction and powers in relation to land formerly held by the Land Court, and all appeals from the High Court are to go to a new Court of Appeal of CI. Articles 46 and 88, relating to NZ legislation and regulations, have been repealed and replaced by a new Art.46 under which no Act of the NZ Parliament is to extend to CI as part of the law of CI unless provided by Act of Parliament of CI.

These changes were justified by the CI Minister of Justice in a press statement made at the time of the introduction of the Constitution Amendment (No.9) Bill. He explained that CI had had difficulty in the international arena in persuading other states that CI was a fully sovereign country:

States having doubts about the status of the Cook Islands have pointed to what they have termed as vestiges of the Colonial System which they consider are still present in the Constitution.

AN OVERSEAS CONSTITUENCY

There is a large community of Cook Islanders living in NZ and their status in CI elections has been a persistent source of dispute. The constitutional crisis following the 1978 election arose from the use by the Albert Henry Government of public money to fly in CI voters from NZ. Now, the Constitution Amendment (No.9) Act, in the course of a reallocation of constituencies, makes an interesting innovation. It creates an additional overseas constituency in respect of "The islands comprising New Zealand and all other areas outside the Cook Islands" (Art.27). The election of the additional member is to be by postal or special vote or by vote cast at a polling booth which is likely to be in NZ and the qualifications of electors in the constituency are set out in the Amendment (Arts.28 and 28b). This development raised interesting questions as to the propriety of NZ citizens who reside in NZ voting in both CI and NZ elections. The NZ authorities examined the issues with some care, but in the event took no firm action to discourage CI from proceeding with its new constituency.

A SEPARATE IDENTITY FOR THE COOK ISLANDS: THE QUEEN'S REPRESENTATIVE

Many parallels can be found in Commonwealth history for the difficulties that have arisen over the position of Head of State in CI. The constitutional advisers responsible for the 1964 CI Constitution were aware of the difficulties that would arise from the decision to give a dual
role to the High Commissioner, that of being a constitutional Head of State, acting on the advice of CI Ministers, and that of representative of the NZ Government— they had the experience of Governors of British colonies as they moved into Dominion status to warn them (see Aikman et al. 1963:11).

The dual system persisted until 1975, when the NZ authorities and the Premier, Sir Albert Henry, decided that it was time for a change. However, the CI Government did not have the two-thirds majority necessary for the constitutional amendment involved, and the Democratic Party of Dr Tom Davis was unwilling to agree to the amendment. The two Governments, therefore, had recourse to the provision in the Constitution under which, in the absence of the appointment of a High Commissioner or a Deputy High Commissioner, the Chief Judge of the High Court performed the functions of the High Commissioner. It was agreed that a newly appointed Chief Judge, Chief Judge Donne, should become Acting High Commissioner and assume the functions of the representative of Her Majesty the Queen. The NZ Government would appoint its own representative. Chief Judge (now Chief Justice Sir Gaven Donne) has successfully carried out the functions of both Acting High Commissioner and Chief Justice up to the present—a term of office that saw him deal successfully with an electoral petition in which a finding of electoral malpractice led, after the 1978 election, to the replacement of Sir Albert Henry's CI Party Government by a Government led by Dr Davis (now Sir Thomas Davis) (see Crocombe et al. 1979; Hancock 1979). The new Government had the two-thirds majority in the Legislative Assembly that would enable them to amend the Constitution.

The Constitution Amendment (No.10) Bill which passed through its third reading on 24 March 1982 will replace Art.3 of the Constitution relating to the appointment of the High Commissioner by a new Art.3 relating to the appointment of the Queen's Representative:

There shall be a representative of Her Majesty the Queen in the Cook Islands, to be known as the Queen's Representative.

(2) The Queen's Representative shall be appointed by Her Majesty the Queen, and shall hold office for a period of three years, and may from time to time be reappointed.

Apart from the new designation and restricted functions of the appointee, the new Article embodies three changes:

(1) The Queen's Representative is to be appointed by Her Majesty the Queen, whereas the High Commissioner was appointed by the NZ Governor-General;

(2) There is no indication as to whether it is the Prime Minister of CI or the Prime Minister of NZ, or both, who proffer advice to the Queen, whereas the High Commissioner was appointed on the recommendation of a NZ Minister, after consultation with the Premier (now Prime Minister) of CI. The constitutional status of CI would seem to require that the appointment should be made on the advice of the Prime Minister of CI; but since, by virtue of Art.2 it is Her Majesty the Queen in right of NZ who is the Head
of State in CI, the question arises as to the part to be played by the NZ Governor-General and his advisers.

(3) The appointment of the Queen's Representative is made for a term of three years — an anomaly in the case of an appointment made by the Queen.

It has been announced that Sir Gaven Donne is to become the first Queen's Representative in CI and that he is to be replaced as Chief Justice by a retiring NZ Judge of the Supreme Court, Mr Justice Speight.

FREE ASSOCIATION - A DEVELOPING RELATIONSHIP

The special relationship of free association between NZ and CI was unique when it was established in 1964. The actual nature of the relationship had yet to be worked out; and it was to be expected that it would be a developing relationship as the CI people and their Governments assumed the responsibilities and realised the potentialities of self-government. When questions were raised in 1973 over certain of the policies being followed by the CI Government the NZ Prime Minister, Norman Kirk, initiated an exchange of letters with the Premier of CI, Albert Henry, which can still be regarded as setting out the essential aspects of the relationship. Mr Kirk emphasised that:

in the view of the New Zealand Government there are no legal fetters of any kind upon the freedom of the Cook Islands, which make their own laws and control their own Constitution.... the relationship between our two countries has been simply one of partnership, freely entered into and freely maintained. The Cook Islands Constitution Act, and the Constitution itself, provide guarantees and guidelines for the conduct of this partnership; but in the final analysis everything turns on the will of each of our countries to make the arrangement work (Appendices to the Journal of the [NZ] House of Representatives 1973).

The Prime Minister pointed out that, although NZ had a statutory responsibility for the external affairs and defence of CI, it was intended that CI should be free to pursue their own policies and interests — as they were doing in the Pacific. Mr Kirk went on to recall that the people of CI were NZ citizens and that they owed allegiance to Her Majesty the Queen in right of NZ, and recognised the Queen in her NZ capacity as their Head of State. He continued:

For the reasons I have already indicated, the bond of citizenship does entail a degree of New Zealand involvement in Cook Islands affairs. This is reflected in the scale of New Zealand's response to your country's material needs; but it also creates an expectation that the Cook Islands will uphold, in their laws and policies a standard of values generally acceptable to New Zealanders.
It seems to my Government that this is the heart of the matter. The special relationship between the Cook Islands and New Zealand is on both sides a voluntary arrangement which depends upon shared interests and shared sympathies. In particular, it calls for understanding on New Zealand's part of the Cook Islands' natural desire to lead a life of their own, and for equal understanding on the Cook Islands' part of New Zealand's determination to safeguard the values on which its citizenship is based (ibid.).

The application of the principles set out in the 1973 Exchange of Letters to aspects of the special relationship has continued to be worked out. This has been particularly so in response to the enthusiasms of members of the Government of Sir Thomas Davis. One area of interest that highlights the nature of the special relationship is the desire of the CI Government to assume increasing responsibilities in the area of external affairs.

EXTERNAL AFFAIRS

In the early stages following self-government the CI Government was content to allow NZ to handle its external affairs; but in Albert Henry CI had an active, ambitious and, it must be said, charismatic Premier who soon established that he had a contribution to make to regional politics in the Pacific. He became an influential figure in the meetings of the South Pacific Conference and laid the groundwork for the admission of CI as an associate member of the South Pacific Commission in 1978 and a full participating government, along with independent states like Fiji and Western Samoa in 1980. Albert Henry was one of three Pacific Islands leaders who took an initiative in establishing the South Pacific Forum. CI became a full member of the Forum and has since been admitted as a party in its own right to the Agreement establishing the South Pacific Bureau for Economic Co-operation (SPEC) (Apia, 17 April 1973 NZTS 1973:No.18), the Convention on the South Pacific Forum Fisheries Agency (Honiara, 6 July 1979 NZTS 1979:No.6), the Memorandum of Understanding on the Establishment of the Pacific Forum Line Limited, and the South Pacific Regional Trade and Economic Co-operation Agreement (SPARTECA) (Dept. of Trade and Industry Wellington July 1980). CI became a party to the four last-mentioned regional agreements in its capacity as a member of the South Pacific Forum. It is relevant that in the abortive discussions on a draft Convention establishing a South Pacific Regional Fisheries Organisation, of which the US, the UK, France, Chile and possibly other metropolitan powers were expected to become members, it was recognised that any member of the Forum regardless of its status would be able to sign the Convention (see Aikman 1981). In the still wider sphere of the Third UN Conference on the Law of the Sea the NZ delegation succeeded in having the views of the CI Government placed before the Conference, and the final Convention is expected to have a provision that will enable CI and Niue to become full parties to the Convention.

CI is an associate member of the Economic and Social Council for Asia and the Pacific (ESCAP) and became a member of the Asian Development Bank in 1965. More recently CI signed a bilateral maritime boundary
delimitation treaty with the US and a fishing agreement with the Republic of Korea.

Whatever may have been the original intention of s.5 of the Cook Islands Constitution Act (1964), the NZ Government has taken the view - and made this generally known - that the CI Government is competent to take the executive and legislative action required to enter into international obligations on behalf of CI. NZ concedes, however, that capacity at international law depends on recognition and that CI can enter into international obligations only if other parties to the proposed obligation are prepared to recognise that CI has the necessary attribute of sovereignty to enter into the obligation. Should such recognition not be forthcoming NZ has the competence by virtue of the executive authority of Her Majesty the Queen in right of NZ - also the Head of State of CI - to enter into the obligation on behalf of CI. It would nevertheless be necessary for the CI Parliament to take any legislative action that might be required to implement that obligation. It has been suggested that in such case the NZ Government is acting as the delegate of the CI Government. This may be the case as between NZ and CI, but not as between NZ and the other contracting party or parties - in that case the NZ Executive is alone the responsible contracting party.

The issues we have been considering were thoroughly canvassed when the Davis Government applied to the African, Caribbean and Pacific Group of States (ACP Group) to be permitted to accede to the Lomé II Convention. The ACP Committee of Ambassadors referred the matter to an Ad Hoc Working Group on CI. Under Art.186 of the Convention admission can be granted to states whose economic structure and production are comparable with those of the ACP States. NZ handed a statement to the Lomé Council Secretariat in which it explained the international position of CI. The statement pointed out that CI is not a colony or a dependent territory. Nor is it a sovereign independent state as that concept is traditionally understood in international law.

It falls into a special character of which the Cooks and Niue are perhaps the only members. It is an associated state with full control over its own destiny in matters relating to both domestic and external affairs .... All legislative and executive powers [sic] ... is vested exclusively in the Government of the Cook Islands and the exercise by the New Zealand Government of any responsibilities in foreign affairs or defence must be preceded by full consultation with the Cook Islands.

In its own representations CI placed particular emphasis on the changes that had been made in the Constitution Amendment (No.9) Act and were to be made in Constitution Act (No.10) as confirming their autonomous status. Nevertheless, the Working Group decided that admission under Art.186 was open only to independent states:

The Cook Islands does not enjoy such a status and is not acknowledged by the United Nations as an independent state or acceptable as a Member of the United Nations.
The Group acknowledged that CI deserved full sympathy as a developing country, confronted with serious economic problems and with economic structure and production comparable to those of ACP States. It, therefore, considered the possibility of recommending CI accession as a special case. Here the Group came up against apprehensions of a precedent that would open the door to other countries whose cases were not identical but had common characteristics with those of CI. The conclusion was, therefore, that on a strict legal basis, accession could not be recommended. The Group, therefore, reported that the decision should be political and that the ACP Council of Ministers might wish to consult the CI representative and Ministers of the Pacific Group of States who had supported CI admission and who attach great importance to the consolidation of the position already occupied by CI within the economic groupings of the Pacific.

As was to be expected in the light of this Report, the ACP Ministerial Council was not prepared to accept the invitation to take a political decision. The CI application was refused with the rider that the Committee of Ambassadors should talk to the Community about improving co-operation between CI and the Lomé members short of actual membership.

This decision has, of course, wider implications than accession to the Lomé Convention. The Working Group accepted that CI as an associated State is not recognised as an independent State by the UN. It is, therefore, unlikely that the UN Secretariat will accept the CI as a party to conventions of which the Secretary-General is the depositing authority, unless General Assembly approval, either specific to a particular case or of general application, is first obtained. Against this would need to be placed success in having CI and Niue accepted as parties to the Convention on the Law of the Sea.

So far as bilateral international obligations are concerned the legal position is relatively straightforward. The CI Government has the legal competence to enter into relations with other states as international entities that recognise that competence. There is, however, the overriding obligation, flowing from the special relationship, to consult NZ in the first instance, and to have regard to her policies and interests. That is the price of the maintenance of the special relationship.

NEW ZEALAND'S OBLIGATIONS TO THE COOK ISLANDS

NZ must also have regard to the position of CI when entering into international obligations since she shares with CI (and Niue) the same international legal personality. In the case of bilateral agreements entered into by NZ the position is relatively straightforward - the parties can agree on the territorial entities to which the agreement applies - but NZ is under an obligation to consult in appropriate cases.

Multilateral treaties and conventions, however, present more problems. Where there is the traditional type of territorial application clause under which the contracting state can either extend the instrument to a particular country or exclude it, the position of CI can theoretically be met. The need to take advantage of such a clause does, however, offend the CI claim that it has the competence to enter into international obligations on its own behalf and could be regarded as prejudicing that claim. The
issue arose recently when CI wished to become a party to the International Coffee Agreement ratified by NZ in November 1976 (London, 3 December 1975 NZTS 1976:No.31). The CI Government was reluctant to take advantage of a territorial application clause, contained in Art.64, but eventually accepted a compromise formula under which the UN Secretary-General was advised that:

in accordance with the special relationship between New Zealand and the Cook Islands, the Government of the Cook Islands, which has executive competence to implement treaties in the Cook Islands, has requested that the Agreement should apply in the Cook Islands. Accordingly, the International Coffee Agreement 1976 should be regarded as being in force in the Cook Islands from the date of receipt of this notification.

The UN later advised that the Agreement had been applied to CI with effect from 20 August 1981.

The situation is more complex in regard to instruments that do not contain a territorial application clause. Under Art.29 of the Vienna Convention on the Law of Treaties (Vienna, 23 May 1969 Appendices to the Journals of the House of Reps 1972:A.8.), in the absence of such a clause the signature of a treaty by a state extends the application of that treaty to the territories for whose international relations that state is responsible unless the treaty is manifestly incapable of that extension. The UK, in respect of the associated States of the West Indies, has made a general statement to the effect that in future any treaty action not specifying a particular associated State is not to apply to that State. Apparently, no objection has been raised to the UK declaration on the basis of inconsistency with the Vienna Convention rule. This approach is not, however, an attractive solution to the CI problem. First, associated States of the West Indies do not have full legislative competence and CI would not wish its position to be assimilated to that of the West Indies States. Second, the action to apply an instrument would have to be taken by NZ - and not CI itself. Third, a general declaration would halt the process by which CI is establishing precedents under which it is becoming a party to international obligations in its own right.

Here again there is a recent precedent for the adoption of a compromise approach. The NZ Instrument of Acceptance of the GATT Subsidies Code, dated 7 September 1981, included the following reservation:

AND WHEREAS in accordance with the special relationships which exist between New Zealand and the Cook Islands and between New Zealand and Niue, there have been consultations regarding the Agreement between the Government of New Zealand and the Government of the Cook Islands and between the Government of New Zealand and the Government of Niue,

AND WHEREAS pursuant to Article 19 (2) (d) of the Agreement the acceptance of the Government of New Zealand shall not extend the application of the
provisions of the Agreement to the Cook Islands and Niue ....

Assuming that the formula adopted in respect of the International Coffee Agreement and the GATT Subsidies Code is acceptable to other contracting parties to international agreements, the NZ Government still faces the need to consult the CI Government before accepting obligations under such agreements. The wording "accepting obligations" is used advisedly since the NZ Government may feel disposed to sign a particular convention, subject to ratification, before it has heard the views of the CI Government. The alternative may be to lose the opportunity of signing the convention and be faced with no way of giving support to the obligations of the convention other than accession, with the concomitant need for legislation. In the case of an instrument which has a bearing on CI and has no territorial application clause, the NZ Government cannot proceed to ratification or accession without obtaining the views of the CI Government and satisfying itself that CI has enacted any necessary legislation. The prospect is a forbidding one. The need to obtain a decision from the CI (and Niue) Government and to ensure in appropriate cases that legislative action has been taken before the NZ Government itself can take action is likely to lead to frustrating delays. The advisory services and back-up to the legislative process in CI and Niue are so exiguous that the procedures could break down under their own weight.

NOTES

1In July 1979 Albert Henry was convicted on charges of conspiracy to defraud the Crown. Later, Her Majesty the Queen stripped him of his KBE.

2Pressure in the Pacific for a more flexible approach on the status of territories that have not yet acquired full independence was shown by a provision in the draft under which a territory within the region would have been authorised to sign the Convention and to assume rights and obligations under it, by the government of the state which was internationally responsible for that territory. It would not have been necessary for the metropolitan state concerned to become a party itself. To meet the more traditional approach, there was another provision under which states signing the Convention would designate their territories within the region, not enabled to sign in their own right, to which the Convention was to apply. Territories so designated would have become full members of the Conference of the Organisation.

3For the following see the Report of the Group (ACP/199/81 Rev.1, Brussels 24 March 1981).
8. THE CONSTITUTIONS OF NIUE AND THE MARSHALL ISLANDS: COMMON TRAITS AND POINTS OF DIFFERENCE

A. Quentin-Baxter

INTRODUCTION

The Constitutions of Niue and the Marshall Islands (MI) invite comparison, because those responsible for their development chose in each case to draw upon the same reservoir of constitutional principle and experience — and to some extent relied upon the same advisers. This continuity occurred because some of the leaders in MI, a part of the Trust Territory of the Pacific Islands administered by the United States (US), were conscious that the parliamentary system of government was already working well in the former Trust Territory of Nauru, and in other island countries of the Pacific, previously under British, Australian or New Zealand (NZ) administration. There was a feeling that this system might be one of the keys which would admit MI to a similar status of independence or self-government.

At the most superficial level, there are similarities between the two Constitutions because, in dealing with the same needs and problems, it was natural to draw on a precedent which was familiar and had already been tried out in practice. There is, however, a more fundamental basis on which to compare the course of constitution-making in Niue and MI. In both, the goal was self-government, in free association with the former administering authority, a status which Niue has since achieved (Niue Constitution Act (1974) (NZ)). In MI a Constitution for self-government is now in force; but the final chapter on the future relationship between MI and the US has still to be written.

The focus of this paper is on the nature of the two Constitutions (Niue Constitution Act (1974) (NZ) in force from 19 October 1974; MI Constitution adopted by the Constitutional Convention on 21 December 1978 and in force from 1 May 1979). The simultaneous process of working out the details of a relationship of free association, and, in the case of MI, of deciding whether to become self-governing as a separate entity or in federation with other island groups in Micronesia, will be described only to the extent that it played a part in shaping constitutional development. On the other hand, the concepts of self-government and free association are, in a sense, opposites which have to be reconciled; and their inter-relationship will be dealt with in the concluding section.

The story of constitution-making in each country revolved around ways of overcoming people's fears about the consequences of self-government. Assurances were required that democratic institutions would take sufficient
account of the traditional organisation of society and would at the same time maintain the imported guarantees on which people had also come to depend. Although the form and content of each Constitution and the procedures followed to put it in place, reflect differences in culture, geography, history and hopes for the future, the Constitutions as a whole, and the relationships of free association on which each is predicated give to the people of Niue and MI a constitutional and international status, that, in all important respects, seems likely to be the same.

Niue is a single island of uplifted coral, moderately large by Pacific standards. Its annexation by NZ in 1901 made its people British subjects, and in due time, NZ citizens, with the right to enter and live in NZ. Originally annexed as part of the Cook Islands (CI), with which its people had no culture or historical ties, Niue was soon administered separately, but under a system of law and government developed in the first instance for CI and applied to Niue as a matter of course. The first assertion of a separate Niuean interest occurred in October 1963 when the people of Niue rejected a commitment which CI had accepted, to move, in accordance with a predetermined timetable, towards the goal of self-government. Niue accepted self-government "in principle" only, and wished to work towards that possible goal at its own pace (see Chapman 1976:13-14). Less ready than the people of CI to express confidence in their ability to manage their own affairs, the Niueans required a practical demonstration that NZ control could be relaxed without diminishing either the internal safeguards of the external support on which Niue had come to depend. In part, this demonstration was provided through the exercise of progressive instalments of representative and responsible government. By 1970, the elected Legislative Assembly was ready to take the initiative in appointing a constitutional adviser. His report concluded that the next step was to reassure the people that they would not be asked to give up any of their three main requirements of constitutional development. These were: to keep their NZ citizenship and right of access to NZ; to be sure of continued financial and administrative support from NZ; and yet to achieve substantial control of the affairs of their own island. The final choice of future status should be made when the people of Niue had tried out in practice the arrangements they would then be approving or rejecting.

Accordingly, at the Assembly's request, the NZ Government conferred on the Executive Committee of the Assembly, as of right, and in full conformity with the principle of collective responsibility, the executive powers which it had already been exercising by delegation from the Resident Commissioner (Niue Act (1966) (NZ) ss.5-14, as repealed and substituted by Niue Amendment Act (1971 (NZ) s.3). This, and other constitutional developments which left the unused legislative authority of the NZ Parliament as the only residual control, brought the people of Niue as close as possible to the actual experience of self-government. The visit in 1972 of a UN mission aroused great interest and added further stimulus (see Chapman 1976:50-57). By the end of 1972, the Niue Island Assembly was ready to inform the NZ Government of the wish of the Government and people of Niue to achieve, in 1974, the status of self-government in free association with NZ and to ask that a constitution be drafted for consideration by the Assembly.
In contrast to the compactness of Niue, MI are a widely scattered group of twenty-nine coral atolls and five low-lying coral islands with a total land area of about 180 square kilometres. Again in contrast to Niue, they have known a succession of foreign rulers. In 1885, they were annexed by the German Empire. On the outbreak of World War I, Japan took possession of the group, along with the Caroline and Northern Mariana Islands, and was subsequently granted a League of Nations Mandate. At the end of World War II, in which the three groups had been won back by US forces, they were placed under UN Trusteeship, with the US as the administering authority, and were designated a strategic area (TIAS 1665 (1947);8 UNTS 189). This status did not, however, qualify the duty to promote constitutional development (UN Charter:Art.83, para.2). With administration of the Trust Territory centred upon the office of the High Commissioner, it was natural that the administering authority should think in terms of Territory-wide, as well as local institutions. Indeed, UN doctrine laid upon it an obligation to do so (UN 1973:para.526). It was natural, too, that institutions for self-government should be developed on the same principle of the separation of powers which animated the US Constitution itself. Yet, as a visiting UN mission pointed out, the separation of the legislature and the executive ruled out any form of unified political development by which elected representatives could acquire experience of both the legislative and executive branches of government (UN 1964:paras.196-98). Even when a Micronesian was appointed to a position of authority in the territorial or a district administration, he necessarily remained responsible to the High Commissioner, not to an elected legislature. Accordingly, the primary emphasis was placed on the development of the legislative branch of government. In 1965, the first elective Congress of Micronesia was convened to carry out legislative responsibilities for the whole Territory (Dept. of the Interior Order No.2882 of 28 September 1964). District Legislatures were also established (3 Trust Territory Code s.2). Of these, the MI District Legislature (known as the Nittjela (MI Code 1975:App.A)) was one of the first to become a forum in which the people of a particular administrative district could focus on their individual aspirations for the future.

On the basis of past experience, the US might have expected that the peoples of the Trust Territory, invited to consider their future status, would choose to strengthen their links rather than weaken them. This might well have been the outcome if the only choice lay between independence and integration. The UN, however, with the example of CI in mind, drew attention to the option of free association as a means whereby the people of Micronesia could co-exist alongside a larger state without absorption (UN 1964:paras.297-302).

It soon became clear that only the Northern Marianas, attracted by what they saw as the advantages of Guam's situation, wished to place themselves under US sovereignty (see Pub. L. No.94-241, 90 Stat.263 (1976)). The five districts of the Caroline Islands and MI preferred to pursue the alternative of self-government in free association with the US. This was an objective which seemed likely to provide a means of satisfying US security interests as well as the Micronesian interest in being assured of continuing US financial support. Accordingly, efforts were made to promote a federal constitution for self-government, and negotiations for a compact of free association were conducted on a Territory-wide basis. In MI, a majority of those in positions of leadership had begun to feel that
their future relationship with the US should not depend on negotiations conducted only by a body on which all of the districts were represented. The desire to pursue their future separately from the rest of Micronesia was born of two dominating influences. First, there were no traditional ties to the peoples of the Carolines who spoke different languages and were culturally distinct. In the second place, the people of MI, more than those of any other group in Micronesia, had experienced both the advantages and disadvantages of an intimate involvement in US use of the Trust Territory for the development of strategic weapons. If the Marshallese people had to pay the price, they also wanted to have a controlling voice in the disposition of the benefits. In other situations, this seemingly selfish interest might have given way to stronger considerations of mutual advantage and commitment to a shared identity; but, added to the barriers of distance and differences in language and culture, there was a feeling that MI was being asked to provide a subsidy for the other groups in Micronesia, and were thereby relieving the administering authority, at least in part, of its own duty to provide a full measure of economic assistance to the people of those groups.

In 1973, the Nitijela set up its own political Status Commission (MI Code 1975:61) drawn largely from its elected Members and the Marshalls' delegation to the Congress of Micronesia. By July 1977, the Commission had won for itself the right to participate in "two-tier" negotiations with the administering authority on the future of Micronesia. To strengthen the hand of the Commission in these negotiations, and to provide a credible alternative to approval of the proposed federal constitution on which a referendum was still to be held, the Nitijela also convened a constitutional convention to draft a separate MI Constitution, (first convened on 8 August 1977 after election pursuant to District Law 23-32-2 of 30 August 1976). In this way, MI too had reached the point of constitution-making.

THE CONSTITUTION-MAKING PROCESS

In Niue, the main forum for constitutional discussions was the Niue Island Assembly which, since 1960, had been composed of Members elected to represent each of the fourteen villages in which Niue's social organisation is based. In their first discussions with the constitutional adviser, the Members of the Assembly had stressed that any new steps must depend on the wishes of the Niuean people themselves. The adviser saw his task as helping to clarify the people's wishes, and suggesting how those wishes could best be carried out (see Quentin-Baxter 1971).

As time went on, the Members of the Assembly, and, in particular, of its Committee on Constitutional Development, took more of the responsibility for consulting the people and initiating requests to the NZ Government for further instalments of self-government, and, finally, for the preparation of the Constitution itself.

By force of circumstances, the actual drafting had to be done outside Niue, but a continuous process of consultation with the Executive Committee was maintained. The making of the Constitution involved not only the Government and people of Niue, but also the NZ Government. There were several reasons for this. In the first place, as the administering
authority, NZ saw itself as having a continuing responsibility to contribute to constitution-making in Niue up to the moment when an act of self-determination would take place. In the second place, the Government and people of Niue were seeking a relationship of free association. This had involved direct governmental negotiations and assurances, the results of which were to be embodied in an Act of the NZ Parliament that would also give to the Constitution the force of law. In the third place, the people of Niue wished to remain NZ citizens. This created a general NZ interest in the constitutional arrangements which would govern the lives of those citizens of Niuean origin—numbering more than the population of Niue—who had chosen to make their homes in NZ. Finally, it was proposed that Niue should continue to use the services of certain NZ governmental institutions on an agency basis. There was, therefore, an input from the NZ side, as well as from the Government and people of Niue. It was, of course, always clear that the latter would have the last word; but the legislation promoted in the NZ Parliament to give effect to self-government would constitute the commitment which was prerequisite to Niue's final decision in a referendum.

In MI, a combination of forces saw the entire constitution-making process undertaken and completed without active participation by the administering authority. In part, this was the result of a philosophical approach stemming from the US experience: people should be allowed to give themselves their own constitutions. In part, it stemmed from the fact that when a Constitutional Convention first met, it did so in opposition to the official policy that the political unity of the whole of Micronesia should be maintained. It lost only gradually its anti-establishment character, and attracted some financial support from the US authorities. Even then, because the agencies responsible for territorial administration had not been involved either in the constitution-making process or in the negotiation of future status, it was difficult for them to realise that the time had come to tailor their own actions largely by reference to the wishes of the new Governments.

The MI Constitutional Convention consisted of forty-eight delegates representing a significantly wider spectrum of Marshallese society than would have resulted from calling only on members of the MI delegation to the Congress of Micronesia and on members of the Nitijela. Both these groups were represented, as were the traditional leaders, the irotij. The Convention delegates also included an 'owner' from the atoll of Likiep where the heads of families descended from two Europeans who had settled there had come to have a status corresponding to traditional leaders. There were also thirty-three delegates specially elected from twenty-four delegate districts comprising the whole of MI. At the first session (from August to October 1977) the delegates put forward proposals, sometimes merely as a basis for discussion without personal commitment, but in other cases as a reflection of deeply held views on such matters as local government or land rights. The Convention set up committees, including one on convention, procedure and jurisdiction, which came to be known as the CPJ Committee and which acted as a steering committee.

During the second session (convened in February 1978) the CPJ Committee put forward proposals for inclusion in a single text which represented a developing consensus among most, though not all, delegates. By the end of the session, a more or less complete, though still rather
rough, draft of a Constitution had been produced which could be used as a basis for discussion with the people as a whole. In the interval before the third session (15 November to 21 December 1978) Convention Committees held extensive public hearings. In response to the views expressed, and also to improve its legal efficacy, the draft text was further refined. The Constitution was finally adopted with the support of all but two of the forty-eight delegates. As with the Niue Constitution, it was to come into force only after it had been approved by a majority of the people in a referendum (Art.XIV, s.6).

In MI, the role of the constitutional experts had been somewhat different from that in Niue. There, the constitutional adviser, on the basis of his discussions with all concerned, had himself made proposals to the Niue Island Assembly and had been involved on its behalf in negotiations with the NZ authorities. In MI, the lawyers advised delegates who were putting forward their own proposals, and later produced revised drafts at the request of the Convention Committees. In the proceedings of the Convention itself, the outside experts took no part, except to respond to questions put by the delegates when the Convention was meeting either in select committee or, as it did for most of the second and third sessions, in committee of the whole. This meant that delegates in favour of particular proposals, including, as time went on, the draft Constitution as a whole, had to introduce and defend their proposals on the floor. In this way, the political leaders absorbed the details and nuances of the system of government they were developing, a preparation which helped to take the place of the experience gained by the Niuean leaders who had been able to try out most elements of their system in advance. Although, in both Niue and MI, the constitutional advisers had, at times, to be conciliators between opposing points of view and to identify common ground, it was never their role, in any dialogue with the people or their representatives, to act as advocates for a particular solution, and they had sometimes to decline invitations to express their own views on what decision should be made.

The account of constitution-making would not be complete without reference to two elements which enabled the people to make a reasonably knowledgeable decision about their future system of government. The first was the broadcasting of the whole of the proceedings of the Niue Island Assembly and of the MI Constitutional Convention. The second was the substantial effort made by the people themselves to understand and debate the choices to be made (see UN 1972:para.271; Chapman 1976:53-54 for contrasting assessments of the efficacy of political education in Niue; UN 1979:paras.154, 171-77 for an evaluation of the opportunities to study the draft Constitution available to the people of MI).

In a referendum held on 3 September 1974, in the presence of a UN observer team, the Constitution of Niue was adopted by a vote of 887 in favour to 469 against. The referendum in MI was held on 1 March 1979, also in the presence of a UN visiting mission, and the Constitution was adopted by 5,670 votes in favour to 3,210 against.
THE CHOICE OF THE SYSTEM OF GOVERNMENT

In Niue, the hard decision was whether to become self-governing. It was explicit that, having tried out the parliamentary system of government inherited from NZ, before making that decision, the Constitution of self-governing Niue would embody that system without substantial change. The converse was true of MI. There was little disagreement that if MI did not become self-governing in federation with the other Micronesian States, it should do so on its own, but the choice of governmental system on which a constitution for self-government should be based was the largest issue to face the Constitutional Convention. At the first session, the delegates wished to consider alternative systems of government on the basis of actual drafts of a constitution, rather than a theoretical presentation of their main features. They had before them three mutually exclusive outlines, one embodying the parliamentary system, one the presidential system, and the third combining legislative and executive powers in a single elected body modelled on a typical local government council. The decision to proceed on the basis of the parliamentary system was recommended by the CPJ Committee which explained the reasons for its choice in the following terms:

Surprising as it may seem, the main reason is that this system is closest to the actual political experience of the Marshall Islands people. Although, for the last 30 years, they have been governed under a system based on the separate physical identity of the legislative and executive branches of government, the democratically elected representatives of the people have served only in the legislative branch. The Marshall Islands have never been governed under a system where the head of the executive branch, also, was democratically elected. There has been no experience in achieving the necessary spirit of political compromise which must modify the inevitable sense of competition between the two branches, when each is separately elected. Events in some neighbouring countries with a presidential system of government show clearly that this spirit of compromise is even more difficult to find when the elected legislative branch has a much longer history and more political experience than an elected chief executive. It must be said, therefore, that, in spite of their familiarity with the theory, nothing in the actual political experience of the Marshall Islands up till now particularly equips the people to live under the presidential system of government, to make it work well.

In contrast, they already have considerable experience of looking to the people who have emerged as leaders in the elected legislatures - whether the Congress of Micronesia or the Nitijela - as their effective spokesmen, either for or against particular courses of action. In some cases, the people concerned are members or officers of statutory authorities; but their real authority comes from the fact that most of them are people who have been elected to represent
their own districts in the legislative branch of government (quoted in UN 1979:para.164).

Subsequent assertions that the parliamentary system of government was less expensive than the presidential one (see UN 1979:para.163) were, perhaps, a rationalisation, though it was true that, under the parliamentary system, the members of the Cabinet would be able, and indeed required, to function at the same time as legislators. The opposition to choice of a parliamentary system was, in the main, symptomatic of opposition to separation from the rest of Micronesia; but, reasonably enough, people asked whether the parliamentary system departed from the principle of the separation of powers and thus failed to provide adequate checks and balances. In answer to this question, the CPJ Committee explained that, under the parliamentary system, the separation was less complete than under the presidential system but both made the same distinction between the legislative, executive and judicial functions of government and entrusted those functions to different bodies. The main checks and balances would be regular elections, the power of the Nitijela to pass a vote of no confidence in the Cabinet, the power of the President to dissolve the Nitijela and call for a new general election and the power to call in question before independent courts the validity of governmental actions, particularly by reference to the Bill of Rights (see UN 1979:paras.166, 167).

Once the decision had been taken to draft the Constitution on the basis of the parliamentary system, the next question was to identify the functions of the Head of State. The notion that he might exercise certain reserve powers, but that he should otherwise act on advice was so foreign to Marshallese experience that it struck no responsive chord. On this point, the Constitution of Nauru provided the model (Arts.16, 17, 18). The MI President serves both as the Head of State and the Head of Government (Art.V, ss.3, 4) but has no powers, formal or otherwise, vested in him in the former capacity.

The Constitution of Niue had, in this respect, also drawn inspiration from Nauru. The position was, however, a little more complicated because Her Majesty the Queen in right of New Zealand continues to be the Head of State of Niue (since Niue continues to be part of the realm of NZ) and has to be represented there. Here, a lesson was drawn from experience in CI, where the Constitution has made provision for the office of a High Commissioner who would be the representative of both the Queen and the NZ Government (Art.3(1)). From the beginning, this dual role gave rise to problems, especially as the Constitution, while imposing on the High Commissioner in his capacity as the Queen's representative a general duty to act on advice (Art.5) also vested personal discretions in him (Arts.13(2), 14, 19, 24, 25, 37(3), 44). In order to avoid a similar situation in Niue, the Constitution, like that of Nauru, was made self-regulating (Arts.4(2), 7, 22(1), 26) avoiding the need to vest personal discretions in the representative of the Head of State whose role could therefore be almost entirely ceremonial. For this reason, it was possible to provide that the NZ Governor-General should be the representative of Her Majesty the Queen in relation to Niue (Art.1). Naturally, in this capacity, he exercises only such functions and powers as are given to him under the law of Niue; and in all cases he acts on the
advice, not of NZ Ministers, but of the Niue Cabinet (see, e.g., Art.45(1)).

THE EXECUTIVE

Both the Niue and MI Constitutions provide for the election of the Head of Government (the Premier in Niue and the President in MI) by the Legislature from among its Members (Niue Arts.2(1), 4; MI Art.V, ss.2(1), 3(2)). Such an election must be held after every general election (Niue Art.4(2); MI Art.V, s.3(3)) and there is provision to ensure that the Premier or President does not take or retain office unless he has in his Cabinet a full complement of Ministers (Niue Arts.5, 7(2), 7(3); MI Art.V, ss.4, 8(2), 8(3)). In both Constitutions, executive power is that of the Cabinet, whose members are collectively responsible to the Legislature (Niue Arts.2(2), 3(1); MI Art.V, s.1(1)). This means, first of all, that the power is, as a matter of law, that of the group rather than of one man, as it is under the presidential system. Secondly, there is the notion of the cohesiveness of the group, which is the only guarantee, under the parliamentary system, of reasonably stable government. In the absence of well-developed parties, the notion of standing or falling together awakens no natural response. On the other hand, personal loyalties tend to be strong, and there was no reason to think that this aspect of Cabinet Government would not take root. Thirdly, the concept of collective responsibility to the legislature evokes a further set of constitutional conventions relating to the consequences of delegating executive responsibility to individual ministers, the extent to which the legislature should intervene to redistribute or otherwise circumscribe executive powers, and the effect of any such intervention on the principle of collective responsibility. It was felt that the codification of these conventions in MI would be the most helpful way of adapting the parliamentary model to a US context, so that, in a limiting situation, the courts might be able to find, in the provisions of the Constitution itself, a means of determining the boundaries between the legislative and executive functions. Accordingly, the Constitution contains a provision which seeks to state explicitly the essential duality of the parliamentary system. Article V, s.1(2) provides:

Subject to law, the Cabinet may exercise elements of its executive authority directly, or through its individual members, and through other officers responsible to the Cabinet; but neither the provisions of any such law, nor any delegation of elements of the Cabinet's executive authority shall have the effect of diminishing the responsibility of the Cabinet and each of its members to the Nitijela for the direction and implementation of executive policies.

In the MI Constitution there is also a non-limiting description of the content of executive authority (Art.V, s.1(3)). The purpose was partly to make up for the lack of any actual experience of executive government, and partly to overcome doubts which might have arisen from the differences in law and practice relating to the functions and powers of the executive under the Westminster and US systems. In some cases, the Marshallese wished to retain the division between executive and legislative
responsibility found in the US Constitution. Thus, no treaty may be
finally accepted and no ambassador or other head of diplomatic mission may
be appointed without the approval of the Niti jela (Art.V, s.1(3)(d)).

Even in Niue, there had been reason to set out specifically some
elements of the executive function. In the days when executive
responsibility was first being practised, it was threatened by out-of-date
provisions and vestiges of practice which seemed to give NZ Ministers and
officials a controlling voice in such matters as the determination of
education policy and its implementation through the allocation of finance
and teaching staff. While these continued to be circumscribed by the
limits of NZ financial aid, it was important to indicate that the
priorities should be set by the Government of Niue (see Quentin-Baxter
1971:paras.50, 51).

As a reminder to the Cabinet of its own duties, as well as a
continuing reminder to NZ of the nature of self-government, the Niue
Constitution provides that the Cabinet shall be responsible for maintaining
health, education and other social services in Niue (Art.61). These
provisions are paralleled in the MI Constitution (Art.V, s.1(3)(g), (h),
(i)) which emphasises also the notion that the enjoyment of health care,
education and access to legal services are individual rights worthy of
protection under the Bill of Rights (Art.ii, s.15).

The result is that, in Niue, only the political process monitors the
Cabinet's determination of what it considers necessary to provide a
reasonable standard of living for the people of Niue. In MI, the courts
also have been given a general overview of the exercise of aspects of this
function, but in terms that do not invite them to intervene deeply in
budgetary processes.

Both Constitutions make provision for the Legislature to pass a vote
of no confidence in the Cabinet. That of Niue codifies the classical
principles. A positive motion of confidence may be moved by a Member of
the Government, and a motion of no confidence may be moved by any
backbencher; but the question of confidence must be raised specifically,
and only after prior notice (Art.6(1), (2)). It is not possible, except
indirectly, to treat a particular issue as one of confidence; and
therefore no constitutional consequences flow from the defeat of the
Cabinet on such an issue. A Premier defeated on a motion of confidence is
deemed to have tendered his resignation, but he has always the right to
appeal to the electorate by asking for the dissolution of the Legislative
Assembly (Art.6(3)). To prevent this provision being used to defeat the
wishes of the voters as expressed in a general election, the right to
request a dissolution does not arise until after the Assembly has
deliberately committed itself to a Premier and his Cabinet. On the other
hand, the Premier has no right to improve his political situation by
calling for an early general election; but he has the option of
determining the actual date of dissolution within the last three months of
the life of the Assembly (Art.26(1)(b)). The only other circumstance in
which the Assembly will not run its full three-year term is the case where,
after two attempts, the Assembly has failed to elect a Premier who is able
to take office along with the requisite number of other members of the
Cabinet. In such a case, the Assembly is automatically dissolved, and
another general election is required to be held (Art.26(1)(d)). In every
case of a dissolution, the continuity of government is maintained by requiring the Premier and other members of the Cabinet to remain in office until their successors are appointed (Art.3(2)).

The main elements of these provisions also appear in the MI Constitution (Art.IV, ss.12, 13; Art.V, ss.2(2), 4, 7). Understandably, however, no aspect of the parliamentary system gave the members of the Constitutional Convention more difficulty than the concept of a premature dissolution of the Legislature, accustomed as they were to the election of legislators who would serve for a fixed term. Even the notion that, following a premature dissolution, a general election and a session of the Nitijela might need to be held at a time of year other than the usual one gave rise to a certain amount of concern. More fundamentally, there was a feeling that, if a President defeated by a vote of no confidence had the right to appeal to the electorate, he would certainly do so, regardless of his prospects of success, or of the inconvenience and expense to which he would subject other candidates and the country as a whole. Eventually, the Convention delegates decided that there should be provision for the premature dissolution of the Nitijela, at the option of the President, only if it should become clear, after the adoption of two votes of no confidence followed on each occasion by an unsuccessful attempt to elect a new President, that the Nitijela would neither support the incumbent President and his Cabinet nor elect another President in his place (Art.IV, s.13(1)(a)). In the MI cultural climate where it is customary to hold in respect those in authority, a vote of no confidence was not seen as part of the normal functioning of the Legislature. It was thought of as a measure of last resort to protect the Legislature, and through it, the people, against possible tyranny on the part of the Cabinet.

THE LEGISLATURE

Longer experience of the legislative branch of government put both the Niueans and the Marshallese on more familiar ground; but in settling its details, geographical and cultural differences required different solutions.

In Niue, which had long lost its original chiefly system, there was no reason to consider anything but a unicameral legislature. NZ experience had not encouraged any belief in the utility of a second chamber in a unitary state, without other elements in society which might provide a different basis of representation.

MI also decided to perpetuate the unicameral Nitijela, which was already functioning in the District; but this was not an outcome which could be taken for granted. The decision accorded with a general, though not universal, acceptance of the idea that MI should not be a federal state. The attachment to institutions of local government is, however, very strong. The Constitution recognises in an unusual, though not entirely novel way, that the people of every populated atoll or island have the right to a system of local government (Art.IX, s.1(1)). It is implied that, if such a system of local government is not given under the law emanating from the central government, the people may give themselves such a system, pursuant to the customary, and, it may be argued, the common law, both of which form part of MI law (I Trust Territory Code ss.102, 103; see
also Roberts-Wray 1966:153-57). Nevertheless, the division of authority between local and central government is a matter for political rather than judicial determination (Art. IX, s.2) and there was no disposition to create a bicameral legislature in which the various atolls and islands would have been represented on a basis of equality, as well as on a basis of population. To the extent that there was any support for a second chamber, it was seen as a way of giving a suitable status and function to the highest ranking group of traditional leaders, the iroijlaplap. In the District Legislature, eight seats out of twenty-four were reserved for those leaders (Charter of the MI Nitijela (1968) ss.2, 3). The first question was whether this privileged position should be perpetuated, or whether any voter should have the right to be elected to any seat in the Nitijela, on a basis of equality. The majority of delegates favoured the latter solution, provided a place of honour could be found, within the Constitution, for the traditional leaders. Few delegates favoured the creation of a House of Iroij which would share the taxing and spending powers of a fully representative lower house. They were, however, ready to give a Council of Iroij an advisory role, including the right to call for the reconsideration of any bill which had been adopted on the third reading, other than an appropriation bill (Art. III, s.2). An enormous amount of time and effort went into settling the arrangements for membership of the Council of Iroij, taking account of custom and tradition (Art. III, s.1(2)-(8)). Even so, several of the iroijlaplap realising where political power would reside, have since preferred to enter the electoral contest for a seat in the Nitijela rather than claim a seat in the Council of Iroij.

As to the composition of the Legislature, it was settled doctrine that, in Niue, every village, and in MI, every inhabited atoll or island should be separately represented (Niue Art. 16(2)(b)(i); MI Art. IV, s.2(1)), even though, in some cases, the population was so small that the principle of equal representation was severely breached. In each Constitution, an attempt was made to counter to some extent the effect of the disparity of the number of voters in the various electoral districts. In Niue, six "common-roll" seats were created, so that every elector, in addition to voting for a single candidate for his own village constituency, had the right to vote for six candidates standing for election in a constituency comprising the entire island (Art. 16(2)(b)(ii)). The intention was that, in this way, the total membership of the Legislative Assembly would be more representative of the people as a whole, opportunities for election would be given to people who, perhaps, could not hope to win election within their own villages, and the Assembly would develop more of a national outlook (see Quentin-Baxter 1974:para.25).

In MI, the delegates gave the more populous atolls multiple representation (Art. IV, s.2(1)). They also gave a choice of voting either on the basis of residence or on the basis of the possession of land rights in a particular atoll (Art. IV, s.3(3)). The expectation was that voters living in the larger communities, but possessing land rights in smaller ones, might register in the atoll or island where their votes would count more. As many Marshallese have land rights in a number of different atolls and islands, the scope for a redistribution of voters in this way is quite large. To control abuses, such as swamping a particular electoral district in anticipation of an election or bi-election, the Constitution expressly
recognises the power of the Nitijela to make laws prescribing the mechanism for making a change of voter registration (ibid.).

Each Constitution embodies the principle that, if the Legislature reapportions the electoral districts, any such reappointment shall reduce, rather than increase, the disparity in the number of voters in each district (Niue Art.16(3), proviso (c); MI Art.IV, s.2(3), (4)). In MI, the Nitijela has the duty of considering the question of reapportionment at intervals of not less than ten years (Art.IV, s.2(6)).

In Niue, geography permits the Assembly to meet at short notice and for short periods; and the Premier has the right to convene the Assembly at any time (Art.22(1)). In MI, there was a desire to maintain the practice of meeting in regular session on a fixed date, but the President may convene a special session (Art.IV, s.10(1), (4)). In both countries, the Legislature must meet whenever the election of a Head of Government is required (Niue Art.4(2); MI Art.IV, s.10(2)) and, if the Legislature has not met for some time, a minority of the backbench members may require a meeting (Niue Art.22(1); MI Art.IV, s.10(3)).

In a closely-knit community, with inherited concepts of loyalty and disloyalty to those in authority, one of the hardest distinctions for the majority and minority alike is that between political opposition on the one hand and, on the other, support for the institutions which permit that opposition to be organised and voiced. In recognition of this, the MI Constitution requires the Rules of the Nitijela to ensure that there is an opportunity for all points of view represented there to be fairly heard (Art.IV, s.15(2)). The Speaker, whose role had to change from that of political leader of the majority to presiding officer only, is responsible for ensuring that official business is carried out in compliance with the Constitution and the Rules, and is required to exercise his functions impartially (Art.IV, s.8(2)). Because under each Constitution the Speaker's functions include a number of formal actions evidencing or implementing constitutional mechanisms (Niue Arts.4(2)(b), 5, 7(1), (2), 8(1), 9(1), (2), 22(1), 26, 34(1)(b), 35(1)(c); MI Art.III, s.3(4), (9); Art.IV, ss.6(1)(c), 10(2)(3), 21(1)(b); Art.,V, ss.4(1), (2), 6(1), (2), 8(2), 9(1), (2); Art.XI, ss.3, 4(1), (7), 5) there are provisions to ensure that, in the absence of the Speaker, someone is always available to discharge the functions of the office (Niue Art.20(7), (8), (9); MI Art.IV, s.8(3), (4), (5)).

Again on the theme of impartiality, both Constitutions recognise that the legislative branch of government may have difficulty in dealing judicially with the rights of individual legislators and voters, and of members of the public who are alleged to have acted in contempt of the Legislature. In each country, these questions are required to be dealt with by the courts (Niue Art.24(5), Assembly Ordinance (1966) s.90; MI Art.IV, ss.9, 15(12)).

At the same time, both Constitutions embody the common law principle that the courts may not call into question the internal proceedings of the Legislature (Niue s.24(1); MI Art.IV, s.16(1)). Under both, it is left to the courts to draw the fine line between non-interference with the legislative branch of government and their right to determine whether an instrument purporting to be a legislative Act has indeed that character
THE JUDICIARY

Niue and MI were faced by the same concerns and problems in making provision in their Constitutions for a judicial system. In the first place, how could such a system be established, without undue reliance on outsiders, and with guarantees of the competence and independence of judges, in a small country with, for the time being, almost no legally-trained people amongst its own population? In the second place, there was a felt need to make special provision for the determination, in a knowledgeable forum, of rights pertaining to land.

Niue was able to perpetuate, in large measure, existing arrangements which institutionalised the assistance of NZ courts, either by requiring the court itself to function also as a Niuean court, or by making its judges available to serve as members of a Niuean court. Thus, while the High Court of Niue is established under the Constitution as a court of record with unlimited jurisdiction (Art.37) there is a right of appeal from the High Court to the NZ Court of Appeal (Art.51) (applying, naturally, the law of Niue).

The MI court system, on the other hand, is self-contained, comprising a High Court of general jurisdiction (Art.VI, s.3(1)) from which there is a right of appeal to a Supreme Court (Art.VI, s.2). Unlike many courts of appellate jurisdiction, the Supreme Court is to consist of a single judge, the Chief Justice of the Supreme Court, unless and until the Nitijela makes provision by Act for additional judges of the Supreme Court (ibid.). Corresponding provisions establish both the MI High Court and the High Court of Niue, each of which may comprise only a Chief Justice (Niue Art.38(1); MI Art.VI, s.3(1)).

This element of flexibility in the court structure was a first step in coming to grips with the practical difficulties. A second step was to avoid specifying in the Constitution a need for legal training or experience as a qualification for judicial office (Niue Art.38(2); MI Art.VI, s.1(4)). The third step was to make a reasonable compromise between two competing considerations: the strengthening of judicial independence by providing for security of tenure and the need to be able to draw, at least in the immediate future, on the services of legally-trained non-citizens. Under the Niue Constitution, the compromise involves a choice between substantive appointment, with the right to hold office until the age of sixty-eight (Art.46(1)) or temporary appointment for a term of not more than one year (Art.47). The same kind of choice is permitted by the MI Constitution, except that only a person who is not an MI citizen may be appointed for a specified term. If a citizen is appointed a judge, he holds office, during good behaviour, until he reaches the age of seventy-two (Art.VI, s.1(4)). Each Constitution contains provisions limiting the grounds on which a judge may be removed from office (Niue Art.49; MI Art.VI, s.1(8)) and providing for the fixing of judicial salaries by Act (Niue Art.50; MI Art.VI, s.1(7)).
The Niue Constitution vests the substantive power to make judicial appointment in the Cabinet (Art.45) but in MI, the Cabinet must act in accordance with the recommendations of the Judicial Service Commission (Art.VI, s.1(4)) (comprising the Chief Justice, the Attorney-General and an MI citizen appointed by the Cabinet (Art.VI, s.5(1))). Judicial appointments also require the approval of the Nitijela (Art.VI, s.1(4)).

Under both Constitutions, provision is made for a special court having jurisdiction to determine questions concerning the title to land and related questions governed by the customary law. In Niue, it was a matter of making provision in the Constitution for two courts which had been functioning for many years - the Land Court (Art.40) and the Land Appellate Court (Art.43) and the main provisions of the existing law were followed without being called in question. In contrast to the situation in Niue, in MI there had not been, at least in the period of the Trusteeship, any special court to deal with matters relating to land. An assessor might sit with a judge presiding in the Trial Division of the High Court, to advise him in regard to the local law and custom (5 Trust Territory Code s.353) but there was clearly a wide-spread feeling that decisions in land matters had not always taken full account of the nuances of the applicable customary law. The delegates therefore wished to establish a Traditional Rights Court. As the Convention did not have at its disposal the time and knowledge to deal definitively with all aspects of the composition and functioning of such a court, the Constitution sets out a framework within which they may be determined by Act, and, pending that, by the High Court. The Traditional Rights Court consists of panels of three or more judges fairly representing the different classes of MI land rights. It does not have original jurisdiction but a party to a proceeding in another court may invoke jurisdiction as of right. The determination by the Traditional Rights Court is referred back to the originating court, where it must be given substantial weight, but it is not to be deemed binding unless the originating court concludes that justice so requires (Art.VI, s.4).

Despite the provision for the maximum involvement in the administration of justice of Niueans and Marshallese who may not have legal training, both countries will, for the time being, have to rely to some extent on the services, as counsel or judges, of lawyers from other jurisdictions. This will call for a special effort on the part of those lawyers to get inside the skin of the relevant Constitution and legal system, and to remember that it must be allowed to operate in its own social and cultural setting. Specifically, this may require of the NZ-trained lawyer the unfamiliar task of weighing legislative or executive action against the requirements of a Constitution which is supreme law. US-trained lawyers are thoroughly familiar with the techniques involved; but they in turn may be tempted to rely too heavily on their own jurisprudence and social climate. On the other hand, the readiness of US courts to look at the legislative history as an aid to interpretation is a precedent which almost certainly will be followed, at least in MI, with beneficial results.

The MI Constitution contains directives which express the need to achieve a correct balance among possibly competing influences on judicial behaviour. It requires a court, in interpreting and applying the Constitution, to look to the decisions of courts of other countries having constitutions similar, in the relevant respect, to MI. It is not, however,
bound by any such decision and in following it, a court shall adapt it to MI needs, taking into account the Constitution as a whole and the circumstances in the country from time to time. The Constitution further requires that, in all cases, its provisions shall be construed to achieve the aims of fair and democratic government, in the light of reason and experience (Art.1, s.3). There are no such express directives in the Niuean Constitution. Equally, however, in interpreting that instrument and the governing Niue Constitution Act, there is need to focus on their special purpose and status in the law of Niue. Their interpretation will almost certainly call for a wider frame of reference than that which might ordinarily circumscribe, under NZ law, a decision on a question of statutory interpretation.

THE PROTECTION OF HUMAN RIGHTS, COMMUNITY VALUES AND RIGHTS TO LAND

On the framework provided by the three branches of government, the two Constitutions build their own structures to protect individual rights and to preserve and strengthen the values of the community.

In MI, thirty years' exposure to US administration and education, the existence of a Bill of Rights in the Trust Territory Code (ss.1-14) and the invocation of the American Bill of Rights in the US courts to protect important community values in MI (e.g., actions initiated in an effort to halt nuclear weapons testing) put beyond a shadow of doubt the inclusion of a Bill of Rights in the Constitution and the role of the courts in enforcing it. The only question was the terms in which it should be framed. Opinion polarised between word-for-word adherence to the unqualified assurances apparently conferred by the US Bill of Rights and a more cautious formulation which would reflect two considerations. The first was that, in the US, the rights so briefly formulated had been extensively interpreted by the courts to adapt them to changing conditions, and to strike a balance between the competing rights of individuals, and between individual rights and the collectivity of rights embodied in the state. The second flowed from the first: an anxiety that the rights developed and the balances struck in the US might be imposed on the very different MI society in ways which might damage its functioning or even threaten its continued existence. In response to the latter point of view, a draft was introduced at the second session of the Convention indicating the restrictions which other codifiers had placed upon particular rights in order to take account of the rights of others. The draft drew on such sources as the European Convention on Human Rights and the Bill of Rights in the WS Constitution. When people in MI saw that, in general, this draft failed to prescribe the tests by which the reasonableness of permitted restrictions might be judged, they reacted sharply. It became clear that the US Bill of Rights should serve as the model.

The result, in the Constitution finally adopted, is a catalogue of positive guarantees, repeating, spelling out and supplementing the familiar succinct assurances of the US Bill of Rights, and setting out the criteria by which the courts are to judge in a particular case the reasonableness of permitted categories of restrictions on their exercise. These criteria, based on decisions of the US Supreme Court but adapted to MI conditions, have the effect of making unlawful any restriction that does not fulfil the conditions laid down. In codifying and adapting to the different
conditions of a different society history's best-known and most influential constitutional guarantees of individual liberties, the MI Bill of Rights breaks new ground. On this account, it should have considerable precedential value.

By way of contrast, the Niue Constitution, proceeding on the Diceyan view that the right to individual freedom is inherent in the ordinary law of the land, dealt with the possibility that changes in the law made by statute might impinge on this freedom. Before changes were made, both the Legislature and the public should have access to specialised advice. Although there was no inclination to give the High Court a judicial role in considering the effects of legislation, there seemed every reason to call on the Chief Justice to make his expertise available in an advisory capacity. Accordingly, before proceeding on a bill dealing with the constitution and jurisdiction of the courts, the substance and procedural aspects of the criminal law and questions of personal status, he must be given an opportunity to make comments on the legal, constitutional and policy issues raised by the bill. In order to give him the opportunity of preserving his judicial role in possible future litigation, he is, however, given unrestricted freedom in deciding whether and to what extent he should respond (Arts.31, 55).

The techniques used in each Constitution to protect individual rights were also invoked to protect community values. That must already have become apparent from references to the MI Bill of Rights provisions dealing with such matters as health, education and legal services (see above). The mechanism of requiring a formal inquiry and published report as a preliminary to legislation was also used in both Constitutions in other contexts where issues of public sensitivity were likely to arise. These included, in Niue, changes in the law relating to the management of the public service (Art.32); in MI, the enactment of legislation prescribing the qualifications of judges (Art.IV, s.20); and, in both countries, the making of the mandatory legislative provision fixing the levels of remuneration of the holders of high office (Niue Art.25; MI Art.IV, s.19).

The same techniques were also used in both countries to give constitutional protection to the rights to land. In each case it was recognised that the Legislature might need to pass laws affecting land rights. In Niue, the objective was likely to be provision for the use of land left idle by its owners when they took advantage of the open door to NZ. In MI, there was a felt need for legislative codification and development of the customary law (Art.X, s.2(1)). In both places, safeguards were desired. In Niue, a Commission of Inquiry must report before the Assembly proceeds on any bill relating to land questions (Art.33). In MI, a joint committee of the Council of Iroij and the Nittjela must be given a reasonable opportunity to make a similar report (Art.X, s.2(3)). There, also, the customary law duty to consult representatives of all classes of owners before making any disposition of land became a constitutional requirement (Art.X, s.1(2)). Finally, the Bill of Rights came to the aid of the customary law by drastically curtailing the power of eminent domain. Article II, s.5, protecting property from confiscation, places stringent restrictions on any taking of land for public use and provides that if land is taken, the basis of compensation is to be sought in the value of land in Marshallese society and not in the irrelevant Western concept of fair market value.
Conversely, the customary law, enshrining a hierarchical system of land rights, had to be protected from attack under a Bill of Rights guaranteeing to all persons equality under the law (Art. X, s. 1(1)).

THE PUBLIC SERVICE AND ITS SENIOR OFFICERS

In Niue, the composition and role of the Public Service Commission (PSC) and the basis of employment in the public service went to the heart of anxieties about a future in which NZ's controlling hand would be removed. In the period before self-government, the public service, which offered almost the only opportunity for salaried employment, was under the control of the NZ State Services Commission (SSC). There was deep attachment to the principle that public service appointments, promotions and gradings should be made independently of any political influence. The first position of members of the Niue public service was to insist on maintenance of the SSC's role (see Niue CCD 1972:para.15). Nevertheless, despite amendments to the law requiring it to account to the Government of Niue for its overall management and salary policies (Niue Act (1966) (NZ) s.664 as repealed and substituted Niue Amendment Act (1971) (NZ) s.12) this body had not, in the period before self-government, responded fully to its dual responsibilities.

When the Constitution was drafted, it was decided that, as an encouragement to greater awareness of the importance of the public service to Niue's economic and social development, a Niue PSC should be created. This body comprises the Chairman and one other member of the NZ SSC and, although the third person is required to be a person having special knowledge of Niue, that person is also appointed by the SSC (Art. 64). Thus, in response to the wishes of the people of Niue, there is still total outside control of the Niue PSC, and almost total identity with the NZ body. The Constitution guarantees that all appointments to the Niuean service shall be made by or on the authority of the Commission, which is required to act independently in making all decisions about individual employees (Art. 69).

The attitude of people in MI towards the independence of the public service was a little more ambivalent. While independence was guaranteed under Trust Territory administration (61 Trust Territory Code) there were some who, in an atmosphere more keenly partisan than that in Niue, perhaps looked forward to the day when they would be free to follow the distant example of Washington and, at least in some degree, distribute spoils amongst those who had supported the victors in an electoral contest. Nevertheless, no voice was raised in the Constitutional Convention to dissent from a proposal that the MI public service should be independent, under the control of a three-member Commission, with much the same, or even more assurances that it would act on an independent and non-discriminatory basis than those which would apply in Niue (Art.VII, ss.1, 5, 10, 11).

Much will depend on the choice of members of the PSC, at least two of whom must be MI citizens, and on the extent to which they are able to work free of political and other pressures. In sum, the mechanism is available to maintain freedom from political patronage in MI if that is felt to be desirable. At the same time, members of the Cabinet are entitled to be advised by senior public servants whose loyalty to the Government in office
is not in question. It will be for the people themselves to decide how far they wish to exercise the self-restraints on which the independence of the public service ultimately depends.

Like those of other Pacific countries, both Constitutions provide for the office and co-ordinating role of the senior official of the public service - in Niue, a Secretary to the Government (Art.63) and in MI, a Chief Secretary (Art.VII, s.2). In Niue, the establishment of this post was seen as an essential element in continuing to discharge the administrative and advisory responsibilities formerly vested in the Resident Commissioner. It would ensure efficiency and overall co-ordination of various spheres of government activity and relieve the Cabinet and individual Ministers of any involvement in day-to-day administration. At the same time, the Secretary to the Government would exercise, and encourage departmental heads to exercise, an advisory role in the formulation of policy by individual Ministers and by the Cabinet (Niue CCD 1972:para.14). To enable him to discharge this last-mentioned responsibility, innovative provisions facilitate his attendance at meetings of the Cabinet (Art.12(3), (4)).

In MI, where the District Administrator had full responsibility for the executive branch of district government up to the moment when the Constitution came into force, and there was no practical experience of the working of the Cabinet system, there seemed every reason to include corresponding provisions, and to extend them by conferring similar rights and responsibilities on two other senior officials, the Attorney-General and the Secretary of Finance (Art.V, s.10(4), (5)). The Attorney-General, acting independently of any political direction, is required to advise the Government and its members on legal matters and to be responsible for instituting, conducting or discontinuing proceedings for offences. Reflecting the duty laid upon the executive branch of the US Government, he is also responsible for "seeing to it that the laws are faithfully executed" (Art.VII, s.3). He is given standing, acting in the name of the people of MI, to bring any violation of the Constitution before the courts (Art.I, s.4). On the Secretary of Finance rests the duties of preparing the public accounts and advising the Minister of Finance on all matters pertaining to the budget (Art.VII, s.4). These duties reflect the financial responsibilities of the Cabinet under the parliamentary system.

Here the Constitution bit hardest into established practices. The NitiJela was accustomed to playing some part in scrutinising the District Administration's proposals for the expenditure of US grant funds, but no corresponding budgetary mechanism had evolved in relation to local revenue which was at the disposition of the NitiJela. Individual members introduced appropriation bills for purposes to which they attached importance, and they were sometimes able to demonstrate that they had been instrumental in obtaining tangible benefits for their constituents.

In these circumstances, there was a first reaction of shock to the notion that, under the parliamentary system, no proposal for taxation or expenditure could be allowed to proceed without the backing of a member of the Cabinet (Art.VIII, s.2). Developed originally as a means of exercising ministerial control over the monarch's requests for supply, the principle can be taken for granted when the parliamentary system operates on a strict party basis. But when political allegiances are inchoate or shifting, the
financial responsibility of the Cabinet is the only way in which the Government is able to present to the Legislature a coherent financial policy. This carries with it an identifiable responsibility not only to the Legislature but also to the electorate. For that reason, as the Convention delegates came to realise, the play of political forces, within the ranks of the Government’s supporters as well as those of its opponents, would still affect the financial proposals put forward and adopted.

CITIZENSHIP

In the provision made for citizenship, Niue and MI had each to exercise their basic decisions about the relationship they desired to have with the former administering authority. The retention of NZ citizenship by the people of Niue is provided for (Niue Constitution Act (1974) s.5). In the law of Niue, this provision forms part of the Constitution and may be amended only by the most stringent of the procedures for amendment (Art.35(1)(b)(i)). In NZ law, it is on the same footing as any other Act of Parliament, but it represents also a solemn assurance to the Government and people of Niue by the NZ Government.

The people of MI, having rejected the idea of US citizenship, had to make provision for a citizenship of their own. The first step was to decide which Trust Territory citizens should become MI citizens on the entry into force of the Constitution. Surprisingly, the administering authority took no interest in this question, and each Micronesian entity decided for itself who should acquire its citizenship. It is not impossible, therefore, that cases of statelessness may arise. The second question was to settle the basis on which citizenship would be acquired by children born after the entry into force of the Constitution. The Convention delegates were clear that, in both contexts, citizenship should go, and only go, with rights to land. They therefore rejected the principle of *ius soli*, applied in US law, and followed the principle of *ius sanguinis*, without limiting its application to successive generations born outside MI (Art.XI, s.1). This approach was clearly inconsistent with any general outlawing of dual citizenship, but, as it may be inconvenient that persons who have lost all touch with MI will nevertheless be citizens by birth, as well as citizens of another country, the law may impose the requirement of election in such cases (Art.XI, s.3). Persons not automatically becoming citizens but having a real connection with MI may become citizens by registration (Art.XI, s.2).

AMENDMENT OF THE CONSTITUTIONS

The Niue Constitution, deriving its legal force from an NZ Act of Parliament, is in the British Commonwealth tradition of constitution-making for former dependent territories. Although NZ had fostered the exercise of autochthony in the former Trust Territory of WS, it was not inappropriate that the Niue Constitution, like that of CI, should be created without any break in legal continuity. The goal was not Independence but a form of free association involving the maintenance of a constitutional link. Nevertheless, by recognising that Niue should be self-governing and that the Constitution should be the supreme law of Niue, the NZ Parliament put it beyond its own powers to alter the Constitution, or make other changes
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in the law of Niue. Under the Constitution, the Legislative Assembly is
the only body with the power to make, or in the case of constitutional
amendments, to initiate, such changes (Niue Constitution Act (1974) (NZ)
ss.3, 4(1), 8; Arts.28, 35, 36).

By a different route, a similar situation was reached in the law of
MI. The people there wanted to make a break with the past. Therefore, in
keeping with US experience and legal doctrine, they wished to give
themselves their own Constitution, which would derive its force solely from
its adoption by the representatives of the people meeting in constitutional
convention, and its subsequent approval by a majority of the people in a
referendum. The steps taken under US law to recognise the Constitution did
not purport to confer on it the force of law (Secretarial Order No.3039).
Thus the US officials acknowledged its inherent authority; but they had
more difficulty in accepting the implications of its status as the supreme
law of MI (Art.I, s.1).

With the realisation that the Constitution would come into force
before the termination of the Trusteeship, and wishing to protect its
supremacy, the Convention delegates had included a mechanism for the
modification of the Constitution during the period that the Trusteeship
Agreement continued to be part of MI law (Art.XIII, s.4). Although the US
authorities asserted that they retained legal authority to make these
modifications by virtue of US law as it applied to the Trust Territory, it
was not easy to controvert the argument that, if the Constitution had any
validity at all, it had the effect of creating a separate MI legal system.
At length, it was agreed that in accordance with the procedure laid down in
the Constitution, an Act of the Nitijela would recognise the modifications
set out in a Secretarial Order (Public Law 26-23-2 (1979) s.3 as
supplemented by Resolution No.7, cl.6 of the MI Constitutional Convention
Transition Committee (30 April 1979)). That Order would itself confirm the
Nitijela Act (Secretarial Order No.3039). This procedure preserved intact
the principle that the Constitution may be amended only by the procedures
laid down in the Constitution itself.

In considering these procedures, it was necessary, in both Niue and
MI, to take account of the importance which people attached even to
questions of detail in each Constitution. In both cases, people wished to
have assurances about the way their institutions of government would
actually work. The MI Constitutional Convention made a conscious decision
not to leave large questions of government structure or process unsettled,
or to make too much depend on action by the Nitijela in the first few years
of self-government. There was therefore a desire to make the details as
well as the broad principles, relatively hard to change. In Niue, any
amendments, and in MI, all but major amendments, may be proposed by bill in
the Legislature. The bill must be passed on second and third readings by a
two-thirds majority, with an interval of three months between the two
readings to allow time for informed public debate. Except in the case of
major amendments, the bill will come into force when it has been approved
by a majority of voters in a referendum (Niue Art.35; MI Art.XII, s.3).

In Niue, major amendments comprise any alterations to the provisions
of the Niue Constitution Act concerning the basis of self-government in
free association with NZ, to the making of appointments to the public
service and to the amendment procedure itself. Amendment of those
provisions requires approval by a two-thirds majority in the referendum (Art.35).

In MI, there was a strong feeling that the basic principles of the Constitution should be alterable only by a procedure demonstrating even more clearly than those followed in establishing the Constitution that the people were in favour of change. Consequently, the concept of major amendments was given a wide ambit (Art.XII, s.2). Such amendments must be approved by a specially convened constitutional convention and approved by a two-thirds majority in a referendum. There are provisions for the convening of such a convention either by Act of the Nitijela approved on second and third readings by a two-thirds majority or as a result of a popular initiative which must itself be the subject of a referendum. In either case, the convention is restricted to a consideration of proposals for amendment notified in the public petition or the empowering Act (Art.XII, s.4).

It would have to be said that the Constitutions of both countries are therefore rather rigid; but this was the only basis on which people were prepared to commit themselves to government by their own political leaders accompanied by, or preparing the way for, a change in their relationship with the administering authority.

THE RELATIONSHIP OF FREE ASSOCIATION WITH THE FORMER ADMINISTERING AUTHORITY

It is outside the scope of this paper to set out in detail the nature and effect of the relationship of free association which Niue already has with NZ and which MI is contemplating with the US (see n.2). There is, however, some value in identifying the boundary lines which are or will be fixed by the Constitutions of the two associated States and by the constitutional law of the former administering authority. Outside these limits, norms of international law will tend to govern relationships.

The starting point is the unlimited constitutional capacity which each Constitution confers on the executive and legislative branches of government. No gap in the legal system prevents them from entering into transactions with other states. The MI Constitution refers expressly to the responsibility of the Cabinet for conducting foreign affairs (Art.V, s.1(3)(d)). The same responsibility is implicit in the provision which empowers the Niue Cabinet to exercise on behalf of the Queen the executive authority of Niue (Art.2(2)). Each Constitution confers plenary legislative powers (Niue Art.28; MI Art.4, s.1) and contemplates their use to implement treaties (Niue Constitution Act (1974) (NZ) s.8; MI Art.5, s.1(4)).

This proposition leads on to the next: the powers conferred on each Government are exclusive. Neither Constitution gives to the former administering authority any executive or legislative competence in respect of either associated State. In this context, it is necessary to examine carefully the effect of s.6 of the Niue Constitution Act:

Nothing in this Act or in the Constitution shall affect the responsibilities of Her Majesty the Queen in right
Many things have, at times, been read into this provision which first appeared in the CI Constitution Act of 1964 (s.5). Although some legislators apparently believed then that it did impose unspecified limitations on the authority of CI, a careful analysis indicates that it did not have that effect. In relation to Niue, s.6 acknowledges that in the first place, the free association of Niue with NZ involves a constitutional link. Both countries owe allegiance to the Queen in right of New Zealand and form part of a single realm. This was a prerequisite to an arrangement under which the people of Niue would remain NZ citizens (Niue Constitution Act (1974) (NZ) s.5). Read in conjunction with Parliament's declaration that "Niue shall be self-governing" (ibid., s.3) s.6 was a reminder that the NZ Government would still have the constitutional authority to act for the realm as a whole, including Niue, in matters of external affairs and defence. For that purpose alone, the provision was scarcely necessary. Its main objective is to give an assurance to the Government of Niue of NZ assistance in the fields mentioned, in terms which embody the notions both of positive responsibilities and of powers held in trust. A later section of the Niue Constitution Act (s.8) requires NZ's responsibilities to be exercised only after consultation between the two Governments.

The need for NZ assistance did not arise simply from Niue's lack of the practical means to undertake responsibility for all aspects of its own international relations. At the time when the concept of free association was first evolving, the expectation was that NZ and its associated States would constitute a single international personality which might sometimes need to be engaged in the interests and on behalf of an associated State. In this idea lies the real impact of s.6. On the other hand, the fact that NZ would still be able to act internationally for Niue was not seen as presenting any impediment to the development of Niue's own international personality. Niue is free to have dealings with other members of the international community to the full extent that they are willing to have dealings with Niue. Section 6 does not impose any constitutional limitation on the executive and legislative powers conferred on Niue by its own Constitution in the fields of external affairs and defence. Nor is it a reflection of any agreement between the two Governments that the Government of Niue will refrain from exercising its legal powers. The most that can be said to arise from the relationship of free association is a commitment on the part of both Governments to consult each other before acting in ways which may affect the interests of the other, remembering always that if either should feel that the conduct of the other is incompatible with the continuation of the relationship, it is free to bring that relationship to an end (Niue, by constitutional amendment in accordance with Art.35 and see n.2).

Finally, s.6 does not give the NZ Parliament or Government any legislative or executive power within Niue to carry out commitments made on the latter's behalf in relation to external affairs or defence (Niue Constitution Act (1974) (NZ) s.8). Again, it is implicit in free association that Niue will honour those commitments in its executive policies and, if necessary, by legislative action.
When the governments of other states make an engagement with Niue intended to have effect at international law, they contribute to a growing body of practice tending towards the recognition in international law of the international personality of a self-governing, freely associated state. The recently adopted Law of the Sea Convention demonstrates the willingness of the international community to acknowledge in terms that self-government, establishing constitutional competence over matters dealt with in an international instrument, should be accompanied by recognition of the capacity to become a party to that instrument. (Both Niue and MI, even before the termination of the Trusteeship Agreement, will be entitled to sign and ratify or to accede to the Convention). The terms of the draft Compact of Free Association between the US and each of the self-governing States in Micronesia suggest that the trend is likely to accelerate.

There is express recognition of the capacity of the Micronesian Governments to conduct foreign affairs (Draft Compact ss.121-124), and it is clearly the expectation that they will do so, subject only to their commitments of forebearance in matters bearing on defence and security for which the US Government has "full authority and responsibility". The "authority and responsibility" seem, however, to involve assistance, operating rights and the "option to foreclose access" (ibid.: ss.311-316) and cannot in themselves be taken as an indication that the US will retain a continuing capacity to speak internationally for MI in these or any other areas. On the other hand, the provision concerning the effect of both past and future defence treaties and international security arrangements (ibid.:s.331) does suggest that here, at least, US commitments made after consultation may continue to bind the Micronesian States. This possibility seems also to be contemplated under a provision which recognises that the US Government may "assist or act on behalf of" the Micronesian States, but the subsequent denial of responsibility to third states "unless expressly agreed" suggests that this assistance is likely to be given mostly on an agency basis (ibid.:s.124).

It can be said with certainty that the relationship with the US created by the draft Compact does not involve any continuing constitutional link. Free association is the product solely of an agreement which recognises that the Micronesian States are self-governing (ibid.:preamble, s.111). No US institution or authority is given in any Micronesian State any power which purports to supercede or over-ride the powers of government conferred by its own Constitution. In MI, as in Niue, the self-contained, exclusive powers and authority conferred by a Constitution that is supreme law provide a safeguard that everything done within an associated State as a result of the rights and obligations flowing from free association is the product of its own voluntary agreement, implemented, where required, by provisions in the domestic law made by its own legislative organs.

It will be for international law to measure the effect of the Compact provisions on the international personality of MI and on that of the US in relation to MI. In their case also, as in the case of Niue, developments in practice will be relevant. Here, it is important that international law should expand to fill the gaps left when constitutional competence contracts. This proposition has relevance in two contexts. If the responsibility of the parent state for the international relations of the associated state is limited, it would be a travesty if that state were not able to enter, in its own right, into as wide a range of international
relationships as is compatible with free association. The draft Compact shows clearly a contraction of US responsibility for the international relations of the Micronesian States. Such a contraction may well occur in the case of Niue also, despite the maintenance of allegiance to a common sovereign. This is illustrated by the development of the international personalities of the self-governing Dominions of the British Commonwealth long before the divisibility of the Crown, or indeed the autonomy of their own legal systems, was fully recognised.

Practice within the British Commonwealth also suggests that when the constitutional links between the partners in a free association are non-existent or their significance is diminishing, international law will take the place of the former domestic law remedies and relationships. In the period before World War II, the self-governing Dominions saw themselves as having a fully developed international personality, but they did not think of their relations with one another as being governed by the norms of international law. Over a period, various elements contributed to the withering of this *inter se doctrine*, as it was known, and, in the post-war period, the Commonwealth countries have regarded their contractual commitments to one another as international treaty relationships.

There is evidence of a similar development in the relations between NZ and its freely associated States (e.g., a civil aviation agreement entered into by the Government of NZ and CI in 1968). The partner Governments make agreements which are indistinguishable in form from treaties, and do not appear to be intended for enforcement under the domestic law or in the courts of either of the parties. Much more explicitly, the terms of the draft Compact show that the parties desire the principles of international law to be applied in determining questions about their relationship (ss.152, 311(c), 424(d)).

The right to claim the protection of international law principles is an important safeguard for associated states. Within their own legal systems, their constitutions can protect them, but this is not so in the legal system of the parent state. In that context, an associated State like Niue faces the possibility that the doctrine of the sovereignty of Parliament might be seen as cutting across the grant of self-government. An associated State like MI is at risk in a different way. When Congressional approval has been given, the Compact will be part of US domestic law and may be interpreted and applied by its courts. At the same time, other protections formerly afforded by the law of that country, especially the Bill of Rights, will be, to a large extent, withdrawn. It is essential that the new relationship of free association is not thought of as operating in a kind of no-man's-land where no writ runs, under either constitutional or international law. The ultimate safeguard, the right to move at any time to full Independence, international law already guarantees (see, e.g., UN General Assembly Resolutions 1514(XV); 1541(XV) (1960) re the decolonisation of CI). Here the Constitutions have a supporting role, because they are in all respect as ready to serve the needs of independence as those of free association. In conclusion, one can suggest an answer to the question: "What distinguishes a freely associated state from an independent state?" Not, it seems, the existence of a constitutional link between the partners, and not necessarily the inclusion of the associated state within the international legal personality of the state with which it is associated. The elements are, it is submitted, first, an agreement
between the two governments which involves, perhaps, a greater degree of commitment on the one hand and of forebearance on the other than is usual in relations between independent states. For the rest, free association is not regarded as affecting the relationships of the associated state with the outside world, where its position seems likely to be assimilated more and more to that of an independent state. Free association is the hallmark of a special relationship between the partners. Even though international law standards may apply, they are still not "foreign", one to the other. There is a subjective, qualitative element, as well as a quantitative element, in the relationship. The mutual forebearance needed to make a relationship of free association work requires a basis of shared values. For Niue and MI, the future depends on the depth of the sharing and how long it is sustained.

NOTES

1 In 1970, Professor R.Q. Quentin-Baxter (Victoria University of Wellington) was appointed as constitutional adviser to the Niue Island Assembly and retained this position until after the Niue Constitution had entered into force in October 1974. He was assisted by his wife, the author of this paper. In 1977, Professor and Mrs Quentin-Baxter were asked to advise the MI Constitutional Convention. The former was able only to give assistance from time to time, but the latter was appointed Counsel to the Convention and worked with it throughout its three sessions. As it was always clear that a constitution founded in a legal system inherited from the US should not be drafted without the help of an American constitutional lawyer, Professor Laurence Tribe (Harvard University) was, in 1978, appointed as a consultant and requested to review the draft Constitution as a whole, paying special attention to those provisions dealing with the judiciary and the Bill of Rights.

2 A Compact of Free Association between the US Government and the Government of Palau, MI and the Federated States of Micronesia (FSM) was initialed by the US and MI delegations in Hawaii on 14 January 1980, and was signed on behalf of the Governments of those two countries on 30 May 1982. It is to come into effect on the termination of the Trusteeship Agreement after approval by each Government in accordance with its constitutional processes, following in the case of MI, approval by the majority of votes cast in a plebiscite.

3 For the report of the UN visiting mission to Niue see UN General Assembly Docs.A/AC 109/L. 810 Rev.1; A/AC 109/L. 810/Add.1.

4 CI and Niue have been the only former non-self-governing Territories to become self-governing in free association with the former administering authority, in respect of which the UN has recognised, since the adoption of General Assembly Resolutions 1514 (XV) and 1541(XV) in 1960, the fact of decolonisation.

5 The referendum on the FSM draft Constitution was held on 12 July 1978. Of the MI votes cast, 6,217 (61.5 per cent) were against the Constitution
and 3,888 (38.5 per cent) were in favour of it. For the report of the UN visiting mission to observe the referendum see Official Records of the Trusteeship Council 46th Sess., Supp.No.2 (T/1795).

The agreement between the people of Niue and the Government of NZ concerning their relationship of free association is to be found in and between the few lines of the Niue Constitution Act (1974) (NZ). The NZ Parliament has the power to repeal at any time all or any of these provisions, but it would be a breach of faith to do so, as long as Niue wished to continue the relationship and was playing its part. For a further gloss on the nature of the relationship, see also the exchange of letters between the NZ Prime Minister and the CI Premier reprinted in Appendices to the Journals of the House of Representatives (NZ) Paper A.10(1973).
In British dependencies the tradition has been for the government of the dependency to formulate its independence constitution during a process of gradual constitutional development. Through successive stages relatively limited changes are made in the existing constitution so achieving an ordered transition from a government under colonial control to one under local control. The transition is increasingly arranged in a manner that is decided by elected representatives in the Colony – with the legislature proposing or endorsing changes and the executive concurring. The British Government while retaining formal authority for the constitution has come to treat its obligations as being to satisfy itself that this transformation of the constitution has the support of the Colony Government, that the electors have the opportunity to take part in an election in which the terms for becoming independent are before them, and that the constitution conforms broadly to accepted principles of constitutional government.

In the Gilbert Islands and Tuvalu Colonies, there were interesting attempts at innovating in the way the Independence Constitutions were fashioned. In both colonies effort was made to depart from a procedure under which, through incremental adjustments, the colonial constitution would be transformed into a conventional 'Westminster model' constitution. It was an explicit aim that, by following different procedures, constitutions might be fashioned which were better suited to the circumstances of the colonies.

The idea of innovating in the procedure for fashioning the constitution, and possibly in its content also, derived in the first place from John Smith, the Governor of the Gilbert and Ellice Islands Colony in the mid-1970s who became also the first Governor of the Gilbert Islands Colony after the separation of the Ellice Islands in 1975 as the Colony of Tuvalu. His thinking was influenced by four factors. First, there was his own earlier experience as a colonial official in Nigeria where he had participated in the preparations for fashioning a constitution to replace the "Richards Constitution" of 1946. This had involved conducting wide-ranging consultations both to awaken political awareness and so as to secure guidance on what the public desired. In Nigeria officials rejected the idea that a committee could "return from the clouds with the perfect constitution to last for ever, written on tablets of stone" (Foot 1964:105). Instead a complicated list of constitutional questions was widely distributed, and, after discussion in divisional and provincial meetings and native authorities, a General Conference approved a draft of
what became known as the "Macpherson Constitution". This was, as Sir Hugh Foot claimed, "the most ambitious plan for public consultation ever undertaken in any colonial territory" (ibid.). Significantly it took control over the preparation of a new constitution away from the Legislative Council, and allowed for powerful political forces - including the chiefs and native authorities in Northern Nigeria - to be associated in fashioning a new constitution.

A second factor in John Smith's thinking was that neither the Gilbert Islands nor Tuvalu had had an extended experience of government in a form that served as a precursor of constitutional government on the 'Westminster model'. The Gilbert and Ellice Islands Colony had only been placed on the standard British colonial tramlines in 1971-72. Hitherto, the Colony had been a distinct territorial entity in law but governmentally it was not a unit. Thus it had lacked its own separate legislature: the High Commissioner for the Western Pacific constituted the legislature, and it was only in 1963 that the Resident Commissioner in the Gilberts had acquired a legislative authority concurrent with the High Commissioner. Similarly in the 1960s the Colony still came within the jurisdiction of the Western Pacific Court and did not have a separate judicial system. At this stage thinking remained, as the 1965 Colonial Office Conference on the future of Britain's dependencies had been explicit, that the Gilbert and Ellice Island Colony could not be expected to proceed to Independence. Only with the 1970 Constitution and its amendment in 1971 to provide for a Governor to replace the Resident Commissioner on the abolition of the Western Pacific High Commission, did the Gilbert and Ellice Island Colony acquire a conventional executive council, with an elected Chief Minister and a legislative council with an elected majority; and the Colony only acquired a separate High Court in 1975. When the Gilbert Islands and Ellice Islands were separated in 1975, therefore, their experience of the institutions for the central government of the Colony which had formed the basis elsewhere for adjustment to suit an independence constitution was a recent one.

A third factor influencing the Governor of the Gilberts was hesitation about the appropriateness of the Westminster model of constitution for the Gilberts and Tuvalu. There were a series of doubts about the model. One doubt arose from the particular dependence in the Westminster model on an independent judicature as an instrument for safeguarding constitutional government. Interpreting alien provisions, adjudicating disputes and enforcing rules on the government presupposed not only independent courts but a bar and the means for securing access to the courts and it appeared unrealistic to envisage such institutions emerging in a way that provided necessary support for a Westminster model constitution. (Even if there were lawyers in private practice in Tarawa how were citizens in the Line Islands, dependent for contact with Tarawa on radio telephone and the occasional government ship, to secure access to them?) There was doubt also about the centralising effect of the model and the reliance on bureaucratic administration and the overhead model of democracy, particularly when in the early years it appeared that the effect would be to place far too much control in the hands of senior officials, many of whom were expatriates without the education or experience to restrict themselves to a subordinate but educative role. There was further hesitation about the operation of checks and balances between institutions in a small society, the effectiveness of institutions like a body in
imitation of Parliament when it had a membership of eight or a dozen, and the cost of maintaining the panoply of institutions on a realistic scale when the resources of the two colonies were so limited.

It was also, however, that to adopt the alien Westminster model missed the opportunity of bringing to the support of constitutional government features in the culture and society of the Gilbert Islands and Tuvalu both of which, once they had been separated into separate colonies, had a considerable degree of cultural unity—each having a common language for instance. The Governor recognised the strength of local traditions and systems and it seemed to him crucial to try to bring these into the constitutional settlement.

Finally a factor in the thinking related to the political situation in the mid-1970s. The Governor had doubts about the support which the elected Government on South Tarawa commanded particularly in the outer islands and he saw dangers in leaving to the Government and Assembly the task of preparing the Independence Constitution. In the outer islands there was already a tension between the recently introduced elected local government councils, and the village meetings, and in the latter there was a particular distrust of the Government in South Tarawa. The policy moreover of the elected Ministers in the Colony Government of establishing a military defence force partly reflected strains in the relations of elected Government and the public—difficulties with organised labour was one reason for the Government to seek a military force—and this was further adding to the distrust shown to the central Government. What could be foreseen was not only that the elected Government would formulate constitutional proposals which lacked wide public support but that the electorate could divide even more explicitly on religious denominational lines and, as a result, for there to be a growing demand to continue colonial rule. If the Colony was pushed into Independence in this situation there was the prospect of a government with restricted denominational support relying on increasing repression to maintain its authority.

The Governor therefore saw considerable merit in opening to wide public discussion the issue of what form the Independence Constitution should have (and focus attention away from the issue of whether the Gilberts should indeed become independent).

In Tuvalu the Queen's Commissioner shared much the same thinking as the Governor of the Gilberts (where he had been Deputy Governor). In Tuvalu, however, the elected Chief Minister provided an independent encouragement to innovatory thinking about the form of an independence constitution. In response to the Commissioner's address to the first meeting of the Tuvalu House of Assembly in October 1975 in which the Commissioner drew attention to the need to plan for Independence, the Chief Minister presented him with a paper formally stating the desire of his Government to gain Independence on 1st October 1977 and at the same time setting out in substantial detail the nature of the desired Constitution for an independent Tuvalu. He also proposed a method by which the Constitution should be established on an autochthonous basis. The Chief Minister had worked for some years in Nauru and the proposals were closely modelled on the Constitution of Nauru, but also showed a clear concern to develop a constitution and machinery of government adapted to the
circumstances of Tuvalu. The proposal was that there should be a constitutional convention to formulate and adopt the constitution derived from the experience of Nauru.

With such thinking about how to proceed in fashioning independence constitutions it is worth outlining the processes followed in the two territories.

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In the Gilberts the Governor secured the willing co-operation of the elected ministers and the Assembly for wide-ranging discussions and consultations which culminated in a Constitutional Convention in 1977. The discussions began a year earlier in March 1976 with a series of seminars in Tarawa which were attended at the personal invitation of the Governor by leading figures in Gilbertese society. At the end of a week's discussion the different seminar groups presented reports in a general meeting. These reports and the discussion influenced the preparation of a list of questions which the Governor circulated in English and Gilbertese throughout the Territory. Discussion was encouraged in other ways - involving for instance talks on Radio Tarawa and the despatch of teams to all the islands organised by the University of the South Pacific Extension Centre.

In April 1977 with the agreement of the Council of Ministers, the Governor convened a constitutional convention. Legally it was a purely advisory body and the members were there again by invitation of the Governor. It was a large gathering - 169 persons - and comprised all the senior elected and appointed Gilbertese office-holders in the Gilbert Islands Government and governmental organisations, representatives of every national organisation and representatives from all islands and island associations. All expatriate officials, even the Attorney-General, were excluded. At the insistence of the Convention the questions widely circulated by the Governor were used as the agenda for the meeting, and in three weeks of discussion the Convention formulated proposals on the major features of a constitution. Initially discussion was dominated by the inimane or elders from the islands but, using the procedures of a traditional Maneaba meeting, there was a coalescence between different members and groups, and the importance of achieving a consensus was evident.

Although the Convention was an advisory body meeting to assist the Government it established for itself a moral authority as the voice of the Gilbertese people as a whole. Not only were its proposals the basis for further discussion but this discussion reflected an expressed aim of interpreting what the Convention wanted, and, where there was a departure from what was proposed, significant efforts were made by Ministers and other members of the Assembly alike to explain and justify the changes.

The subsequent discussion of the Constitution took place in a way that was customary to British dependencies. The proposals of the Constitutional Convention were received by the House of Assembly and referred to a select committee of all the members (including the Attorney-General as a member of the Assembly ex officio). In July 1977, the Committee recommended various
elaborations and certain amendments, including several designed to increase the power of the central Government. Thus the Committee by a majority rejected a proposal that legislation should normally be enacted using a procedure under which the first reading (the second or main consideration in many legislatures) of a bill was to be taken at one meeting and the committee stage at the next meeting to facilitate consultation with the public, particularly in the outer islands. It also rejected the proposal that there should be any limit on the number of terms which a President could serve (see Gilbert Islands Constitutional Committee 1977). The Committee's recommendations were adopted by the Assembly. According to normal practice the UK Government required a general election to test both the judgement that the Colony should go forward to Independence and that this should be on the basis of the proposed Constitution. The election was held in February 1978. The fresh House then resolved that the recommendations of the Constitutional Convention for the election of a President should apply to the election of the Chief Minister, and a Chief Minister, Jeremia Tabai, was elected nationally. The House of Assembly then passed a resolution seeking Independence, and, on the proposal of the Government, reviewed the select committees' recommendations for the Constitution. Significantly it reversed certain decisions of the previous year to vary a proposal of the Constitutional Convention which would have strengthened the central Government against the electorate. Thus the provision for considering proposed legislation in successive meetings of the Maneaba was restored and likewise a limit on the number of terms which a President could serve.

The recommendations on the Constitution were subsequently elaborated in a form suitable for consideration at a constitutional conference in London. At this conference, on the proposal of the Gilbert Islands Government, a chapter was added designed to safeguard the interests of Banabans, whether resident on Banaba or on Rabi Island in Fiji. Altogether the proposals of the Gilbert Islands Government were approved by the Conference with only limited changes (see Gilbert Islands Constitutional Conference 1978). The subsequent drafting was undertaken in London. It involved substantial elaboration and many decisions on consequent details were taken by the Council of Ministers. The resulting Constitution was approved, without amendment being proposed, by the House of Assembly in May 1979. In the normal British way it appeared as a schedule to the Kiribati Independence Order which was made in June 1979.

It is not my intention to summarise the provisions contained in the constitutional instrument. I shall, however, comment briefly on certain features which reflect the procedure used to fashion the Constitution. The Constitutional Convention came to occupy the central place in the process, and in it those associated with the central government confronted individuals of standing outside government. The Unimane - or elders - in particular expressed a distrust of central government and a concern to keep government responsive to the public and subject to control. Some of the striking innovations, regarded from the perspective of the traditions for British independence constitutions, reflect these concerns of the Convention. First there are certain provisions relating to the office of President - the Beretitenti. The Constitution provides for a Nauru-style President in that the office combines the role of head of state with chairman of the Cabinet. As in Nauru - but unlike the Presidents in other former British dependencies - the President has no immunity in Law; he is
answerable to the courts and is removed from office if guilty of offences and sentenced to stipulated punishments. Uniquely the President is elected nationally according to a method that involves the elected Maneaba (House of Assembly) serving as the nominating body in selecting from its own members candidates for election in the Presidential election. Again, in a manner outside previous British tradition there is an absolute limit of three terms to the period any one person can serve as President. Further, if defeated on a motion of no confidence the President ceases to hold office during the ensuing election period and a Council of State carries out his functions thus depriving him of the control of the machinery of executive government during the ensuing election.

Secondly the electorate is strengthened in relation to the legislature. Members are elected using a two stage alternative vote electoral system for constituencies which, outside Tarawa, constitute a whole island. (The detailed provisions for elections are contained not in the Constitution but in the Elections Ordinance). Members are then subject to the recall. Further, legislation other than urgent bills is required to be referred out for consideration in the constituencies between two meetings of the Maneaba.

There are two other significant features that are worth mentioning. The establishment of any military force is stipulated as requiring an amendment of the Constitution, and cannot be achieved under ordinary legislation. The Constitution is also required to be in the vernacular as well as English — a provision which is unique in the independence constitutions of former British dependencies.

There are also what some might see as gaps in the Constitution which similarly reflect an interest of the Convention in limiting government. I will mention two, the absence of a ceremonial head of state — a Governor-General — reflects a rejection of the expense of a figure head; and the absence of an ombudsman results from a distrust of a centralised device for inquiring into grievances, when it was seen as the job of the elected member who has to answer locally — on pain of being recalled — for his effectiveness in seeking the redress of grievances.

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In Tuvalu the process for formulating the Constitution turned out to be significantly different from that in the Gilberts. The central feature of the process reflected the Chief Minister's efforts to retain personal control over the formulation of the Constitution. Attempts made by the Queen's Commissioner to encourage wider discussion of the Constitution were taken to be attempts at undermining the Chief Minister's position.

The public discussion of constitutional options began in Tuvalu in November 1976 with three seminars held on different islands. The seminars were arranged by the Queen's Commissioner with the agreement of the Chief Minister and the discussions were focused on the ideas which the Chief Minister had outlined in his own confidential paper which set out ideas on an independence constitution. The Chief Minister insisted on chairing the discussions on the headquarters island of Funafuti, and spoke over the
radio to warn the Church Assembly meeting on Vaitupu - where another seminar was conducted - to refrain from involving itself in political questions.

Thereafter discussion was arranged under the direct control of the Government and House of Assembly. In December 1976 the House appointed a Committee of all the elected members under the Chief Minister to "formulate views on the Constitutional provisions". The Committee used a list of questions similar to those circulated in the Gilbert Islands but toured the islands themselves seeking the public's views on these questions in one-day meetings. The Committee then produced its report in February 1977 which was adopted in May 1977 (see Tuvalu Constitutional Committee 1977). A general election was held. The new Assembly confirmed its acceptance of the Constitutional Committee's report subject to any amendments to be taken at the next meeting of the House. The report as amended was then used as the Government's proposals for an independence constitution presented at a Constitutional Conference in London in February 1978. The proposals as agreed in the Conference formed the basis for the draft constitution and this was approved by the Tuvalu House of Assembly in May 1978 (see United Kingdom 1978).

This statement of chronology does not reveal anything about the genesis of ideas. In the development of thinking the initial seminars, unlike those in the Gilberts, had no significance; similarly the tour of all the islands by the Committee of the Assembly was interesting only for its lack of significance. Much of the discussion in meetings on tour was of matters unconnected with the Constitution - why there were weevils in the flour, for instance. Only one question relating to the future Constitution was considered in the meetings on all the islands and that was the first relating to the head of state. Opinion on this was divided but the majority of meetings favoured a Nauru form of President.

Yet although styled 'A Report of a Committee to ascertain the views of Tuvaluans on the constitutional provisions best suited to an independent Tuvalu', the recommendations reflect more obviously the political self-interest of the Committee members. The question which the Committee treated as central was whether to have a conventional 'Westminster model' constitution. The Committee, like the Assembly, was divided 4-4 (in the House of Assembly the Government depended on ex officio votes for its majority), but the Committee had been established without the question being clarified of its status, so it was unclear whether the Chief Minister as Chairman of the Committee had both an original and casting vote or simply a casting vote. On legal advice, the Committee adopted the latter rule leaving the four opposition members with a majority in the Committee. They were able as a result to impose a 'Westminster model' constitution in a largely traditional form.

The opposition members in adopting this model were particularly concerned to provide for a Governor-General and to give him unconventional powers. There were two reasons for this. First, there was the aim of using the office to provide a counterbalance to the Chief Minister. It was proposed that the Governor-General "provide a valuable safeguard against possible abuse of power" (Tuvalu 1977:2.2), and it was proposed that he should have the authority to appoint to several significant offices - judges and magistrates, the Chairman and members of the Public Service
Commission, and the Chief of Police - and authority also in other matters where independence was justified. The second reason for desiring this office derives from the personal situation of the leading figure among the opposition members. This member had been elected with a majority of two in the previous election, and, with a new stronger candidate expected to stand against him in the next election, the post of Governor-General was seen as one into which the likely opponent might be drawn, so leaving the leader of the opposition with a better chance of being re-elected.

Subsequently the Chief Minister managed to remove from the proposed office of Governor-General the independent powers recommended. By this stage he had however, recognised the value of such a prestigious position so long as it was in reality in his own patronage, and so long as the post had no powers. He did not, therefore, seek to abolish the office. The occasion for removing the Governor-General's powers was the preparation of the Government's position paper for the London Constitutional Conference. On the grounds that advice was needed on how to prepare a position paper in a form appropriate for a legal draftsman, the Government arranged to receive advice from a further legal adviser in the Commonwealth Secretariat. Meeting with him when the House of Assembly was not sitting, and in the absence of the four opposition members, and with the active encouragement of a legal adviser who was quite unfamiliar either with local conditions or the background, the Government arranged for the proposals relating to the Governor-General to be restated in a traditional form. He was to retain the formal powers assigned to him but it was provided that these were to be exercised on the advice of the Prime Minister. The opposition members subsequently challenged the reformulation in Tuvalu and afterwards, having secured no change, also at the London Conference, but the British Government delegation, guided by the weight of tradition in the formulation of 'Westminster model' constitutions, took the Chief Minister's side. The Independence Constitution emerged, therefore, with provisions relating to the Governor-General which were characteristic of such constitutions.

I quote this as one example - a particularly important one - of the way the main features and detailed provisions of the Independence Constitution were the product of internal politics among the small group of members of the Assembly. Much else - the number of members of the Assembly and the electoral system, the method of selecting the Speaker, the appointment of secretaries to ministries, to mention examples - was decided, wholly understandably, in the light of the immediate self-interest of the members of the Assembly. They, and the Government, had achieved positions of power in a Constitution that presaged a full 'Westminster model' constitution and changes made were designed to safeguard or strengthen themselves.

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The Independence Constitutions of Kiribati and Tuvalu are significantly different and these reflect in part the processes adopted in fashioning them. The differences might in fact have been more considerable because in the Gilberts it had been intended to explore certain somewhat different provisions as the drafting of the constitutional instrument
proceeded; and to do more to develop a wider public understanding of the Constitution and commitment to it. The departure of John Smith as Governor in 1978, however, had produced a significantly different climate. The Attorney-General was able thereafter more openly to obstruct the adoption of innovatory features – he consistently opposed, for instance, the idea that the Constitution should appear in an I-Kiribati version, even though as in Western Samoa in case of dispute the English version was to be used – and there was continuing conflict over such obstructiveness and the attempts to increase substantially the power of the Attorney-General in the Constitution. The unminuted agreement reached in the London Constitutional Conference that the new Governor, as an official with special experience of finance, would assist with revising provisions in the chapter on Finance – in particular so as to safeguard the substantial reserves built up from the receipt of royalties on phosphate mining – did not result in attention to these provisions. As a result the financial provisions in the Constitution conformed to a traditional pattern. They rested on assumptions – such, for instance, as a primary reliance on taxation for funding government activities – not altogether appropriate to the circumstances of Kiribati and contained significant gaps and limitations when it came to managing the reserve.

The Constitution also gathered a substantial collection of marginally significant provisions – on the pension law and the Court of Appeal for instance – and so became an elaborate and extended document where the Constitutional Convention had sought one that was short and simple like that of Nauru. In part this was because by including them in the Constitution the Gilbert Islands Government could draw on the expert draftsmen available in the Foreign and Commonwealth Office in London, and partly because, by including provisions in the Constitution, they became law in Kiribati without having to be enacted by the House of Assembly.

Perhaps most importantly in the months leading up to Independence without the active support of the Governor or the co-operation of the Attorney-General little was done to promote a wide interest in the Constitution. Formally the Constitution belonged to the schedule of responsibilities of the Governor and the Attorney-General but the Attorney-General took no action to develop a knowledge in the society of the content of the Constitution, nor to encourage a commitment to it. The Chief Minister was left having to circumvent the Attorney-General in arranging for an I-Kiribati version of the Constitution. In the preparations for Independence and the ceremonies marking it in Western Samoa much attention was focused on the Constitution, but this was not so in Kiribati.

The thinking which lay behind the processes used to fashion a constitution for Kiribati rested on the assessment that in that country constitutional government would depend on a wide knowledge of the Constitution and on people having the inclination and opportunity to ensure that government operated according to the Constitution. Whether the preparations which led to the Constitutional Convention, the Convention itself and the arrangements built into the Constitution achieved this, only those familiar with Kiribati after Independence are in a position to comment on.
In Tuvalu planning started with similar ambitions, but, as followed, the processes used for fashioning the Constitution served to record simply the basic rules according to which those with power already expressed the intention of playing the political game.
The question I wish to address arises not only in Hawaii: that is how to deal with the claims of native citizens who seek restoration and protection of their 'traditional' or 'heritage' rights. In recent years a renaissance of sorts has occurred where 'original' inhabitants (or their descendants) are emerging as a force to be reckoned with as they demand resurrection and protection of cultural values and often compensation (reparations) for broken promises of the past.

Tension has always existed in society between traditional and contemporary values and approaches. It occurs in families when a child breaks from the values held by his or her parents and it occurs likewise within countries where 'progress' often displaces older approaches and traditions. No-one doubts that 'progress' has many good sides but the sad truth is that the new government jobs as well as the profitable real estate development on the beaches can kill off a fishing tradition as easily as a cavalry charge on the inhabitants.

What happens to native rights as a state rushes into the twenty-first century? Are they integrated with the rest of society and in the process, destroyed or relegated to quaint but plastic tourist attractions; or are these rights protected? And if they are to be protected, by what means? Hawaii, like New Zealand (NZ), has chosen to deal with the needs of its native citizens, but Hawaii has chosen to protect these heritage rights through constitutional means and it is that story I wish to tell.

However let me preface it by noting that though there is a common area for discussion that brings us together for this workshop - that of constitutional developments in the Pacific Islands - there is not, I am sure, a common constitutional solution to the issues facing these countries. So it is with some emphasis that I tell you I am speaking as an observer and not as an advocate as I describe to you Hawaii's choice of protecting its citizens' 'traditional rights' through constitutional means.

HAWAII: HISTORICAL PERSPECTIVE

The story of the Hawaiians' displaced cultural heritage is not unlike that of other Pacific Islands. Western explorers and early settlers 'discovered' the Hawaiian Kingdom - though with natives already living on their new discovery (Kuykendall 1938). While Hawaiian sovereignty prevailed for some decades it soon became apparent to the new business
interests that for economic reasons the country would fare better under an increasingly close relationship with the United States (US). Eventually the Islands' monarchy was overthrown and Hawaii became first a US territory and then a state (Fuchs 1961).

Paralleling these political events was of course economic development and an increasing number of new residents (Schmitt 1968). New laws and policies were evolving under Western influence, changing land ownership rights from commonly held land to fee simple (Chinen 1978), but somehow not many Hawaiians became landowners and eventually much land was owned by the US Government which by statutory mandate was to manage it (though the revenues from the use were to be used for the benefit of Hawaiians: 30 Stat.750, s.91 (1898)). This right of native Hawaiians was made more specific in 1920 by the Hawaiian Homes Commission Act (42 Stat.108 (1921)) and by the Admissions Act of 1959 (Pub.L.86-3, 73 Stat.4 s.5 (f) and embodied in the Hawaiian Constitution Art.12, s.1) where over 200,000 acres of land were placed in trust for Hawaiians with the purpose of 'rehabilitating' them through a return to a farming lifestyle.

Thus the scenario into the 1960s is complete: a culture was discovered, displaced by being exploited or ignored and then 'rehabilitated' by special benefit programs. However, it was not long after this point that native Hawaiians began to demand more than just the right to sell plastic crafts on Waikiki.

These demands were made by a growing number of politically sophisticated and active groups with broad-based support including many non-native Hawaiians (Ka Wai Ola O Oha, Vol.1, No.1:1 (Summer, 1981)). Cynics at the time noted that though justice might require support of native rights, at the same time it was not bad for the business of tourism too. Though boards and commissions were established and trusts created to help native Hawaiians, most were appointed by non-Hawaiians and there was still a feeling by native Hawaiians that their interests were not adequately represented.

HERITAGE RIGHTS GRANTED CONSTITUTIONAL PROTECTION

The pressure increased until at the 1978 Hawaii Constitutional Convention (see Meller and Kosaki 1980) an 'Hawaiian affairs package' was presented which called for among other things:

1. the establishment of the Office of Hawaiian Affairs (OHA) that would be a central conduit for money and programs that would benefit all Hawaiians, administered by a board composed of and elected by Hawaiians (now Art.12, ss.5, 6);

2. the protection of rights "customarily and traditionally exercised for subsistence, cultural and religious purposes" (now Art.12, s.7); and

3. the granting of increased funding and an increased share of public lands to be held in trust for Hawaiians (now Art.10, s.4).
Additional mandates included that public educational institutions include a program promoting Hawaiian culture (now Art.10, s.4), recognition of Hawaiian as an official language, the addition of a state motto, and safeguards to protect Hawaii's agricultural and ocean environments (*ibid.*:256 fn.9). The amendments were approved by the voters and the vehicle for 'rehabilitating' native Hawaiians was in place.

HOW THE OFFICE OF HAWAIIAN AFFAIRS IS WORKING

The purpose of OHA is to promote the betterment of conditions of Hawaiians. It seeks to meet this objective by assessing the impact of government decisions on Hawaiians and acting as advocate for their interests. This has been given an impetus by increased funding for the agency. In 1980 the legislature by statute designated that 20 per cent of the public land trust funds be set aside for OHA (*Haw. Rev. Stat.*, s.10-13.5 (1981)) and the legislature also appropriated $415,000 for 1981 to 1982 (a two-fold increase from the year before) (*see* Hawaii OHA 1981:7).

The Board of OHA is comprised of nine persons and operates separately and independently from the Government. It has the authority to acquire or dispose of property and contract with any entity it wishes in conducting its business (*Haw. Rev. Stat.* s.10-4 (1981)). Presently its legal work is performed by the Native Hawaiian Legal Corporation, an independent organisation funded from federal moneys. In its short tenure it has sought: to obtain legislative approval of a comprehensive cultural plan; to limit conveyancing of certain lands and to acquire others; to create a new trust fund to be used by OHA for services to Hawaiians of less than 50 per cent Hawaiian bloodline; and to set up a revolving loan fund to assist Hawaiian entrepreneurs. It is also seeking to promote high standards for Hawaiian culture as a resource for the State of Hawaii. Toward that end it has supported a tourist tax whose revenue would be used to reimburse the Hawaiian community for years of 'exploitation and overcommercialization' by the visitor industry. For example plastic leis and 'Hawaiian crafts' made in Taiwan have in OHA's view disparaged the traditional cultural offerings by 'true' Hawaiians. In the public schools it is seeking to expand the schools' Hawaiian curriculum and create an Hawaiian Education Commission to monitor the State's development in that area (*see* Ka Wai Ola O Oha, Vol.2, No.1:6-7 (Winter, 1982)).

ISSUES THAT CONTINUE TO LINGER

In assessing how OHA is working it is only fair to also ask how well it is working. Issues that continue to linger include: whether so much money should be channelled to one group based on its heritage; whether there is any fair definition as to who is a 'Native Hawaiian'; and what is meant by 'traditional and customary rights' that are to be protected.

As to the fundamental issue of whether a group should be separated for special treatment, the easy answer is that a public judgment was made by the Hawaiian Constitutional Convention delegates and subsequently by the voters' ratification.
A more difficult issue deals with who is a 'Native Hawaiian'. Originally the Constitution provided a definition making eligible for benefits those who were at least one-half Hawaiian. But due to an invalid ratification it was struck down pursuant to a lawsuit (Kahalekai v. Doi (1979) 60 Haw. 325) which left the present constitutional definition as "the descendants of native Hawaiians who inhabited the Hawaiian Islands prior to 1778" (Art. 12, s. 7) as the beneficiaries. However, subsequent implementing legislation followed the definition of earlier Hawaiian laws and defined 'Native Hawaiians' as those with 50 per cent Hawaiian blood and 'Hawaiians' as the descendants with a lesser percentage (and with different entitlements): Haw. Rev. Stat., s.10-2(4)(1981). Yet, there remains a practical political problem for the future as those Hawaiians with less than 50 per cent bloodline feel they also are entitled to fully participate in the benefits. This potential controversy explains OHA's interest in obtaining special funding for Hawaiians of less than 50 per cent Hawaiian bloodline.

As to what constitutes a 'traditional and customary right' that matter was left largely for future interpretation and negotiation. OHA is seeking several interesting interpretations. In addition to "access rights to public lands for hunting, fishing, worshipping, and gathering" (ka Wai Ola O Oha, Vol.2, No.1:1 fn.8 (Winter, 1982)) and stronger enforcement of state regulations affecting those areas, it also has proposed that regulations be established on the traditional kapu system to ensure proper use, and enforce that by a konohiki system (wherein persons are named as chief caretakers of certain areas of land) to ensure that traditional land use areas are properly managed (ibid: see also Levy 1975).

As any urban land use planner knows, each new development faces a variety of hurdles before construction even begins; but what we are now seeing in Hawaii is an open confrontation between 'progress' and 'tradition'. The traditionalists will now march into court not only with their zoning ordinances but also with a constitutional mandate which may alter the outcome that would have resulted had the battles been fought instead on the beaches, opposing 'progress' with a traditionalist 'nostalgic sentimentality' rather than with the constitutional sword. Frankly though, so far in Hawaii it has not helped in small skirmishes where 'squatters' exerting traditional rights were forced off public lands by statutes, but new cases on the horizon in connection with roads which are being planned through special native Hawaiian lands may soon provide the courts with a proper test case, in which the following legal issues are likely to arise.

LEGAL ISSUES

First, is it unfair, or, under the US Constitution, a denial of equal protection, to grant benefits to one group of citizens but not others, especially on the basis of race or ancestry? The US Supreme Court, while normally striking down such individuous discrimination, has carved out an exception for native Americans (see, e.g. Morton v. Mancari (1974) 417 US 535). For example, American Indians were permitted to receive special government preferences and benefits because of their special place in American history as being the country's original inhabitants as well as the
victims of government misconduct. The Supreme Court stated part of its rationale as follows:

the United States overcame the Indians and took possession of their lands, sometimes by force, leaving them an uneducated, helpless and dependent people, needing protection against the selfishness of others and their own improvidence. Of necessity, the United States assumed the duty of furnishing that protection, and with it the authority to do all that was required to perform that obligation and to prepare the Indians to take their place as independent, qualified members of the modern body politic (Board of County Commissioners v. Seber (1943) 318 US 705).

Thus we see again the familiar scenario of displacing a culture and then 'rehabilitating' it.

An issue related to the fairness or equal treatment issue is whether if one group is entitled to special treatment, why not others? In the US 'others' have included the native Alaskan, and Congress and the courts have found their plight to be similar and have upheld comparable special treatment (see Fuller 1976). A reasonable question can be asked: where does the justification for special treatment end? It is clear that only a country's particular history can provide the answer as to whether and how many displaced cultures occurred and require rehabilitation.

Closely connected with the American Indians' victories has been the historic fact that old treaties existed between them (as sovereigns) and the US, which contained promises that were subsequently broken. This not only buttressed the conclusion that special preferences were needed to undo the effects of neglect and mistreatment, but also opened the possibility that due to the breach of past promises reparations were legally required (see, e.g., Blondin 1981). American courts have upheld such claims in numerous cases (see, e.g., US v. Sioux Nation of Indians (1980) 100 S Ct 2716 for a court-ordered settlement valued at $134 million) which have thus established a precedent for others who wish not only to have their displaced culture rehabilitated but also want the return of land and/or the payment of large amounts of money to help compensate for their loss.

Whether other Pacific Islands have similar historic situations I leave to you to decide. It is certain, however, that even if they exist, the Hawaiian approach of protecting heritage rights of native inhabitants by constitutional means is but one illustration, one alternative, of what can be done with creative constitutional development.
11. FEDERAL CONSTITUTIONS THAT NEVER WERE: 'NAGRIAMEL' IN THE NEW HEBRIDES AND THE 'WESTERN BREAKAWAY MOVEMENT' IN THE SOLOMON ISLANDS

P. Larmour

Most of the chapters in this volume deal with the Constitutions adopted by Pacific island territories as they became independent, or entered into 'free association' with metropolitan countries. With the exception of Tonga's, the Constitutions are products of a process of decolonisation. Many of their provisions reflect the particular historical and political circumstances in which they were drafted. Some provisions may be hard to understand if these circumstances are not reconstructed and taken into account. The Constitutions embody the outcomes of domestic political processes, negotiations with metropolitan governments, and discussions with foreign consultants.

During the political process of constitution-making, alternatives may be rejected, suppressed, or otherwise fail to get on the agenda. The following chapter describes and compares two such unsuccessful alternatives: a series of amendments to the Solomon Islands (SI) Constitution, proposed by the leaders of the 'Western Breakaway Movement' in 1978; and a series of alternative constitutions drafted for the Nagriamel Movement in the New Hebrides, which became Vanuatu in 1980.

The Constitutions that SI and Vanuatu adopted at Independence included provisions promising devolution of power: to provinces in the former; and to regions in the latter. Transitional provisions in the SI Constitution renamed existing local government councils 'provincial assemblies', and in Vanuatu required the election of regional assemblies for Santo and Tanna before Independence. In both countries Review Committees were established before Independence to make recommendations about the way the constitutional promises of devolution should be implemented.

Nevertheless, SI and Vanuatu both became independent in the midst of a separatist crisis. Early in 1978, the SI Local Government Council for Western District resolved that it "may possibly declare eventual unilateral independence" if it were not granted 'state government' status. The Council refused to organise celebrations for Independence Day on 7 July 1978; it continued to fly the British flag; and extra police were flown in following a scuffle in the streets of Gizo over an attempt to raise the new national flag.

In January 1980 Jimmy Stephens' Nagriamel Movement declared the separate Independence of Santo and parts of the Northern District of the New Hebrides as the 'Vemarana Federation'. At the end of May, the
Movement's supporters occupied the district capital, Luganville, wrecked government buildings and kidnapped the District Commissioner. The Central Government evacuated its civil servants from Luganville, and declared a blockade of Santo. Neighbouring SI joined the blockade by cutting airline and telex links with Santo.

In both countries separatist threats or declarations were preceded or followed by proposals to amend, or replace, the Constitutions that were about to be adopted with alternatives designed to accommodate separatist pressure within a more 'federal' or 'confederal' structure of government.

Nagriamel had begun to propose independence constitutions long before the detailed negotiations within the New Hebrides and with the metropolitan governments that led to drafting of the Vanuatu Constitution. At least three versions were produced: constitutions for a group of federations within a confederation of 'Natakaro' (1978); a more elaborate, and rationalised, 'Constitution of the Nagriamel Federation', published in book form in the United States (US) and called Blueprint for a New Nation (Doorn 1979); and a constitution for a 'Republic of Vemarana', attached to a prospectus posted to businessmen in Vila and Santo at the time Nagriamel supporters forcibly occupied Luganville.

Leaders of the 'Western Breakaway Movement' proposed amendments rather than complete constitutional alternatives. They would have substituted the two clauses in s.114 of the SI Constitution dealing with provincial government with 61 clauses that spelt out in detail the structure of government within the province and its powers in relation to the national government. The final constitutional conference held in London in September 1977 had agreed that the SI Constitution would provide generally for provincial government, but that the details would be worked out after Parliament had considered the report of a review committee to be established before Independence. Section 114 provided simply that:

(1) Solomon Islands shall be divided into provinces, the number and boundaries of which shall be prescribed by Parliament after considering the advice of the Constituency Boundaries Commission.

(2) Parliament shall make provision for the government of the provinces established under this section, and consider the role of traditional chiefs therein.

The additional clauses proposed by the leaders of the 'Western Breakaway Movement' reproduced many of the provisions of the rest of the Constitution, but applied them to provincial governments as well as the national government. There were provisions for provincial governors, chief ministers, cabinets and electoral commissions. The envisaged provincial constitutions duplicated and rested within the national constitution, rather than subsisting in a parallel, complementary, relationship with it.

In the event, the amendments and alternatives were not adopted. In SI they were considered by a Review Committee which made its report to the Government some time after Independence, when political circumstances had changed. While accepting many of the Committee's recommendations, the
Government did not accept that they should be implemented by constitutional amendment. In Vanuatu, the Nagriamel Movement that had proposed the alternative constitutions was defeated by military force and its leaders arrested.

The rest of this chapter considers the Western and Nagriamel Constitutions-that-never-were in the following terms: their claims to 'federalism'; their conceptions of the role of the state in development; their land tenure provisions; and the role of consultants in their drafting. I have chosen these four headings because they suggest comparisons with the Constitutions that were adopted in both countries, or in other Pacific Islands, and because they raise problems and issues considered by other contributors to this volume.

* * * * * *

Claims to 'federalism'

In both SI and Vanuatu the suggested amendments or alternatives were described by their advocates as 'federal'. Nagriamel was to be a "federation of settlements" (Doorn 1979:7). In SI it was:

> envisaged that the desired structure of the Provincial Government for the West should be one which follows, with drastic modifications, Federal principles and systems of government (SI 1978:4).

They set out the powers and functions of the government of the whole territory, and the governments of geographically defined units within the territory: 'settlements' in Nagriamel, and 'provinces' in SI.

The only nominally federal Constitution currently adopted in the Pacific Islands is that of the Federated States of Micronesia (FSM) — though there is an historical precedent in the Cook Islands (CI) which were governed as a federation between 1891 and 1900, before annexation by New Zealand (NZ) (Gilson 1980). There are hints and echoes of federalism elsewhere: in Palau's Constitution, which renames the colonial municipalities "states" (Art.XV, s.6), or in the reforms proposed by a Commission on Local Government in Kirabati in 1980. Ghai and Isana (1978b) have discussed the extent to which the PNG Constitution can be characterised as federal, and Ron May's paper (elsewhere in this volume) notes some growing 'federal tendencies' in PNG.

In 1982 the SI Government appointed a committee to review the national Constitution, and included among its terms of reference that it should "recommend for the people a Federal system of government" (Solomon Star, 30.7.82). Federal alternatives have also been proposed for New Caledonia, as a way of accommodating the interests of the Territory's different racial groups.

'Federalism' is an elusive, if politically potent term. In a paper produced for the Constitutional Planning Committee (CPC) in Vanuatu, Yash Ghai argued that the term be set aside in favour of a case-by-case delineation of the relative powers and functions of central and local
governments (Ghai 1979). A political scientist, Duchachek (1970), offers seven 'yardsticks' for federalism.' Measured against them the 'Western Amendments' emerge as more clearly 'federal' than the 'Nagriamel Constitutions': 'provinces' in SI would have been granted a say in constitutional amendments (Art.114 AAD and Yardstick 4); and protected against elimination of their identity (Art.114 B and Yardstick 5). Neither would 'settlements' have had protection in Nagriamel.

Among the Constitutions adopted by Pacific Islands, FSM's scores highest on Duchachek's yardsticks meeting all but the requirement for equal representation of the units in an upper house: FSM is unicameral, although some seats are apportioned equally between the states (Art.IX, s.8 and Yardstick 6). However, several nominally unitary constitutions score on one yardstick: protection of the units against elimination of their identity. Kiribati's Constitution protects Banaba, as does Vanuatu's in its entrenchment of regional governments for Tanna and Santo, and Marshall Islands (MI) gives each atoll the right to a local government.

In some ways it is surprising that federalism is not more pervasive in the Pacific. Federations were a classic method of decolonisation in Africa and the Caribbean. But by the 1970s, the track record of these post-colonial federations did not look good (see Hicks 1978). Britain, at least, seems to have made a conscious decision, in a review of its policy towards dependent territories made in 1973, against encouraging federation. Even where federalism was proposed in Micronesia it was rejected by two of the six districts it was offered to. In 1978 Palau and MI rejected the draft FSM Constitution and preferred to go their own way. Continuing aid commitments, 'free association', and regional institutions like the University of the South Pacific, the South Pacific Commission and the Forum [Shipping] Line, have become functional alternatives to federalism.

The earlier Nagriamel versions went further than federalism to propose a third level of 'confederal' government, though the difference between 'federal' and 'confederal' was not clearly worked out: the 'federal' Constitutions of 1978 are practically identical to the 'confederal' version.

The 'Nagriamel Constitutions' are less preoccupied than the 'Western Amendments' with a division of powers between levels of government. The 'Western Amendments' seek to entrench legislative and financial autonomy of provincial governments against the centre. 'Settlements', as such, in the Nagriamel Constitutions are granted no particular autonomy in relation to the federal government. They have a kind of general competence to make 'regulations' that are more reminiscent of 'by-laws' made by local governments than 'laws' made by states supreme in their own sphere. The thrust of the 'Nagriamel Constitutions' is the protection of individuals against the government, rather than the protection of one level of government against another. In the US terms in which the 'Nagriamel Constitutions' are drafted, they are less concerned with 'states rights' than with individual rights, particularly in the economic field.

The 'Nagriamel Constitutions' are an odd mixture of right wing libertarianism and traditional parochialism. The federal government was not to "engage in, or give support to, any sort of wealth redistribution" (Doorn 1979:29), nor to make any laws "that would abridge, or tend to
abridge, the individuals rights of self defence" \((ibid.:26)\) and it was "never [to] levy taxes" \((ibid.:28)\). In addition, and of personal relevance to Jimmy Stephens, each individual was to have "the right to marry as many persons of whatever sex desired" \((ibid.:13)\).

While the powers of the federal governments were rightly circumscribed, the provisions for the government of 'settlements' seem wide open to a petty authoritarianism reminiscent of indirect colonial rule. Each settlement, consisting of at least 2,500 people, was to be governed by a board, with wide powers to make 'regulations' (Art.VIII). The chairman of the board was to be called "The Chief", and was "considered to be the wisest man" \((ibid.:39)\). The 1978 and 1980 versions of the 'Nagriamel Constitutions' were endorsed 'approved by all Nagriamel 15 Islands custom chiefs' and signed by Jimmy Stephens.

* * * * *

The role of the state in development

Peter Sack argues elsewhere in this volume that one of the twin pillars of 'constitutionalism' in the Pacific Islands is the promise that the state will provide 'development'. If so, the promise is rarely explicit, except perhaps in the provisions of the Palau Constitution which require the Government to promote the national economy and provide free or subsidised health and education services (Art.VI). The promise is continuous with post-war colonial ideology, expressed particularly in the South Pacific Commission, where it had a conservative corollary: political independence might not be granted until 'development' had taken place. Yet it has sometimes been resisted by the independent governments. In SI, for example, the Mamoloni Government elected in August 1981 initially declared its intention to dismantle some of the apparatus of state intervention, e.g., the Government Shareholding Agency. Other island governments, in Kiribati, Niue and PNG are showing increased interest in 'hiving off' government services to private enterprise.

While in most Pacific countries the state takes an active, but sometimes ambivalent, role in development, the 'Nagriamel Constitutions' offer an alternative ideology. The role of the state is rigorously circumscribed. Section 3 of Art.VIII of the 1978 Federal Constitution, e.g., provides that:

The...Federation may provide for essential government services such as agreements for telecommunications with other nations. The government shall have no power to operate or own such services itself.

Such provision might outlaw the post and telecommunications service provided through a statutory corporation by the PNG Government, or through joint ventures, like Sotel in SI, Hebrite in Vanuatu, and Pintel in Fiji. Yet the Vermarana Development Corporation, to whose prospectus the final version of the 'Nagriamel Constitutions' was appended, was functionally equivalent to the kind of 'public enterprise' the Constitution sought to proscribe. It was supposed to improve telecommunications, to buy ships and aircraft, to lease land, to set up a bank and run a postal service. This monolithic agency would have been responsible to its shareholders rather
than a local Minister or legislature and would 'at least in the beginning' be based offshore in Panama.

The 'Western Amendments', however, show no sign of disagreement with the SI Constitution on the role of the state in development. Section 114 AAA, for example, provides that:

the public land of each province, and the land, timber, wood, natural resources and fresh water of each province shall vest in the Governor General of Solomon Islands in right of, and for the benefit of, each such province.

The role of the state as an agent and intermediary in the development of natural resources was accepted without hesitation; the only question was whether it should be the central state based in Honiara, or a state based in Gizo, the capital of Western Province.

Land tenure provisions

For both SI and Vanuatu land policy was a critical issue at Independence and both the 'Western Amendments' and the 'Nagriamel Constitutions' contain land tenure provisions.

The Constitutions that SI and Vanuatu adopted each contain provisions for the return of land alienated during the colonial period. SI's provisions retrospectively justified a conversion of foreign-owned freeholds into government leaseholds that had taken place a year before. There is also provision for the valuation of alienated land, but no legislation has yet been enacted to implement it. Vanuatu's Constitution is more radical: s.71, of itself, returned all alienated land to its custom owners. While legislation was required to implement the provisions in the SI Constitution, and was not fully enacted, the provisions of the Vanuatu Constitution were treated as self-enacting: legislation was only required to deal with their consequences (see Larmour forthcoming; and Fingleton in this volume).

'Control of land' was one of the 'six points' the Western Council wanted met by the Central Government before independence. Land in the Western Province was relatively heavily alienated. In what was then the New Hebrides, Jimmy Stephens' Nagriamel Movement had begun a squatter settlement on Santo in 1968 to resist land clearances by European settlers (see Sope 1976).

While on Santo the land issue was one between European settlers and Melanesians, in Western Solomons it was between Melanesians and the Central Government over the future of land owned by the Central Government, particularly on Kolombangara Island and in New Georgia. The amendments to the SI Constitution proposed by Western leaders vested 'public land' in the provincial governments.

The references to land in the 'Nagriamel Constitutions' are more indirect and conservative than the provisions of the Vanuatu Constitution. The 1978 'Nagriamel Constitution' refers to land in three contexts: in a
general way in the declaration of rights, which include "acquiring and possessing property" (II, s.1); as excluded from the jurisdiction of local courts (VII, s.7(b)); and, more interestingly, as the sole source of finance for the federal government:

All expenses for financing all governmental activities shall be funded by leasing...Federation Custom land to any person or entity that the Assembly may determine is suitable, and upon such terms as the legislature may determine (X, s.3).

The *Blueprint for a New Nation* makes similar, but more extensive, references to land as individual property. Absolute individual ownership is qualified only by the provisions of an 'Environment Law', which would deal with rights to water flowing across land, and with rights of way and pollution (XXVIII). There is also provision for 'staking a claim' to land (I, s.42) which is unfortunately reminiscent of colonial 'waste land' doctrines in SI. The chapter dealing with the federal budget, perhaps more realistically than the 1978 version, includes sources of federal finance additional to leasing land, particularly lotteries.

The 1980 Vemarana Constitution, however, has the most politically-interesting land provisions. It is almost identical to the 1978 federal Constitution, except that four sections were added to Art.II (Declaration of Rights), and that the section dealing with federal finance includes the additional sources proposed in *Blueprint for a New Nation*. The (new) s.16 in Art.II provides:

The right to ownership of land by any individuals or any other private entities is recognised. Such owners shall, in turn, also recognise the ownership of land by Custom Law.

The equivocation of s.16 reflects the different interests of the Nagriamel's Melanesian and non-Melanesian supporters. Stephens' movement had become a Melanesian front for various non-Melanesian interests: mainly French planters, Polynesian migrants, mixed-race people like Stephens himself, and American land speculators. The intent of s.16 becomes clearer if compared with the 'land' provisions of the Vanuatu Constitution, agreed to late in the previous year:

71. All land in the Republic belongs to the indigenous custom owners, and their descendants.

72. The rules of custom shall form the basis of ownership and use of land in the Republic.

Under the Vanuatu Constitution, Nagriamel's non-Melanesian supporters, and possibly even Melanesians who were not 'custom owners' stood to lose titles to land. The final 'Nagriamel Constitution' offered an alternative, dual, system of land tenure, familiar in other parts of the Pacific. Titles to already alienated land would not be affected by Independence, but further acquisition would be by lease from the custom owners. SI used this approach in dealing with the land rights of Gilbertese settlers: their
existing freehold rights would be unaffected, but they could only acquire more land on lease (see Bobai 1979).

The role of consultants

A number of the chapters in this volume have been written by people who, usually as foreigners, were participants in the process of national constitution-making. Some of the issues raised concern professional ethics and activism, others the problems of cross-cultural communication, and the paradox of foreigners assisting in the production of a 'home grown' constitution.

The 'Western Amendments' and the 'Nagriamel Constitutions' offer two extreme cases of constitutional consultancy. The first were drafted by a QC in Sydney on a brief from a delegation sent to Australia early in 1978 by leaders and supporters of the 'Western Breakaway Movement'. The delegation knew what it wanted, and wanted it expressed in legal form. The legal consultant's role was purely technical, and paid for in the normal way that a client pays for legal advice, with money raised in the Western District (see Premdas and Larmour: forthcoming).

The consultancy work done for Nagriamel was quite the opposite: activist, advocatory, manipulative, highly ideological and funded from abroad. The Phoenix Corporation of Amsterdam and Reno, Nevada, provided lawyers, funds and a radio station to promote Nagriamel. Nevertheless, foreign manipulation was presented as somehow 'home grown'. Michael Oliver, defending the role of the Phoenix Corporation, offered a kind of parody of the role of foreign consultants in the constitutional planning committees in SI, Vanuatu and elsewhere in the Pacific Islands:

My friend Tom Eck, a Lawyer, agreed to travel to the New Hebrides. He spent two weeks talking with 20 chiefs and other prominent persons to develop and alternative constitution for all of the New Hebrides (letter to The Economist, London, 13/9/1980).
APPENDIX 1

Federal 'Yardsticks'
(adapted from Duchachek (1970))

They can be summarised as follows:

1. Does the central government have exclusive control over foreign affairs?
2. Are the units prevented from seceding?
3. Does the central government act directly on citizens?
4. Do the units have a say in constitutional amendments dealing with themselves?
5. Are the units protected against elimination of their identity?
6. Is there equal representation of the units in an upper house?
7. Are there two sets of courts?
8. Does the supreme court deal with relations between the centre and the units?
APPENDIX 2

PHOENIX/NAGRIAMEL/VEMARANA 1978-80

Confederal Natakaro 1978: foreign affairs, defence, provision of essential government functions (e.g., telecommunications), but "no power to operate or own such services itself".

Federal

a) Banks - Torres and Tanna 1978: as for confederation plus the right to join or withdraw from confederation.

b) Nagriamel 1979: citizenship, banking (but not the issue of currency), lotteries, companies, environment, weights and measures, airplane, vehicle and shipping registration (all subject to the Restrictions on the Federal Government in Part IV)

c) Vemarana 1980: identical to Banks-Torres and Tanna constitutions of 1978, except for additions to Article II (Declaration of Rights). Article X, (Federation Finance), and a new Article XIII (Initial Elections)

Settlement

Nagriamel 1979: 'regulations that are essential for law and order, morality, health and for the maintenance of a smooth running settlement'. 
### Appendix 3

**'Western Amendments' to Solomon Islands Constitution 1978**

<table>
<thead>
<tr>
<th>National</th>
<th>(unlisted)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Concurrent</td>
<td>imposition of taxes, rates and duties.</td>
</tr>
<tr>
<td>Provincial</td>
<td>sale and lease of public land; management and development of all land; compulsory acquisition of land; mining and prospecting, on land and in territorial waters of the province; water management; fishing within territorial waters of the province; immigration into the province; provincial borrowing and banking.</td>
</tr>
</tbody>
</table>
They can be summarised as follows: (1) Does the central government have exclusive control over foreign affairs? (2) Are the units prevented from seceding? (3) Does the central government act directly on citizens? (4) Do the units have a say in constitutional amendments dealing with themselves? (5) Are the units protected against elimination of their identity? (6) Is there equal representation of the units in an upper house? (7) Are there two sets of courts? (8) Does the supreme court deal with relations between the centre and the units?
INTRODUCTORY

Over recent years a number of small Pacific countries have acquired new constitutions, either on independence or, in the case of the "entities" of the US-administered Trust Territory of the Pacific Islands, by adopting constitutions that in form are independence ones (subject to transitory provisions). These constitutions exhibit resemblances and differences that are not only interesting in themselves, but should be of more general interest to anyone concerned with smaller countries of the Pacific and with Australia's relations with them, or with constitution-making and parliamentary and constitutional matters generally. This paper looks at certain of the constitutions from the point of view of the legislatures and related matters.

The paper deals primarily with the legislatures as institutions, and with their structures as set out in the constitutions and the limitations placed on them by the constitutions: how they operate within the constitutional framework is a different matter, in some ways a more important one, but the theme is constitutional law and not political science (thus, my approach is the converse of that taken by Wolf-Phillips 1972:7): the dynamic aspect of a constitution is conditioned to some extent by the static one, and they necessarily interact.

I have also limited the study to the formal constitutional documents, on the basis that they contain the provisions that were at the time considered to be of the greatest legal or political importance and of the most permanent nature. This has led me to exclude, for example, the Organic Laws in Papua New Guinea (PNG).

THE LEGISLATURES GENERALLY

In this section, I discuss differences rather than resemblances, using as a standard a legislature that (1) is unicameral, and (2) has a single class of members, who are (3) elected from single-member constituencies (4) on the basis of a universal, citizen, adult franchise, the voting age being eighteen (which is common to all except Nauru, where the age is twenty (Art.29), and Western Samoa (WS) where qualifications for electors are to be prescribed by Act (Art.44(3)). Further, although there may be some special qualifications for, or disqualifications from, membership (such as residence, insolvency, insanity, being under sentence for an offence, etc.) the general qualification is much the same as for the franchise: such
special provisions vary almost in a random manner, as if they depended mainly on previous dependency arrangements and on the personal views of the framers of the constitutions (or those of their advisers).

An important aspect of the franchise is the secrecy of the ballot, prescribed in Vanuatu, the Marshall Islands (MI), and the Federated States of Micronesia (FSM). The practical problem is that if a ballot is literally secret, blind, illiterate or otherwise handicapped people may be disenfranchised by a written ballot-paper (though there are alternatives), so that the better answer is either to say nothing, or else to adopt the PNG approach of requiring the electoral law to make provision for "safe-guarding the integrity of elections" (s.126(7)).

Only Belau has a bicameral legislature. However, Kiribati, PNG, FSM and WS each have special classes of members.

In Kiribati, there are three special classes. Firstly, the Attorney-General is a public officer but is *ex officio* a full, voting member (see below). Secondly, when the president, who is elected from among the members of the legislature by the national electorate (see below) represents a single-member constituency, an additional member is elected for that constituency (s.53(3)). Thirdly, to accommodate the difficult problem of the secessionist Banabans who, while being I-Kiribati, are almost all resident on Rabi Island in Fiji (where they were re-settled in 1945) a special Banaban member is nominated by the Banaban Rabi Council (see Kiribati Ch.IX for the "Banaban" provisions generally). This experiment (it is due for review in 1982) is a very special case, but may be worth considering as a means of representing at least a homogeneous group more-or-less permanently resident abroad but retaining land rights and other attachments at home.

PNG has provisions for two special classes. Firstly, the Parliament may appoint, by a two-thirds absolute majority vote, not more than three "nominated members" (ss.101(1)(c), 102). This provision has not been used, and was I think designed to reassure the conservative element that there would be room for representation either of special individuals or interest groups. Secondly, there are members for "provincial electorates" (s.101(1)(b)), to give representation of the semi-autonomous provinces: in fact, this is largely an adaptation to different purposes of the pre-independence schemes of "special" and later "regional" electorates, originally designed for racial representation and later made subject to educational qualifications.

The PNG provision for provincial representation is taken further in FSM, which provides for a federal system in a unicameral legislature by allotting a special seat to each state and by allowing each state to apportion its own ordinary seats (Art.IX, ss.8, 10), and also (see below) by giving extraordinary voting rights to state blocs (Art.IX, s.20). In addition, a state may set aside one of its ordinary seats for a traditional leader elected in accordance with statute, the state seats being reduced and re-apportioned accordingly (Art.IX, s.11).

WS provides for three kinds of members: members elected from "territorial constituencies" (*a matai* (chief) franchise); one additional member elected from each of such four of those constituencies as are
prescribed by Act; a number of members calculated on a formula set out in
the Constitution by "those persons whose names appear on the individual
voters' roll" - that is, those who are not members of an aiga (traditional
group) (Art.44(2), Sch.2).¹

Multi-member constituencies are specifically provided or allowed for
in Nauru, Tuvalu, Kiribati and MI, and to the extent noted above in WS
(though Vanuatu and Belau leave the matter open, and it is a matter of
inference that constituencies are single-member in FSM). There is little
doubt that this is a good arrangement for small islands countries with
relatively great concentrations of populations in areas that are too small,
or otherwise unsuited, for division: as the Kiribati example shows
indirectly, it can also help with the recurrent problem of how a national
leadership whose duties transcend constituency ones can be combined with
acceptable constituency leadership.

Except for the matai franchise in WS and for the Banaban provision in
Kiribati that a Banaban who is a non-citizen is entitled to register as an
elector on Banaba on the same basis as a citizen, there are no special
franchise provisions. Given the strength of custom and the traditional
social structure in most of these countries it is a little surprising that
only in FSM, and that indirectly, is there any provision for representation
of the traditional leadership (though no doubt it operates behind the
scenes). This is perhaps explicable by a rather uncritical acceptance of
Western political values by the more influential of the framers of
constitutions and their advisers. Even in MI, where the iroij (chiefly)
system remains strong and iroij were represented in the legislatures from
1949 to 1979 either by a separate House of Iroij or through reserved seats,
and where there is considerable popular pressure for the recognition of the
traditional leadership in local government, there is no special provision
for the traditional leaders (though as will be seen below, traditional
influence is accommodated in other ways).

In relation to eligibility for membership of the legislature there is
little to add. In Nauru, a candidate must be twenty years of age (the
voting age); in Solomon Islands (SI), Tuvalu, Kiribati and MI 21 and in
PNG, Belau and Vanuatu 25. In PNG, in addition, reflecting the interest
taken in the local nature of the responsibilities of a member, a candidate
must have been born in the constituency or have resided there continuously
for two years. Perhaps because of the prestige attaching to age in parts
of Micronesia, in FSM a candidate must be at least 30, and as well, must
have been a citizen for fifteen years and have been resident in his state
for five years (Art.IX, s.9). The tendency of such provisions to produce a
conservative, tradition-oriented and state-oriented central legislature is
obvious, and it is relevant that these requirements are stricter than those
in the former Congress of Micronesia, where the age of 25, five years'
citizenship and one years' residence in the District (the present state)
were prescribed (Secretarial Order (of the US Secretary of the Interior)
2918, Pt.III, s.6), and that Belau retained much of the previous
requirements (Art.IX, s.6).

A matter that was not referred to at the commencement of this section
is the forum for deciding questions of eligibility for membership. Here
there is a straight-forward split between the Westminster-oriented
constitutions (including MI) and the Washington-oriented ones: in the
former, they are matters for the courts, whereas in the latter, they are matters for the House concerned. Politically the difference is important, and related to it is the fact that the Washington-oriented constitutions (and formerly the Charter of the MI Nitijela) allow a House to expel a member (by a two-thirds majority vote, or three-quarters in the MI Nitijela) while the Westminster-oriented ones do not (although in PNG a member may be dismissed by the appropriate independent tribunal for an offence against the Leadership Code (s.104(2)(h)).

There are also provisions in Kiribati and Belau for the recall of a member by the electorate, which are discussed below.

All in all, leaving out of account the differences between parliamentary-executive and presidential-executive systems, there does not seem to be much rhyme or reason to many of the variations shown in this section, and one is forced to conclude that personal preferences and idiosyncracies played a great part in them. Nonetheless, the mere existence of such differences is significant not only to the student of constitutions but also, and more particularly, to the makers and revisers of constitutions.

LAW-MAKING

The making of laws is usually regarded as the principal constitutional function of a legislature. Four main aspects are discussed here: the formulas conferring the function; the form of laws and the requirements of law-making; assent and veto; and other limitations and controls (direct or indirect). I have also included a note on law-making by popular initiative in Belau. Constitutional amendment is dealt with below.

Legislative power is usually conferred by the use of variations on two standard formulas:

The legislature may make laws for the peace, order and good government of the country;

which is the "English" formula, and the more "American":

The legislative authority is vested in the legislature.

The problem with the first type of formula is that it is based on English usage and implicit understandings, and is largely fictional or programmatic without appearing so: the intention is that the power be exercised in that way, but whether a law will achieve the purpose is for the legislature alone to decide - but that is not what is said. PNG uses a similar formula, adding a reference to "the welfare of the People", but at least clarifies it somewhat by providing that a law cannot be challenged in a court on the ground that it does not pass the test (s.109(1), (3)).

The second type of formula is used in MI, FSM and Belau, and is a little doubtful because it tends to suggest a strict doctrine of the separation of powers (though MI attempts to avoid this by a provision - in itself not altogether clear - allowing the delegation of the law-making power (Art.IV, s.1(2)(b))).
LEGISLATURES

WS avoids such problems:

Parliament may make laws for the whole or any part of Western Samoa and laws having effect outside as well as within Western Samoa (Art.43).

This is not just playing with words: there is no guarantee in the Pacific that a constitution will be interpreted or applied by persons who know or accept the unstated assumptions of its framers. If the framers of a constitution know precisely what they mean, there is neither need for nor benefit in the use of a 'hallowed' formula.

Turning to the form of laws, PNG, WS, Vanuatu and Nauru use the simple word "law" while the others specify "Bill" or "Act". There is little to the point except that the more specific reference may avoid such a situation as occurred early in MI where both legislative and non-legislative instruments were made by undifferentiated "Resolutions" (see MI Code (1975), cl.65). A related point may, however, be important: SI, Belau and FSM (and formerly MI) set out in their Constitutions a specific enacting formula, the significance of which is that a bill may be "killed" by the omission of the formula, and I understand that, for example, in the Idaho Legislature, amendment for this purpose is used as a political ploy. As in all drafting matters, the aim should be simplicity and directness. FSM goes further in prescribing form: a bill may embrace but one subject expressed in its title and a provision outside the subject so expressed is void, and also prescribes the form that amendment must take (Art.IX, s.21). One cannot but think that as constitutional requirements, and presumably prerequisites of validity, these provisions go too far. Other countries include similar provisions in essentially non-justiciable rules of procedure, which seems an adequate approach.

Some constitutions require a number of readings of a bill: in FSM there are two; in Belau and MI, three, in Tuvalu and Kiribati, at least two. Unless there is some particular purpose to be served this is pointless, though in these particular cases there is: in Tuvalu (and in Kiribati (s.68(3)), though the reason is not so stated) a non-urgent bill is deferred until the next session "so as to permit consideration of the Bill by the Island Councils" (s.60(2)). (In Tuvalu, the Rules of Procedure provide for a separate stage for the consideration of comments of island councils on a bill.) In Belau (Art.IX, s.14) and FSM (Art.IV, s.20), readings must be on different days. In MI, certain bills need special reports to be made and published before proceeding beyond first reading (Art.IV, ss.2, 19, 20). Such purposes could, however, easily be served by better means. In general, readings are passed on a simple majority but FSM (presumably in aid of state rights) requires a two-thirds absolute majority on first reading and a two-thirds majority of state members voting as units on second reading (Art.IX, s.20), which amply justifies separated readings. There was nothing similar to the FSM provision in previous practice in the Trust Territory of the Pacific Islands, and apart from the inherent difficulties it poses for any controversial legislation, it can only have been included to discourage further separatism (though it might in fact exacerbate it).
I turn now to assent and veto: where there is a power to refuse assent I use the expression "veto".

There are three procedures: simple certification that a bill has been properly passed (MI, PNG and Nauru); veto (WS, Tuvalu, FSM and Belau); and "assent" (SI, Kiribati and Vanuatu).

The veto in WS and Tuvalu is nominally exercised by the Head of State, but actually by the Prime Minister (WS (Art.60)) or the Cabinet (Tuvalu (ss.58(2), 39(1))). Conceivably it was assumed that "Westminster" conventions would apply, but this is a most questionable assumption, and I think that it must be accepted that a true veto exists - in SI it is made quite clear that assent is a mere formality (s.59(2)). In FSM and Belau, with presidential executives, the veto power is a real one. In Belau its exercise can be over-ridden by a two-thirds majority in each House (Art.IX, s.15), but FSM places another restriction on the power of the legislature by requiring for the purpose a three-quarters majority of the state members voting as units (Art.IX, s.2(q)).

The "assent" in Kiribati (s.66(3)-(6)) and Vanuatu (Art.16(3), (4)) is not a mere formality, but gives the President an express power to refer to the courts a bill that he believes to be unconstitutional. In a related procedure, PNG (s.110(3)) and Belau (Art.IX, s.15) make provision for the executive to return a bill to the legislature for consideration of amendments recommended by the executive.

Except where there is a true veto, the certification procedure is by far the simplest to understand and operate. Even if a procedure referred to in the preceding paragraph is required there is no reason why a delay in certification should not be introduced for the purpose - in an analogous procedure, in MI certification is delayed pending Council of Iroij consideration (Art.III, s.3(4) and see below).

I need mention only four "other limitations and controls": in the neo-Westminster constitutions, the standard limitations on the right to introduce "money" bills and amendments (though there are minor variations); the requirement noted above of prior reports on certain types of bills in, for example, MI; the entrenchment of some or all of the constitution; and in MI the provisions relating to the Council of Iroij. Only the last needs further reference here.

The Council of Iroij (see, generally, MI Art.III and Lynch 1982b) is a non-legislative body of traditional leaders elected by their peers, and has two functions in relation to legislation. Firstly, it may request the Nitijela to reconsider any bill (bills not becoming Acts until certified by the Speaker (Art.IV, s.21(3))) that "affects the customary law or a traditional practice, or land tenure, or a related matter" (Art.III, s.3(2)). The Nitijela must reconsider accordingly, but makes the final decision. Secondly, the Council must be given an opportunity to report to the Nitijela and to the public on any bill to declare the customary law before it goes beyond first reading, by means of a joint committee of the Council and the Nitijela (Art.X, s.2(3)). The second function of the Council is analogous to the Vanuatu requirement that before providing for a national land law, of which "The rules of custom shall form the basis" (Art.72) Parliament must consult with the similar National Council of
Chiefs (Art.74). These provisions allow of a direct traditional input into the legislature of a kind different from what might be had if traditional leaders were ordinary legislators, without taking away from the supremacy of the legislature. By way of contrast, in Yap State of FSM a council of pilung and a council of tamol, comprised of traditional leaders, have a joint veto (in fact exercised) over any bill:  

which concerns tradition and custom or the role or function of a traditional leader as recognized by tradition and custom (Yap District Charter, Title 3 Trust Territory Code, S).  

However, how these various institutions will operate in practice remains to be seen.  

Belau has a provision that is unique among the Pacific Constitutions that I have studied:  

Citizens may enact or repeal national laws, except appropriations, by initiative ... An initiative petition shall take effect if approved at the next general election by a majority of the persons voting on the initiative. A law enacted by initiative or a repeal of a law by initiative may not be vetoed by the President. A law enacted or repealed by initiative may be subsequently amended, repealed or reenacted only by another initiative pursuant to the provisions of this section (Art.XIII, s.3).  

Approval of an initiative petition is thus by relative majority, voting being voluntary and abstentions not being counted. The mechanics of the procedure are not set out, but in any event it is a clumsy one. However, in a country such as Belau these may not be significant points. The resultant law is made directly by the people and not by the legislature. It is in effect entrenched, and thus, like Organic Laws in PNG, resembles an additional constitutional law.  

In a small country, it is difficult to say how non-government groups that lack drafting and other technical skills could produce effective initiative laws other than programmatic ones and directions to the government, but if they can this procedure may present a threat to the legislature. There is also the real possibility of political manipulation, especially as a majority of the voters voting in the concurrent election is not required (as will be seen, this is also an apparent defect of constitutional "referenda" in Belau). But the Belau Constitution is too young for the procedure to have been tested. In relation to the possible form of initiative laws in Belau, I am reminded of a procedure (now abolished) in the former MI Niti jela, under which there was provision in its Rules of Procedure for the introduction of a "short-form" bill - that is, "a bill which expresses an idea about desired or intended legislation but is not in a form for adoption as law". A "short-form" bill was referred to a committee for drafting (Rule 8(f)) (this is similar to the English practice before Henry VI, when bills were merely petitions to the King and the judges drew them up into statutes (see Maxwell 1962:39-40; Craies 1971:21-22). Such an approach may be suitable for initiative laws,
and indeed could perhaps have a wider application in legislatures with limited resources and experience: something of the same result might be obtained by means of a simple resolution, but the "short-form" approach is more formal and positive.

CONSTITUTIONAL AMENDMENT

There is no general agreement on the process of constitutional amendment otherwise than that: (1) a special procedure is required; and (2) except in Tuvalu, MI, FSM and Belau, certain provisions are entrenched more deeply than others. Two levels of entrenchment is the rule, except in PNG which has four (plus a transitory procedure for urgent amendments (ss.14(1)-(3), (6), 17(1), (2), (3))), Kiribati which has a special procedure, amounting to a Banaban veto, for the Banaban provisions (s.124); and MI which allows constituency apportionment to be varied by Act subject only to the tabling and publication of a special report (Art.IV, s.2(5); Art.XII, s.2(3)).

The basic procedure is amendment by Act, except in FSM and Belau, although in MI some amendments (the minor ones) are "considered and disposed of as if they had been proposed by Bill" (Art.XII, s.3). The special aspects are: (1) special time for consideration (except in Tuvalu), and in SI special notice (s.61(4)(a)) (Vanuatu gets much the same result by requiring a special sitting of Parliament (Art.83)); (2) a special majority or majorities; and (3) final approval by referendum in all cases in MI, FSM and Belau, and in the case of specially entrenched provisions in WS, Nauru, Kiribati and Vanuatu (only Tuvalu, PNG and SI have no referendum provision).

Additionally, PNG (s.13(a)) and SI (s.61(4)(b)) require constitutional amendments to be expressly stated to be such (thus guarding against accidental or incidental amendment), while the required special meeting in Vanuatu, referenda in other countries and the procedures in FSM, Belau and MI described below get the same result.

PNG also has a useful procedure by which amendments can be made by ordinary Act if the Speaker, after consultation with the Chief Justice or a Judge, certifies that they are not substantive, or merely correct self-evident errors, or are merely incidental or consequential (s.14(6), (7)).

Belau (Art.XIV) and FSM (Art.XIV, s.1) are especially interesting, because not only is the process different from the making of Acts, but also (like MI) they provide for direct popular participation. There are three ways in which amendments may be proposed: by constitutional convention; by popular initiative; or by the legislature. In all cases, amendments become effective on approval in a referendum or the equivalent. FSM leaves procedures to statute, but typically requires approval by three-quarters of the votes in three-quarters of the states. Belau spells out the procedures, allowing proposals to be initiated on a review of the Constitution (see below), on petition by 25 per cent of registered voters, or by a resolution of three-quarters of each House. As with initiative laws, in Belau a proposal is voted on at the next regular general election
and requires a majority of the votes cast on the proposals, and also a majority in three-quarters of the states.

In MI (Art.XII, s.4), popular participation is secured by requiring the question of the establishment of a constitutional convention to be put to a referendum on petition by 25 per cent of qualified voters, and by requiring approval (either two-thirds or a simple majority, depending on the nature of the amendment) of any amendment in a referendum. Its approach is more restrictive than those of FSM or Belau especially in that a convention can propose only amendments submitted by the Nitijela or by referendum (and amendments related to or consistent with such amendments).

An important aspect is the question of review of the constitution, but only FSM, Belau and MI provide for regular reviews: FSM requires referenda, at not more than ten-year intervals, on the question of holding a constitutional convention (Art.XIV, s.2), as does Belau (at fifteen-year intervals) (Art.XIV, s.1(a)); MI requires a report (of unspecified origin) on the desirability of amendment, or on the calling, or the holding of a referendum on the calling, of a constitutional referendum, to be provided for by the Nitijela at least once every ten years (Art.XII, s.6). PNG (s.260), emphasising I think the importance placed on the permanence of the Constitution, required a single review three years after Independence (the result of the review is not yet reported), and Kiribati required a review of the Banaban provisions (a very special case, of political rather than legal importance) three years after Independence (s.122). The other Constitutions have no similar provision.

I believe that regular and continuing review is desirable even at the risk of fostering amendment, especially where the constitution is obviously an imported product, or is to some extent experimental (e.g., in MI, Kiribati, Vanuatu and probably FSM), or if some specifically local development and adaption is expected: most of the smaller countries of the Pacific would fall into one or other of these categories. In this respect, I note that reviews are already under way, or are about to get under way, in Tuvalu and Belau, without a specific constitutional requirement.

I referred above to the device of special entrenchment used in seven of the constitutions, but the only principle applied seems to be that the depth of entrenchment depends solely on local perceptions (or perhaps persuasibility) at the time. There is no agreement even on the relative importance of bills of rights, which are specially entrenched only in Kiribati, MI, Nauru and SI, while PNG entrenches to the maximum only four provisions of the bill and four more provisions in the related field of states of emergency. Nor is there agreement on the importance of custom and land, only SI, MI and WS specially entrenching such matters.

It seems that the reason for the special entrenchment of, and special protection for, a provision is not its intrinsic importance (if there be such a thing), but its political importance at the time, and I think this is the right approach. Vanuatu seems to express it most clearly in specially entrenching certain politically controversial issues, namely:

- the status of Bislama, English and French, the electoral system, the powers and organization of
Regional Councils and the parliamentary system (Art.84).

Over-entrenchment and unnecessary entrenchment give an undesirable rigidity to a constitution and are very likely counter-productive. However, there is no doubt in my mind that regular review is the best cure for constitutional malaise, and the crux of the matter is that there must be some simple and acceptable way out (perhaps in part, provision for Acts of Indemnity (see below) or amendment by a standing constitutional convention) in cases where a basically imported constitution, or foreign-oriented constitutional thinking, hampers reasonable and proper action.

THE LEGISLATURES AND THE EXECUTIVES

Legislature/executive relations and the control of the latter by the former are central to any discussion of the legislature, but I simply point out some relevant differences between constitutions discussed here.

The first group of differences relates to the appointment and dismissal of the executives. On the presidential-executive side, in Belau the President is elected in the usual way by the national electorate (Art.VIII, s.4), but in FSM by the Legislature (Art.X, s.1) (making him so much the more dependent on it) and in addition he must be a member of Congress elected by a state at large (i.e., in a special state seat) (Art.X, s.4). In Belau (Art.VIII, s.9) and FSM (Art.IX, s.7), he may be removed by the Legislature by impeachment, and as we shall see he may be recalled in Belau.

There are variations among the parliamentary-executive countries, too, although the general rule is that Heads of Government at least are selected by the Legislature and Ministers by the Heads of Government.

In Kiribati, the President is elected by the national electorate, but from a panel selected by and from the Legislature (s.32), in Vanuatu, where the President has considerable discretionary powers, he is elected by an electoral college consisting of Parliament and the Presidents of the Regional Councils (Art.32); in WS the Head of State, who also has significant personal powers, is elected by the Legislature (Art.18), while the Prime Minister is appointed by the Head of State as the person "who commands the confidence of a majority of the Members of Parliament" (Art.32(2)(a)).

Even in the monarchies, there are differences as to the Governor-General. In PNG (where he has for practical purposes no power) he is nominated by the Cabinet in accordance with a decision of the Legislature, and is dismissable on the "advice" of the Cabinet either of its own motion or on a decision of the Legislature (ss.88, 93). In SI, he is nominated by the Legislature and is dismissed in accordance with an address by it (and a two-third majority vote) (s.27), while in Tuvalu he is nominated by the Prime Minister after consulting the Members of Parliament, and is dismissed on the Prime Minister's "advice" (s.28(2)). In these cases, incidentally, the Governor-General has real powers.
In general, the executives are responsible to and are dismissible by the legislatures, though in WS the Head of State may be so dismissed only on the ground of misbehaviour or incapacity, while in Vanuatu the President may be dismissed on similar grounds by the electoral college referred to above.

A point arising out of this is that the closer the connection between the executive and the legislature the greater the implicit or indirect influence of the latter is likely to be, quite apart from its direct influence. A related point is that all the parliamentary-executive constitutions limit, either absolutely or by percentage, the size of the Cabinet (although in SI the Legislature may determine the size), so as to maintain parliamentary control: maxima vary from five out of twelve in Tuvalu to 25 per cent in Vanuatu.

The dismissal of the executive by the legislature in the "Westminster" countries has varying effects, though in general it does not involve dissolution of the legislature. However, in Kiribati (s.78(1)) it does (logically, since the President is elected by the national electorate), while in Nauru there is an automatic dissolution if a new President is not elected within seven days (Art.24(2)), and in PNG one occurs if the Executive is dismissed in the last twelve months of the normal life of the Legislature (s.105(1)(b)). In WS, Tuvalu, Vanuatu and MI there is a discretionary power to dissolve: in WS, on the "advice" of the Prime Minister (Art.33(2)(b)) or if a new executive is not formed within a reasonable time (Art.63(2)); in Tuvalu, if a new executive is not formed in a reasonable time (s.71(3)); in Vanuatu on the advice (which does not appear to be binding) of the Cabinet (Art.26(3)); and in MI by an outgoing President if no incoming executive can be formed (Art.IV, s.13). The point is that the greater the likelihood of a dissolution on the defeat of the executive, the greater (in general) the disincentive for votes of no confidence, and the stronger the executive in the legislature.

There are, however, other forms of control over the executive. In addition to the usual financial and legislative controls, there are committee systems (provided for in any detail only in PNG (Pt.VI, Div.2, Subdiv.E) though Public Accounts Committees are common); control of delegated legislation (provided for only in PNG (s.116)); control of treaties (see below); and in the parliamentary-executive systems the physical presence of the executive in the legislature and its availability for questioning both on the floor and in committees. The practical importance of such controls should not be overlooked.

The final aspects of parliamentary control to which I should like to draw attention are the power in Kiribati (s.33(2)(b)) and in PNG (s.145(1)(a)) to move a motion of no confidence in the Head of Government personally, rather than in the Cabinet collectively (though the effect is the same), and the power in PNG to move a motion of no confidence in an individual Minister (s.145(1)(a)). The latter provision, though at least superficially attractive, is I think a serious breach of the principle of collective responsibility of the Cabinet itself as expressed in the Constitution.
It should be noted that the executive can be dismissed only on an express motion of no confidence (or in WS and Kiribati on the vote on a matter that it has declared to raise an issue of confidence— in Kiribati, due to the automatic dissolution provision this lends itself to a kind of parliamentary blackmail). There is no "convention" that on defeat on certain motions or bills (e.g., financial proposals) an executive should or must resign.

Control by the legislature of the executive has its counterpart in influence by the executive over the legislature. This is largely a political and practical matter, and I merely mention three points. Firstly, it is not uncommon for the executive to have a fairly tenuous control of numbers in the legislature, so for it to be over-ruled is equally not uncommon. Secondly, in typical "Westminster" fashion the parliamentary-executive constitutions give the financial initiative to the executive. Thirdly, where there is a true executive veto (even if, as in Belau and FSM the veto can be over-ridden) the executive has a fairly tight grip over legislation.

EMERGENCY POWERS

The balance of powers between legislature and executive during emergencies is everywhere an important constitutional issue, though MI makes no provision for emergencies. The general picture is one of a broad suspension of individual rights, with legislative power granted to the executive and little in the way of day-to-day parliamentary supervision.

The declaration of a state of emergency is usually a matter for the political executive. In Tuvalu the decision is made by the Prime Minister (s.18(6)(b)) and in WS by the Head of State in his discretion (Art.105). Its continuance beyond a limited period depends on the positive approval of the legislature, except in WS (Art.105(2)) where the Head of State can make continuing declarations, each for 30 days. A declaration can be revoked by the legislature, except in WS, FSM and, it seems, Nauru (though in that case the approval of the legislature might be revoked).

Except in SI and Tuvalu, the Executive is given legislative power to deal with the emergency, largely free from direct control by the Legislature, but PNG has a more complicated system under which the Parliament can make Emergency Acts and the Cabinet Emergency Regulations (Pt.X, Div.3). Emergency laws over-ride constitutionally-guaranteed rights except for the more fundamental ones, although in WS, Nauru, Belau, and FSM the over-riding power is absolute if necessary and in Vanuatu the preserved rights are minimal (Art.69(1)). However, all the Constitutions except Belau and FSM provide certain safeguards against detention without trial (though in Vanuatu again the safeguard is minimal (Art.69(1)(b))).

One might therefore expect provision for continuing parliamentary supervision and control, but in fact only PNG, Belau and Vanuatu, and to a limited extent WS provide for it. PNG has fairly elaborate provision for supervision and report by parliamentary committees (Pt.X, Div.4). Belau in effect requires a meeting of the Legislature every ten days (Art.VIII, s.14); Vanuatu merely provides that the Legislature shall meet "whenever it decides" (Art.68(4)), while in WS control is limited to power to revoke
Emergency Orders (Art.107(2)). All the Constitutions, however, require early meetings of the Legislature except in Tuvalu (where the point is not really relevant since only the Legislature can make emergency laws).

The problem lies in the unpredictable nature, gravity and requirements of any given emergency, the need for adequate power to cope with it, and the need to limit responses to its real requirements. Possibly the Vanuatu (Art.69(2)), Belau (Art.VIII, s.14) and FSM (Art.X,s.9(b)) provisions that the response be "necessary" together with limitations on detention without trial, greater parliamentary supervision as in PNG (which is difficult in scattered island countries), and the preservation of the truly basic rights, is about the best that one could hope for.

A related provision in PNG should, however, be mentioned: that is, the power of the Legislature to pass an "Act of Indemnity", to relieve from liability (civil and criminal) a person who contravenes or fails to comply with a provision of a constitutional law where:

the contravention or non-compliance was made in good faith and in exceptional circumstances for the purpose, or with the intention, of upholding this Constitution or protecting Papua New Guinea, or of dealing with an emergency for which no provision or no adequate provision appeared to exist; and ... no blame-worthiness attaches (s.137(1)(b)).

Special formalities are required, and before certifying the Act the Speaker must seek the opinion of the Supreme Court. This provision may ease the mind of anyone who feels himself forced, for a valid reason, to take or to risk taking unconstitutional action, but unfortunately may tend to encourage such action: as always, the problem for the constitution-maker is one of balancing benefits and disadvantages, and in particular of discouraging the complete overthrow or ignoring of the constitution, in the hope that it will survive even breaches of it. What the PNG provision attempts to provide is a kind of spring-board back to constitutionalism.

PRESIDING OFFICERS

The office of Speaker (or his equivalent) is central to the functioning of a legislature. I intend to concentrate here on three main points: his membership of the legislature; his voting rights; and his functions. At the outset I point out that Vanuatu makes no provision other than that "Parliament shall elect a Speaker" (Art.20(1)).

The general rule is, that the Speaker must be, and remain, a member of the legislature, but this is not the case in SI and Kiribati. In the former any person qualified to be a member of Parliament may be elected Speaker, but if a member is elected he vacates his seat (s.64); in the latter only a non-member is eligible, and there are no restrictions (even citizenship) (s.71). In both cases his normal term of office ends when the legislature meets following a general election. There is a third possibility: that the Speaker may be either a member or a non-member. This is the case in CI (Art.31), but not in any of the Constitutions primarily discussed here.
The problem for a small country is two-fold: in a small legislature the demands of ministerial office may well make it difficult to provide a suitable Speaker from among the members, while to do so reduces the number of back-benchers in a position to supervise the executive; and it is difficult for the electorate to see its member primarily as an impartial Speaker and not as its representative and spokesman. I admit a strong preference for the Kiribati solution, which by helping to depoliticise the office also makes it available for extra-parliamentary functions (see below).

There is little agreement on the voting rights of the Speaker. SI and Kiribati logically give him none. MI, Belau and FSM give him full rights, which assures electorate representation at the risk of apparent partiality (MI complicates the picture by requiring all members present to vote (Art.IV, s.15(4))). WS and Nauru give him only a casting vote, and PNG (s.114(2)) and Tuvalu (s.65(3)) a casting vote with a deliberative vote on certain matters only. (The exceptions are in both cases basically motions of no confidence and constitutional amendments.)

The casting vote of the Speaker is a method of resolving deadlocks, but if he exercises it in his political judgment once again his impartiality is in question, whereas if he exercises it by reference to some "convention" of preserving the status quo he may appear to his electorate to be in default. There are, however, alternatives: in SI (s.71(3)) and Kiribati (s.73(3) (subject to the Rules of Procedure) for example, on a tied vote the motion is lost (which might create problems if there is a procedural inhibition against the re-introduction of a defeated motion). PNG (s.114(3)) and MI (Art.IV, s.15(7) have, I think, the best procedure: a tied vote is a no-decision vote, the PNG provision being procedurally the better in deeming the motion to be withdrawn. A real question is, whether such matters should be in a constitution at all. 7

There is little to be said on the parliamentary functions of the Speaker, which are primarily to preside over the House and to manage its business (though it is worthwhile to refer again to his certification as an alternative to "assent"). MI, however, supplies a precedent that may be useful if only for its educative value:

The Speaker shall be responsible for ensuring that the official business of the Nitijela is conducted in compliance with this Constitution and the Rules of the Nitijela, and shall exercise his functions impartially (Art.IV, s.8(2)).

For small countries with scarce manpower resources the use of people in multi-functional roles is highly desirable, and though the use made of the office of Speaker might be greater the following selection of non-parliamentary constitutional functions may be suggestive. He is the Acting Head of State in PNG, Vanuatu, Belau and (if there is no other already appointed) Tuvalu, and in Kiribati is a member of the Council of State (which administers the Government when the Cabinet is dismissed); in MI, he formally appoints the President and the Ministers; he is Chairman of the Electoral Commission and a member of the Committee on the appointment of the Ombudsman in SI, and is consulted on any such appointment in Vanuatu; in Vanuatu, quite remarkably he originally nominated a judge.
Some of these functions may be held as a representative of the legislature, but others seem to be based on the standing and impartiality of the Speaker.

Finally, there is provision for a Deputy or Vice Speaker in all cases except FSM and Belau (where the matter is left to the Legislatures), Kiribati and Tuvalu, and in each case (including SI) he must be and remain a member. SI, MI, WS and Tuvalu provide for ad hoc appointments of members to preside - PNG leaves this matter to Act or Rules of Procedure. It might here be noted that in SI a member presiding who is not the Speaker has a casting, but not a deliberative, vote (s.71(2)(b)) (unlike the Speaker who has none).

MISCELLANEOUS MATTERS

There are a number of other features of some of the Constitutions discussed here that are worth mentioning, even if they cannot be examined in detail. I have chosen some that I find striking, or of practical importance.

The first is the position of the Attorney-General, an office that is often a problem, especially where it has to be filled by an expatriate. MI, SI, Kiribati and Tuvalu illustrate different approaches (in each case the office is a public office).

In MI, the Attorney-General is simply the legal adviser to the Executive (Art.VII, s.3(3)) (there is, however, a separate statutory office of Legislative Counsel, responsible to the Legislature). In SI, if the Minister responsible for justice is not entitled to practice in the country the Attorney is entitled to take part (but not to vote) in proceedings in Parliament as adviser to the Cabinet (s.42(4)).

Kiribati adopted an extreme, and unfortunate, provision: the Attorney-General, who is appointed by the President personally (s.42(2)), is a full, voting, member of both the Cabinet and the Legislature (ss.40, 53(1)(c)), but does not go out of office with the rest of the Cabinet. The result is to give the President a nominated vote, responsible to no electorate but only to the Cabinet (which is itself collectively responsible to the Legislature).

Tuvalu, however, has an approach that seems to solve (as far as a law can solve it) the problem of providing legal advice in the legislature. Unless excused by Parliament, the Attorney-General must attend all meetings of Parliament without the right to vote, and similarly attends all meetings of the Cabinet unless excused by the Prime Minister (s.43(4), (5)).

The second feature is the "Official Opposition" and the party system, referred to in SI, PNG and Vanuatu. In SI the Speaker, after consultation, "advises" the Governor-General on the appointment of a Leader of the Official Opposition and a Leader of the Independent members, basing "advice" on his assessment of support for his nominee from the groups concerned (s.66), whereas in PNG the Parliament recognises the principal and second speakers (if any) on behalf of members not committed to support the Executive as Leader and Deputy Leader, respectively, of the Opposition
(s.Sch.1.2(1)) (in addition there is a general recognition of the existence of political parties or groupings in relation to the leadership of Permanent Parliamentary Committees (s.119(2))). These approaches are administratively convenient, but unless politically necessary they tend to polarise the legislature and to institutionalise opposition to the executive.

Vanuatu merely states a principle (which in the circumstances was hardly unavoidable):

Political parties may be formed freely and may contest elections. They shall respect the Constitution and the principles of democracy (Art.4(3)),

but in some circumstances even this could legitimate oppression.

Parties and an opposition are not essential to democratic parliamentary government, and it seems best to say nothing of them.

The third feature is the "recall" of members, provided for in Kiribati and Belau. In Kiribati (s.59), the procedure does not apply to members of the Cabinet and involves: (1) a petition by the majority of the registered voters in the member's constituency at the time of his last election; (2) a referendum among those voters; and (3) if the referendum approves recall, a by-election - the problem of tracing voters who have moved from the constituency is obviously major. In Belau (Art.IX, s.17) a petition by 25 per cent of the persons who voted at the member's last election is required, followed by a "recall election" (i.e., a referendum) in the constituency and if necessary a by-election, but there are limits to the occasions on which a recall may be sought; the President and Vice-President may be recalled by resolution of two-thirds of the state legislatures in three-quarters of the states, approved in a "national recall election" (Art.VIII, s.10). The recall may be, in principle, highly democratic, but it is also expensive and confusing, even if limited (as it should be) to the eligible voters in the constituency from time to time; furthermore, it may well inhibit the introduction of necessary tough long-term measures and is obviously open to political manipulation (especially in Belau). However, it is more manageable in a small country, where election is on a personal rather than a party basis, than in others.

The fourth feature is control over treaties, in PNG, Vanuatu, MI, Belau and FSM. PNG, in general, requires prior parliamentary approval (s.117), while FSM merely empowers the Legislature to ratify (Art.IX, ss.2(b), 4). In Vanuatu parliamentary ratification of certain treaties is required (Art.24), whereas MI (Art.V, s.1(2)(d)) and Belau (Art.VII, s.7(2)) require approval in all cases. In Belau, further, a treaty delegating "major governmental powers" requires a two-thirds majority vote in the Legislature approved in a referendum (Art.II, s.3); while if the treaty authorises the presence or use of harmful substances "such as nuclear, chemical, gas or biological weapons or of nuclear reactors" a three-quarters majority vote in a referendum is needed (Art.XIII, s.6).

Nuclear weapons and the proposed Compact of Free Association with the US are, of course, key issues in the Trust Territory of the Pacific Islands, and both MI (Art.XIII, s.6) and Belau (Art.XV, s.11) make additional provision for the latter.
It is nowhere stated that treaties are part of the law (as in the US) and both PNG (s.117(7)) and MI (Art.V, s.1(4)) specifically provide to the contrary.

The concern of these countries with treaties is understandable, and while parliamentary ratification is a democratic procedure it makes for delays and uncertainties that may be unacceptable in, for example, finance and trade matters (although PNG excepts urgent cases, and cases where advance approval "would not be in the national interest" (s.117(5)(b))). The requirement could well lead to the use of US-type "executive agreements" not amounting to treaties in domestic law and hence not requiring approval.

Finally, Belau has a quite remarkable provision, that might greatly fetter the legislative power:

> Statutes and traditional law shall be equally authoritative. In case of conflict between a statute and a traditional law, the statute shall prevail only to the extent it is not in conflict with the underlying principles of the traditional law (Art.V, s.2).

No guidance is given as to what are "underlying principles of the traditional law" (one is reminded of Sir Edward Coke's view of the common law (see Maxwell 1962:251-52), so the way is open for a considerable amount of judicial legislation. However, US courts have distinguished between fundamental and other provisions even of the Bill of Rights (in connection with the difference between incorporated and unincorporated territories (see de Smith 1970:108-12; Laughlin 1980:343-60) so that a basis for the necessary jurisprudence may exist.

CONCLUSION

At the end of a study such as this, one asks oneself what it proves and what use is it: the answer depends on one's interests and on what one is looking for. My own primary interests are in the drafting of constitutions, and in the legislative and administrative implementation of them, rather than in political or sociological considerations, except to the extent that the latter affect the former. As a result, I derive from this and other studies in comparative constitutions four main principles: three of them are truisms, and the fourth should be.

Firstly, there is no ideal set of constitutional provisions, and probably not even one for particular circumstances. Secondly, there are always alternative ways of achieving the same constitutional purpose. Thirdly, even within basically similar systems there are more variations possible than is often thought. Finally, a principal use of the comparative study of constitutions is as a source of ideas rather than of precedents, and the newer and smaller countries of the Pacific may have much to offer older and larger countries in this regard.

To me, the most striking features of the Legislatures discussed here are their similarities and their "ordinariness". No matter how much it has been naturalised, and no matter what the local variations, the legislature
in the Pacific largely remains an Anglo-American importation, and reflects little of the region's long history of traditional government through formal and informal customary assemblies and meetings. There are exceptions - the Council of Iroij in MI and the seats for traditional leaders in Belau, for instance - but that is the general constitutional picture. This is not necessarily a bad thing, and parliaments may well be suitable institutions - but it is noticeable.9

However, the picture may be deceptive.

In other papers I have suggested that in operation the MI Constitution may prove to be a hybrid of "Westminster", US and traditional patterns (see Lynch 1980) and that Vanuatu may be a blend of "Westminster" and tradition (see Lynch 1981a), to take two instances. A further matter that may prove more important in practice, at least in some parts of the Pacific, is that government tends to be consultative and consensual rather than, as in the West, confrontational. "Consensus" in this case is more than just decision-making by general agreement, and involves a positive avoidance of polarisation of attitudes, and the deliberate attainment, by consultation and discussion, of generally-acceptable solutions; it goes beyond consultation, and is different from compromise (at least in the pejorative sense of that word). An institution that operates on consensual lines is likely to be quite different, in real terms, from one that does not (see Lynch 1981b, 1982a).

Related matters are the effect of the close personal links between many legislators, public servants, and other public figures, all of whom tend to be regarded as "leaders"; the fact that legislators tend to be regarded (and to some extent to regard themselves) as spokesmen for their electors rather than as representatives in the Anglo-American parliamentary sense; and the possibility that procedurally, if not structurally, the legislatures may adopt traditional rather than imported approaches and values (ibid.). Such factors, especially the last, may give a new complexion to parliamentary government.

Though such matters are not covered, and probably cannot be effectively covered, by the written words of constitutions, it remains true that little consideration seems to have been given to alternatives (traditional or other) to orthodox parliamentary systems.

NOTES

1The High Court has recently (March 1982) held the matai franchise provisions, which were contained in the Electoral Act, invalid.

2The Charter is, pro tem., the Constitution of Yap State.

3Significantly, this provision is not contained in the Article dealing with the Legislature.
The reference to Regional Councils is now omitted. See Constitution First Amendment Act (1980) s.1(h).

Now the chairmen of the local government councils. See Constitution First Amendment Act (1980) s.1(g)(ii), (iii).

Vivian Bose's reservations concerning the applicability, at all times and in all places, of the principles of the rules of law, and the need to "view with sympathetic understanding the plight of those that accept our principles and ideals but who, whether they be right or wrong, feel it their duty temporarily to reject certain of the matters in which they also have ultimate faith in order that the things in which they believe and we believe can be preserved and ultimately restored in a newer and cleaner form" (1959:41 et seq.) ought to be borne in mind.

CI has an even worse provision (Art.34(3)) under which it seems that a non-member Speaker has a casting vote.

This provision has now been omitted (Constitution First Amendment Act (1980)).

However, I am informed that it was the deliberate decision in MI to adopt the "Westminster system" because of its resemblance to the traditional order (personal communications, but confirmed in part by MI Political Status Commission 1977), and also that it was decided not to have direct iroij representation in the legislature but instead to provide for a traditional input through the Council of Iroij (personal communications and see Lynch 1982b, 1982c).
Controlling the Executive in Papua New Guinea (PNG) in effect means controlling the exercise of power by five groups of people who are either directly or indirectly employed by the State. These include the Ministers and their personal staff, public servants and employees of State services and employees of statutory bodies. It is these people who exercise the actual power but in the name of the particular executive organ to which each of them belongs; and these are the bodies behind which the individuals seek shelter when challenged, or in whose name they claim to act when asserting power. One thing is, however, clear: the executive power is derived from a written constitution, the Constitution of the Independent State of Papua New Guinea.

THE NEED FOR LEGAL CONTROL

Third World constitutions have invariably adopted the traditional Western technique of dividing the total governmental power into the celebrated tripartite system of legislative, executive and judicial powers, perhaps rather blindly! Following the precedent of Western democracies, these constitutions always allocate to the executive arm of government the power and function of the actual governing of the state. This puts the executive in a position where it is bound to have much impact on the daily lives of the citizens.

The need to have legal control of the executive is but one aspect of the general concern to limit power of government; what constitutional lawyers call 'constitutionalism' is basically government with limited powers. But the justification for the cry for greater control of the executive arm of government in particular is founded in the world-wide experience of frequent breaches of the individual's human rights by the executive — what the International Commission of Jurists calls breaches of the rule of law.

In his address to the International Commission of Jurists at its 1962 Congress in Rio De Janeiro, its Secretary General Sir Leslie Munro observed:

That in our endeavour to promote and foster understanding and respect for the Rule of Law we have encountered over the years breaches of the Rule of Law — breaches perpetrated by governments and their
instruments. The most powerful arm of government is indisputably the Executive, and by Executive I mean both the ruling politicians and their Administrations. The experience of the Commission shows that it is from the hands of the Executive that the ordinary citizen should have the undisputed right to vigilant and continuing protection from abuse of power. Executive is made for the citizen, not for itself (International Commission of Jurists 1962:62).

But in the PNG context the control of the Executive in terms of protecting the individual's human rights has another and even more important dimension to it: only if the Executive is controlled effectively can the National Goals that Papua New Guineans have set for themselves in their Constitution (see PNG Constitution: Preamble) be achieved. If the governmental policies are to benefit the human needs of the people of PNG instead of some other needs, control of the Executive is vital. Such traditional doctrines as ultra vires with which courts have been able to control the executive lack full meaning in PNG unless they are portrayed against this wider context of the nation's constitutional system.

But there were also two other reasons that rendered the concern for adequate legal control of the Executive predominant in the minds of the members of the Constitutional Planning Committee (CPC) on whose recommendations much of the present Constitution is based. In the first place, it was noticeable that the Executive enjoyed what seemed to be an unnecessarily dominating position under Australian colonial government. Although the executive domination of the colonial government was not peculiarly Australian, the degree of that domination was. As Professors Tordoff and Watts observed:

... in our experience of political systems in Asia, Africa and the Caribbean, we have not come across an administrative system so highly centralized and dominated by its bureaucracy (PNG CPC 1974:10/1).

The particular aspect of this scenario that concerned the members of the CPC most, was the opportunity denied to Papua New Guineans to take part in the decision-making process particularly within the executive area of government. Hence, the CPC not only wanted to see the total power repatriated as it were from Canberra to Konedobu, but also that this power should be returned as much as possible to the people themselves through some form of decentralisation. Naturally, this would lead to a greater number of executive bodies.

Secondly, the experience of breaches by the Executive of individual human rights in PNG during the colonial rule rendered the need to control the Executive obvious to the members of the CPC. Both John Momis and John Kaputin were actively involved in break-away movements in New Britain and Bougainville respectively, and knew what brutality meant when the members of their movements clashed with the police. It was during this period that the Executive of the colonial administration tried unsuccessfully to have the House of Assembly enact the 1970 Public Order Bill which was aimed at restricting certain human rights. There was a consequent out-cry against the move and this led to a successful passage of the Human Rights Ordinance.
CONTROL OF THE EXECUTIVE

(1971) sponsored by Sir Percy Chatterton, a long-time missionary and a then member of the House of Assembly. The CPC's concern in this respect is reflected in the present Basic Rights provisions in the Constitution. These provisions are some of the most elaborate constitutional provisions on human rights in recent years.

THE DILEMMA

The question of the need to control the executive is but one side of the challenge that all developing nations face. The other side is the need to allow the executive a certain freedom of action so that it can deliver the social goods the people expect from it. The real dilemma thus lies in being able to balance these two needs which often seem antithetic to each other. The task of achieving this balance legally rests on tackling two fundamental questions.

First, one needs to identify those areas within the executive action where for national and other legitimate reasons the executive must be allowed some relative freedom but subject to a posteriori control of some kind. The means by which this relative freedom of action can be enjoyed is, of course, discretion. Without discretion, much of governmental process would be frustrated and executive initiative stifled. One can in fact see two dimensions to this scenario. In one set of situations the executive may be denied any discretion; whilst in another, discretion may be conferred on the executive but its exercise is made subject to either a priori or a posteriori control. In a priori control situation, control acts as a guide to the exercise of discretion, whilst in a posteriori control cases, control in effect is a judgment about an exercise that has already occurred.

The second question is the task of determining and ensuring that the legal means devised to control the executive action are both adequate and effective. It is this question, and particularly the adequacy of control in terms of institutions and principles, that I want to confine myself to in this paper.

ADEQUACY OF LEGAL CONTROL

The question of adequacy of control of the executive has been a thorny issue in the Third World generally. The traditional approach, at least according to the common law system, has been to rely on the parliament to control the executive; and if this fails, then to resort to the courts. But as it is now appreciated these traditional devices have their internal as well as external limitations which inhibit effective control of the executive. S.E. Finer for instance, argues that it was the failure by parliaments to control the executive on the Continent of Europe that led to the establishment of administrative courts and the development of administrative law (Finer 1980:348).

The response to this inadequacy by the Third World constitutions has been to incorporate additional means of control through additional institutions and principles: ombudsman commissions and leadership codes come readily to mind. But often these are carbon copies of similar
institutions and principles elsewhere. However, the point that needs to be emphasised is that implicit in these constitutional arrangements is the concern to take what may be called 'a composite approach' of providing as many control devices as necessary to achieve an over-all adequacy of control. The rationale for the composite approach rests on two propositions: First, it is now appreciated that the traditional control devices could be restructured to enable them to overcome some of their inherent limitations in relation to controlling the executive. Second, that the remaining limitations of the traditional control devices can be remedied by new institutions and principles. In this way it is hoped that the composite approach will ensure the attainment of the total adequacy of control that has been lacking.

Although this approach is commendable, it does appear that it has not been taken by Third World constitution-makers as a matter of deliberate policy. Rather, this approach seems to be implicit in the constitutional arrangements. One possible explanation for this could be the willingness of the Third World countries to emulate the precedents and experiences of the more developed countries rather uncritically. In this respect PNG is no exception. This unconscious act has produced a number of problems: A glance at their operation shows that these various control devices are not organised into a coherent system. This naturally leads to imprecise definitions of the scopes of their control roles and the consequent problems of overlaps in jurisdiction and co-ordination.

I do not intend to discuss all these problems in the rest of this paper except to allude to some of them to illustrate the types of problems that various control devices might encounter in real life. Rather, I intend to identify the additional control principles that the PNG Constitution has adopted, and to discuss briefly only some of these principles to illustrate their nature and their use.

ADDITIONAL PRINCIPLES OF CONTROL

The PNG Constitution has adopted a number of additional control principles to reinforce the traditional principles of parliamentary and judicial control. These include:

- a modified form of the separation of powers doctrine;
- the principle of participatory democracy;
- a Leadership Code; and
- the National Goals and Directive Principles.

It should be stressed that this list is illustrative rather than complete. What then, has been the experience in the application of these additional principles?

(1) A Modified Form of the Separation of Powers Doctrine

The Final Report of the CPC reveals two underlying concepts about the organisation and use of the total governmental power. First, there is a clear and strong conviction that if the National Goals were to be achieved a concentrated and initial effort towards this end was required. This
necessitated maximum co-operation between all the agents of that governmental power. The CPC was not therefore concerned with the traditional concept of separation of powers as such. Thus, the CPC asserted:

If government is to be truly responsive to the people, it is vital that those whom the people elect to represent them should be able to contribute actively and effectively to the government of the nation. The legislature should not be seen as a rival to the executive arm, but rather as a full and constructive partner (PNG CPC 1974:6/1) (my emphasis).

In a similar vein the CPC stated:

...courts do not...exist in a vacuum. Like other institutions of the government of a country they are caught up in political realities and often their decisions have important political consequences. In carrying out their judicial role judges and magistrates must take full account of the goals of the society in which they live; they must be attuned to the wishes of that society and to that extent must be politically conscious (although not party politically conscious). At the same time, the judiciary has a duty to protect the rights of the individual and minority groups: its job is not simply to reflect the will of the government of the day. These two principles may well be contradictory in a given situation and the courts are therefore faced with the need to make a satisfactory compromise between them (ibid.:6/1).

The second underlying concept was the need to avoid concentrating one particular type of governmental power in one single institution. Thus, the legislative power was to be exercised by agents other than by the National Parliament alone. In relation to the executive field, the CPC was quite specific on the point. The Committee saw "a few very specific executive functions" that it proposed should be exercised by bodies other than the National Executive Council and to be performed strictly in accordance with the Constitution (PNG CPC 1974:7/2).

These two concepts have been incorporated into the Constitution and qualify the separation of powers doctrine that is formally adopted by the Constitution. Thus, one finds that some of the functions that are performed by the Executive elsewhere have been allocated to constitutional Office-Holders - a new class of governmental institutions the Constitution created. The prosecution function for instance, is being carried out by the office of the Public Prosecutor. The essence of these offices is the constitutional requirement that they are to be independent from outside control. Apart from the office of the Public Prosecutor, the others with executive-type functions are the office of the Public Solicitor, the Public Service Commission, the Electoral Commission, the Auditor-General, the Clerk of the Parliament and the Ombudsman. But not all activities that these institutions perform can be said to be executive in kind, for some of them fall into the semi-legislative field. The Electoral Commissioner, for
instance, plays a major part in the legislative process in that Parliament has no power to amend his report on changes to the existing electoral boundaries. The only power Parliament has is to either accept or reject the report (s.125(3)). Although administratively the Constitution Office-Holders are a part of the executive structure, in functional terms they are not.

Hence, even though the Constitution has adopted the doctrine of the separation of powers it is not a strict separation in the traditional sense.

The attitude of the courts, especially the superior courts, in this has been ambivalent largely because they have not come to grips with this basic scheme of the Constitution.

This position was first illustrated in the Constitutional Reference No.1 of 1978 [1978] PNGLR 345 involving the office of the Public Solicitor and the Ombudsman Commission. For purposes of this paper the relevant question referred to the Supreme Court by the Ombudsman was whether he had power to investigate the conduct of the Public Solicitor or any of his employees. The consideration of this question involved the initial task of establishing the exact status of the Public Solicitor within the structure of government as defined by the Constitution. Disappointingly Prentice CJ and Wilson J were content to take a narrow approach of interpreting that question from the view of the traditional separation of powers doctrine (although the Chief Justice was prepared to consider the doctrine in a wider context, ibid.:350). Pritchard J, the other member of the Court, took an approach that corresponded to the intentions of the 'founding fathers'. His Honour specifically denied that separation of powers doctrine in the traditional sense was ever considered as part of the PNG constitutional system (ibid.:377). If this was the case, His Honour pointed out, the word 'principal' the Constitution uses to refer to the traditional arms of government (ibid.:384) would be a redundancy. According to Pritchard J, therefore, the functions of government on the national level are allocated to a number of arms of the National Government. Some of these are the principal arms; others are 'lesser' arms. The Office of the Public Solicitor falls into the latter category, but is neither executive nor judiciary in the functions that it performs.

Prentice CJ was prepared at one stage of his judgment to regard the Public Solicitor's Office as completely outside the framework of the National Government since the function of legal aid could not be easily related to a governmental function, and was in fact conferred independently on the Public Solicitor by the people through their Constitution. This is a better view than to regard the office as an arm of the National Government in order to avoid the logical absurdity that Pritchard J found himself in at the end where he was forced to state that he was not prepared to say that legal aid was not an administrative function but part of the judicial function (see The State v. John Wonom [1975] PNGLR 311), even though he maintained at the same time that the Office of the Public Solicitor was one of the lesser arms of the National Government – which is not to say that the basic approach Pritchard J took is not to be commended.
The issue of separation of powers also arose indirectly in Wonom's Case, the first constitutional case decided by the Supreme Court two weeks after Independence. The issue in that case was whether indictment should be brought in the name of the State or in the name of the Queen of England who is the constitutional Head of State. The consideration of the issue involved some discussion of the nature of the prosecution function. Frost CJ who presided over the case was prepared to regard it as an executive function without any attempt to relate it to the institutional structure of the Executive into which the Public Prosecutor was fitted. The other two members of the Court, Raine and Williams JJ, held it to be a judicial function but also without any real effort to put it in its proper context as attempted by Pritchard J in the 1978 case discussed above.

The issue was thrown again squarely at the Supreme Court a year later by Nahau Rooney and again the Supreme Court avoided the issue (see Re Rooney (no.2) [1979] PNGLR 448). In a letter to the Leader of the Opposition, Mr Okuk, on 13 July 1979, Rooney stated clearly the fundamental issue in her case was "the separation of powers between the judiciary and the legislature" (roneyed judgment SC 223, 22 March 1982). Raine DCJ, although he quoted those very words, made no attempt to take up the issue but instead clubbed the Minister down for contempt of court. Wilson J attempted some discussion of the independence of the judiciary without showing that this independence is thereby an aspect of the separation of powers doctrine. The other judges only made vague references to the matter.

Very recently the Supreme Court confirmed that there is a separation of powers doctrine in the traditional sense under the Constitution in the Constitutional Reference 1A of 1981 (roneyed judgment, SC 223, 22 March 1982 at p.16) without any reference to the 1978 Constitutional Reference discussed above. The 1981 Reference was concerned with amendments the National Parliament had passed to the Motor Traffic Act, the Local Courts Act and the District Courts Act respectively, empowering a policeman to serve a summons on a person whom he suspected of having committed a traffic offence. The amendments allowed the policeman to file proof of service of the summons in court and if the offender did not pay the prescribed fine within the time allowed he was to be recorded by the Court as having committed the offence and having been found guilty.

The Public Solicitor referred to the Supreme Court for its opinion the question whether these amendments infringed s.37(5) of the Constitution. That section prohibits any trial of an offence in the absence of the accused unless he so conducts himself as to render trial in his presence impracticable. The essence of the Public Solicitor's argument was that when the alleged offender failed to appear in court and pay the fine, he was to be recorded as having been found guilty of the offence and yet there had been no 'hearing' as stipulated by s.37(5) and (3) of the Constitution. The Supreme Court accepted this argument. Kearney DCJ, however, went further and held that the amendments constituted a usurpation of the separation of powers doctrine by the legislature:

It is clear from the structure that the Constitution contemplates a general separation of powers between the three principal arms of government - the legislature, executive and judiciary; see Constitution s.99. As a
Parliamentary system with an executive responsible to Parliament, the separation of powers between the arms cannot be rigid. But the separation principle remains of basic importance in the Constitution and prohibits incursions by one arm of government upon basic functions of another. The legislation presently in question, I think, is an example of the legislature having gone too far in prescribing rules which control judicial decisions in certain cases, thus invading the realm of judicial power. Here there are, in truth, no judicial functions for the court to perform; the legislation has wholly absorbed the judicial process (Constitutional Reference No.1 of 1978 [1978] PNGLR 345).

The other members of the Supreme Court agreed.

Nevertheless, this view misconceives the separation of powers embodied in the Constitution. First, as Pritchard J rightly pointed out (see above), the separation of powers in the traditional sense had never been intended to apply under the Constitution. Instead there are some powers that the Constitution has labelled as legislative, executive and judicial, but there are others that are constitutional powers which do not fit into any of these three categories. Secondly, there is nothing in the Constitution that prevents the National Parliament from conferring the judicial power of the people on bodies other than the courts and s.159 expressly authorises the Parliament to do that. The only exception is contained in s.159(3) where Parliament is prohibited from conferring on bodies outside the courts any power to impose a sentence of death or imprisonment or to impose any other penalty of a criminal nature. Whereas the legislative power cannot be permanently divested from the National Parliament under s.100(3), there is no similar provision in relation to either the judicial or the executive powers. Thus the Supreme Court failed to indicate the full scope of s.159 by not explaining why Parliament cannot confer on itself some other elements of the judicial power not prohibited by the exception contained in sub-s.3 of that section. Thirdly, the Constitution provides under s.99(3) that in principle the powers and functions of the three arms are to be kept separate from each other. To the extent that s.159 empowers the National Parliament to confer judicial powers on bodies outside the National Judicial System, it could be argued that it is an elaboration rather than a contradiction of s.99(3), even with the exception contained in sub-s.3 of s.159. But to the extent that s.159 is interpreted as empowering the Parliament to confer on itself any element of the judicial power, it is clearly inconsistent with s.99(3), and both sections would therefore have to be reconciled; and this the Supreme Court failed to do. Such reconciliation would require reading down the provisions of s.159 in order to give effect to the over-riding intention explicit in s.99(3). This means that the National Parliament is one of those bodies (outside the courts) which are ineligible to have conferred on them judicial power because to do so would breach the provisions of s.99(3). The problem with that interpretation, however, is that s.159 is not made subject to the provisions of s.99(3). Such interpretation can be maintained only if one reads 'in principle' under s.99(3) to mean notwithstanding any other provisions of the Constitution. The Supreme Court therefore failed to give full consideration to the relevant
constitutional provisions that govern both the separation of powers and the judicial power, and thereby perpetuate the misconception once more.

(2) Participatory Democracy

The CPC reacted against Executive domination by proposing a system of provincial governments as the basic means by which the people of PNG could share the power of government. Not unexpectedly the Committee's chapter on provincial government began with the sentence:

There is widespread discontent with the present distribution of power in our country, and a deep yearning among our people for a greater say in the conduct of their affairs (PNG CPC 1974:10/1).

The Committee went on:

Our recommendation that a system of district-level government should be established in the Constitution is designed to achieve several ends at once: decentralisation; greater participation in decision-making by local leaders; and greater coordination of developmental activities undertaken by government officers in the districts (ibid.).

The decentralisation of the governmental power has two implications for PNG's Executive. It means that the executive power is decentralised along with legislative power. The provincial authorities must be able to carry out the laws that their legislatures enact. This further requires the decentralisation of executive structures and, consequently, all provinces have provincial executive councils provided for by their respective constitutions.

Although executive power and executive structure that goes with it are decentralised, the constitutional means of the control over the Executive have not been decentralised. The lower courts that are located in the provincial headquarters for instance, are denied any jurisdiction relating to constitutional questions. This jurisdiction is restricted to only the Supreme Court (s.18 of the Constitution) which resides in Port Moresby and does not go on circuit as the National Court does. For a country with a most difficult terrain and severe transport and communication problems, this means unnecessary delay in dispensing justice at one end and more work for the Supreme Court at the other. One basic reason for excluding the lower courts in this respect initially appeared to be the lack of sufficient professional legal qualification among magistrates manning these courts. But this problem was partly attributable to a deliberate policy of the Magisterial Service to oppose the appointment of any qualified national lawyer to the district court and those below it. This policy seems to have been condoned by both the Justice Department and the Judicial and Legal Services Commission. Hence, a number of well qualified national lawyers were known to have applied to become magistrates of lower courts only to be told that they could not be appointed - although expatriate lawyers have found no barrier in getting the same appointments. The appointment of qualified national lawyers to the bench of the lower courts would make it possible to increase their jurisdiction to include some constitutional
questions. Such a move would not deny the Supreme Court any jurisdiction since it still retains the powers of judicial review on all exercises of judicial power, including constitutional questions (ibid. s.155(2), and see Bayne 1981). The question of transfer of jurisdiction to lower courts, however, is not really a question of decentralisation in the proper sense since the courts are still a matter of national concern in the decentralisation arrangements. The point about decentralisation is that since lower courts are physically located in provinces, adequate jurisdiction should be given to them to at least provide interim checks on any abuse of executive power by provincial executives. This involves in the main constitutional questions over which they presently lack jurisdiction.

Neither the national legislature nor each of the provincial legislatures has adequate control over the provincial executive. The National Parliament lacks a committee on provincial government affairs. So it has to take what the Minister of Decentralization tells it, although at times with a grain of salt! Provincial legislatures are more concerned with questions of who should get the money rather than with the need to ensure that the control of provincial executives is effective.

The concept of participatory democracy under the PNG Constitution is not restricted to decentralisation only. In fact, the notion that peoples' representatives should take part in all stages of decision-making rings throughout the constitutional provisions, if not throughout the whole constitutional system. But sometimes the concept is pushed on to an artificial level. For instance, although the CPC rejected regionalism as the proper form of decentralisation or something that should be encouraged in political terms (PNG CPC 1974:10/2) the Constitution lays it down as a principle to be observed in filling public offices. Thus the practice of the Chau Government has been that if a vacancy is created by a Highlander then it should be filled with another Highlander, not with a Tolai and definitely not with a Sepik! The Constitution and constitutional practice therefore proceed on the assumption that there is some regional ethnic homogeneity that needs to be fostered which was the very thing that the CPC raised serious doubts about (PNG CPC 1974:10/3).

(3) The Leadership Code

The prospects of success of any nation, developed, developing or underdeveloped, depend on the quality of its leaders. The CPC was well aware of this, for in its own words:

No amount of careful planning in governmental institutions or scientific disciplines will achieve liberation and fulfilment of the citizens of our country unless the leaders - those who hold official positions of power, authority or influence - have bold vision, work hard and are resolutely dedicated to the service of their people (PNG CPC 1974:3/1).

In fact, the CPC was so concerned with the question that a good part of its Final Report was allocated to spelling out the underlying considerations and the actual recommendations for a Leadership Code.
There was no doubt that the experience of leadership codes in other Third World countries, especially that of Tanzania, had some influence on the thinking in this respect. However, as from 1971 there was a Parliamentary Integrity Ordinance which was a mini-leadership code aimed principally at the members of the House of Assembly. As the Executive was almost taken over by the PNG Ministers there had been increasing concern about bribery within the government. Somare responded by devising a Ministerial Code of Conduct. But the Code was never officially released (ibid.) and an associated Public Officers Integrity Bill suffered the same fate.

The leadership code that the CPC recommended was comprehensive. It was to cover the whole range of a leader's conduct: from general moral standards to special questions such as the acceptance of shares in foreign companies or the entering into partnerships with foreign citizens. The code was also to apply to virtually everybody who was in a public position, except public servants who were below Divisional Heads within the public service Departments.

Not everything recommended by the CPC found its way into the present Code under Part III Division 2. For instance, Divisional Heads within Departments are not included; yet they wield tremendous influence at initial stages of policy formulation. At the provincial level only provincial premiers are covered by the Leadership Code (Constitutional Amendment No.3 - Provincial Government (Consequential Amendments) s.3(a)).

It is significant, however, that the Code requires a leader not to act in such a manner as to demean either his position or the office which he occupies for the time being (s.27). This requirement is further extended to include not only members of his immediate family but also the leader's nominees, trustees and agents (s.27(3)). The following are further cases of conduct expressly prohibited: use of offices for personal benefit; Ministers holding directorships of companies; leaders holding shares in foreign enterprises or interests in government contracts, or other paid employment. Further, leaders are prohibited from accepting bribes or misappropriating public funds or taking personal advantage from official information to which they have access (see Organic Law on the Duties and Responsibilities of Leadership).

The task of enforcing the Leadership Code is the constitutional responsibility of the Ombudsman Commission (s.28) which has described it as "by far the most awesome and important task entrusted to it" (PNG Ombudsman Report 1981:12). All leaders have the constitutional duty to send to the Ombudsman Commission annual statements of assets and interests. The Ombudsman Commission then becomes the arbiter of the leader's other interests for the purpose of determining whether these other interests pose risks to the leader's primary responsibility for the public office he or she holds.

It has been said that the Leadership Code does not have teeth. Perhaps the true position is that it has some teeth but not enough. In its 1981 report to the Parliament the Ombudsman Commission summoned fifteen to explain why they were late in submitting their statements out of 600 leaders the Code presently covers. During the same period the cases of six
leaders were referred to the Public Prosecutor for prosecution before the Leadership Code Tribunal (*ibid.*:88-89).

One of the interesting omissions under the present Leadership Code is a provision debarring a leader from venturing into local business ventures or into other types of commercial activity. It has been noticeable that the new class of wealthy Papua New Guineans which has begun to emerge over the last eight years consists primarily of the leaders that the Code purports to cover. These include political leaders and those that may be labelled as 'economic leaders' who have direct access to the economic power. But most 'economic leaders' are not covered by the Code. Presumably they were excluded on the basis that they do not hold public office. An example of an 'economic leader' would be a former politician who has a substantial connection with those in power to enable him to acquire loans and other types of benefits from the government easily. This converging of the two interests was quite predictable at the dawn of Independence, and it did not take long for Somare to realise this phenomenon. In 1978 he attempted unsuccessfully to introduce a new Leadership Code in order to prevent precisely this trend of development. The measure precipitated Chan's withdrawal from the Coalition, although it was not given as the reason for the withdrawal at the time. As Professor R.B. Seidman points out, when "the political elite allies with the economic rulers, it does not initiate much change" (Seidman 1978:346). Perhaps there is some evidence of this in PNG. There has been a high level of political rhetoric that preaches about the needs at the grassroot level but cleverly merely serves to disguise the real interests, viz., those of the leaders themselves.

There are two practical problems that the Ombudsman Commission faces in trying to enforce the Leadership Code: one is adequate facilities, especially staff to carry out inquiries; the other is the resistance by the leaders themselves to control under the Code. In view of the stiff opposition that has been experienced so far from the leaders it almost seems sheer luck that the present Leadership Code was passed in the first place. For nothing like it would be entertained or even thought of by the present leaders, especially the politicians. It is interesting to note the recent complaint by Ombudsman Andrew Maino, who had been in charge of the Leadership Code Section at the Ombudsman Commission, that he was being forced to leave the Ombudsman Commission before his term expired.6

The number of staff the Ombudsman Commission has and the amount of finance allocated to it make it impossible to extend its presence to all provinces. The Commission therefore has to be organised regionally with offices in Port Moresby, Lae, Mt. Hagen and Rabaul (PNG Ombudsman Report 1981:16-17). This means that complaints from provinces to which a lot of power has been decentralised will take time to reach the regional offices.

One fundamental defect in the present Leadership Code from the viewpoint of control is the denial to the public of access to the annual statements that leaders submit to the Ombudsman Commission (as required by Organic Law and the Duties and Responsibilities of Leadership ss.4(5)). When challenged, leaders often have referred to the fact that all their interests were on record at the Commission for all to see, when they knew very well that these records were not public records.
Despite its limitations, the present Leadership Code has had some success in the sense that there has been a number of successful prosecutions of leaders among whom were several Ministers and Departmental Heads and a member of Parliament. It is difficult to say whether the mere existence of the Code does have some restraining effect on leaders. But the greatest weakness of the Code is its inability to prevent what has now become a rush to grab the economic power by leaders for their own ends. Unless this trend is reversed or at least arrested, the present degree of difference between the 'haves' and the 'have nots' in the basic material comforts of life will become even more marked. The Ombudsman Commission expressed this concern in its 1981 report to the Parliament in the following deeply felt rhetorical question:

How can our people feel secure and trust the leadership if such fundamental principles are forgotten in the greedy scramble to grab the first fruits of economic development? (PNG Ombudsman Report 1981:5).

NATIONAL GOALS AND DIRECTIVE PRINCIPLES

The PNG Constitution provides more than just the mere legal framework of government. It is what Wolf-Phillips classifies as a *programmatic constitution* (Wolf-Phillips 1972:34-38) in that it contains a programme of action to which the legal framework of government is related—or should be related! The programme aims to achieve what had not been achieved by the time Independence came. The CPC put the position succinctly thus:

We believe that the significance of Papua New Guinea's attainment of Self Government and Independence is that, by transferring power into the hands of the people of this country it gives us a chance to define for ourselves the philosophy of life by which we want to live and the social and economic goals we want to achieve. If the constitution is to be truly the fundamental charter of our society and the basis of legitimate authority, it should be an instrument which helps to achieve these goals and not one which obstructs...it should be related to the national goals that we leaders of this country are enunciating (PNG CPC 1974:2/1).

The CPC recommended five National Goals which have been incorporated into the Constitution's preamble. These are:

- Integral human development;
- Equality and participation;
- National sovereignty and self-reliance;
- Natural resources and environment; and
- Papua New Guinean ways.

These five National Goals were based largely on the fundamental guidelines for national improvement known as the 'Eight Aims' that the Somare Government adopted in 1973. To the CPC these Aims, however, were too economically orientated. The implication here being that other values such
as social and cultural goals appeared to have been ignored by the Aims. What it wanted to see were goals that aim "at achieving a free and just society" (PNG CPC 1974:8/9).

The implementation of the five National Goals is intended to be achieved through what the Constitution calls the 'Directive Principles' that accompany each of the National Goals. For instance, Directive Principle No.1 under National Goal 1 (Integral Human Development) in the Constitution's Preamble requires:

everyone to be involved in our endeavours to achieve integral human development of the whole person for every person and to seek fulfilment through his or her contribution to the common good.

All government bodies have the constitutional duty "to apply and give effect to" the National Goals and Directive Principles (NGDPs), although they are made non-justiciable which the Constitution defines as beyond the competence of any court or tribunal (see Sch.1.7). But this does not mean that courts and tribunals cannot observe the relevance of the NGDPs in their roles as interpreters of the law. In fact the superior courts have often done this (see Kidu CJ in Constitutional Reference No.4 of 1980 (The Vanuatu case) roneod judgment).

Otherwise there is hardly any evidence that serious attempts have been made by all governmental authorities over the last eight years to implement the NGDPs. Obviously the fact that they are non-justiciable has deprived the courts of any practical role they could play in giving them some concrete meaning, although this position reflects a trend that has been followed by virtually all constitutions that contain some type of national goals (such as the Indian Constitution).

Nonetheless there is a clear constitutional direction that all other governmental authorities are to implement the NGDPs. Under Sch.1.7 the Ombudsman Commission for instance, is required to take them fully into account. Whether that means the Commission could investigate complaints about breaches of them still remains to be seen. But the core question that has hardly been discussed is whether they are mere guides or whether they are imperative constitutional standards to which all governmental action must conform at all stages. Undoubtedly the latter is the constitutional position. But because of a lack of common agreement on this, there is very little in existence that suggests for instance the existing policies conform to these constitutional standards. Although it is clear that the CPC conceived the NGDP's as goals and principles of state policy (PNG CPC 1974:2/2). There is no specific procedural system by which the formulation of a policy (to take one instance) can be processed as intended by the constitution-makers. Hence, the NGDPs are one of the constitutional areas to which more lip-service has been paid by government authorities generally, and the Executive in particular.
SUMMARY

The PNG constitution-makers responded to the inadequacies of the traditional devices for control of the Executive by adopting a composite approach which introduces new principles of control. These principles include a modified form of the separation of powers theory, participatory democracy, a leadership code and the adoption of National Goals and Directive Principles.

Although the principle of the supremacy of the Constitution now appears to be established, the PNG Supreme Court still does not understand fully the constitutional scheme under which a modified form of the separation of powers doctrine has been incorporated into the Constitution. Decentralisation is conceived as the main feature of the participatory democracy principle, though participation by either the people themselves, or their representatives in the decision-making process at all levels is a common feature of the Constitution.

The Leadership Code has had some restraining effect on leaders generally, although it has not prevented the leaders from monopolising the economic power and wealth in the country. One reason for this could be the lip-service leaders pay to the implementation of the National Goals and the Directive Principles of State Policy contained in the Constitution.

NOTES

1If there is ever such a thing in practice (see Sawer 1961:177).

2Formally the report is presented by the Boundaries Commission but the Electoral Commissioner is obviously by far the most important member.

3Interestingly enough none of the judges in the 1978 case referred to Wonom's Case.

4PNG Constitution, s.254(c) the word 'areas' in the section seems to have been interpreted as regions.

5A Wantok system in a different form?

6Besides the Chief Ombudsman, the other Ombudsman, K. Anderson, is responsible for complaints.
When the Westminster model was exported to the new states of Asia and Africa there was a hope that constitutional provisions might control political behaviour. This hope was based on a belief in constitutionalism — that governmental power could be limited by a legal document. The constraints on governmental power were to be partly ensured by the opportunities that a Westminster Constitution would provide for opposition to an incumbent government and also for an actual change of government to occur if the electorate or the parliament became disenchanted with the existing political leadership. It did not take long for this belief to be shattered. Most of these states were never to experience a constitutional change of government. Where a change did occur it was usually achieved by use of force. Where there was no change in the political leadership the constitution was usually altered or ignored to entrench a one-party state maintaining its rule through the employment or threat of force.

By contrast, the experience of the eleven newly independent Pacific States appears to give new support to constitutionalism. Their Westminster-type constitutions provide an opportunity to challenge the existing government and these constitutions actually govern the way in which power changes hands. There have now been twelve cases of a succession of government in the region. In each case the change has been constitutional. They have also been peaceful: the constitutional changes of power did not have to be upheld by force; those losing power accepted the situation. Further, where a change of government has not occurred, the opportunity for a successful challenge has nevertheless existed, the only exception being Tonga. Force has not been used to suppress legitimate opposition, nor has there been any attempt to alter the constitutional mechanism in a way that would entrench the existing power-holders.

This paper examines this rather unique experience of the post-colonial states of the Pacific. The States included are Papua New Guinea (PNG), Fiji, Western Samoa (WS), Vanuatu, Solomon Islands (SI), Tonga, Kiribati, Tuvalu, Nauru, Niue and the Cook Islands (CI).

I have two main purposes. The first is to demonstrate that most of the Pacific States share a common set of constitutional mechanisms concerned with changing governments, and further, that these mechanisms
differ significantly from those contained in other variants of the Westminster model exported to Dominions and, more recently, to Asia and Africa. I argue that this is so to the point where we can talk of a 'Pacific model of succession'. My second purpose is to demonstrate the legitimacy that has been accorded these constitutional mechanisms throughout the Pacific. Corresponding to these purposes, the first section of the paper deals with the constitutional provisions, and the second with their operation. I conclude by raising two general questions that are prompted by this discussion; firstly, why do the Pacific countries accept and positively support constitutional succession of a Westminster-type when this has not generally been the case in other post-colonial societies, and secondly, what are the implications for constitutional succession in the future of the forces for change which are already affecting the nature and level of political participation and organisation in the Pacific Island States?

CONSTITUTIONAL MECHANISMS

There is a high degree of similarity in the approach taken by Pacific Constitutions to the question of how, and in what circumstances, governments should be appointed and dismissed. A starting point in understanding this similarity is the fact that all the independent Pacific countries were British, Australian or New Zealand territories. They each experienced British-style decolonisation and preparation for self-government. Nine of the eleven countries in fact adopted a form of Westminster model as their constitutional structure, the exceptions being Tonga and Kiribati. We would therefore expect that these constitutions would at least embody the general principle underlying the Westminster view of succession - that the opportunity should be provided, within certain prescribed limits, for governments to be changed if the electorate or a representative parliament wish it. The similarities in succession mechanisms actually go well beyond this in eight of the nine countries which have a form of Westminster model. Such mechanisms are not only shared, taken together, they also amount to what arguably is a unique variant of the Westminster approach to succession.

Why would such a unique approach develop in the Pacific? Three reasons may be advanced. The first is that the countries involved shared the services of a handful of constitutional advisers. Professor Davidson of The Australian National University, for example, moved from advising WS, to Nauru, and finally to PNG. Colin Aikman was a consultant to both WS and CI Governments. Another prominent adviser, Professor Ghai from Warwick University, was one of several advisers to PNG and later became the most influential consultant in SI and Vanuatu. We could therefore expect some ideas concerning the mechanisms for changing governments to be transported from country to country with these advisers. But it should also be emphasised that constitution-making in the Pacific has taken place over a twenty year period - from the late 1950s to the late 1970s. Thus the image should not be created of several constitutional consultants working at the same time and communicating with each other on approaches to the task.

Secondly, it is very likely that especially in the 1970s, those working on Pacific constitutions would have been influenced by the experience with Westminster succession mechanisms in the former British
territories in Africa. Partly as a result of this experience, thinking in legal circles had begun to change particularly in relation to the encoding of conventions and the discretionary role of the Head of State.

A third, and I think by far the most important, factor contributing to the development of a unique approach in the Pacific, was the general absence of organised parties that could form a government under a Westminster system. At the time that their constitutions were being devised, seven of the eleven Pacific countries did not have political parties at all, nor in most cases did they look like developing. Only in Fiji, Vanuatu and CI existed what might be called a party system. Faced with such a situation the constitution-makers were likely to devise similar mechanisms to resolve the problem of who should select a government. The absence of parties in the South Pacific countries eliminated the usual approach to the choice of a government - namely, that the party that gains a majority of seats in Parliament after a general election becomes the government, and its leader the Prime Minister.

A 'PACIFIC MODEL' OF SUCCESION?

The approach to succession of government questions which have emerged as a result of these influences has, I believe, to be seen primarily as a common response to similar political features at a time when certain aspects of the conventional approach had become unfashionable. There are grounds for viewing this approach as a 'Pacific model' of succession, but by employing this terminology I do not want to imply that the constitution-makers or their advisers saw it as such at the time. There does not appear to have been a general consciousness among these people that such an approach was being employed throughout the region. Just how this approach differs from Westminster practice in the models exported to the dominions and to Asia and Africa will become clearer after its specific features have been examined.

There are three main features of the 'Pacific model': firstly, the use of a parliamentary vote to determine all prime ministerial appointments; secondly, the absence of a discretionary role for the Head of State on questions of succession, and thirdly, the encoding of the convention that the Prime Minister should resign following the passing of a no-confidence motion. The most important characteristic is that the appointment and dismissal of governments is solely in the hands of Parliament. Let us take the appointment of governments first. The key act in selecting a government in these countries is the appointment of a Prime Minister. The Prime Minister may then select his ministry, or in some states his ministry may be chosen wholly or in part by party decisions. In either case it is the decision to appoint the Prime Minister that is crucial in determining who is to govern. The Parliament makes this decision by voting for a political leader when the position of Prime Minister becomes vacant. An absolute majority is required so that if there are more than two candidates in the first ballot other ballots may have to be taken with the person receiving the least votes being eliminated after each round.
It should be emphasised that the provision is that such a vote be taken whenever there is a vacancy, whatever the reason. We would expect in normal circumstances that the usual occasion for a parliamentary vote would be after a general election. However, the same procedure is also employed to select a new government after the resignation of a Prime Minister and/or government, after the death of a Prime Minister or after the forced dismissal of a Prime Minister following a successful no-confidence motion. In the latter case, even if there is a provision for the Prime Minister to advise a general election after a no-confidence motion is carried, the new Prime Minister will still be selected by Parliamentary vote after the electorate has determined the composition of Parliament.

The provision that Parliament should vote to select the Prime Minister, and hence the government, is set out without ambiguity in most Pacific Constitutions. A typical form of wording can be seen in s.33 (1) of the SI Constitution:

> There shall be a Prime Minister who shall be elected as such by the Members of Parliament from amongst their number in accordance with the provisions of schedule 2 to this Constitution.

Schedule 2 states, *inter alia*:

> As soon as possible after a general election of Members of Parliament or whenever there is a vacancy in the office of Prime Minister, the Governor-General shall convene a meeting of members for the purpose of electing a Prime Minister...

In the WS Constitution the wording is less precise and is open to interpretation. The relevant provision states:

> The Head of State shall appoint as Prime Minister to preside over Cabinet a Member of parliament who commands the confidence of a majority of the Members of Parliament (s.32(2)(a)).

This wording was originally used in the *Samoan Amendment Act* of 1959 which introduced the first stage of cabinet government. Davidson explains that at the draft bill stage the wording "who is likely to command" was changed by the Working Committee on Self-Government to read "who commands". This amendment, he says, "was intended to ensure that no appointment would be made till the Legislative Assembly had considered the matter and submitted a nomination" (Davidson 1967:363). Thus we see that, although the wording reflected the fact that this Constitution was drawn up in the late 1950s, the intention was the same as that provided for more explicitly in later constitutions.

The same wording is used in the CI Constitution of 1965 (s.13(2)). In this case, though, the intention is made clearer by the inclusion of a provision concerning the appointment of the Premier when the Legislative
Assembly is not in session. Confronted with this situation the High Commissioner should appoint as Premier a member of the Assembly who "in the opinion of the High Commissioner, acting in his discretion, is likely to command the confidence of a majority of the members of the Assembly". When Parliament is in session the High Commissioner is to appoint the person who "commands the majority" of the Assembly. The implication is that the phrase "commands a majority" involves a parliamentary vote. The situation where the CI Legislative Assembly is not in session is the only exception to the parliamentary vote being the sole determinant of all selections of government in the eight Westminster systems conforming to the 'Pacific model'.

We have concentrated thus far on the role of the parliamentary vote in appointing governments, which often coincides with its role in dismissing governments. For example, a parliamentary vote after a general election which appoints a new Prime Minister at the same time dismisses the incumbent Prime Minister and his Government. The two functions are separate in relation to a no-confidence motion. If it is carried by a majority vote in Parliament, the Prime Minister has to resign or be dismissed. The decision to select a new Prime Minister is taken at a separate parliamentary vote either with or without an intervening general election. The only exception is PNG where the dismissal and appointment function is carried out simultaneously (s.145).

A second characteristic of the 'Pacific model', and a corollary of the first, is that the Head of State has no active or discretionary power in relation to questions of succession of government. There are no exceptional circumstances in which he can take action. These are taken care of by other provisions. This is so whether the Head of State is a Governor-General representing the British Monarch, or the Head of a Republic. Where the Constitution provides for a Head of State to intervene in matters of succession, no discretionary power is involved. In such cases the Constitution stipulates the particular action he must take if certain circumstances arise. In SI, for example, the Governor-General has the constitutional duty to remove the Prime Minister from office in the event of a no-confidence motion being passed by Parliament (s.34(1)).

The third distinctive feature is the compulsory removal of a Prime Minister after a no-confidence motion has been passed by Parliament. This is not left to convention. The specific mechanisms vary in respect of who it is that formally removes the Prime Minister, whether notice has to be given of intention to put such a motion, whether an alternative Prime Minister has to be named, whether there is a prohibition period after an election when a motion cannot be put, and whether the Prime Minister has the option of advising a general election. But whatever the specific mechanism, the main principle is the same: a Prime Minister has to resign or be dismissed if the Parliament passes a no-confidence motion.

These mechanisms constitute an approach to succession questions quite different from those taken in Westminster constitutions exported to other ex-British colonies. Following Stanley de Smith we can differentiate between the approach taken in the constitutions of the Dominions and those of the new-Commonwealth states in Asia and Africa (see 1964:78-96). In the first group - the Dominions - the Prime Minister is not even mentioned and the Governor-General is given seemingly unlimited power in matters of
appointing and dismissing governments. The way in which the main mechanisms are actually used is left to convention. In the second group of constitutions, those of Malaysia, Nigeria and Kenya, for example, there is an attempt at codifying British conventions relating succession questions. The Prime Minister is actually referred to in the Constitution. He is to be the person who appears likely to command the support of a majority of the Lower House of Parliament. There was a slight refinement of this provision in the Constitutions of British Guiana, Malta, Jamaica and Nyasaland. Here the wording was "best able to command". This, argues de Smith, can be seen as "a more satisfactory formula which accurately mirrors British practice" *(ibid.*:95). But in either case it is the Head of State who decides. Most of the new Westminster-type constitutions of Africa and the Caribbean, in particular, also codify conventions surrounding the dismissal of a government by a no-confidence motion carried by parliament. Generally the provision is that the Prime Minister should resign and, if he fails to do so, the Governor-General should dismiss him.

Seen against this background, I would argue that the 'Pacific model' constitutes a third approach to succession questions within Westminster-type constitutions. In this approach, as we have seen, the Governor-General does not have the discretionary power to choose as Prime Minister the person who is "likely to command" or "best able to command" the support of a majority in Parliament. Instead the power to appoint governments is given to Parliament itself. This includes the case where a government collapses mid-term. A general election is not called to determine the issue as it would be in other Westminster systems. The only exception is where a Prime Minister is dismissed by a no-confidence motion in which case he may advise a general election rather than submit to a parliamentary vote.

DEPARTURES FROM THE 'PACIFIC MODEL'

There are three Pacific Constitutions which do not conform to this model: those of Fiji, Tonga and Kiribati. Fiji's mechanisms for changing governments bear a close resemblance to those contained in the Westminster model variant typically adopted in Asia and Africa. The Governor-General is given discretionary power in relation to questions of succession.

"Acting in his own deliberate judgement" he selects as Prime Minister "the member of the House of Representatives who appears to him best able to command the support of the majority of the members of that House" *(s.73(2)).

There is no provision for a parliamentary vote for leader. But the requirement that a Prime Minister resign or be dismissed if a no-confidence motion is carried in parliament is encoded *(s.75(5)(d)). In this respect it is similar to other Pacific Constitutions.

By contrast, succession of government in Kiribati is intended to operate within a semi-presidential constitutional framework. The members of the government, the President and the Ministers he appoints, have to be elected members of the Maneaba (Parliament). The Maneaba puts forward candidates for the office of Presidency after a general election. The
people then vote for the candidate they wish (s.32). There is, then, by contrast with the 'Pacific model', a direct involvement of the people in the selection of a government. The Maneaba can remove the President by a vote of no-confidence. If this occurs, the Council of State (Chairman of Public Service Commission, Chief Justice and Speaker) performs the functions of the President until a successor is elected by the people after the next general election (s.35). The Maneaba does not have the power to select the new government, only to remove the existing one. This again is a departure from the 'Pacific model'. In Kiribati, all decisions to appoint governments are made by the electors.

In the case of Tonga there is no constitutional provision for a change of government. Although there is a cabinet, the King appoints the ministers (s.51). Parliament does not provide the cabinet. The Parliament is in any case unrepresentative. The electoral provisions are heavily weighted in favour of the nobles and against the people (s.60). A change of government can really only occur if the King dies or resigns, in which case his successor becomes the government. Changes in the composition of cabinet do not really amount to a change in government in the Tongan case. There is no constitutional means of challenging it. There is, for example, no provision for a no-confidence motion. Clearly this places Tonga in a unique category in the Pacific context.

THE SUCCESSION MACHINERY IN OPERATION

It is one thing to have constitutional mechanisms to govern when and how power should change hands; it is another for these mechanisms actually to be used and respected by a government and those challenging it. The experience of most Third World states would suggest that one seldom follows from the other. In the Pacific, however, it does appear that the mechanisms governing succession of government have been regarded as legitimate. The twelve changes of government that have occurred have been constitutional. Further, several of those leaders losing power made it an occasion to publicly support the constitutional mechanism which allowed the change to occur. In Fiji, after the April 1977 election, for example, Ratu Mara, thinking his party had lost government, made the following statement during a broadcast announcing his resignation:

I will tomorrow morning tender my resignation and that of my government to his Excellency the Governor-General. I have accepted the verdict of the people of this country arrived at by democratic processes and am proud to do so. Nothing else would accord with this political philosophy of ours in respect for parliamentary institutions which my party stands for. We have lost the general elections and the National Federation Party have won. It is not only their right, it is their duty to form a government (quoted in Murray 1978:231).

There are three mechanisms which have actually been employed to change a government: the parliamentary vote; Head of State discretionary power; and the no-confidence motion. We shall examine each in turn. It should be
emphasised, however, that we are not just interested in these mechanisms when their use results in a change of government. As important for our present purposes is their use or availability even where government does not change hands. Part of our task is to demonstrate the fact that where change has not occurred, the constitutional mechanisms are still operative and provide an opportunity for change if there is enough support forthcoming. This is of particular significance because the Pacific States have experienced very few changes of government. Despite the existence of independent and self-governing states from 1962, WS is the only country that experienced a change of government before 1976. Even there the first change did not occur until 1970 when Mata'afa was defeated after twelve years as Prime Minister. Further, eight of the twelve changes that have occurred took place in only two states: WS and Nauru; several countries have not experienced a change of government at all.

THE PARLIAMENTARY VOTE

Based on the intentions of the constitution-makers, we would expect the parliamentary vote for Prime Minister to be of primary importance in determining who wins and loses governmental power in the Pacific States. This expectation is confirmed by the historical record. Of the twelve changes of government that have occurred in the region, nine were decided by a vote of Parliament. Six of these followed a general election: in WS in 1970, 1973, 1976 and 1982; in Nauru in 1976; and in Tuvalu in 1981. The other three cases occurred after the resignation of the Prime Minister: twice in Nauru in 1978; and in SI in 1981. There were, in addition, many occasions on which a parliamentary vote resulted in the return of the incumbent Prime Minister.

Western Samoa has had the longest experience with this mechanism. The parliamentary vote was first used in 1959 to select the Prime Minister who would take the country into Independence. Since Independence in 1962 it has been used seven times, always after a general election. On four of these occasions the vote resulted in a change of government. Typically, the period between the general election and the first parliamentary meeting when the vote for leader is held is one of intense political activity. In some senses the politicking that takes place during this period is more important than that which takes place prior to the general election. Two factors contribute strongly to this. Firstly, until recently there has been a very low level of formal political organisation in Samoan politics. Until 1979 there was no political party. Even now there is only one party, the Human Rights Protection Party, which was in opposition between 1979 and 1982. Those supporting the government did not form a party though they were grouped around their leader, Tupuola Efi.

This lack of party organisation has to be seen in conjunction with a second feature of Samoan politics — the very high turnover of representatives at each election. This has been around 50 per cent for most general elections. In such circumstances it is difficult for the political leaders aspiring for the Prime Ministership to maintain a large group of solid supporters in the Parliament. In the 1982 election, for example, over half of the Prime Minister's supporters were not returned (see Pacific Islands Monthly April 1982:5). The leader's task therefore becomes one of winning to his side as many of the uncommitted new members
of Parliament as possible before the vote for Prime Minister is taken at the first parliamentary sitting. The fact that there are so few individuals to be influenced and that the stakes are so high encourages the use of both 'traditional' and Western enticements to be made to the uncommitted. Family ties and obligations are called upon, 'gifts' are arranged, and ministerial posts are offered as a special inducement.

In recent elections it has been impossible to ascertain at the beginning of this period who will win the vote. There were significant shifts of support over the six weeks. That anyone can be enticed to join the opposite camp at this time can be demonstrated by examples from the two most recent elections. Before the 1979 vote Tupuola Efi actually managed to persuade the brother of the leader of the opposing faction to join him in return for a ministerial post (private sources). During this period after the 1982 election Tupuola succeeded in winning the support of one of the main leaders of the opposing party, Laupepa. Laupepa had in fact been one of the contenders for the leadership of the Human Rights Protection Party. The results that effective politicking can have at this time are also shown in the dramatic change in support that has occurred over these weeks. Although estimates of support are rather shaky it was generally thought at the beginning of the 1982 negotiating period that Tupuola would lose heavily to Va'ai Kolone. By the end of the period Tupuola had gained much support and only missed out on the leadership by one vote.

Such features are also associated with the period prior to the parliamentary vote in some of the other Pacific States. This experience is not confined to countries with a low level of political party organisation like WS. In PNG, for example, where there are a number of political parties, the period before the parliamentary vote in 1977 had similar features. The outcome of the parliamentary vote for leader could not be predicted on the basis of the general election results: the crucial negotiations were still to take place. This is the period in which parties look for supporters and parties negotiate with each other about coalitions. As in the WS case, the turnover of representatives is high and a significant number are uncommitted.

Among those countries using the parliamentary vote system only Vanuatu and CI have firm party systems. Therefore, only in these two countries is it generally possible to know who will form the government before the parliamentary vote is taken. The pre-parliamentary vote period is consequently of less significance. In such circumstances, the parliamentary vote itself becomes a formality except where numbers are very close and there are a few wavering members. The importance of the period before the parliamentary vote is likely to decrease in significance in countries like PNG and WS as party organisation develops. The system encourages this because it is obviously to a leader's advantage to have members of parliament committed to his faction at the time of the general election. This trend is already evident in both countries.

Whilst the parliamentary vote following a general election has been regularly used throughout the region, a vote to determine the selection of a government following the resignation of a Prime Minister and/or the collapse of a government has only been taken on three occasions: twice in Nauru and once in SI. Given the fluidity of allegiance in many of the polities, the lack of any ideological base for political commitment and the
lack of political organisation, we would expect the mid-term collapse of a government to occur more often. The use of the parliamentary vote rather than a general election to resolve the leadership issue in these circumstances appears to have worked smoothly. In the three cases mentioned the procedure met with general acceptance.

DISCRETIONARY POWER OF THE HEAD OF STATE

We noted above that the constitution-makers had generally attempted to minimise or totally exclude discretionary power on the part of a Head of State as an element in the determination of who should govern in the Pacific States. The main exception is Fiji which explicitly allows the Governor-General to exercise such power. But we also noted the intention to give the Head of State such power in CI when Parliament was not in session. Further, it was shown that although the wording of the WS Constitution appeared to give the Head of State full discretionary power in selecting a Prime Minister, the intention was that the Head of State would always choose in accordance with the wishes of Parliament as expressed in a parliamentary vote. In all three countries, the legal wording allows discretionary power on the part of the Head of State though the intention might have been otherwise. It is not surprising, then, that it is only in these countries that we have seen the use of such power.

In WS it occurred in 1975 following the sudden death of the Prime Minister, Mata'afa. Within a few hours of Mata'afa's death the Head of State, Malietoa, asked Tamasese to form a government. Tamasese was a member of the Legislative Assembly and a former Prime Minister (1970-73). He was also the only tam'aiga (chief of highest rank) in the Parliament. A parliamentary vote was not taken nor did the Head of State make the appointment subject to a later decision by Parliament or to Tamasese advising a general election. This action by the Head of State appears contrary to the intentions of the constitution-makers and also to established practice since 1959 of having a parliamentary vote whenever there was a need to select a government. Felise Va'a, writing in Pacific Islands Monthly shortly after Tamasese's appointment, observes:

Although the legality of the action of the Head of State in swearing in Tupua Tamasese as Prime Minister only 4 hours after Mata'afa's death had been questioned by some, there had been practically no objections and the Legislative Assembly had confirmed it (August 1975:15).

The question arises as to what would have happened if the Parliament had not 'confirmed' the Head of State's decision. The circumstances surrounding his involvement do seem to suggest that this was an exceptional action taken in exceptional circumstances, the death of an incumbent Prime Minister. On subsequent occasions when a new government has had to be selected - after general elections in 1976, 1979 and 1982 - it was the parliamentary vote that was used to determine the outcome.

The CI case was also one in which exceptional circumstances prevailed (see Crocombe et. al. 1978). After the March 1978 election Albert Henry's Cook Islands Party was returned with a convincing majority (15-7). In
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April, however, the Democratic Party laid sixteen election petitions before the Chief Justice charging that the votes made by people flown in free of charge from New Zealand by the Government amounted to 'bought' votes (see Short 1979:227-39). In July, Chief Justice Donne found in the petitioners' favour. He declared the 'fly-in' votes void. This had the effect of immediately unseating the Premier and seven of his Cook Island Party colleagues. Dr Tom Davis, the leader of the Democratic Party and seven supporters became Members of Parliament. Thus the incumbent government was expelled by judicial decision. The Head of State did not dismiss the Prime Minister or his Cabinet. The appointment of a new government did not follow the usual procedure of a parliamentary vote for a Premier. Instead, the Chief Justice, immediately donning his other hat as Head of State, prorogued the Parliament and appointed Dr Tom Davis as Premier. As we noted above a parliamentary vote is not required if the Parliament is not in session. By proroguing Parliament the Head of State created conditions in which he could take a decision without a parliamentary vote. As in the WS case we could argue that these are exceptional circumstances and ones that are unlikely to recur. Apart from this Davis could clearly command a majority in the Legislative Assembly, and thus the Head of State's decision was not disputed.

A much more contentious case of the use of discretionary power in selecting a government occurred in Fiji after the March 1977 election. Here the Governor-General's decision did not result in a change of government but rather in the return of a government despite its minority support in the new parliament. The Alliance Party gained twenty-four seats whilst the National Federation Party gained twenty-six. One seat also went to the Fiji Nationalist Party and another to an independent. When the House of Representatives met in May it was obvious that the Alliance Government did not have the confidence of a majority of members. The opposition was, however, reluctant to move a motion of no-confidence because they feared that this would give Ratu Mara the opportunity to advise a dissolution and to call another general election. A motion was passed requesting the Governor-General:

not to dissolve Parliament should an advice in that behalf be tendered but to invite the leader of the majority party in the House, namely, the Leader of the Opposition, to form the government (quoted in Murray 232).

Nevertheless Ratu Mara advised dissolution of the House the following day and this was accepted by the Governor-General. In his comprehensive examination of these events, Murray (1978) questions the Governor-General's actions on two counts: firstly, that he based his decision to select Ratu Mara on "factors other than the voting strength of the parties"; and secondly, that he provided Ratu Mara with the dissolution he required. He argues that, taken together, these actions amount to a departure from Westminster principles upon which the Fijian Constitution is based. He concludes that:

The Governor-General, having chosen as Prime Minister the leader of the minority party, was able to disavow further responsibility by claiming that he had no
discretion in refusing to grant a dissolution. The Prime Minister, moreover, was given the means for removing a House in which, as a direct result of the general election, he commanded only minority support, and in which, on his own statement, the opposition commanded a majority (ibid:233).

Whether or not we agree that the Governor-General's actions amount to a departure from Westminster principles - in the sense that he broke unwritten rules concerning the use of his discretionary power - it is clear that his actions were seen as partisan by the party with majority support in the Parliament. The National Federation Party already had a longstanding dissatisfaction with the electoral system, which they regard as favouring Alliance interests (see Vasil 1972:27). That is, they already held the view that the constitutional mechanisms concerned with changing governments were weighted against them. The Head of State's actions in 1977 could only reinforce that view. Thus the case may have more far-reaching implications for the legitimacy accorded Fiji's constitutional provisions concerned with succession of government. By contrast, the Head of State's actions in the WS and CI cases did not call into question continued support for the constitutional mechanisms. These actions had the support of Parliament and were seen as necessary in exceptional circumstances.

THE NO-CONFIDENCE MOTION

The third mechanism available for changing governments in the Pacific States, the no-confidence motion, has only been used in PNG and even there it has only once been successful in ousting a government. At first sight this appears surprising. Most Pacific countries, as we have noted, have either fluid multi-party systems or no parties at all. This lack of firm party allegiance would seem to lend itself to a situation where a challenge to an incumbent government could attract the required support. This is particularly so as there is a constitutional guarantee that a government cannot ignore such a motion. If it is carried, the government must resign or advise a general election.

How then do we explain the lack of interest in this mechanism? Part of the answer lies in the fact that in several of these states the Prime Minister has the option of advising a general election if a no-confidence motion is carried. Such a possibility is not attractive to the individual member of Parliament because of the chance that he may lose his seat at a general election.17 The odds that this may happen are extremely high in many Pacific countries. In WS, as we have seen, the turnover of parliamentarians has been around 50 per cent at all general elections. Thus the possibility of calling an election becomes a threat which a Prime Minister can hold over those planning a no-confidence motion.18

In PNG, on the other hand, there is no such provision. The Prime Minister cannot advise a general election if a no-confidence motion is carried by Parliament. Thus it is very tempting for the opposition parties to mount a challenge. Between the 1977 election and March 1980 three no-confidence motions were put. On the third occasion, in March 1980, the opposition was successful and power changed hands without a general
election being called. Since becoming Prime Minister, Chan has criticised this mechanism (see Chan 1982:2). He argues that the fact that a challenge can be mounted at any time after the six months 'honeymoon period' (the period in which a motion cannot be put after a government takes office) creates considerable instability: "the result of this is that at almost every sitting of Parliament the air is thick with rumours that the government is about to fall". He suggests two modifications to the rules governing the use of this mechanism. The first would be to prohibit its use for a period - "say a year" - after a no-confidence motion has been defeated. The second would be to give to the Prime Minister the ability to recommend a dissolution of the Parliament if a no-confidence motion is passed. Chan recognised the worth of the latter as a deterrent:

> if Members of Parliament knew that failure to maintain a stable government could mean having to face re-election, they would surely think several times before creating such a situation in the first place (ibid.:2)

Whilst no-confidence motions have not been put elsewhere in the Pacific, their role as a potential sanction should not be overlooked. The knowledge that a parliament could move such a motion would discourage a government from refusing to resign in a situation where it could not, for example, get its legislation passed. Although Dowiyogo cited Westminster practice as the reason for his resignation from the Presidency in Nauru in 1978, he also knew that if he did not resign a no-confidence motion could have been put to force him out. The same was true when the Independent Party left Kenilorea's governing coalition in SI in August 1981. Kenilorea knew that there would be no use in attempting to continue governing because a no-confidence motion could be put. He resigned making a no-confidence motion unnecessary. Nevertheless the mechanism was still in the background as a sanction.

CONCLUSION

We are in a position to make three general observations concerning the Pacific experience with succession of government. The first is the central role of parliament in selecting and dismissing governments. The parliamentary vote system of selecting a new Prime Minister after a general election, or to fill a mid-term vacancy, has governed how power changed hands in all but two instances: WS in 1975 and CI in 1978. Even these cases appear to be exceptional within the experience of these particular countries. As a corollary of parliament's centrality, we note the relatively insignificant role for the Head of State, political parties, and even the voter, particularly when compared with their respective roles in other Westminster systems.

Secondly, we note the almost total absence of mid-term challenges to an incumbent government despite the availability of the no-confidence motion and the fluid political allegiances within Pacific parliaments. The mid-term collapse of a government or the resignation of the Prime Minister is also very rare.
Finally, we observe that the constitutional mechanisms for changing government have met with general acceptance. Even where government has not changed hands—in Fiji, Kiribati, Vanuatu and Niue—the mechanisms which allow the opportunity for change are still available and in use. Parliamentary elections are still held, parliamentary votes for leader are taken, and no-confidence motions can still be put. Elections are free and force is not used to suppress opposition. Thus the legitimacy of the succession mechanisms appears to be established both in countries that have experienced a change of government and those that have not. We need, however, to make two qualifications to this observation. The first is that this does not apply to Tonga, as a change of government in the Westminster sense is not possible there. The King's authority appears to be widely supported by the Tongan people. Secondly, we noted that in Fiji there has been a questioning of the succession machinery, and particularly the electoral system, by the Indian-supported National Federation Party. The machinery is viewed as favouring Alliance Party interests and contributing to their own exclusion from power.

The conclusion that there has been general acceptance of the mechanisms for changing government in the Pacific prompts consideration of two questions: first, how do we explain the legitimacy accorded these mechanisms, and secondly, how might social and political change affect such acceptance in the future? These questions are complex and their detailed consideration must lie beyond the scope of this paper. For my present purposes, it is sufficient to suggest why these are important questions and to put forward some tentative propositions.

In asking why it is that there has been general support for the succession mechanisms we are really asking why force has not been used to seize power in the Pacific states and why incumbent governments have not sought to entrench their own position and cripple that of their opponents by changing the rules or ignoring the existing procedures concerned with succession of government. These questions immediately occur to us because of the experience of the post-colonial states of Africa and much of Asia where the Westminster succession mechanisms are quickly jettisoned and the military coup or one-party state with suppressed opposition became commonplace.

An explanation of the Pacific experience would need to include consideration of: the very small size of most of the states involved; the general absence of nationalist parties; the non-existence of armed force outside PNG, Fiji, Tonga and Vanuatu; the lack of ethnically 'bipolar' states except in Fiji, and possibly Vanuatu; the continued existence of chiefly authority in Polynesia; the relatively low level of political participation and organisation; and the absence of external involvement in domestic political processes.

I would argue that the most important factor is that no significantly sized group within these states has felt itself to be fully excluded from the possibility of gaining government or from having some representatives of their interests in power. Most of the Pacific Island States consist of only one ethnic group speaking the same language. This is the case in WS, CI, Niue, Kiribati, Tuvalu and Nauru. In such countries there is no ethnic group that would always feel excluded from power by virtue of being a minority group within a Westminster system based on 'majority rule'. This
contrasts with virtually all of Africa, Asia and the Caribbean where there are typically several major ethnic groups in one state, each group defining its political identity on the basis of its ethnic allegiance.

Papua New Guinea and SI, although composed of large numbers of ethnic groups, also do not conform to the pattern typical in other post-colonial states. They have so many groups that no one group can predominate and fully exclude others. Coalitions have to be formed. There is then, I would argue, a feeling that if you play your political cards well you could get access to power through the Westminster mechanisms. This is not to say that ethnic and regional loyalties are not felt very strongly but rather that they are not politically organised in such a way that a permanent 'in-group' and 'out-group' have formed in relation to political power at the state level. Only in Fiji and Vanuatu do the conditions exist for the development of such an 'out-group'. In these countries, political allegiances are generally determined by identification with one of two major ethnic groups. Support for political parties is by and large based on this division. Although Vanuatu has a large number of traditional ethnic groups it is the Anglophone/Francophone overlay which provides the most important 'ethnic' division for politics at the state level. If the Indians in Fiji and the Francophones in Vanuatu continually feel excluded from power their support for the Westminster-type succession mechanisms is likely to wane.

Many of the factors that I have put forward as contributing to constitutional succession of government are currently undergoing change. The forces of Western education, cash economy, the experience of travel, increased external interest in Pacific politics, unionisation, the development of political parties, and the growth of armed forces, are already being felt. There are more groups wanting to vie for political power and to challenge chiefly authority where it is entrenched. What implications do these trends have for constitutional succession in the future? I would contend that the changes in political participation and organisation are likely to increase the propensity to change government and also the significance of that change. The political stakes are likely to be raised. This is unlikely, however, at least in the short-term, to affect the respect for the constitutional mechanisms which allow the opportunity for peaceful change of government.

The most likely threat to the continuance of constitutional succession would stem from the development of political 'out-groups' based on ethnic or regional allegiance. For reasons outlined above, such developments are more likely in Fiji and Vanuatu though they may also occur in PNG and SI if political identification based on large regions becomes the predominant pattern. If such groups feel that they are continually excluded from power by the operation of Westminster succession mechanisms they may withdraw their support for them. This may take the form of an attempt at succession. It may be expressed as a demand for a change in the rules so that power-sharing is a possibility. It may not only be the 'out-group' which could no longer accept the Westminster succession mechanisms. The power-holders could also change their views on the desirability of the operation of such mechanisms. The possibility of one of the opposing groups gaining power might be considered to pose too great a threat to their interests. Or it may be that there is indeed a 'Pacific way' of
doing things which will ensure that the states in this part of the world do not follow the example of other post-colonial societies.

NOTES

1 Although the CI and Niue only enjoy 'associated statehood' status they are nevertheless included because succession of government questions are fully determined by processes within these countries.

2 The term 'Westminster model' is used in the sense put forward by Stanley de Smith (1964:77). Although Tonga has Westminster trappings, effective power lies with the King. Kiribati is a semi-presidential model.

3 Parties did subsequently develop in Nauru, WS and SI. There were parties in PNG when the Constitution was being drawn up but this was a very fluid system.

4 WS, Nauru, Kiribati and Vanuatu are republics. The CI, Fiji, Niue, PNG, Tuvalu and SI have Governors-General. Tonga is an independent kingdom.

5 The Head of State or Governor-General is given the constitutional duty of removing the Prime Minister after a no-confidence motion is passed in PNG, Fiji, SI, WS and CI. In the case of Vanuatu, Niue, Kiribati, Tuvalu and Nauru the constitution stipulates that the Prime Minister shall resign or advise a general election. The Head of State does not have a role in these countries.

6 Notice of intention to put a no-confidence motion has to be given in PNG, SI, and Vanuatu and Niue.

7 PNG is the only Pacific Island State to have the requirement that an alternative Prime Minister be named in a no-confidence motion.

8 PNG is alone in having this requirement. During a six months period after an election a motion cannot be put (s.145(4)).

9 The Prime Minister has an option of advising a general election in Fiji, Niue, WS and CI. In the case of the CI, however, the Head of State is given the discretionary power to refuse the Prime Minister's request for a dissolution. (s.14(3) (6)). In Nauru the President does not have the power to call a general election but if Parliament has not selected a new President within seven days Parliament 'shall stand dissolved' (s.24(2)). In the other countries there is no provision for a general election. The matter has to be resolved by Parliament.

10 Mata'afa's long term was not exceptional. In six of the eleven countries under study the first Prime Minister has held his leadership position for more than nine years.
There were ten such votes if we include the vote of no-confidence which ousted the Somare Government in March 1980. This is, however, in a different category and is considered separately.

Based on figures reported in *Pacific Islands Monthly* after each election, there was a 45 per cent turnover in Legislative Assembly members in 1970, 49 per cent in 1973, 60 per cent in 1976, 55 per cent in 1979, and 53 per cent in 1982.

This is shown by the fact that it was Laupepa who nominated Tupuola for Prime Minister during the first sitting of Parliament.

See, e.g., Felise Va'a's assessment of a possible 30-17 against Tupuola in *Pacific Islands Monthly* April 1982:5.

In Nauru, Parliament elected Lagumot Harris as President following Bernard Dowiyogo's resignation in April 1978. In March of the same year Parliament elected Hammer DeRoburt following the resignation of Harris when his government lost an appreciation amendment bill by nine votes to eight. The SI case occurred in August 1981. Solomon Mamaloni was chosen as Prime Minister by a parliamentary vote following the collapse of the Kenilorea Government.

In the WS context Tupua Tamasese's traditional rank is of particular importance. Only chiefs can vote or stand for Parliament. The two Prime Ministers WS had between 1959 and 1976 were Tama'aiga. The Head of State also holds a Tama'aiga title. There are only four such titles in the country.

It may also not be attractive to a political party as we saw in April 1977 in Fiji where the National Federation did not want to put a no-confidence motion in case Ratu Mara advised a general election.

In the case of WS the high chiefly rank of Mata'afa and Tamasese also reportedly discouraged any challenges during their terms (private sources).

Dowiyogo resigned after his government lost a motion to close debate on a bill to provide "a greater proportion of phosphate royalties to be set aside for government funds" (see Backgrounder 19 May 1978:17).

After the six Ministers from the Independent Party announced their intention to withdraw from the coalition, Kenilorea tried to negotiate the necessary support to govern but failed to do so. He then resigned and lost the subsequent parliamentary vote for Prime Minister (20-17) (see *Pacific Islands Monthly* October 1981:33; Backgrounder 26 August 1981:3).

Y.P. Ghai

The independent states of the South Pacific all have constitutional systems which may be broadly characterised as 'Westminster' (although most of them have features different from the classical Westminster system and are thus sometimes referred to as 'export Westminster models' (see de Smith 1964) or 'neo-Westminster' (see Lynch 1982a)). On the other hand, all but one of the constituent entities of the US Trust Territory of Micronesia (the exception being the Marshall Islands (MI)) have adopted the 'Washington' model, again with some modifications. Despite the fact that there was considerable controversy over many other provisions of the independence constitutions, agreement on the major question of the form of government was in most cases reached easily (largely following the 'metropolitan' model) and often with little discussion (see Ghai 1982).

This paper looks at some of the reasons for the ready acceptance of the 'metropolitan' model and at some alternatives which were canvassed in the pre-independence period. It also discusses the modifications to the Westminster system and concludes with some comments on the consequences of the adoption of that system. The paper is confined to an examination of the Constitutions of Fiji (1970), Papua New Guinea (PNG) (1975), the Solomon Islands (SI) (1978) and Vanuatu (1980).

REASONS FOR THE ADOPTION OF THE WESTMINSTER SYSTEM

The abandonment of the Westminster-based independence constitutions in Africa and some parts of Asia has given rise to some controversy as to whether that system was imposed by the colonial authorities or demanded by the national leaders. A similar controversy is beginning to emerge in the Pacific and criticism is made of the inappropriateness of the independence constitutions to local political, social and economic conditions. Except in the case of Vanuatu, the people of the countries under consideration and their leaders have had considerable freedom to fashion their own constitutions. In no case was a constitution imposed upon them and in SI, the colonial authorities in fact even advocated for a considerable time the adoption of an alternative to the Westminster system.

It is nonetheless important to appreciate the context and the circumstances in which the leaders made their choices. Most were brought up under a Western system of education and were deeply influenced by missions. They then rose to prominence through electoral and constitut-
ional systems which were the precursors of the Westminster system, and gained political and ministerial experience under it. They had thus been socialised in various ways to believe that other systems were less democratic. This was particularly striking in Fiji where constitutional decisions were made by conservative, traditional leaders (in the Alliance Party) or by lawyers (in the Federal Party), all professing a firm commitment to the rule of law. A continuing responsibility of the executive to the legislature is considered to check dictatorial tendencies and the disregard of public opinion.

A further reason for the preference for the Westminster system is said to lie in its congruence with traditional Melanesian forms of political organisation, so that its adoption would promote national unity. Here again, a contrast is implied with the executive-presidential system, where executive power is constitutionally vested in one person, presumably from the majority group.

The Westminster system may well serve this purpose, especially if there are now only weak parties, as has so far been the case in PNG and SI, although, as we shall see, Peter Konilore (1972) argued that the creation of political parties by the Westminster system would itself be divisive. It does not follow, however, that it must achieve this result. Given political parties based on regional or ethnic affiliations (especially when elected on the basis of a first-past-the-post system of representation), the consequence may well be that the 'winner takes all', that the majority party gains full control over legislative as well as executive powers (and through the appointments power, even over the judiciary). Multi-ethnic or regionally-orientated states (i.e., those with 'permanent' minorities) which have adopted the Westminster system have generally found it necessary to make federal or similar arrangements (Canada, Australia, India, Malaya, South Africa, etc.).

Other devices which have been used to modify the centralising and monopolising consequences of the Westminster 'export model' include the isolation of various institutions (such as the public service, the judiciary or the public prosecutors) from executive control, and the establishment of ombudsmen, public solicitors, etc. (see de Smith 1964:Ch.4). Still, a 'permanent' majority party in power will have little reason to make concessions to the minority, and the minority will despair of gaining or sharing power through elections and may be tempted into subversion.

It is consequently doubtful if the Westminster system was appropriate in Fiji and Vanuatu. Fiji contains two main communities (native Fijians and Fiji Indians in a proportion of 42:48 per cent), which have been politically organised along racial lines. Each community has a chance of winning elections only if it closes ranks, and the community which loses has no share in executive power. The Westminster-type Constitution has therefore provided neither an incentive for integration nor the possibility of power-sharing (problems which have been compounded in Fiji by the racially-based electoral rolls and seats).

In the case of Vanuatu, the major division has been perceived to be between the English- and the French-speaking sections of the population, with the latter in the minority. Although the 'francophones' had proposed
a constitution with a 'Fifth Republic' type presidency, the constitutional consultant appointed by the French Government, Prof. C. Zorgbibe, recommended a Westminster system to allow for greater influence on policy by 'francophone' parliamentarians and a greater possibility of power-sharing. This view was not necessarily shared by the French Minister for Overseas France, M. Paul Dijoud, who wanted a strong president with veto powers (with the expectation that a 'francophone' president might be harnessed to an 'anglophone' prime minister) and the dispersal of certain key powers amongst chiefs, chairmen of regional councils, etc. In the mid-1960s, the French had already argued for a 'power-sharing' constitution, under which both factions would have posts in the cabinet in proportion to their seats in the legislature (a proposal which has also been made in relation to Northern Ireland).

This sounded too much like the perpetuation of the condominium, and was opposed by the ('anglophone') Vanuatu Parti on the grounds that this would make policy and administration difficult - a position which I also took at the time (see Ghai 1974). I supported the normal rule for the composition of the cabinet because I did not consider the 'francophones' to be a 'permanent' minority. The factors that divided them from the 'anglophones', though potent, were artificial and it was unwise to adopt a constitution that would perpetuate them. A more conventional parliamentary system was likely to encourage the integration of the two communities. That this view was not shared by several leaders of the 'francophone' community is evident from their rejection of the Independence Constitution and attempts at secession.

PROPOSED ALTERNATIVES TO THE WESTMINSTER SYSTEM

Only in the case of Fiji was there no debate as to which basic form of government should be adopted. In one of their early secret meetings in 1969 to discuss a constitution, the leaders of the Alliance and Federal Parties agreed on the Westminster system of the 'classical Dominion type' in a matter of minutes. There was no discussion of its merits, its applicability to local circumstances or of alternatives to it.

In PNG, although alternatives were canvassed, there was also little serious discussion of them. The alternative which appears to have received the greatest attention was the parliamentary president (of the Kenyan variety), although the strongest proponent of the presidential idea, John Guise (see Guise 1972), advocated a Tanzanian-type system (the difference being that the President in Kenya remains a Member of Parliament and shares with his Cabinet collective responsibility and can be removed by Parliament, while in Tanzania he is not a Member, cannot be removed by Parliament, and does not share his executive responsibility with the Cabinet, which consists of either elected or nominated Members of Parliament). Guise proposed that the president could be dismissed by the legislature, but also that he could dismiss Parliament "if it carries on in a manner contrary to the good, stable government of the country" (ibid.) - which might have raised the interesting question of who would pull the trigger first! Although a member of the Constitutional Planning Committee (CPC), Guise did not press these proposals - in fact he took no part in the decisions of the CPC. But he has returned to them in his submissions to
The General Constitution Commission, which is currently reviewing the operation of the PNG Constitution.

The acceptance of the Westminster system was more problematic in SI and Vanuatu. In the early 1970s, the colonial authorities in SI decided upon a different model, which they were able to persuade the elected Members of the Assembly to accept. The 1970 Constitution abolished the Legislative and Executive Councils (in their embryonic Westminster form) and established instead a Governing Council, in which both legislative and executive powers were vested, and which was to operate largely through a committee system for policy-making and administration. It was to meet in private when discharging its executive functions, and in open session when discussing legislation.

It was hoped that each member of the Council would sit on at least one committee. Each committee was to be responsible for specific matters, while the chairmen of all (other) committees met as the Finance Committee.

There is little evidence of enthusiasm in SI for these proposals (see Russell 1970; Paia 1975) although they were submitted for public discussion and a recommendation to adopt them was made by a Special Select Committee of the Legislature (Legislative Council Paper No.22 of 1969). Moreover, opposition was expressed by Solomon Mamalon on behalf of "some young people". As the 1970 Constitution bears a strong resemblance to the system which operated in Ceylon (now Sri Lanka) from 1936 to 1946 - known as the "Donoughmore Constitution" after the chairman of the Commission which recommended it - it is best to turn in this direction to discover the rationale for the system in SI.

"DONOUGHMORE" IN SRI LANKA: AN EXCURSUS

The Donoughmore Commission was asked to recommend amendments to a constitution under which the majority of the Members of the Legislative Council were elected, while executive responsibility was vested in a nominated Executive Council (irremovable by the Legislature). The divorce between power and responsibility was aggravated by the Legislature's control over finance. The British had expected to work the system by eliciting the support of the elected members, or at least some of them, but this was not to be. The latter, although not organised in political parties, united in their opposition to the executive. The absence of party organisation was expected to help the Government, but the Commission noted that its absence created other problems, for if the Members were divided along party lines, the Government could have expected the support of one group or the other (Ceylon 1928:21). The elected Members did not obtain experience of policy formulation or administration, and so did not learn 'responsibility'.

The Commission recommended the abolition of the Constitution and its replacement by one under which legislative and executive functions would be combined in a state council. Executive responsibility would then be delegated by the council to several committees, each with a ministerial chairman. The ministers would meet as a board of ministers to determine the order of business and would be responsible for the budget estimates. The council (and its committees) would meet in private session when sitting
as the executive, and in public when sitting in a legislative capacity. The Commission justified its proposals with three broad considerations:

(1) The non-existence of a party system, which prevented stable parliamentary government; (It acknowledged that the development of responsible government might lead to the development of parties, but feared that if parties did develop, they would be along racial or caste lines, and therefore be "fatal to the best interests of the country" (ibid.:42)).

(2) It was not convinced that the Westminster system was a good form of government, especially because of the insignificant role of backbenchers, and considered that it may already be "obsolescent" even in Britain (ibid.:43).

(3) Members of the Legislative Council in Ceylon had shown much more interest in administration than in policy-making.

In so small a country and with the conception of the scope of government which has existed up to now, administration rather than legislation has loomed large in the eye of the politician (ibid.:44).

An over-riding consideration (which had no application in SI in the late 1960s) was the Commission's view that due to racial divisions within the population, Ceylon was unlikely to achieve self-government for a long time (and hence would need to retain ex-officio ministers). It was thus, in the end, unwilling to accept the logic of its own other arguments: the elimination of the official non-elected majority in the legislature.

The proposals were opposed by various Ceylonese leaders, although not only, or even primarily because of the fusion of the Executive and Legislative Councils - ethnic and electoral provisions were more controversial. But there was dissatisfaction with the fusion, which grew as the shortcomings of the new system became apparent after its implementation. Although agitation for reform began almost immediately, yet it was not until after World War II (and partly due to it) that an independent review was made of the "Donoughmore Constitution" by a commission under Lord Soulbury (see Ceylon 1945).

By this time the British had accepted a Dominion status for Ceylon and so one difficulty feared by Donoughmore was removed. The Soulbury Commission accepted the criticisms made of the State Council system. These were that the executive committees:

made administration cumbersome and dilatory, they prevented any co-ordinated effort and hindered the emergence of any real ministerial policy or responsibility. These were defects so inherent in the system that it could not be efficiently operated (ibid.:21-22).

The Commission perceived remedies to these defects in the Westminster system, and Ceylon obtained Independence under a Westminster Constitution.
THE GOVERNING COUNCIL IN THE SOLOMON ISLANDS

The background to the introduction of the Governing Council appears to lie in part in the conflict between the ex-officio Members of the Executive Council and the elected Members of the Legislature, with the elected Members of the Executive Council understandably refusing to accept collective responsibility (see Russell 1970:227-29). The second official reason given was the absence of a party system:

democracy on the Westminster pattern depends for its working on the party system with its inherent concept of a government and an opposition (ibid.:228).

It was also claimed that the Governing Council was particularly suitable for a small Melanesian country: based on consensus, inexpensive, simple, capable of uniting the country and allowing for the best and most effective use of available leaders and educated people (see British Solomon Islands Protectorate (BSIP) 1968).

The Constitution was opposed by some Members, and a motion by Mamaloni to set up a committee to review it was passed in 1971. Mamaloni had attacked the Constitution as being retrogressive, in that it was neither responsive to modern needs nor in tune with traditional custom which required open and lengthy discussions (see BSIP 1969:40-41).

The Committee found various defects with the Constitution: it had proved to be neither simple nor cheap (Members had to travel more frequently to Honiara and stay for longer periods); it neither provided a place for individual leadership nor did it encourage the development of the characteristics of leadership; co-ordination at political level was difficult; the system was dilatory, requiring wide consultation, and policy initiatives were difficult to take; finally, the system was difficult to understand, in particular:

the fact that committee meetings and meetings of the Governing Council sitting as an executive are held in private is not consonant with customary practice and is regarded with some suspicion (BSIP 1972:10-11).

The Committee therefore recommended the separation of the Executive from the Legislature and the appointment of a Chief Minister. Its recommendations were implemented in the 1974 Constitution and provided the blueprint for the next constitutional review committee (the terms of reference of which enjoined it to depart as little as possible from that Constitution).

Although the 1972 Committee advocated a return to the Westminster system, it recommended that the participatory features of the 1970 Constitution should be retained through the establishment of a standing advisory committee, consisting of all non-ministerial members. One-third of its members were to be resident in Honiara at any given time to familiarise themselves with government business to be discussed in the Assembly and to advise the Chief Minister or other Ministers of the Committee's views on any matter on which its views were required (see ibid.:15-16). The subsequent history of this proposal, which did not feature in the next Constitution, is obscure.
THE ROLE OF POLITICAL PARTIES IN THE WESTMINSTER SYSTEM: ANOTHER EXCURSUS

The discussion both in Ceylon and SI turned on the role of political parties. On the one hand, it was assumed that the Westminster system could not work unless there were two well-organised parties (more than two would cause problems; see Ceylon 1928:42) and, on the other, that the development of parties would endanger national unity. The latter assumption was underlined by Peter Konigorea (1972) in his support of the Governing Council: party politics would further fragment an already divided country, for party support could only be based on differences of race, language and region.

Yet by now there is sufficient evidence that a parliamentary system can work without any strong party as well as with a multitude of parties - although in ways which differ significantly from a two-party situation (see Dodd 1976). The party-less situation is the more difficult if all conventions of the Westminster system are adopted, as they have tended to be in the Pacific. In these circumstances - whether they like it or not - politicians must organise themselves into parties, both to gain and to retain power.

It is also doubtful that parties are necessarily divisive. It is fashionable to explain the strength of local or island feeling compared to nationalism in terms of the absence of political parties, but in Vanuatu the strong organisation of the Vanuatu Party was largely instrumental in overcoming separatist tendencies. Apart from Fiji, parties in the Pacific cannot expect to gain power if they are based on language or ethnicity: they must either form coalitions or expand their electoral base throughout the country - both strategies which are likely to promote national unity.

THE SEARCH FOR AN ALTERNATIVE: VANUATU

Because of its joint administration by France and Britain, it is not surprising that there was not a general acceptance of the Westminster system in the New Hebrides. The Vanuatu Party was anxious to have executive authority vested in one body, thus the Westminster system, providing the head of state only with formal powers, would have suited it.

The 'moderates' originally advocated a presidential system of the 'Fifth Republic' type. A number of 'francophones' were later persuaded of the virtues of the Westminster system, but an influential group led by the then Minister of Finance, Guy Prevoit, held out for the presidential system (although no formal proposals were presented to the Constitutional Committee until it had agreed on most provisions of the present Constitution, and were then not seriously pressed). However, by this time it had become difficult to identify what this group really wanted since a faction of it, led by Jimmy Stevens of the Nagriamel and subsequently, on Santo's secession, Vemara, had put out its own proposals (which lawyers from the Phoenix Foundation had helped to draft) advocating a prime ministerial system (see Doorn 1979). In any case, the attention of the 'moderates' was focused on the question of federalism or decentralisation.
Before discussing the proposals that were advanced in 1979, reference should be made to an earlier (1977) proposal by Jimmy Stevens (presumably also prepared by Phoenix). It included a US-style president - with a fixed term - to be elected by the people. Among the many interesting - and occasionally bizarre - aspects of that draft constitution (which prohibited, for instance, all forms of taxation) was one which required compulsory voting in the presidential election on payment of a sum to be determined by the legislature, the proceeds to be paid to the winning candidate, for his salary and the expenses of government during his four years' of office.

The later (1979) proposals by Jimmy Stevens are of interest primarily for their federal and confederal aspects, discussed by Peter Larmour elsewhere in this volume. The supreme executive power was to be vested in the Prime Minister, who was to be elected by a majority of the Assembly and to hold office for as long as he commanded majority support. His Cabinet would consist of four Ministers who had to be Members of the Assembly. There was no provision for a head of state; presumably the Prime Minister, who was also made commander of the military forces, would be so regarded.

Unlike these proposals, which were not formally presented to the Constitutional Committee nor discussed by it (indeed, Jimmy Stevens himself seemed to have only a vague notion of what they contained), those presented by Guy Prevot had been the subject of considerable debate. Their basic feature (again, apart from the federal elements) was a President elected by a college consisting of Members of the National Assembly and Regional Councils. He was to hold office for five years. He was to appoint the Prime Minister from either within or outside the Assembly. The Prime Minister also could choose his Cabinet from the Assembly or outside it. But once appointed, neither the Prime Minister nor his Ministers (the 'Government') could be Members of the National Assembly or a Regional Council. The Government could be dismissed by a vote of no confidence by the Assembly.

The 'moderates' supported the proposal for this Gaullist-type President on the grounds of the stability it would provide. It was not easy to see if it was also regarded as helping the 'francophone' minority. If, as they had hoped, one of their own number had been elected President, conflicts between the Government and the Legislature would have become endemic, and the system would in all probability have been unworkable. The Vanuatu Parti opposed the proposal mainly on account of its fear (understandable but exaggerated) that with a 'francophone' President there would be a continuation of the condominium under another name and by other means. There was little discussion of the virtue of 'stability' - a factor not to be lightly dismissed - to which we will return in the concluding section.

MODIFICATIONS OF THE WESTMINSTER SYSTEM

Although in the end, all four countries opted for the Westminster system, it was not without modifications to suit local circumstances and predictions, in some respects significantly affecting the operation of the system. Here we can only discuss the modifications related to the core of the system, concerning the relationship between the legislature and the
executive (modifications implicit in bills of rights, independent service commissions and the like must be excluded).

Although in substantive terms the matter may be considered minor, the question of the head of state, particularly as between the (British) Monarch or a local president, generated considerable controversy (see Lynch forthcoming). There was less controversy over the method of appointment and tenure of the 'Head' (or Her representative if the British Monarchy was opted for) and, except in Vanuatu, almost no controversy as to its role and functions.

This somewhat paradoxical state of affairs came about because the general public, unable to grasp the complex structure of governmental systems, fastened on to the formal or symbolic aspect of the state, and because there appeared to be so much agreement among the leaders on the question of the role and functions of the head of state that it was regarded as scarcely necessary to spell them out. Unfortunately, this narrow focus tended to obscure and to pre-empt other more substantive issues.

It has been suggested that the very choice of the Westminster system was dictated by the wish to retain the British Monarch as the Head of State. There appears also to have been considerable misunderstanding, especially among the general public, of the implications of different options (e.g., in SI a constitutional President of the Indian type was considered by some to contain the seeds of dictatorship while the British Monarch, represented by a Governor-General, was seen as a check on such tendencies).

The nettle, however, was firmly grasped by the CPC in PNG: it recommended that there should be no head of state at all. It argued that this notion had developed when kings had established their unchallenged authority in society, frequently through conquest, and that more recently some states adopted the presidential system as a kind of substitute (although with the growth of democratic systems, executive power, although formally vested in the monarch/president was no longer exercised at their own discretion but at the direction of the elected government). There was no reason why the people of PNG should have to adopt this foreign idea.

The CPC also demolished the concept of a head of state in functional terms. It argued that, contrary to some popular conception, the existence of a formal head of state did not prevent the emergence of dictatorial prime ministers and government; that it could accentuate a constitutional crisis if the head of state and the prime minister did not get along well; that a head of state could not provide a focus for national unity if his office did not have its roots in local culture and history (as in PNG); that political compromises and ultimately courts were better means than a head of state to solve controversies and crises; that a head of state was not necessary to ensure continuity of government, as the matter could be regulated by constitutional rules for the transition of government; and that the formal functions of the head of state (receiving ambassadors, opening sessions of Parliament, giving assent to legislation, etc.) should be dispersed among ministers and the Speaker, thus emphasising the collective nature of leadership in PNG (see PNG CPC 1974:7/1-2).
Discussions in other countries were not pursued with such thoroughness, and the arguments did not even convince the Somare Government in PNG. In its comments on the CPC recommendations, it proposed bluntly that there should be a head of state and that he would be a president, only to shift soon afterwards to the British Monarchy, a move which found favour with the Constitutional Assembly. Let us therefore examine why PNG as well as SI and Fiji chose the British Monarch as the Head of State (an option precluded in Vanuatu by its condominium history).

In none of the countries was it necessary nor possible to institutionalise a local dignatory as Head of State (the reason why Malaysia or Zanzibar or perhaps even Western Samoa broke links with the British Monarch). If Fiji had not had its Indian population, it might have proved possible to institutionalise the Fijian chiefdom into the presidency, although it would have been very difficult to agree which of the chiefs should hold office. However, it was positive sentiment rather than difficulties of this kind which led Fiji in particular, as well as other Pacific states, to a retention of the British Monarchy. Indeed, so natural did it seem to the Fijians that the British Queen should be Head of State that the Constitution nowhere provides for her to be the Head of Fiji - it simply takes it for granted. By way of contrast, the PNG Constitution recites that the people have requested the Queen to be Head of State, which she had graciously consented to be.

In Fiji the monarchical version of the Westminster system may have served a double purpose: it retained the links with the British Crown desired by the Fijian people (as against the Indians, who wanted a republic) and at the same time, allowed recognition of the traditional Fijian hierarchy by appointing one of its senior members as Governor-General. It is perhaps no coincidence that the first occupant of that office is the grandson of Cakobau who signed the Deed of Cession whereby sovereignty over Fiji passed to the British.

To put it more generally, the link with the British Monarchy was retained for conservative reasons; it manifests the desire to minimise change, consistent with the general lack of enthusiasm for independence. In PNG one of the Somare Government's motives in moving to the Monarchy was clearly the wish to reassure the Papuans and the Highlanders who approached Independence with considerable suspicion. And in SI too, a number of Parliamentarians were anxious about what Independence might bring, and were glad that through the adoption of the Monarchy, the Queen's experience and wisdom would be available to the new Government (although students of Australia's Constitution and politics know that the Monarch's powers are vested in the Governor-General to be exercised by him without royal intervention - see Sir John Kerr 1978:374-75).

It is worth noting that the younger people had fewer anxieties, and wanted a republic both to mark unambiguously the attainment of Independence, and to promote nationalism. University students marched in protest against Somare's decision to retain the British Monarch; in Kiribati, the younger elements persuaded the older to go republican; and in SI, Bart Ulufalala's entry into the Legislature (and his leadership of the Opposition) on the eve of the constitutional negotiations changed the temper of discussions. If the 1975 Constitutional Committee had not unanimously recommended the Monarchy and if this recommendation had not
been endorsed by all the local councils, the Legislative Assembly might still have opted for a republic. As it was, the Assembly agreed on a compromise: SI would be a monarchy on Independence, but on the first anniversary it would automatically become a republic, the Governor-General turning into a President at the stroke of midnight, with substantially the same powers. However, at the London Conference in September 1977, under slight pressure from the British, this position was again abandoned in favour of monarchy, without a time limit (see Ghai forthcoming).

The link with the British Crown was also seen as a way of obtaining favourable British financial and technical assistance, and as a ticket for gaining entry into the Commonwealth. (Although it is not a prerequisite, 'royalist' colonial officers have not been adverse to encouraging the belief.)

Finally, there is the question of honours: the Prime Ministers and their supporters soon find it useful to be able to win friends and to placate enemies with knighthoods and the like.

Nevertheless PNG and SI have substantially modified the usual conventions - as if, having adopted the Monarch, they wanted to cut off all her links with the Governor-General - while Fiji retained the traditional pattern. The Fiji Constitution provides that the Governor-General is to be appointed by the Queen, and to hold office during her pleasure (s.28), while in PNG (s.88) and SI (s.27), the Governor-General is appointed on the nomination of Parliament with a fixed term of office (six years - non-renewable - in PNG (s.91) and five years - renewable only once - in SI (s.27(3))). His earlier removal can be effected by Parliament. Moreover, qualifications for appointment as Governor-General are specified in PNG (s.87) and SI (s.27(2)) but not in Fiji. Yet the Fiji Constitution obscures the real position: the appointment and removal of the Governor-General is in fact decided by the Prime Minister; by convention a five-year term is offered in the first instance; and although unlike PNG and SI, there is no constitutional requirement that he be a citizen, it is most improbable that a non-citizen would be appointed. Fiji also differs from the other two countries in the way that the Governor-General's powers are formulated. In general, in all three countries, he represents a constitutional monarchy, and is therefore expected to act on the advice of the Government - there appears to be no controversy over this. This may be contrasted with the Presidency in Vanuatu, where France and the 'francophones' pressed strongly for substantial discretionary powers in the President, on the theory that he was the guardian of the Constitution and protector of liberties (tasks that the Anglo-Saxons have learnt to leave to the courts) so that he would have powers to veto legislation and could make appointments in his own discretion to various offices. The constitutional provisions reflect a compromise between the French and British approaches. The President cannot veto legislation but he can refer any proposed law within two weeks of submission for his assent to the Supreme Court for a ruling on its constitutionality (Art.16(4)).

This leads to differences in the provisions for assent to legislation. In Fiji, the Governor-General shall signify that he assents or that he withholds assent (s.14) suggesting a discretion that he may not have according to Westminster conventions (Marshall and Mordig 1959:196) and which, otherwise, would probably have to be exercised on the advice of
Cabinet. This would give the Government a veto over legislation - an unusual outcome (although expressly provided for in a modified form in PNG, where the Governor-General may refer back bills passed by Parliament (s.110(3)).

A number of rules or conventions shaping the relationship between the executive and the legislature (and the head of state) lie at the core of the Westminster system. Briefly, these are: that the government is appointed from the members of the legislature; that it is collectively responsible to the legislature; and that it remains in office only for so long as it commands the support of a majority in the legislature. The prime minister is appointed by the head of state and is the person who is likely to command majority support in the legislature. In a two-party system, such a person would be the leader of the majority party. When there is a multiplicity of parties, the head of state may have a real discretion as to the person to be asked to form a government, although he would not remain prime minister without majority support, achieved either through forming a coalition or through the support of a political group (or groups) which remain(s) outside government. Normally the government is deemed to have lost majority support if it loses a vote of no confidence (or, more controversially, if Parliament defeats an important bill of the government). It was thought that the head of state could also dismiss the government if convinced from other evidence that it had lost majority support, but it is now unlikely that a head of state would so act. Another important aspect of the system is the right of the prime minister to ask for the dissolution of Parliament at any time (although in exceptional circumstances the request may be refused by the head of state, in whom lies the power of dissolution under the law (see Marshall and Mordig 1959).

Except in Fiji, the appointment and dismissal of the Prime Minister is a matter for Parliament. Fiji follows the more conventional pattern whereby the appointment is within the deliberate judgment of the Governor-General: he is to appoint as Prime Minister a Member of the House of Representatives (the lower and elective House) who is likely to command the support of the majority of that House (s.73(2)). This option was rejected elsewhere in order to minimise the political role of the head of state and to emphasise the importance of Parliament, especially where the absence of well-developed political parties made nomination by him difficult.

Some consequences of the political role of the head of state should be noted. Even in Fiji, with its two-party system, the exercise by the Governor-General of his powers has turned out to be controversial. For example, after the 1977 elections, he failed to call upon the leader of the winning Federal Party to form a Government, and instead asked Ratu Mara of the Alliance Party to continue as a caretaker Government, although he had conceded defeat (see Murray 1978).

In regard to dismissal, Fiji follows the traditional system, but the powers of the Head of State are more carefully circumscribed (s.74) by requiring an express vote in Parliament (unless the latter has been dissolved).
Elsewhere dismissal is purely a matter for Parliament, to be effected on a vote of no confidence. By implication, the Government need not resign if defeated on a major policy issue. This is not an unreasonable rule, particularly in the circumstances of a rudimentary party system (as in PNG and SI) where the opposition by the majority of the Legislature to a particular Government policy does not necessarily mean opposition to the Government as such. The rule preserves flexibility as well as stability (and is closer to the position towards which the British system has been moving since Harold Wilson).

PNG has restrictions on how and when a vote of no confidence may be passed, measures designed to ensure some stability in government. No motion for such a resolution may be passed within six months of the appointment of a government (s.145(2)) and when a motion is introduced, it must nominate a person who would become Prime Minister if it were successful. PNG also differs from the other countries in allowing a vote of no confidence to be moved against an individual Minister. This cuts across the principle of collective responsibility established in its Constitution and can cause awkward problems for coalition Governments.

The dissolution of Parliament is also handled differently. In SI and PNG, dissolution before its normal period of office can only be effected by the Parliament itself on a resolution supported by an absolute majority. In Vanuatu, it can, in addition, be effected by a decision of the Council of Ministers (not the Prime Minister) and in Fiji, either on the request of the Prime Minister or by the Governor-General himself, if a vote of no confidence has been passed and the Government has neither resigned within three days nor recommended a dissolution. (In Fiji, the Governor-General can also dissolve Parliament when the office of the Prime Minister is vacant, and he thinks no-one commands majority support.)

The consequence is that in PNG and SI a vote of no confidence does not entail the dissolution of Parliament. This means that given the absence of effective party organisation or discipline, Members are more likely to support such motions, since their own seats are secure. Nevertheless, in either country a vote of no confidence has only rarely been successfully carried, although a number of motions have been introduced (see Fry elsewhere in this volume). On the other hand, as the Government has no powers of dissolution, it cannot use this threat to bring backbenchers into line. (It has been argued that this considerably weakens the Prime Minister's ability to control the Cabinet and Legislature (see Chan 1981)).

So far the rules regarding dissolution, combined with the need in these two countries to operate coalition Governments, also mean that an excessive amount of time is taken up in 'coalition management', that coherent policies are hard to pursue and that collective responsibility is hard to achieve. A further problem, since Parliament is unlikely to vote for its early dissolution, is that deadlocks can arise which there may be no way to resolve short of new elections. In situations like this, a case can be made for discretionary powers in the Governor-General to remove the Prime Minister and appoint another, or to dissolve Parliament (as suggested by both Mamaloni and Konilorea to me in personal communications). But such powers are bound inevitably to involve the Governor-General in controversy. Furthermore, even fresh elections may do little to clear the air if no
clear party positions are taken, and to give the powers of dissolution to the Prime Minister would unfairly strengthen his hand.

CONCLUSION

Despite various problems with the Westminster system, the political life of these countries has been conducted without breakdowns, serious deadlocks or challenges to the legitimacy of the constitutional order. Although it may sometimes preclude the pursuit of vigorous policies, this is not always a bad thing. 'Coalition-building' and 'management' also have their advantages and assist in maintaining a measure of consensus. Coalition Governments are not necessarily unstable, as the experience in the Pacific and elsewhere has shown (see Dodd 1976; Butler 1978). But it is possible that the difficulties that the Westminster system creates for an aggregation of power, for the rise of national leaders and for the pursuit of tough policies may incline some people towards systems which have a certain built-in stability, as in some African presidential systems, or the 'Washington' and 'Gaullist' models (see Wilson 1980 in relation to Sri Lanka).

At the moment, Parliaments are genuine forums for the articulation of sectional and regional interests and for the resolution of different views. But as the economy becomes more complex, class interests develop, foreign public and private intervention increases, the ability of the parliamentary systems to discharge these functions is likely to be undermined and future crises may seem to require different solutions. Currently, the challenges to the Westminster system arise from those who advocate customary or traditional models, which imply a further dispersal and weakening of state power. Those familiar with centralising tendencies in Africa and Asia will watch with interest to see if there is a reversal of current attitudes in Melanesia.
16. DECENTRALISATION IN PAPUA NEW GUINEA: CONSTITUTIONAL FORM AND POLITICAL REALITY

R.J. May

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

THE CONCEPT

In the course of planning the Constitution, the Constitutional Planning Committee (CPC) made an early decision in favour of decentralisation. In its 1st Interim Report of September 1973 it discerned "the emergence of some clear majority views", according to which:

a system of district government should be introduced with greater powers for districts than those vested in area authorities (ibid.).

Two months previously the CPC had been presented with a demand for immediate district government in Bougainville and a detailed draft (prepared by the Bougainville Special Political Committee (BSPC)) of the form which it should take. Referring specifically to the demand from Bougainville the CPC proposed a tripartite meeting between the National Government, the CPC and the BSPC "to find a solution to the immediate problem of making interim arrangements for district government [in Bougainville], pending the Committee's final recommendations" (PNG CPC (1), 1973a:9-10). In its 2nd Interim Report of November 1973 the CPC noted that this proposal had been accepted by Cabinet:

subject only to the condition that any agreement which might be reached must be within a general legislative framework to be applied to the country as a whole (1973b:1/7),

and on the general question of decentralisation it said:

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

It saw district-level government as:

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

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

The precise form of provincial government which was finally recommended by the CPC in its Report of 1974 drew heavily on the recommendations of the consultants' Report on Central Provincial Government Relations (Tordoff-Watts Report) 1974. Their terms of reference required them to outline options and make recommendations:

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

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

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

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

that a fully decentralized system of unitary government should be constitutionally assured as an ultimate goal, but that it evolve by stages, with each province beginning at that stage most consistent with provincial capacity (*ibid.*:3/9).

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

Experience in other recently independent states does not incline us towards recommending a federal system for Papua New Guinea. The overwhelming majority of our people favour the maintenance of a unitary state (1974:10).

The Government's 'White Paper' (*Proposals on Constitutional Principles and Explanatory Notes PNG, 1974*) which challenged the CPC recommendations on several points, expressed some reservations about the proposals on Provincial Government, but "strongly supported" the principle.

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

...to put the relations of the National Government and the Provincial Governments on a flexible but definite basis that provides a strong central National Government along with significantly autonomous Provincial Governments (*ibid.*).

The sequence of events concerning Provincial Government between 1975 and 1977 is well-known and has been documented elsewhere (Conyers 1976; Conyers and Westcott 1979; Standish 1979; General Constitutional Commission 1980; Ballard 1981): the decision of the Constituent Assembly in July 1975 to exclude the Provincial Government provisions from the Constitution; the preparations, nonetheless, for the introduction of Provincial Government, including the establishment of the Bougainville Interim Provincial Government in July 1974 and the creation of constituent assemblies in other provinces; the Bougainville negotiations, culminating in the Bougainville Agreement of August 1976; and the eventual decision to reinstate the Provincial Government provisions through amendment to the Constitution and the passage of the Organic Law.

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

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

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

The latter he describes as "Buleit bilong mekim bel isi":

The machinery established by the Constitutional arrangements is such that if the National Government has certain policies which it wants to be carried out by provincial governments, its ability to control provincial administration (by control of manpower) and of provincial finance can ensure that its wishes prevail (ibid.:283).

The political circumstances in which Provincial Government was proposed, planned, rejected, revived and then haltingly implemented obviously had much to do with people's reasons for rejecting 'federalism' and opting for what the Tordoff-Watts Report described as "a fully decentralized system of unitary government", but these circumstances will not concern me here. Nor will I attempt (except by way of an indulgent footnote) the fruitless task of trying to locate PNG's Organic Law on Provincial Government on a continuum from confederation to centralised unitary state. The important thing is that the CPC, and subsequently the National Parliament, specifically rejected federalism for a unitary system, and the Organic Law on Provincial Government was intended to give expression to this decision.

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

Status of provincial governments

The subordinate status of the Provincial Governments in PNG's constitutional arrangements seems to be clearly reflected in several provisions of the Constitution and Organic Law: e.g., s.187D of the Constitution (inconsistency and justiciability of provincial laws); ss.19, 28, 29 and 37 of the Organic Law (which respectively secure the power of
the National Parliament to make laws for the peace, order and good
government of PNG; restrict the 'concurrent' legislative powers of
Provincial Governments where there is existing national legislation or in
matters of 'national interest', and enable the National Parliament to
disallow a provincial law "if in its opinion the disallowance is in the
public interest"); s.187E of the Constitution and ss.86-98 of the Organic
Law (suspension of Provincial Governments), and, as Goldring notes, in
relation to the Public Service and fiscal matters. It is these which
identify PNG's system of government as unitary.

As against this constitutional statement, however, it might be noted
that the Bougainville Charter states that:

> the relationship between Provincial and Central
> authorities, are [sic] founded on principles of comple­
> mentarity, [and that] one is not inferior in its nature
to the other

which, as Goldring comments, "asserts even more than federalism"
(1977:251n) - and that in a submission to the third Premier's Council (PC)
conference in 1980 it was stated (by a Provincial Government - apparently
without challenge) that:

> the most important and fundamental principle that both
> National and Provincial Governments should bear in mind
> ... [is that] both Governments are equal partners in

Division of powers

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

> The 'A' list provides a minimum framework for
development within a unitary state. The 'C' list
guarantees a minimal autonomy to provincial govern­
ments. The 'B' list is as accurate an approximation of
the outstanding powers and functions of government in
Papua New Guinea as we have been able to secure ....
It is, in intention, a residual list (1974:10/10).

But while the CPC recommended that final responsibility for all of the
powers and functions on the "B" list be vested in the National Government,
it expressed the view "That responsibility should be delegated to, or
devolved upon, provincial governments to the maximum practicable extent".
Commenting on the proposed division Diana Conyers said:

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

Between the proposals of 1974 and the arrangements embodied in Part VI of the Organic Law there is a subtle change of emphasis: Div.3 lists those subjects which are "primarily 'provincial'", within which - subject to s.19 - Provincial Governments have exclusive legislative power (taxation is covered separately); Div.4 lists "concurrent" subjects, within which provinces may legislate, provided that such laws are "not inconsistent with any Act of the [National] Parliament" (s.28) (though s.29 limits the legislative powers of the National Government under this division to matters of "national interest"); Div.5 provides that in "unoccupied' legislative fields" if the National Parliament has not made exhaustive laws, on any subject, Provincial Governments may make laws not inconsistent with any national legislation. There is also specific provision for the delegation of powers (Part VIII). However, under s.37:

The National Parliament may, by a two-thirds absolute majority vote, by resolution disallow any provincial law, if in its opinion the disallowance is in the public interest.

The Organic Law provisions concerning legislative powers would thus seem to give the Provinces potentially wide scope for initiating policy, yet at the same time - subject to the interpretation given to "national interest" and "the public interest" - to grant the National Government extensive power to overrule provincial legislation. Moreover, although the passage of the Organic Law went some way towards resolving fundamental questions about the division of powers - and a January 1977 decision of the National Executive Council (NEC) which provided a detailed listing of administrative functions divided into national and provincial "spheres of interest" (NEC 19/77) further clarified the situation - most of the uncertainties listed by Conyers, concerning the question of how to implement Provincial Government, remained. This, together with a suspicion that some public servants were fighting a rearguard action against decentralisation, resulted in the Government's decision to employ the consulting firm of McKinsey and Co. to draw up a programme for the implementation of administrative decentralisation. A programme based on the recommendations of the McKinsey team was accepted by the NEC in September 1977 and an Office of Implementation was created to carry out the programme, which involved a transfer of functions, uniformly for all
provinces, in three stages between January 1978 and January 1979. Those functions designated "provincial" within the Departments of Provincial Affairs, Primary Industry, Education and Commerce were transferred to the Provinces in January 1978; those within Health and Information were transferred in July 1978, and in January 1979 the Bureau of Management Services (BMS) was placed under provincial control. (Commencing 1977, all Provinces had assumed responsibility for provincial works and maintenance and the Rural Integrated Plan as well as for provincial legislatures and secretariats.) Functions of other Departments were expected to be transferred subsequently, but as far as I am aware no coherent programme for further devolution has emerged.

I have argued elsewhere:

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

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

It was considered inappropriate, when the Law on Provincial Government was enacted, to set out much detail, either on the structure of Provincial Governments, or the relationship between Provincial Government and the National Government. The Organic Law intended to lay down a broad framework for Provincial Government and the establishment and further evolution of the system was, in large measure, left for consultation between the Provincial and the National Governments ... we consider that the Organic Law sets out an essentially flexible system for the decentralisation of political and administrative powers ... The Organic Law is therefore concerned, in a very large measure, with the relationship of different political authorities and many of the provisions of the Organic Law are concerned, not with narrow legal questions, but with broad fundamental political questions (1978b:3-4).

Elsewhere, however, Ghai and Isana describe the Organic Law as "complex, legalistic and difficult to operate" (1978a:1) and comment that:
The Constitutional amendments to accommodate Provincial Government, the Organic Law on Provincial Government and the provincial constitutions, do not add up to a very coherent picture of the status of Provincial Governments and their place in the overall national system (ibid.:4).

Settlement of disputes

The question of conflict resolution was discussed in a general way in the Tordoff-Watts Report (op. cit.:8/1-8/8). Having observed that, in any system in which there are two or more levels of government, inter-governmental conflicts are bound to arise, the consultants suggested five possible procedures for conflict resolution: an arrangement whereby in any case of conflict the decision of the National Government prevails; requirements for consultation between governments; requirements for consent between governments; judicial review; a special commission; a Premiers' Council. The report recommended a combination of the first three and the last procedures and gave qualified support to a special commission. Interestingly, however, it specifically rejected judicial review:

In our view, the rigidity and legalism involved in such a procedure for settling central-provincial conflicts is for most aspects of a unitary system totally inappropriate (ibid.:8/2).

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

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

The emphasis which the Organic Law places on "consultation" reflects the intention of its framers "that provincial government should embody a spirit of friendly cooperation between the levels of government" (Goldring 1977:256) an intention which is made explicit in s.187D(3) of the Constitution. Goldring expressed the opinion that "consultation would be regarded as a real consideration by the court", but added:

Whether or not the consultation must be effective or meaningful is deemed to be a political, rather than a legal question (ibid.:257).
The body set up under the Organic Law and the National Fiscal Commission Act is rather different from that recommended earlier, both in its composition and its functions. Under s.78 it has the functions:

(a) to consider, and to report to the National Parliament and to the provincial assembly concerned on, any alleged discrimination or unreasonableness in provincial taxation and any proposals by the National Government to remove or correct it; and

(b) in accordance with Section 79 [principles of allocation of unconditional grants], to consider, and to make recommendations to the National Executive Council on, the allocation of unconditional grants under Section 64 to provincial governments and as between provincial governments; and

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

The NFC has been described as a 'buffer' between the National Government and the Provincial Governments. In introducing the National Fiscal Commission Bill 1977 the Minister for Finance said:

It will mean that a lot of politics is taken out of ... disputes [between the central government and the provinces] and that solutions will be more readily found.

Section 187H of the Constitution provides for the establishment of the Premiers' Council (PC) and states that:

A major function of the Council ... shall be to avoid legal proceedings between governments by providing a forum for the non-judicial settlements of inter-governmental disputes (s.187H(5)).

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

At its first meeting, in Kavieng in 1978, the Council resolved:

That a Working Committee be established to prepare a report proposing an Organic Law to grant Mediatory or Arbitral Powers to the Premiers' Council, and enabling Legislation (Resolution No.1/78).
Draft legislation was submitted to the PC conference in Wewak in 1979 and the subject was raised again in Port Moresby in 1980. Finally, the Provincial Governments (Mediation and Arbitration Procedures) Act was passed early in 1981. It lays down procedures for the non-judicial settlement of disputes, but specifically "applies to a dispute ... which is not eligible for reference to the National Fiscal Commission" (s.3(d)).

Intergovernmental financial relations

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

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

Also, Provinces are required to submit annually to the Minister responsible for provincial affairs a full statement of the financial position and of the affairs of the Province (s.73), and Provinces (but not, at present, provincial business enterprises) are subject to inspection and audit by the Auditor-General (and incidentally to review by the Joint Committee of Public Accounts of the National Parliament).

Before leaving the subject of financial relations a brief word on the subject of financial autonomy. Between January and July 1978 three Provinces - North Solomons, East New Britain and New Ireland - assumed full financial responsibility for the functions transferred in 1978-1979. In May 1978 (on the initiative of the Department of Finance) the question of criteria for granting such responsibility was discussed at the PC meeting in Kavieng. The meeting passed a resolution (Resolution No.4/78) which set seven criteria to be met by Provinces before full financial responsibility would be devolved (see May 1981:31). It was anticipated that all Provincial Governments should attain full Provincial Government status before early 1981. In fact, however, although Eastern Highlands joined the 'club' in July 1979, there has been no further grant of full financial autonomy (despite five applications) until this year (1982) (when, it has been announced, another four Provinces will graduate). Pending the achievement of full financial autonomy, the financial allocations to these provincial functions form part of the national budget in Div.248. The levels of expenditure are determined after consultation between the
Provincial and National Governments and the former have some authority to reallocate funds between the divisional subheads. However budgetary and financial control over such funds is exercised by the Department of Finance for the Minister for Decentralisation. Meanwhile, the present level of Div.248 expenditures relative to the projected level of formula grants has created a situation in which, unless the formula is changed, a number of provinces stand to lose — some substantially — by shifting to fully autonomous status.

Administrative relations

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

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

THE REALITY

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

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

Status of provincial governments

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

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

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

To date Provinces have not rushed to exercise responsibility in all areas available to them, though most Provinces are currently exercising a good deal of autonomy in policy-making and administration. More interesting are the demands expressed by Provincial Premiers and Secretaries at Premiers' Council conferences, in submissions to the General Constitutional Commission, and recently to the committee appointed to review the financial provisions of the Organic Law on Provincial Government. These demands for additional powers to Provinces have covered such 'naturally' national responsibilities as foreign investment, overseas borrowing, and aid, not to mention police (in 1979 the East New Britain Premier was sentenced to goal for maintaining what was in effect a provincial police force). On the positive side, such demands are, I believe, evidence of a growing shift of policy initiative (and to a certain extent, expertise) from the centre to the Provinces; as against this there seems to be an emerging propensity for Provincial Governments (and their business arms) to act, out of frustration with central Government, in areas in which they clearly do not have constitutional or administrative competence.

Settlement of disputes

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

Although there has been some consultation between National Government and Provincial Governments the extent to which this has been carried out has been extremely poor. Our experience has shown that there has been no meaningful consultation by National Government in a lot of areas in the concurrent field (1980:31).
And neither the NFC nor the PC has assumed the role apparently intended for it.

In the case of the NFC, to date no question relating to (a) or (c) of its functions (see above) has been referred to it by National or Provincial Governments, and in allocating the small amount of money made available to it by the National Government for unconditional grants it would appear that the NFC has been 'led' by the Department of Finance (which provides its secretariat). This is not necessarily to be condemned. If issues of potential dispute can be negotiated on a government-to-government basis, and if questions of grant allocation can be settled without arousing "provincial and regional jealousies" (Manning 1979:9) so much the better. However I see two major problems in the situation which has developed: first, s.79 directs the NFC to base its decision on allocation on equal per capita payments, but allowing also for "the location and physical nature of a province", "the lack of development of a province", or "any other relevant factor". In practice, the NFC — following submissions from the Department of Finance — has allocated part of the available amount to reducing inequalities between Provinces, part to supplement the cost of Provincial Government (i.e., the "costs of running the assembly and essential supporting services"), and part to supplement maintenance of capital assets. And funds that might otherwise have been allocated to the NFC have been diverted to the NPEP. This would seem to be in contravention of the spirit, and probably the letter, of the Organic Law. Secondly, in several instances where Provinces might have been expected to refer matters to the NFC (e.g., in cases where the National Government has opposed provincial tax increases, and on the question of 're-centralising' sectoral programme funds), they have not done so. In submissions to the Committee to Review the Financial Provisions of the Organic Law on Provincial Government several Provinces expressed the view that the NFC is "in the pocket" of the Department of Finance, and more than one submission called for its abolition.

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

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

However Provinces also are guilty of non-implementation of resolutions: e.g., in an important resolution of the second conference in 1979, the Premiers called on the National Government to set up a Provincial Finance Inspectorate and undertook to amend provincial finance legislation to give the proposed inspectorate access to all provincial accounts and records; to date, however, only a small number of Provinces has made the necessary amendments. The lack of action on resolutions is emerging as a major source of frustration and eventually antagonism in the relations between the National Government and the Provinces, and, taken with the generally
poor service available from the small Secretariat, threatens to undermine the effectiveness of the institution. (In this context an interesting recent development is the emergence of four informal regional Premiers conferences.)

Intergovernmental financial relations

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

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

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

In fact, however, there is to date no evidence for such a conclusion: neither the scale nor the distribution of payments through the NFC has done anything to reduce inequalities, and there has been no significant correlation between per capita NPEP expenditure by Provinces and provincial development indicators. Indeed Berry and Jackson (1981) conclude their survey of inter-provincial inequalities and decentralisation with the comment that:

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

A third comment on the subject of financial relations is that financial management and control by some Provinces has left a lot to be desired. In several instances where a Provincial Government has appeared to be in financial difficulties the National Government has sought to consult with the Province but has been refused access to provincial accounts; in one case national officers were invited in to the Province only to have the invitation withdrawn when they arrived. Two Provinces have actually run out of money through gross mismanagement and have been rescued by conditional loans from the National Government. Yet although it seems to me that the Organic Law intended to provide for national oversight of provincial finances, in fact the National Government has been often unable, and sometimes, it would seem, reluctant, to exercise such oversight (see May 1981:33-39). With regard to financial reporting, for example, the Organic Law simply says that Provincial Governments will submit statements "as soon as practicable after the end of the fiscal year" (s.73), and carries no penalty for non-compliance. The form in which Provinces are required to report has been laid down in Provincial Government Finance Circulars. However in his "Statement on the Financial Activities of Provincial Governments", presented to the National Parliament in May 1979, the Minister for Decentralisation observed that four Provinces had failed to submit their reports for 1978, and in his 1980 report he stated that three Provinces had failed to submit their reports "despite repeated warnings"; fifteen had submitted their reports after the deadline, and that the remaining Province had submitted a report which did not comply with the requirements (Momis 1980:1); he also commented that reports "contained a variety of errors and many were simply not put into the correct format" (ibid.:10). Problems in this area are likely to be exacerbated as more Provinces attain full financial responsibility.

Administrative relations

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

CONCLUSION

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

Finally, bearing in mind that this is a legal workshop I would like to draw attention to the comments above concerning dispute settlement. If in fact the mechanisms provided for consultation cannot be employed effectively to resolve differences between the National and Provincial Governments as Provincial Government evolves, there may be an increasing tendency for Provincial Governments to turn to litigation. In this context, the recent legal challenge over fishing licenses in Milne Bay may mark the emergence of a new trend.

NOTES

1 This paper makes extensive use of material presented in my Report to the Committee to Review the Financial Provisions of the Organic Law on Provincial Government (May 1981).

2 'Districts' were renamed 'Provinces' in 1975, though the term 'Provincial Government' was in widespread use from around 1973.

3 For a general critique of attempts to 'define' federalism, see May (1969:10-11). Also see Riker (1969, 1970) on "the triviality of federalism".

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

The Constitutions of the Pacific are independence charters, drawn up as part of the transfer of power to specify the institutional arrangements of the post-colonial state and provide ostensible legitimacy for its authority. The legitimacy of the constitutions themselves is established by popular consultation, negotiation among the political elite, ratification by an elected assembly and tacit or explicit approval by the retiring metropolitan power. Like a flag, an anthem and membership in the United Nations (UN), a written constitution is one of the distinguishing marks of the newly independent state.

But constitutions can be something more than artifacts outlining and delimiting the political institutions of the state. The British Constitution is the standard deviant, a coherent but flexible body of rules and conventions which describe patterns of repeated behaviour, assumptions and expectations whose precise content and extent vary with the commentator. The British Constitution has evolved, while other constitutions have been negotiated or imposed as part of a revolutionary, federal or post-colonial settlement. There is a sense in which the British Constitution is analogous to the rules of the game in all states, underlying, supplementing or even displacing written constitutions (Wheare 1951:1-18). The written constitution prescribes powers, functions and relationships; the real constitution describes actual practice.

A similar distinction can be drawn between two kinds of policy. There is official policy, promulgated from above with proper authorisation, and there is policy that describes "a committed structure of important resources" (Schaffer 1977:148). The state is also subject to equivocation. It is often treated as equivalent to the formal institutions of government, despite the difficulties of drawing neat boundaries around State activities, but it is also the structure of commitments supported by public authority.

Given the particular requirements of the transfer of power to post-colonial states, as well as the traditions of constitutional design since the late eighteenth century, it is likely that certain elements of the real constitution will be enshrined in independence charters and that others will be left to organic laws or omitted from specification altogether. For example, the career public and military services, inventions of the nineteenth century but now the central core of the state,
are seldom mentioned in written constitutions except in terms of their isolation from political interference. Details of structure and function are left to ordinances, regulations and conventions which are amended even less often than constitutions themselves, and almost never in their fundamentals.

It is not surprising that the public service is largely ignored in post-colonial constitutions. The colonial state in its pure form was a public service edifice and British colonial constitutions were concerned exclusively with the gradual limitation of public service discretion by increasingly elective legislative and executive councils, thus conferring while containing power (Fitzpatrick 1980:123). Only as self-government became imminent and localisation of the public service was planned did it become necessary to provide an alternative to the Secretary of State for Colonies as arbiter of the independence and local political neutrality of the public service. Hence the Public Service Commission and its consecration in independence constitutions, with attendant commentaries on the difference between conventions surrounding the British civil service and the lack of such conventions among new ministers in the colonies (see Mulhall 1962). Other public service matters could safely be left to convention and precedent; in fact these were the only matters on which convention and precedent could be said to be established in the colonial state. Ministers and legislators might have difficulty in determining appropriate roles within their constitutional limits, but localisation of the public service ensured socialisation to conventions and precedents and thus continuity from the colonial to the post-colonial state.

THE PUBLIC SERVICE IN THE WRITTEN CONSTITUTIONS OF THE PACIFIC

Pacific Constitutions which were drawn up during the transfer of power from Britain, Australia and New Zealand (NZ) deal with the public service under three headings. In chapters on the executive, there is sometimes mention of ministers' powers over administrative departments. Chapters which deal with the public service, the state services or administration are concerned with public service commissions or their equivalents and with similar bodies for legal and judicial services, police and armed forces. In addition some constitutions provide for an ombudsman and/or leadership code with specific controls over the public service. (The much older Constitution of Tonga, whose royal provisions bear little resemblance to those post-colonial constitutions, makes no reference to a public service.)

Fiji's Constitution provides that:

Where any Minister has been charged with responsibility for the administration of any department of the Government, he shall exercise general direction and control over that department and, subject to such direction and control, any department in the charge of a Minister ... shall be under the supervision of a Permanent Secretary or of some other supervising officer whose office shall be a public office (s.82).

This standard British post-colonial prescription is repeated in the Solomon Islands (SI) Constitution (s.40) and its essence (omitting "general" from
"direction and control") appears in the Constitutions of Kiribati (s.47) and Tuvalu (s.41). The Constitutional Planning Committee (CPC) in Papua New Guinea (PNG) recommended an identical provision, and the Government's counter-proposals merely specified that "heads of Departments are to supervise government departments subject to ministerial control and direction". However, by a curious transformation of drafting, the PNG Constitution provides only in s.148 that:

(2) Except as provided by a Constitutional Law or an Act of Parliament, all departments, sections, branches and functions of government must be the political responsibility of a Minister...

Despite this, and despite the absence of any provision at all for ministerial control in other constitutions, the Westminster conventions of ministerial control have applied generally throughout the Commonwealth Pacific.

All of the larger Pacific Commonwealth states have Public Service Commissions (PSC), and their Constitutions specify methods of appointment and qualifications for membership as well as the PSCs' powers and functions. There is a clear division between those states which follow the British decolonisation model, in which the PSC is responsible only for personnel matters of appointment, removal and discipline, and those which follow the Australia-NZ model, in which the PSC has also broader management responsibilities which are subject to ministerial control. The SI, Kiribati and Tuvalu follow the British decolonisation model, while Western Samoa (WS), Fiji, PNG and Vanuatu follow the Australia-NZ model, implanted in all but the last well before Independence. But whereas the PNG Constitution (s.191) specifies the PSC's management function and its ministerial control, and the WS Constitution (s.87) indicates that the PSC "shall have regard to the general policy of Cabinet relating to the Public Service", the Fiji and Vanuatu Constitutions would suggest on their face that the PSC has only personnel responsibilities and is wholly independent in their exercise. The additional functions subject to ministerial control are laid out in legislation.

The smaller Pacific states, with no resources for the establishment of independent PSCs, maintain the colonial model whereby public service personnel and management controls are vested in the head of the service, usually the Chief Secretary in the British colonial model. Thus in the Cook Islands the Secretary of the Premier's Department serves as principal administrative officer and head of the public service, with responsibility for appointments, dismissals and discipline, subject to the "general policy of Cabinet" (ss.73-74). In Nauru the Chief Secretary holds similar powers, though there is provision for Parliament to legislate for a Public Service Board (ss.68-69). In Niue, the NZ State Services Commission continues to serve as the PSC, though it may delegate its powers to the Secretary to Government (ss.64, 67).

The Constitutions of the larger states, Fiji, PNG, SI and Vanuatu, provide for the creation of an ombudsman, with jurisdiction to inquire into complaints against the public service, and the latter three also provide
for a leadership code with further limitations on the activities of public servants.

Only in two Constitutions is there evidence of some of the political pressures which focussed on the public service at the time of Independence. That of Fiji specifies in s.105(9):

In selecting candidates for entry into the public service the Public Service Commission shall

(a) give preference, other things being equal, to local candidates who, in its opinion, are suitably qualified and shall not select persons who are not citizens of Fiji except to the extent that the Prime Minister has agreed that such persons may be selected; and

(b) ensure that, so far as possible, each community in Fiji receives fair treatment in the number and distribution of offices to which candidates of that community are appointed on entry.

The Constitution of Vanuatu, on the other hand, contains in ss.55 and 56 an unusual and disparate list of principles, e.g., that "Public servants owe their allegiance to the Constitution and to the people of the New Hebrides", and stipulates, e.g., that only citizens shall be appointed, that public servants shall be given salary increments in accordance with the law, and that personal political advisers of ministers shall not have security of tenure. These clearly reflect some of the sources of distrust during difficult negotiations over a constitutional agreement, and they contrast with the bland and uncontested prescriptions concerning the public service found elsewhere in Pacific Constitutions.

THE PUBLIC SERVICE IN MELANESIAN RULES AND CONVENTIONS

Formal decolonisation through the 'transfer of power' was a moment in which the colonial state was ostensibly open to reshaping, its institutions and traditions vulnerable to nationalist reforms. In practice, however, this was true only to the extent that there was a mobilised political force capable of framing and implementing alternative arrangements. Vanuatu, with the best mobilised nationalist party in the Pacific, had ostensibly substantial opportunities to reorganise and redirect the fragmented public services that it inherited from the condominium, yet there have been difficulties in matching political capacity with public service issues. In PNG and SI the problems of the public service were seen largely in terms of the need for localisation and decentralisation, and such political resources as could be mobilised were committed to these issues rather than to more radical restructuring of public service structures that were taken for granted. Where there were policy vacuums - for instance in PNG's macro-economic and financial policies, because of the previous insistence on maintaining Canberra's prerogatives - there was unusual scope for policy and institutional innovation (see Garnaut 1981). The only obvious vacuum in the public services itself was the absence of Melanesians, and localisation without restructuring meant that the public services survived decolonisation intact as the embodiment of the state.
Like the creation of PSCs to replace colonial secretaries, localisation programmes and the establishment of ministerial control were major agenda items for colonial administration during its final years. However, localisation and even 'ministerialisation' were seen as finite processes which, once achieved, did not need to be reinforced by constitutional sanction. Localisation was dependent on local educational development and was left to each territory's initiative. On the other hand, 'ministerialisation', the establishment of ministerial controls through generalist permanent secretaries over departments which had been under the control of specialist directors, was for the British a fairly well standardised process (see Wettenhall 1976).

In the case of SI it was pushed through by J.H. Smith (Financial Secretary, 1970-73) and A.T. Clark (Chief Secretary, then Deputy Governor, 1972-77), both of whom had operated the ministerial system in Northern Nigeria. There Clark had written a Guide to Administrative Procedures for ministerial and public servant behaviour in 1957, and these were still standard issue when Clark put them into effect in Honiara in 1976. They remain in force by convention. The complementary and compulsory Monday 'Morning Prayers' which Clark initiated as a weekly co-ordinating meeting of permanent secretaries remained intact, albeit as Wednesday 'Vespers', until they were suspended under the new Mamaloni Government in August 1981.

In PNG the Australians had no comparable precedents but the Commonwealth Cabinet's procedures were imported as guidelines for ministers by the PNG Cabinet Secretariat (see Lynch 1981), and Peter Bailey of the Australian Department of the Prime Minister and Cabinet visited to counsel the ministers and department heads of the new Somare Government in 1972. Since 'ministerialisation' on the Canberra model did not involve displacing specialist directors with generalist permanent secretaries it was a more gradual process.

The transfer of power in the New Hebrides was a much more traumatic affair, with French resistance subverting all of the arrangements in the standard British package of official decolonisation. The French had no alternative package of their own, but the fact that the first ministerial government was established under French patronage meant that the French had an opportunity to introduce the 'Paris model' of ministerial cabinet, a political secretary in the first instance, to co-ordinate the work of various public service divisions. When Vanua-aku Party ministers joined the Government of National Unity, they appointed senior party officials as their political secretaries, and they have maintained this arrangement despite a momentary intention at the end of 1981 to amend the Constitution by providing for appointments at this level to be made by the PSC.

The presence of a strongly mobilised party, the confrontationist approach of the French, and the absence of a unified colonial state made for exceptional problems in the transfer of power in the New Hebrides. Elsewhere constitution-making could proceed on the safe assumption that the public service, gradually localised, would provide continuity for the state, ensuring only gradual change in the existing pattern of committed resources. In the New Hebrides the fractured nature of the colonial state was most clearly reflected in the maintenance of three separate public services, those of the French, the British and the condominium, compounded for a critical period in 1977-78 by Vanua-aku's creation of a People's
Provisional Government controlling most of the country outside Vila. The integration of the public services into the unified machinery of a single post-colonial state has been a difficult process. In principle this should have been eased by the rapid departure of most French and British staff shortly after Independence, but their departure removed the limited sources of expertise capable of planning and executing integration. There has thus been no effective capacity for taking advantage of the opportunities for reshaping the public service.

The conventions which define that relationships between ministers and public servants, a crucial link in the chain of representative government, remains outside written constitutions. So do the fundamental features of the public services themselves, all based on colonial precedents. This does not mean that these relationships and features are beyond challenge, but shifting them requires well mobilised and focussed political will. In PNG the ToRobert Committee recommended in 1979 radical changes in the nature of the public service and in the machinery for policy co-ordination: public servants would not spend their careers in public employment but would also circulate within the private sector, to which several government activities would be hived off, and the PSC would be integrated with the activities of the main co-ordinating committee, the Budget Priorities Committee. Further committees of review frittered away these initiatives and they were not taken up again after the change of government in February 1980 (see Ballard 1982). In SI the change of government in August 1981 led to proposals by the new Prime Minister, Solomon Mamaloni, that permanent secretaries be replaced by political appointees. His restructuring of central government machinery, together with the reposting of the most senior permanent secretaries, broke up the co-ordinating official clique which had determined much policy under the previous government.

Decentralisation in Melanesia has required the greatest adjustment in public service conventions and in the patterns of resource commitment. This is particularly true of PNG, where the negotiation of a model of decentralisation was more traumatic than the negotiation of a constitutional settlement, with which it was only partially intertwined. The addition of a chapter on Provincial Government in the Constitution and the enshrining of the terms of agreement with the North Solomons Province in an organic law were a condition of that agreement, but the design of public service arrangements for all provinces was left to management consultants and an administrative task force. The resulting system of decentralised government substantially shifted the bases of political power within the state but did not affect fundamentally the conventions and patterns of behaviour of the central core of the public service.

In SI the new Mamaloni Government has vigorously pushed through the final stages of the Provincial Government Act (1981), but the process of negotiating a model has been much less traumatic than in PNG, and the process of implementing it is likely to be more gradual. Vanuatu's Decentralisation Act (1980) was drawn up during the political crisis of that year without much opportunity for detailed negotiation. Its implementation is being carefully controlled from the centre and its impact on the public service and the distribution of power in the state has been negligible.
The colonial state in Melanesia was an increasingly bureaucratic set of public service institutions operating without benefit of written local constitutions until a decade or so before independence. Given the continuing dominance of the public service in the post-colonial state, independence constitutions can be seen as contracts between relatively small mobilised political elites. The legitimacy of these constitutions remains largely a matter of concern to these elites, which in most instances aim to ensure the continuity and legality of constitutions as a basis for regularised administrative activity. In fact, the public service is in most circumstances the chief beneficiary and chief supporter of a constitution, though it could also expect to be the most notable survivor of the overthrow of a constitution. Written constitutions may come and go with coups d'etat and revolutions, but the public service like the Vicar of Bray, exemplar of an earlier Establishment, persists with the state itself.

The legitimacy of the colonial state in Melanesia rested on its capacity to provide services for which a demand had been generated, and to incorporate local symbols of authority into the colonial administration, backed up by coercion when necessary. The legitimacy of the state was thus very much caught up in the public service, and new institutions of representative government based on electoral legitimation did not supplant the public service in this regard. The legitimacy of the post-colonial state continues to rest on its ability to deliver services and to incorporate local symbols.

In Vanuatu the Vanua-aku Party has successfully incorporated these symbols for the past decade and, through its alliance with the Co-operative Federation, it delivers the most significant of external services. Elsewhere the legitimacy of the post-colonial state is likely to depend on public services whose efficiency declines while demands increase. The terms of written constitutions are not likely to affect materially the resultant crisis of legitimacy.
MINISTERIAL AND BUREAUCRATIC POWER IN PAPUA NEW GUINEA: ASPECTS OF THE DUTTON/BOURAGA DISPUTE

Y.P. Ghai and D. Hegarty

INTRODUCTION

For the past decade the system of ministerial government in Papua New Guinea (PNG) has operated under a considerable degree of stress. The notions of both collective and individual responsibility, usually regarded as essential to the successful operation of a parliamentary system, have applied more in the breach than in the observance. Relations between Ministers and heads of departments have been frequently strained and rarely have their respective powers, roles and responsibilities been defined. Conventions on appropriate relations between Ministers and heads have not, as yet, been adequately established. The result has been a degree of public uncertainty about the stability, cohesion and direction of government, and about the effectiveness of policy implementation.

In many ways this situation has its roots in the late colonial period. The colonial bureaucratic political system did little to prepare the ground for a system of ministerial government. Under-Secretaries in the 1964–68 House of Assembly, Ministerial Members and Assistant Ministerial Members in the 1968–72 House were given only minor powers and functions, and the Administrator's Executive Council did not assume the form of an embryo Cabinet until 1971 (see Wolfers 1971). The House of Assembly, until 1972, was treated very much as an appendage to the Administration, which encouraged, as one writer on Caribbean decolonisation has described, a style of "cuckoo politics" in which politicians learn the rituals of the legislature but have no power over, and therefore no responsibility for, substantive matters (see Singham 1965). As Ministers began to assume executive control in the short period of transition to Independence (1972–75), antagonisms developed between the new Ministers and senior bureaucrats (largely expatriate) hitherto unaccustomed to political direction (see Voutas 1981). These antagonisms were to some extent diminished by the Somare Government's policy of making political appointments to senior departmental positions, but, in turn, this policy created its own problems for ministerial government (see Ballard 1976). One effect was to create small bureaucratic cliques, influential with particular senior Ministers. But it also created a hybrid structure at the top of the public service with some departmental heads being political appointees while others were career public servants. This posed further problems for the establishment of 'conventional' ministerial–departmental relations.
Since 1972 the absence of majority party governments and the need for coalitions has also been a major factor inhibiting the effective development of cabinet solidarity and collective responsibility. Factional disputes between coalition parties, frequent reshuffling of ministries and portfolios, and the relative inexperience of Ministers together with the high rate of mobility of senior bureaucrats has hindered the establishment of a framework of working relations between Ministers and bureaucrats.

The attainment of Independence in 1975 did not improve the situation. Complaints by Ministers of bureaucratic 'obstructionism', and by bureaucrats of ministerial 'interference' have been frequent. A number of departmental heads have resigned largely as a consequence of clashes with their Ministers; and on a number of occasions Ministers have completely ignored the advice of their departmental heads. The Chan/Okuk 'National Alliance' Coalition of 1980-82 has been particularly prone to conflict of this kind. Tension between Ministers and heads has not assumed the proportions of a total cleavage, nor has there been an overt struggle for power between the two groups, but it nevertheless has had a debilitating effect on policy-making and the implementation of policy.

Legislative-executive problems of this kind are by no means unique to PNG. It does appear, however, that the Independence Constitution of 1975, rather than facilitating the operation of a ministerial system, has to some extent compounded the problems described above. Despite the clear intention of the Constitutional Planning Committee (CPC) to establish a system of ministerial authority over executive government (PNG CPC 1974:Ch.7), s.148 of the Constitution contains a clause which seriously diminishes that concept. Section 148(2) provides that all departments, sections, branches and functions of government "must be the political responsibility" of a Minister, yet s.148(3) says that this "does not confer on a Minister any power of direction or control"!

In late 1981 and early 1982 a dispute between Police Minister, Mr Warren Dutton, and Police Commissioner, Mr Philip Bouraga, brought to a head the issue of appropriate relations and relative powers of Ministers and bureaucrats. In November, Cabinet requested Mr Bouraga's resignation for his refusal to respond to requests for information from his Minister. Mr Bouraga refused to resign claiming that as a constitutional office-holder (Police Commissioner) he was protected from ministerial direction. The Coalition Cabinet was clearly divided on the issue, and, rather than dismiss Mr Bouraga as it had the power to do under Sch.1.10(4) referred the matter to a board of inquiry established under the Public Service (Interim Arrangements) Act (1973). The Board, upon challenge to its jurisdiction, referred three questions to the Supreme Court as it is required to so under s.18 of the Constitution when any question relating to the interpretation or application of the Constitution arises. Before the Supreme Court deliberated, Mr Bouraga resigned as Commissioner of Police to contest the 1982 national elections.

DUTTON/BOURAGA CASE

The Board of Inquiry was hearing charges against Philip Bouraga of certain offences under the Public Service Act. Mr Bouraga was the Commissioner of Police appointed under s.193 of the Constitution; he was
also the Secretary of the Department of the Police. The charges against him arose out of his refusal to answer various queries/orders of the Minister of Police, Warren Dutton, viz:

(1) on 29 January 1981 the Minister asked him to advise him on the overall priorities for funding for the next year;

(2) on 4 February 1981 the Minister asked him to brief him on the Highlands law and order situation;

(3) on 18 August 1981 the Minister asked for detailed information on certain disciplinary charges against a member of the police force; and,

(4) the Minister asked him to brief him on the killing of a member of the police force and on allegations of a demonstration and strike by members of the police force.

At the hearing questions arose as to the competence of the Public Service Commission (PSC) to institute these charges and that of the Minister to issue these orders.

Three questions were referred to the Supreme Court (SCR No.1 of 1982; reference under s.18, 23 March 1982 (roneod judgement)):

(1) Did the PSC have the power to charge the Commissioner/Secretary for refusing to answer these questions?

(2) Did the Minister of Police have the power of direction or control over the Commissioner/Secretary to issue the orders?

(3) Did the Minister have power under s.196 of the Constitution to issue the orders?

The reference was determined by the Court consisting of three judges, Kidu CJ, Kapi J and Pratt J, all of whom answered the three questions in the negative. In giving their decisions, the judges discussed various sections of the Constitution, those dealing with the powers and functions of the PSC (ss.192, 193, 194), the Commissioner of Police (ss.196, 198), and the powers and responsibilities of the National Executive Council (NEC) and individual Ministers (ss.141, 148, 149).

To answer the first question, the Court first considered whether Bouraga should be considered as the Commissioner of Police or Secretary of Police. The Constitution establishes the office of the Commissioner of Police and prescribes his functions (s.198) and provides for his appointment (s.193(e), (2)). The Department of Police was established administratively under the Public Service Act and its functions, largely overlapping with those of the Commissioner under s.198, were gazetted. The Court's view was that the establishment of the Department and the appointment of the Secretary were unconstitutional (although Pratt J was willing to concede constitutional validity if the Departmental functions were defined narrowly), and therefore Bouraga's liability had to be determined on the basis that he was the Commissioner. The judges found no
basis for the competence of the PSC in the matter of the discipline over the police. Although s.191(1)(c) of the Constitution enabled Parliament to vest the PSC with such competence over the police, it had not done so. Moreover, it was of the opinion that under Sch.1.10(4) of the Constitution, the power of discipline and dismissal of the Commissioner rested with the body responsible for his appointment, i.e., the NEC in consultation with the PSC and the relevant parliamentary committee (s.93(2)), and could not be vested in the PSC. The judges nevertheless went on to discuss the position on the assumption that Bouraga was the Secretary of the Department, and came to a similar conclusion. Although appointed under the Public Service Act, he was appointed pursuant to s.193 of the Constitution which provides that "all offices in the National Public Service the occupants of which are directly responsible to the NEC or to a Minister" are in fact to be appointed by the NEC in consultation with the PSC. In spite of the fact that the Public Service Act (s.76) purports to give disciplinary powers over heads of departments to the PSC, the Court held that the PSC had no jurisdiction, for under Sch.1.10(4), that power lay with the NEC itself.

The second question involved the discussion of s.148 of the Constitution, which deals with the functions of Ministers. The first sub-section gives to the Prime Minister the power to allocate portfolios and responsibilities to himself and other members of the NEC, while the second says that "All departments, sections, branches and functions of government must be the political responsibility of a Minister". The third sub-section, however, goes on to say that the second sub-section does not confer on a Minister any power of direction or control. The Court held that sub-s.3 merely provided that no ministerial power flowed from sub-s.2, not that Ministers could not have powers under any basis, e.g., an Act or through a delegation from the NEC (s.149, which vests responsibility for executive government in the NEC, also enables it to delegate that responsibility to a Minister). In the instant case, no delegation by the NEC had been made in this regard to the Minister, and the Court found that there was no legislative vesting of authority in the Minister either. Although the question was disposed of thus, all the judges went on to discuss the meaning of the "political responsibility" of the Minister vested in him by s.148(2). Kidu CJ describes it in the case of the Minister of Police:

as the duty to ensure that the Force and the Commissioner have funds to carry out their functions. He is also responsible for speaking on their behalf when they are under criticism.

Kapi J defined "political responsibility" as involving:

(a) all matters concerning the department which require the deliberations or decision of the NEC in its responsibility for the executive government of PNG,

  e.g., to submit, advise, inform, report or brief the NEC, on questions like budget priorities and allocations; and to:

(b) inform, report or answer questions in Parliament or the public through news media regarding any matters
concerning the function of the government as a member of the Cabinet.

Pratt J defined the Minister's political responsibility as his responsibility as a member of the Government for what the department has done in the past, is doing in the present and must do or should do in the future.

He has the responsibility to defend the department when under attack in the Parliament; and has to do the best he can to obtain funds for his particular department to carry out the operation within the context of the entire financial commitments of the country as determined by Cabinet.

The judges drew similar implications for ministerial power from this definition of political responsibility. Kidu CJ said that the responsibility carries with it the right of the minister to be advised and informed of the activities, performances, problems of those who are under his political responsibility. It is the responsibility of a civil servant to advise their ministers. Granted neither the Constitution nor the Police Act nor the Public Service Act specifically so provides. However, the Governmental structure set out in the Constitutional Laws and Statutes would not function if civil servants were not obliged to advise their ministers.

He cites with approval a quotation of Jennings' of the principles upon which civil servants act, which emphasises the civil servants' duty to provide information and suggestions to the Minister for policy and to carry out ministerial policy (see Jennings 1947). Pratt J considered that it imposed an obligation to provide information and material pertaining to the department and its operation. Referring to the Secretary's responsibility to the Minister referred to in s.193, (1), (c), he says that whatever the ambit, it must in commonsense be an integral part of the responsibility to acquire information relevant to a Minister's portfolio, and to keep the Minister in touch with what is going on in the department. Nevertheless all the judges found that the Minister had no power to require the advise and information. But, in formulations of extreme ambiguity, they also said: that the Secretary had the obligation to provide the advice and information (Kidu CJ); that the Minister cannot direct "but he does have the right to request such information and to be furnished with the same" (Pratt J); and "the only thing s.148(2) confers on the Minister is the right to request (and not the power to order) anything for the purposes of his political responsibility" (Kapi J).

The third question concerned the interpretation of s.196, sub-s.1 of which says that the police force is subject to the control of the NEC through a Minister, and the second sub-section says that the Minister has no power of command within the police force except to the extent provided for by a constitutional law or an Act. The Court interpreted "command" to mean the same thing as "direction and control" in s.148, and held that the Minister had no power in the absence of delegation from the NEC or a
statutory provision to require the Commissioner to answer questions, although "he has the right to be informed and briefed", and the conventions of civil service responsibility as under s.148 also applied here.

COMMENT ON THE CASE

It is easy to criticise the Court for rulings which must make the proper functioning of the Government well nigh impossible. On the one hand the judges acknowledge that the discharge of ministerial responsibility is impossible without the Minister's power to require information and briefings from the public servants, and that the public servants have the obligation to provide these. On the other hand, they say that nothing in the Constitution gives the Minister the power to require these; indeed, Ministers cannot give any kind of directive to the public servants who are supposedly there to serve them. Under this ruling the Ministers cannot reasonably discharge their function of policy-making or the supervision of its implementation, or indeed defend the department against criticism. This is a particularly acute problem in a country like PNG where the educational standards of Ministers are likely to be low, and their administrative experience limited or nil. The CPC's wish to establish the supremacy of political leadership can be easily frustrated by an unco-operative public service.

But the primary blame for this state of affairs cannot be placed on the Supreme Court. The Court appeared fully aware of the incongruity of the result of its decision but felt compelled to it by the terms of the Constitution. Its decision highlights yet another defect in a complex, verbose and overdrafted Constitution (the nature of which previous constitutional litigation has already demonstrated). In this particular instance, it is not too difficult to trace the origins of the problem. The CPC had recommended strongly in favour of the political answerability of the public servants to Ministers. This was endorsed by the Government as well as the Constituent Assembly and the penultimate draft (fourth) of the Constitution did not contain sub-s.3 of s.148. The public service, largely expatriate at that time, profoundly unhappy at the loss of its power implicit in s.148, and disturbed by the possibilities of ministerial "excesses", prompted the addition of sub-s.3 at the last minute, and there is reason to believe that none of the political leaders were aware of its implications. This sub-section together with the other constitutional provisions vesting both personnel and management functions over the public service in the PSC (s.191) (again contrary to the recommendations of the PNG CPC 1974:Ch.12) constitute a major contradiction of the Constitution. As we argue below, the Court could have found a way to investigate the rigidity of these provisions, but it is not to be blamed for the general result.

Although the decision may seem a victory for the departmental heads against their Ministers, it may turn out to be pyrrhic. For the corollary of the holding that the PSC had no disciplinary power over the heads is that the NEC does (under Sch.1.10(4)), which is contrary to the general belief that departmental heads enjoyed security of tenure under the Public Service Act. It is far from obvious that this ruling was inevitable, for it can be argued that s.191 in combination with the Public Service Act does vest disciplinary powers in the PSC, thus expressing a "contrary intention"
which under Sch.1.1(c) displaces the application of Sch.1.10(4). While it may be argued that this particular holding restores some balance between the Minister and the Secretary, which otherwise would be tilted under s.148(3) in favor of the Secretary (and both Kapi and Pratt JJ were able to accept s.148(3) because of the ultimate sanction of dismissal of the Secretary by the NEC), it nevertheless creates problems of its own especially as the PSC would as a rule be reluctant to discipline a senior public servant. The remedy envisaged by Kapi and Pratt JJ is drastic and accentuates a sense of crisis. It introduces additional tensions between the Minister and his departmental head. It breeds insecurity in the head which can lead to intrigue and search for alliances with other Ministers, threatening collective ministerial responsibility.

If the Court was confronted with a difficult situation its intervention scarcely served to establish helpful guidance for the exercise of executive power. The Court had the option of declining jurisdiction, and it is submitted that it should have done so. Experience in other countries has shown that it is sensible for courts to exercise self-restraint in taking on constitutional cases. Both for their own credibility and prestige as well as to retain flexibility in the political system, courts should take on constitutional issues only if they are unavoidable, and should attempt to dispose of the case by deciding on the specific and narrow issues rather than make rulings on wider issues. A court too willing to intervene in constitutional disputes provides little incentive for the parties concerned to find workable accommodations and compromises by themselves and prevents the emergence of political conventions to determine relationships between different groups.

This is a particularly important consideration in a developing political system. Courts should be specially chary of getting involved in internal matters of cabinet procedures, and the relationship between ministers and departmental heads. A court decision provides a ruling which can as a general principle only be changed by a constitutional amendment, which is difficult, and a ruling wider than necessary often overlooks considerations that arise when the specific facts of a specific dispute are present. Unfortunately the National and Supreme Courts have been all too willing to jump into the fray and to make rulings on issues wider than has been strictly necessary to dispose of the case. This has encouraged the tendency to convert political into constitutional problems, to engender a sense of crisis, and has served to damage the political process. The problem has been aggravated by the narrowly legalistic approach the Courts have frequently adopted, so that instead of taking grand constitutional principles as their guidelines, they have chosen specific words of the Constitution as their starting points.

Most of these deficiencies are revealed in this case. Bouraga had resigned from his posts before the Court began its hearings; and therefore its ruling could have no effect on his liability. Only Kapi J refers to this fact, but nevertheless decides to go on to substantive issues. The Court should have said that, since the Board of Inquiry had declared itself functus officio, there was no longer a competent reference before it. Even if it did want to take jurisdiction, it should have confined itself to the question of the powers of the Minister over the Commissioner of Police, once it had determined that a department of police could not be established under the Public Service Act with its own Secretary. The Court would then
not need to have pronounced on the position of departmental heads. The considerations that apply to the Commissioner of Police are different from those pertaining to the head of an administrative department.

The Court could have come to a different result on the facts. There is little discussion as to the meaning of "powers of direction and control". It could be argued that what s.148(3) prohibits is the giving of orders for executive action.

What the Minister had been asking for here was information or briefing, outside the prohibitions of that sub-section. Pratt J discusses this point explicitly - the information requested by the Minister was necessary to carry out properly his political responsibilities:

Requesting and receiving such information had no affect on the members of the force. No member was being directed or controlled in relation to the performance of his duties under the Police Act... I have no doubt that such direction was not the type in the mind of the framers of the constitution ... If one could use a nautical analogy, the Minister has the power to command the Master to give information about the ship's complement, fuel endurance, cargo and destination, but not to tell the helmsman to change course immediately as the ship is in imminent danger of running aground because both the captain and the Minister have been engaged in a dispute on the bridge instead of looking ahead.

Yet he concludes that the Minister does not have the power to ask for this information!

WAYS OUT OF AN UNSATISFACTORY SITUATION

The judgments themselves suggest a number of ways out of this difficult situation. Kapi J appears to ascribe very limited powers to the Minister. If orders are necessary then the Minister must obtain the NEC's permission. If a conflict situation exists then the Minister "may relay directions" (in the fashion of a conduit or courier) from the NEC to the Commissioner. This does not appear to be a satisfactory solution for it seriously undermines the authority of the Minister. Pratt J suggests that in a conflict situation the NEC could (should?) dismiss the departmental head; but this is a fairly drastic measure which would increase the insecurity of the head, and perhaps lead to sycophantic relations. A third suggestion of both Kapi J and Pratt J is to provide powers for Ministers under specific laws as, for example, are contained in the Education Act. Pratt J maintains that:

the system of using an Act of Parliament to define and direct ministerial control over specific areas had the great advantage of letting everyone know exactly what powers are conferred in what areas, with the approval of the parliamentary members.
This, however, is likely to lead to further legalisms, unnecessary legislation, and is unlikely to help in the delineation of the general principles of ministerial control.

A relatively simple way out would be for the NEC to delegate its powers of direction and control (s.149(4)) to individual Ministers. Prime Ministers, however, have been reluctant to delegate full NEC authority to individual Ministers (perhaps wisely) given the nature of Coalition Cabinets, the relative inexperience of Ministers, and the large size of their Cabinets. A fifth and perhaps most suitable option would be to amend the Public Service Act giving Ministers general powers of direction and control. Finally an amendment to the Constitution might be attempted, deleting s.148(3) and amending other sections (s.192), making clear the distinction between a Minister's control over policy and his lack thereof over operational matters.

For the public service the situation also remains unsatisfactory. The Chairman of the PSC, Mr Renagi Lohia, has suggested that the NEC delegate the powers of appointment and discipline to the PSC, thus providing a degree of security of tenure and obviating, in the longer term, the need for political appointees. Alternatively, Mr Lohia has suggested that departmental heads be given a special contract.

CONCLUSION

We have argued that the Supreme Court could have declined jurisdiction in the case and that its willingness to 'enter the fray' in issues such as these damages the political process and tends to engender a climate of 'crisis'. It could well be argued, however, that had the issue been allowed to simmer in the political arena in the hope of a political solution, the crisis (involving as it did the head of one of the disciplined forces) would have escalated. It might also be argued that in the particular situation of a 'hung' Coalition Cabinet, recourse to the Court may well have been the only way out. In so doing a court solution might reinforce the stature and authority of both the Court and the constitutional system. On balance, however, it appears to us that 'bailing out' a paralysed Coalition Cabinet (or a Prime Minister who is unable to assert authority over his Executive) in situations such as these, the Court only encourages further references to it from the political arena and might, in the long run, jeopardise its independence.

The upshot of this case is that in terms of appropriate power and working relations the constitutional situation remains unsatisfactory. The status quo has been, if anything, reinforced. A Minister's power remains diminished for s.148(3) has been interpreted to mean exactly what it says. The senior bureaucrat's power vis-à-vis the Minister remains in that he is not subject to "direction or control", but his power is heavily qualified by his insecurity of tenure. Short of a constitutional amendment which, in a finely divided Parliament, would be difficult to negotiate, perhaps the only short-term 'solution' is for both Ministers and bureaucrats to heed Kidu CJ's suggestions regarding their respective obligations, and responsibilities.
INTRODUCTION

This paper intends to examine the law-making powers vested in the judiciary by the Papua New Guinea (PNG) Constitution and to consider how the courts have discharged this onerous responsibility.

The PNG Constitution is unique in the common law constitutions, and more clearly so within the Commonwealth. Whilst it is patterned on the 'Westminster model', its uniqueness is reflected *inter alia* in its adaptation and building onto that model. That is to say, our Constitution does more than just the usual: as well as laying down the basic structure of government by designating the principal organs of a parliamentary democracy and vesting them with their 'traditional' powers and functions, it is what Professor Goldring calls "a novel statement of political ideology and aspirations of the people" (1978:15). Independence is not merely to be the end of an era, but the beginning of a new one in which the people must think and act with a whole new purpose. Independence not only means that our people are now doing things themselves, but also that they must perform them in their own way. This does not imply a reversion to the 'pre-contact' position; what is inherent in this philosophy is that the government together with the people must work with new vigour and purpose towards a common goal. As the Constitutional Planning Committee (CPC) put it in its Final Report:

We believe that the significance of Papua New Guinea's attainment of Self-Government and Independence is that, by transferring power into the hands of the people of this country, it gives us a chance to define for ourselves the philosophy of life by which we want to live and the social and economic goals we want to achieve. If the Constitution is to be truly the fundamental character of our society and the basis of legitimate authority, it should be an instrument which helps to achieve these goals and not one which obstructs. Our Constitution should look towards the future and act as an accelerator in the process of development, not as a brake. It should be related to the national goals that we the leaders of this country are enunciating. We have, therefore, framed our recommendations for the proposed Constitution with these goals in mind (PNG 1974:2/1).
One of the features of the Constitution which reflects its uniqueness relates to the subject of this paper: judicial law-making. In line with the general intention of the constitution-makers to break as far as possible with the colonial past, it was envisaged that a new start be made with the legal system.

THE NATIONAL JUDICIAL SYSTEM

Section 155 of the Constitution establishes the National Judicial System which consists of the Supreme Court, the National Court, and such other courts as are established under s.172. The other courts include the 'inferior' courts in the central hierarchy of the courts system, namely the local and district courts. Attached to this central system are the village courts and the administrative tribunals. Separated from it are the land mediators, the land courts and the recently-established National Lands Commission.

The system essentially is based on the Australian and English courts system with the possible exception of the village courts. The two superior courts in the hierarchy, the National and Supreme Courts, have their respective jurisdictions provided for in the Constitution (ss.162, 166). In contrast to most other Commonwealth jurisdictions, there is no appeal to the Judicial Committee of the Privy Council.

The Constitution vests the judicial authority of the people in the National Judicial System (s.148). It goes to great lengths to make detailed provisions for the establishment of the courts, their jurisdictions, their other powers and duties (see, for example, ss. 22, 57, 60, and Sch.2.3), and the qualifications and mode of appointment of judges (ss.161, 164, 165, 169, 170, 171). This is in addition to National and Supreme Court Acts and the Organic Law on the Judicial and Legal Services Commission.

In line with the intended new start in the legal system, all the judges on the pre-independence Supreme Court bench at the date of Independence were re-appointed - their former commissions having lapsed on that day - under the new retiring age and term of appointment provisions.

THE SOURCES OF PAPUA NEW GUINEA LAWS

As with all other areas of national development, the Constitution gave a clear mandate to the courts of PNG, and more specifically, the National and Supreme Courts, to develop the underlying law of the country. It provides that the law of independent PNG shall consist of statute or written law and the underlying law. The statute law is the Constitution itself, organic laws, Acts of both the national and provincial parliaments, legislation from Australia and the United Kingdom (adopted by virtue of Sch.5), subordinate legislation made under any of those laws, and emergency regulations (ss.9, 20, and Sch.5). The underlying law, subject to limitations, comprises custom and the principles and rules of common law and equity that applied in England immediately before Independence (Schs. 2.1, 2.2).
Section 20 sub-s.(1) provides for an Act of Parliament to declare and enable the development of the underlying law (see also s.60). Sub-section (2) provides that until then, the underlying law and the manner of its development is to be as prescribed by Sch.2 (adoption, etc. of certain laws). As yet no such Act has been enacted. This may be deliberate on the part of Parliament because it could be said that the constitutional provisions on the subject are clear and require no further elaboration. Although this may be true of the adoption of the common law (see Sch.2.2), and of the development of the underlying law (see Sch. 2.3) parliamentary inactivity in this respect, unfortunately, has been used as an excuse for the judicial reluctance or inactivity so far. In any case, as if the message needed further emphasis, s.21 defines the purpose of Sch.2 in the following way:

The purpose of Schedule 2 (adoption, etc., of certain laws) and of the Act of Parliament referred to in Section 20 (underlying law and pre-Independence statutes) is to assist in the development of our indigenous jurisprudence, adapted to the changing circumstances of Papua New Guinea.

For the proper implementation of the above-stated purpose, sub-s.(2) of s.21 provided for the establishment of a Law Reform Commission (LRC) (which duly happened in 1975) and invested both it and the courts with the responsibility. The performance of the LRC is a story in itself. As far as the courts are concerned, six weeks after Independence Day, Frost CJ in Johns v. Thomason [1976] PNGLR 15 adverted to the duty in this way:

In these circumstances the respondent relies upon the doctrine of ratification. It was not suggested, nor is such a suggestion tenable, that this common law principle is inapplicable or inappropriate to the circumstances of Papua New Guinea (Constitution Sch. 2.2) (ibid.:19).

About a year later His Honour in State v. John Beng [1976] PNGLR 471 mentioned the matter again. Prentice DCJ (as he then was), when confronted with a formidable list of foreign case law cited by the defence counsel at a trial one month after Beng, said:

I think the time has come when citation of United Kingdom cases and those from non-Code states of Australia should be eschewed unless they relate to subjects clearly not covered by our Code. The Code we have must be administered by Papua New Guinean lawyers who should, I think, be assisted in their deliberations if reference to decisions of countries and states which do not adhere to a Code similar to our own is made less frequently... We should be building up a body of decisions of Papua New Guinea Courts for specially Papua New Guinea situations and customs (State v. Latam Kiala and Meiai Gomosi, unreported judgment, N. 118 of 17 November 1977 at 5).
The Supreme Court made early reference to the subject in both *Mairi v. Tololo* (unreported judgment, SC.94 of 15 April 1976) and *Constitutional Reference No.1 of 1977* [1978] PNGLR 295 (law of enticement); but making mere mention is no substitute for actually considering and doing something about it. Indeed, in the latter case the Court concluded that as the common law action of enticement had been abolished in England before Independence (by the UK *Law Reform (Miscellaneous Provisions) Act* (1970)), there was no such tort adopted in PNG, and, as there was no evidence of a country-wide custom on the subject, was not prepared to formulate a new rule pursuant to Sch.2.3 (as it clearly should have done, using the aids already prescribed therein (see also s.60)).

After those early cases the recognition and application of custom and the need to develop an underlying law were discussed less and less frequently and with decreasing seriousness. It would seem that it was left to Pritchard J to do something about the matter. His Honour, as well as stating the constitutional obligation of the Courts in *State v. Joseph Tapa* (unreported judgment, N.140 of 10 May 1978), in relation to corroborative evidence of accomplices and the requirement for proper direction and warning to be given, said:

> The judges of this Court have a clear cut obligation under Schedule 2.3 of the Constitution to develop the underlying law of Papua New Guinea and for this reason, I feel in this particular case, I should attempt to do so (*ibid.*:13).

His Honour then proceeded to formulate four principles upon which the PNG courts should consider the evidence of accomplices which essentially qualified and extended the common law rule as enunciated in *Davies v. DPP* [1954] AC 378.

**THE UNDERLYING LAW**

As noted earlier, the underlying law, subject to certain constitutionally prescribed conditions, consists of custom and the principles and rules of common law and equity that applied in England as at 15 September 1975.

Schedule 2.1 in clear and unambiguous language adopts custom and says it shall be applied and enforced as part of the underlying law. The only limitations are as prescribed by the Constitution itself (s.21(2)), that is, if the application and enforcement of any custom will result in inconsistency with a constitutional law or statute, or will be repugnant to the general principles of humanity. The *Native Customs (Recognition) Act* (1963) had already provided a similar provision in a somewhat limited way and included the same restrictions. It was, perhaps, because of the dismal failure of this Act to encourage systematic judicial recognition and application of custom that it was thought best to entrench such a provision in the Constitution.

The hope for a fresh start in this area, as reflected in the specific provisions of the Constitution, was strengthened further by requiring that an Act of Parliament provide for the proof and pleading of custom (Sch.
2.1(3)(a)). It was also provided that this Act should regulate the manner in which, or the purpose for which, custom may be recognised, applied or enforced. It was also to make provision for the resolution of conflicts of custom (Sch.2.1(3)(c)). Despite this clear intention of the Constitution, no such Act yet has been enacted by Parliament. Could this be said to be attributed to a trust by Parliament that the judiciary would perform its constitutional duty and develop and apply custom as part of the underlying law? Perhaps it is rather due to a trend which David Weisbrot suggested has taken place in PNG Government whereby after the innovative measures of the immediate post-independence period, law reform has been shifted to the "back-burner" (Weisbrot 1981:727-31).

The adoption of common law (Sch.2.2) is subject to specific conditions under the Constitution. Under Sch.2.2(1) the principles and rules of common law and equity in England immediately before Independence are to be applied and enforced as part of the underlying law except if, and to the extent that:

(a) they are inconsistent with a Constitutional Law or a Statute; or

(b) they are inapplicable or inappropriate to the circumstances of the country from time to time, or

(c) in their application to any particular matter, they are inconsistent with custom as adopted...

Condition (a) requires no elaboration here. Conditions (b) and (c), however, are more problematic and of great concern to the development of PNG's underlying law.

There would seem to be no dispute that custom has supremacy over the common law in any particular matter. If a particular principle or rule of common law conflicts with custom as adopted, then custom prevails. But custom must have been adopted as applicable in the first place in order for it to prevail over common law in the event of an inconsistency. As long as custom remains undefined, the likelihood of common law conflicting with custom will remain remote. As with the application of custom under the Native Customs (Recognition) Act, the courts (with the exception of village courts) after Independence are still reluctant to recognise and apply custom.

In a case which presented a clear opportunity to formulate a new law of enticement the Supreme Court was content to leave a vacuum in the law: Saldanha J in Constitutional Reference No.1 of 1977 [1978] PNGLR 295 said:

As long as there is doubt that there may be remedy at customary law for the wrong of enticement it would not be proper for this Court to formulate a rule of law on this subject (ibid.:300).

As well as shrinking its responsibility under Sch.2.3 to formulate an appropriate rule (because there was no existing rule of law) as part of the underlying law the Supreme Court, whilst adventing to custom, made no
enquiry into the possible application of custom. It is obvious, therefore, that if the common law tort had not been abolished in England, the common law principles on this tort would have been applied without any advertance to custom. The opportunity that presented itself to the Supreme Court as early as 1977 was lost.

The Court did make reference to lack of evidence of custom on the matter, but in the light of its general reluctance up to now to consider custom it is questionable whether it would have been entertained if adduced. In view of what has transpired since then one wonders if counsel would have been given the time of day if he had suggested adducing evidence on custom.

Part 3 of Sch.2 deals specifically with development of PNG's underlying law. The Constitution does not merely vest the law development powers in the National and Supreme Courts: it goes further and provides the Courts with aids to be used in this task:

If in any particular matter before a court there appears to be no rule of law that is applicable and appropriate to the circumstances of the country, it is the duty of the National Judicial System, and in particular of the Supreme Court and the National Court, to formulate an appropriate rule as part of the underlying law having regard

(a) in particular, to the National Goals and Directive Principles and the Basic Social Obligations; and
(b) to Division 111.3 (Basic Rights); and
(c) to analogies to be drawn from relevant statutes and custom; and
(d) to the legislation of, and to relevant decisions of the courts of, any country that in the opinion of the court has a legal system similar to that in Papua New Guinea; and
(e) to relevant decisions of courts exercising jurisdiction in or in respect of all or any part of the country at any time; and to the circumstances of the country from time to time;

Nothing could be clearer than the above provisions as to the duty of the courts and the areas or matters that can be called in or resorted to for assistance. Schedule 2.4 requires the courts to ensure that:

with due regard to the need for consistency, the underlying law develops as a coherent system in a manner that is appropriate to the circumstances of the country from time to time, except in so far as it would not be proper to do so by judicial act.

This exception can only mean that if a particular gap has to be filled by complex legislation rather than individual rules then it should be left to the legislature to do so. It cannot, however, be read as an ever-present brake on the courts' law-development powers. There are undoubtedly certain matters that need to be in legislative form rather than in the form of a judicial decision in order to give extensive and exhaustive coverage.
Therefore what Sch.2.4 envisages by the exception is that in such situations the courts will refer the matter to Parliament for enacting. This can be done under the very next provision. Schedule 2.5 requires the judges to comment on the state, the suitability, and the development of the underlying law, together with any recommendations as to improvement that they think it proper to make in their reports under s.187 of the Constitution.

JUDICIAL LAW-MAKING: THE TASK

From the foregoing it can be seen that the judiciary in PNG, unlike its counterpart in other countries, has an explicit and far-reaching law-making responsibility to discharge. Our judges have to do more than just perform their traditional functions of applying the law. They are in a unique position to participate fully in the overall development of the country.

It is a truism that social, economic and political changes in society are only possible through changes in the law and the legal system. This is particularly pertinent in PNG where the inherited economic and political institutions were structured under laws meant for highly developed and sophisticated societies. As well as interpreting the Constitution (s.18) and applying the laws passed by Parliament, our judges have to revise, reform and develop through judicial pronouncements the laws that are suitable for the circumstances of the country. No longer can they say with any degree of truth that 'judges do not make laws, they merely apply them'. Moreover, to say so would be to ignore the history of the development of the common law in England. The common law our judges invariably apply in preference to custom, is the result or culmination of centuries of judicial law-making. Hence, the judges in PNG can no longer be concerned only with what the law is; they must also consider what it ought to be. The Constitution has ensured that there be no doubt about this.

Even if custom is found to be inapplicable in a particular case, the very fact that the common law is being applied raises the question of what the law ought to be. Lord Denning's challenge to colonial judges in their application of the English common law in Nyali Ltd. v. The A-G. of Kenya [1956] 1 QB 1, 20-21, is most pertinent to the judges of post-independence PNG. The fact that no legal precedent or authority exists on a particular matter should be no bar to judicial determination. As Lord Denning said in Packer v. Packer [1954] P 15, 22:

What is the argument for the other side. Only this, that no case has been found in which it has been done before. That argument does not appeal to me in the least. If we never do anything which has not been done before, we shall never get anywhere. The law will stand still whilst the rest of the world goes on; and that will be bad for both.

Lord Denning recently took the opportunity to reinforce his views in the preface to his book The Discipline of Law:
My theme is that the principles of law laid down by the judges of the nineteenth century - however suited to social conditions of that time - are not suited to the social necessities and social opinions of the twentieth century. They should be moulded and shaped to meet the needs and opinions of today (1979).

Even when a particular common law rule or principle is not inconsistent with custom it should still be subjected to a further test to see that it is not inapplicable or inappropriate in PNG's changing circumstances (see Sch.2.2(b)). However, this test seems not to be applied in our courts. How often does one read in the judgment statements such as - "No material was put before the court to suggest there were any customary rules on the subject"; or - "It has not been argued in this case that the common law principles are inapplicable or inappropriate to the circumstances of the country".

Admittedly, if a particular matter is not an issue and is therefore not necessary for the decision of a particular case, the court is not bound to deal with it, just as it is not bound to deal with anything that counsel has not dealt with or made submissions on. Nevertheless, it is submitted here that in PNG our judges are required to do more than just decide cases: they have to decide with society and the future very much in their minds.

In support of the 'judges merely apply the laws' argument, it is often said that it would be a naked usurpation of legislative powers of the Parliament if the judiciary attempted to change laws or introduce new ones by its decisions. This argument certainly does not hold water in PNG where the Constitution confers on the judiciary specific law reform and law-making and developing powers. It is also argued that judicial law-making would somehow affect the doctrine of separation of powers, thereby undermining the independence of the judiciary. This argument is usually advanced by the proponents of the strict Montesquieu theory on the separation of powers. Stretching the doctrine to its absurd conclusion would mean that in PNG, Ministers, as members of the Executive, could not sit in Parliament and introduce legislation - but here, as in other Commonwealth countries, most legislation is initiated and introduced into Parliament by Cabinet Ministers. As for the independence of the judiciary, one fails to appreciate how it could be affected adversely. Independence does not mean to exist or to operate in isolation. At least under the PNG Constitution, the judiciary cannot function in a vacuum; it is required to take an active role in the overall development of the country. In any case, as well as being the arbiter on constitutional questions and interpretation, the Supreme Court has a clear legislative power in one special respect: under s.19 it has power to declare an existing or proposed law invalid. The effect of declaring a particular law invalid is to repeal that law. So for all intents and purposes, the judiciary is engaged in legislative functions. "Proposed law" has been defined to mean a law that has been formally placed before Parliament (s.19(5)). Just as a debate by Parliament would decide the fate of such a bill, the Supreme Court intervenes, by reference (see s.19(3)), and declares whether or not the bill can become law. In this respect the Court thus performs also a legislative function. Schedule 2.5 requires judges to make recommendations as to improvement of the underlying law in their annual reports (see
s.187). If the recommendations are accepted and implemented, the judiciary, however indirectly, is involved in the making of a new law.

Finally, the common law of England as at 15 September 1975, is itself (as noted earlier), the product of centuries of judicial law-making. So when some judges still say they do not make laws, are they not resorting to what Bentham called "a childish fiction"? Sir John Salmond put it:

Doubtless judges have many times altered the law while endeavouring in good faith to declare it. But we must recognize a distinct law-creating power vested in them and openly and lawfully exercised (Salmond 1947:179).

JUDICIAL LAW-MAKING: THE PERFORMANCE

One year after Independence, Nicholas O'Neill did a post-mortem on the law-making performance of the judiciary (1976). His verdict was that, with one notable exception, the judges had been reluctant to take up the challenge given to them by the Constitution.

Seven years after Independence the position is still the same, although there have been, during that period, some additional exceptions. There have been many opportunities for the courts to be more daring and innovative, but the judges let most of them slip by. Although all of them have taken great pains to acknowledge their constitutional obligation, it would seem that that is as far as they have been prepared to go. For instance, in the Re Rooney (No.2) [1979] PNGLR 448, the Supreme Court could have applied custom when considering the question of an appropriate sentence. Wilson J in another 'missed opportunity' case, John Kaputin v. State [1979] PNGLR 559, said that the Supreme Court in the Rooney Case gave the parties the chance of adducing evidence of custom in relation to sentence but that it was taken neither by the prosecution nor by the defence. I will stand corrected on this, but I have found no such reference in the judgment. My understanding on this matter has always been that an attempt by Mrs Rooney's counsel to adduce evidence of custom for the purpose of assisting the Court in determining the proper sentence was rejected by the Court. John Kaputin's Case presented another opportunity to apply custom. The Supreme Court dismissed the appeal after refusing an application for fresh evidence to be called. This evidence was to be on custom. The basis for the refusal was that Kaputin's counsel at the trial had been aware of this responsibility but had chosen not to call the evidence, and that the appeal against sentence was for the purpose of review and not for re-trial. It is difficult to appreciate the Court's ruling on this as the appeal against severity of sentence did not dispute the criminal law sanction but rather its severity. In this respect, if evidence on customary sanctions in the Tolai society were thought to be likely to render the appeal a re-trial, the very fact that the issue before the Court had possible customary relevance or implications should have made the Court realise its duty to entertain the evidence.

It would seem that despite the frequent acknowledgements of their constitutional obligation, no real and conscientious efforts are made by the courts to inquire into the possible application of custom in any given case. Instead they invariably resort to the common law as their first step
and once a particular principle or rule of the common law is discovered, its applicability is accepted as a matter of course. The real question as to whether or not a particular common law rule or principle, though applicable, is appropriate to the circumstances of PNG rarely warrants as much as a mention.

It has been suggested (Nicholas O'Neill, above) that the courts may have been going about the matter the wrong way. Instead of following the order of inquiry envisaged by the Constitution, some judges go direct to common law instead of going to custom first. The methodology suggested by Kapi J (Wangi Savings and Loan Society Limited v. Bank of South Pacific Limited, unreported judgment, SC.185, 25 November 1980) would seem to be the following: in a particular case before a court when there is no relevant written law, an inquiry is made of the underlying law; in this inquiry the first matter to be considered is custom; it is only when there is no relevant and applicable rule of custom to meet the facts of the case that resort is made to the common law (not before). If the inquiry finishes up with a particular principle or rule of common law, it should not be applied as a matter of course. It has to be determined whether this principle or rule does in fact apply to PNG and is appropriate to its circumstances. If, however, no relevant underlying law, whether originating from custom or the common law, is formed to meet the particular case, the court is bound to formulate a new rule or principle to meet the special conditions and circumstances of the country (Sch.2.3). It is submitted that generally the courts do not follow the correct methodology, or, if they do, custom gets a passing mention instead of being inquired into deeply.

In some instances the role of custom is dealt with perfunctorily at the outset before getting into the serious business of trying and determining the case. In PNG Ready Mixed Concrete Pty Limited v. The Independent State of Papua New Guinea and Utula Samana etc. (unreported judgment, N.319, 13 October 1981) Miles J dealt with custom as follows:

Before turning to the principles of law to be applied to the facts as above stated, it is desirable to record that counsel have agreed and I think rightly that with regard to the consideration of Schedule 2.1 of the Constitution the case is not to be decided by any rule of Papua New Guinea custom but by reference to the principles of law and equity as they were in England on 15 September, 1975.

So counsel had advised the court that custom was not relevant to the case. One would be interested to know how counsel arrived at the conclusion. The 'squatters' in this case had claimed that the Administration had to find them alternative land nearby as at the time the lease was granted to the company they were already on the land. Furthermore, it was argued that at no time before or after the lease to the company did the Government make any moves to eject them from the land, and that before the lease was granted, they had not been notified in order that they might lodge any objections against the grant. It is admitted that the subject land was Government land and that the people were, by law, squatters. Nevertheless, one cannot help but think that because of the
circumstances surrounding the case, perhaps some kind of customary right, might have been acquired by them.

There are also cases where the courts, without considering custom at all, ignore a clear common law principle to arrive at an unjust decision. In *Jacob Prai and Otto Ondawame* [1979] PNGLR 1, an appeal against conviction (of two West Irianese illegal immigrants) based on defective information for duplicity, defence counsel properly argued that if the case had been tried in England the appellants would have been discharged. Saldanha J said this:

> But it must be borne in mind that in our jurisdiction, the principles and rules of English common law are adopted only "...except if, and to the extent that they are inapplicable or inappropriate to the circumstances of the country from time to time" (Sch.2.2(1)(b) of the Constitution) (*ibid*).

His Honour then made the following extraordinary statement:

> This event occurred at Vanimo which is near the border with West Irian and remote from any big town where legal advice might be readily available. Most magistrates are not legally qualified, and, presumably, the magistrate who heard this case was not so qualified. From my own knowledge and experience of policemen in Papua New Guinea, I would say the policeman who drew up the information would not be expected to be acquainted with such niceties as the rule against duplicity that an information must give the defendant reasonable information of the nature of charge. In circumstances such as those in this case, I am of the view that rigid adherence to technicalities in the application of English common law is inappropriate to the circumstances of the country at the present time and is likely to result in injustice being done (*ibid*).

> Does it mean then that one's fate is determined by where one was arrested and charged, and by who drew up the information? The rule against duplicity applies differently, so it would seem from His Honour's remarks, depending on whether one is in a remote outstation or in an urban area. Why should a defendant be victimised by the shortcomings of the system? One fails to see how injustice would be done if the rule against duplicity etc. were applied to the case.

**PROBLEMS OF ADMINISTERING CUSTOMARY LAWS**

It has been argued that the reluctance to involve custom in the judicial process has been due in the main to the composition of the Supreme and National Court bench and the legal profession. That is to say, the predominance of expatriates on the bench and in the profession means that they will always be disinclined to introduce and entertain evidence of custom or any customary considerations. This may be true of the expatriate
lawyers now, but certainly not of the bench. The present bench has three judges on it who are nationals and more national lawyers are practising before the courts now than pre-independence. Perhaps custom will now be increasingly accorded the prominence it deserves, and we can hope for a general improvement in the area of law reform and development. But to rely completely on the changing composition of the bench and the bar to improve matters is to ignore the fact that custom as a body of coherent and determinable law, must be first ascertained.

In this respect, the Act envisaged by Sch.2.1(3) should be enacted without delay. It would seem that Parliament cannot rely on the judiciary to discharge its duties properly without giving it the means by which it can do so. The courts have not the time nor the proper apparatus to inquire into areas which are very much unknown and likely to include substantial local variations.

Another reason given for the minor role played by custom is that in a great majority of cases the parties are concerned primarily with quick determination of the issues before the court. Time and money are involved in litigation and a party would not be disposed to having his case prolonged over matters that do not affect the outcome directly. This is, of course, understandable. However, counsel and the courts must be ever alert to the fact that each case in PNG is a potential law-maker. As well as deciding the particular issues before it, the courts are bound to evolve and develop a law suitable for PNG conditions and circumstances. Hence the practitioners in PNG have a special responsibility to assist the courts in their great task. Like the judges, the lawyers of PNG must be vitally concerned with what the law ought to be because they too have an important role to play in the overall development of the country. Every issue relevant to law reform and development must be put before the courts for their consideration and determination.

The 'other courts' in the courts system too can and must contribute to the development of an underlying law. Under s.18(2) they are required to refer to the Supreme Court any questions relating to the interpretation or application of a constitutional law. Cases can also be stated by the District Court for consideration and determination by the higher courts. In addition there are the specified persons and authorities under s.19 who can contribute to the overall development of an underlying law for the country, by referring matters to the Supreme Court.

Finally, one means by which at least a start could be made now to give custom greater prominence is to utilise the village courts. The Village Courts Act was passed in 1973 to establish informal people's courts to facilitate the resolution of disputes by traditional means. To overcome the present dilemma of the Supreme and National Courts, the village courts could become the repository of customary law. Decisions of these courts could be collected and collated for use by the higher courts. Eventually, a determinable and defined body of customary law could emerge.

WHAT IS THE CONTENT OF THE UNDERLYING LAW TO BE?

It is submitted the framers of the Constitution envisaged that out of common law and custom would emerge a body of law that would combine the aspects of the two systems most suitable for the current conditions and
circumstances of the country. It is hoped that this is what will eventually result. To discard the common law completely in preference to custom would be, I suggest, a retrograde step. After all, PNG has to exist in this world with other nations and other peoples. In this respect, some of its laws and institutions must reflect those that obtain in other democratic countries. We cannot exist in isolation from the rest of the world. Ultra-nationalism may not be the best thing for PNG in this day and age of internationalism. We are in a unique position to evolve something that appreciates the best of the two systems.

CONCLUSION

It has to be acknowledged, with respect, that the courts are faced with a formidable task for which they are neither properly equipped nor given adequate assistance. It could thus be said that too much may be expected of our judges. Perhaps the Constitution has created unreasonable hopes and this may in turn adversely affect the judiciary in the long run. To do in the space of, say, a decade, what the English judges did over a number of centuries is, without a doubt, nigh on impossible (although the English judges were not compelled, as ours are, by specific constitutional mandates and other provisions). Perhaps an underlying law that evolves gradually would be preferable to one resulting from individual 'rushed jobs', as it were, from the judges.

The underlying law must develop as a coherent system in a manner that is appropriate to the circumstances of the country from time to time, having due regard to the need for consistency (see Sch.2.4). It is submitted that this cannot happen if individual judges try to establish milestones in any and every case that comes before them. The law reform and development function must be carried out as a co-ordinated effort by the whole bench. Otherwise, another problem will be created in the process whereby all the bits and pieces scattered throughout many judgments have to be sorted out and collated. In the rush to satisfy the high expectations of the Constitution there could be a tendency to make judicial pronouncements on various aspects of a particular law by individual judges with little co-ordination of the process. That is to say, the milestones from the courts may not be rational extensions of each other. In the end these milestones may not provide a complete structure.

So perhaps we are expecting too much too quickly. However, the record of the courts so far, with exceptions of course, suggests that little effort has been spent to make even a modest start. It is possible, of course, that the judicial reluctance up until now is connected with the status of the underlying law. Under the Constitution the underlying law is subordinate to the constitutional laws and legislation. Consequently, if legal problems or issues can be resolved by resorting to the existing determinable legislation then why bother about developing something which will not enjoy equal and important status in the end?
1 Judges are now appointed for an initial term of three years, renewable for further three-year terms. Retiring age of the judges is now set at fifty-five years, to be extended to sixty by the Judicial and Legal Services Commission.

2 Whilst the judiciary has been reluctant in developing the underlying law, the LRC, at least under the Chairmanship of Bernard Narokobi, has made many recommendations and submitted draft bills on them which have been virtually ignored by the Government.

3 Section 7 provides that custom shall not be taken into account except in special circumstances or unless not to do so would cause injustice to the accused.

4 It is suggested that the Government/Parliament would take more notice of recommendations from the judges than from the LRC.

5 The Act was to make provisions for (a) proof and pleading of custom for any purpose; (b) regulation of the manner in which, or the purpose for which, custom may be recognised, applied or enforced; and (c) the resolution of conflicts of custom.

6 The authorities are: (1) the Parliament; and (2) the Head of State, acting with, and in accordance with, the advice of the National Executive Council; and (3) the Law Officers of Papua New Guinea; and (4) the Law Reform Commission; and (5) the Ombudsman Commission; and (6) the Speaker, in accordance with Section 137(3) (Acts of Indemnity).

Following the Vanuatu Case, (unreported SC.204 (Reference SCR.No.4 of 1980), of 3 August 1981, the Leader of the Opposition has been added to the list.

7 The Supreme Court's decision on the question of *locus standi* in the Vanuatu Case (see above); and the exceptional individual, are but isolated cases.
INTRODUCTION

In the period in Papua New Guinea (PNG) from self-government in 1973 until full Independence in September 1975, during which the Constitutional Planning Committee (CPC) canvassed the opinions of the populace and drew up its blueprint for the Independence Constitution, there were many notable expressions of discontent from prominent nationalists about the 'received' or imposed system of law.

The then Minister for Justice, John Kaputin, spoke of the law, as utilised by the Australian authorities, as:

an instrument of domination and oppression by the ruling classes ... an instrument of colonialism and a means whereby the economic dominance of the white man was established over us (Kaputin in a Ministerial Policy Statement 1973:1-2).

The then Chief Minister, Michael Somare, stated in 1973 that:

We are facing, at this moment, the need to devise a system of laws appropriate to a self-governing, independent nation. The legal system that we are in the process of creating must ensure the orderly and progressive development of our nation. But, in addition, it must respond to our own needs and values. We do not want to create an imitation of the Australian, English or American legal systems. We want to build a framework of laws and procedures that the people of Papua New Guinea can recognise as their own - not something imposed on them by outsiders. There is great scope for imagination and creativity in making the law responsive to the needs of the people and I put this challenge to all of you concerned about the future of our nation: how can we build a legal system that will truly serve the people's needs (1974:14).

Despite this clear dissatisfaction with the inherited legal system, and the popular belief that customary law should play a central role in the development of new laws and legal institutions, the Constitution which eventually emerged failed to provide the blueprint, or even the authority,
for this legal transformation. And failed badly. While customary law does have a role to play in the legal system of PNG, this role is largely defined and encouraged by legislative initiatives - mostly enacted or inspired pre-independence - and not by the Constitution itself. The failure of the Constitution to facilitate legal change can probably be attributed to three main factors. First, there is an element of technical failure in the provisions relating to legal development and the "underlying law" which makes it difficult for change to come through the courts. These matters are discussed in greater detail below.

Secondly, there is the well-known phenomenon that once independence is achieved, the rhetoric gives way to the new political 'realities'. The contest for power is no longer between the indigenous people and the colonial authorities, but between competing elements within the indigenous society. In the context of PNG, the clash of interests was between the emerging political elite - generally young, urban-based, well-educated, and successful in understanding and manipulating Western-style political, economic and legal institutions - and the traditional leaders. Thus 'customising' the legal system would inevitably transfer power from the politicians who led the movement for independence back to the traditional leaders, and this was not to be.

Finally, the post-colonial period has generally been characterised by a de-emphasis on law reform, particularly in contrast to economic development concerns (Weisbrot 1980:217). Probably because 'the law' - in the form of kiaps, native regulations, labour ordinances, land registration schemes, taxation measures, the Queensland Criminal Code, and the courts - appeared in the minds of most Papua New Guineans to be the powerful cutting-edge of colonialism (Fitzpatrick 1980:251-52), there was a strong focus on law reform in the immediate pre-independence period. There were commissions of inquiry on land matters, court structure and tribal fighting, and a committee on constitutional planning; legislative initiatives on a host of topics; restructuring of the degree programme at the University's Faculty of Law to teach "law in its social context"; the establishment of a Law Reform Commission; and vigorous debates on how legal institutions should be transformed. Within a few years, however, with independence achieved, and a highly dependent economy, legal change was no longer viewed as especially compelling.

With reference to the Constitution itself, the position on four matters, central to the development of the national legal system, is largely responsible for the failure of customary law to become a significant, much less pre-eminent, source of law in PNG: (1) the relegation of the National Goals and Directive Principles to the preamble, and their non-justiciable nature; (2) the failure to require a review of the colonial legislation, which was adopted holus-bolus; (3) the sources of law provisions, especially s.9 and Sch.2, which allow adopted written law to pre-empt the fostering of a Melanesian jurisprudence, and accord English common law and equity 'equal' status with indigenous customary law; and (4) entrusting the development of a national "underlying law" to the judiciary.

In the body of this paper I will expand on these four matters in turn, and then discuss the now dormant recommendations of the PNG Law Reform
Commission aimed at expanding the role and scope of customary law, before providing some hesitant conclusions.

THE NATIONAL GOALS AND DIRECTIVE PRINCIPLES

The National Goals and Directive Principles (NGDPs) formulated by the CPC were intended by the Committee to provide:

A clear definition of Papua New Guinea's most fundamental national goals...towards which the people and we leaders are working. This should help to ensure that these objectives will become known throughout the country and provide a yardstick against which government performance can be judged (PNG CPC 1974:2/1).

The goals themselves refer mainly to social, political and economic concerns, but many would bear as well on questions of legal development. For example, they call for "...development to take place primarily through the use of Papua New Guinean forms of social and political organization" (No.1(6)); for PNG "to be politically and economically independent" (No.3); for the "wise assessment of foreign ideas and values so that these will be subordinate to the goal of national sovereignty and self-reliance" (No.3(5)); and for a:

fundamental re-orientation of our attitudes and the institutions of government, commerce, education and religion towards Papua New Guinean forms of participation, consultation, and consensus, and a continuous renewal of the responsiveness of these institutions to the needs and attitudes of the People (No.5(1)).

The CPC recommended that "All courts and other adjudicatory tribunals shall be guided in the exercise of their functions" by the NGDPs. However, it also recommended that they should "not be directly justiciable", cautioning that nevertheless they:

should not be regarded by any court, other adjudicatory tribunal or institution of government as being of less weight than other directly justiciable provisions (ibid.:2/25).

The recommendation also provided that the Government should make specific reference to the NGDPs in formulating and explaining national policies and programmes.

The Government supported these CPC proposals, but pointed out that:

Courts are not however to apply the goals as law but must administer the law as it stands...The Government supports the rule of law, which requires the courts must apply the law as it exists (PNG Govt. Paper 1974:4).
In the end, s.25 of the Constitution specified that the NGDPs are non-justiciable, but imposed a duty on all governmental bodies "to apply and give effect to them as far as lies within their respective powers". Further, the NGDPs are said to be particularly relevant in the considerations of the Ombudsman Commission, especially in Leadership Code matters (s.25(4); and see s.219(1), (2) and (3)). Schedule 2.3 directs the courts to have regard to the NGDPs where no rule of law applies and they are called upon to formulate a new rule of underlying law; and s.22 calls for regard to be had for the NGDPs in judicial determination of the nature of rights, powers and duties recognised by the Constitution (see also s.39(3)(a)).

Constitutional law authorities have expressed doubts as to whether the Supreme Court judges, particularly those schooled in the Anglo-Australian tradition which does not regard the preamble to a piece of legislation as an aid to interpretation, would be willing to be guided by the NGDPs (Goldring 1978:37-38). In fact, these fears have been justified by the practice of the post-independence judiciary. In the seven years since Independence, the NGDPs have been given judicial consideration only a handful of times, even though there were many matters before the courts in which they could have, and should have, been utilised. Government, as well, has rarely thought it necessary to justify or explain policy decisions in terms of the NGDPs, and indeed many politicians and bureaucrats have been openly scornful of them, professing to view them as something of interest only to academics and antiquarians.

Thus it would appear clear that the CPC's vision of the NGDPs as a 'guiding lamp' in national and legal development has fallen far short of the mark.

REVIEW OF COLONIAL LEGISLATION

The CPC was adamant about the need for an autochthonous, or home-grown, constitution. References to the break with the colonial past and firm assertions of national sovereignty and independence are scattered throughout the document which carries the pointed, if cumbersome, name of "The Constitution of the Independent State of Papua New Guinea". The NGDPs, discussed above, are especially concerned with matters of sovereignty, independence, self-reliance, and traditional Melanesian ways.

In its approach to PNG's international obligations, the Constitution adopts, in s.273, a modified 'Nyerere' approach. That is, a pre-independence treaty could be 'rescued' by declaring that PNG would treat it "as if it were binding" for a period not exceeding five years. All other international agreements would be deemed to have lapsed, and even the rescued treaties would be reviewed during the five-year period.

This reservation of the right to pick and choose with regard to international law was not, however, matched by a similar scheme on the national level. The CPC did recommend a review of existing law:

Ideally, only those existing laws which are in conformity with the new Constitution should be adopted by it. However, we recognize the necessity to make
provision for a reasonable time to elapse before the Constitution becomes fully effective in respect of the body of presently existing law, to enable all of our present laws to be carefully reviewed, and inconsistent laws repealed or amended as is appropriate. We suggest that a period of two years should provide sufficient time for this work to be done (1974:15/2).

And later:

We believe that many of the laws that will be in force at independence are more appropriate to the circumstances of colonial rule than to a society seeking to achieve the National Goals and Directive Principles... The need for a thorough-going review of our legal system is apparent to all of us (ibid.:8/9).

The CPC suggested that such a review be undertaken by the Law Reform Commission or by the 'special body' - a permanent committee of Parliament - to be established with a brief to review existing laws:

for the purpose of making recommendations for the repeal or amendment of those laws which are not in conformity with either the National Goals and Directive Principles or the Fundamental Human Rights and Obligations (ibid.:15/2).¢

In its final form the Constitution makes no reference to such a legislative review. Section 9 provides that the laws of PNG consist of, inter alia, laws "adopted by or under this Constitution", and Sch.2.6 effectively adopts all pre-independence colonial laws, as well as a number of English and Australian (Commonwealth) laws (Sch.5). The Law Reform Commission is charged with the "special responsibility" of overseeing the development of the "underlying law", or PNG common law (see Sch.2.14), but no directions are provided about review of existing legislation.

Even where ad hoc reviews were undertaken they were not always very fruitful. One good example is the review of the Queensland Criminal Code (1899) which applied in both colonial Papua and New Guinea by virtue of adopting ordinances.° Given a possible opportunity to review and substantially revise and adapt the Criminal Code, the Law Reform Committee of the Justice Department did remarkably little. The Criminal Code Act (1974) which eventuated was merely a consolidation of colonial legislation in PNG with some minor amendments. The major law reform thrust in ensuring circumstantial applicability was in replacing references to "the Territory" or "Australia" with "Papua New Guinea" - but even here some opportunities were missed. Under the 1974 Act, e.g., it was still a crime punishable by life imprisonment to "seduce any person serving in the Defence Force of Australia ... from his duty and allegiance to Her Majesty" (s.41(a)). It also retained such archaic offences as "Defamation of Foreign Princes" (s.53)), and the classically inappropriate offence of being found with a "blackened" face with intent to commit a crime (s.414(e)). These defects may now be remedied, however, by Sch.2.7(1) which provides for non-substantive changes in names, titles, offices, persons and institutions necessary to adopt adapted legislation to the circumstances of the country.
The major substantive changes to the Code were the addition of twelve new sections (158-159, 161-169, 632) dealing with counterfeiting currency, none of which have been the subject of an indictment since, and the elimination of offences relating to railways, which do not exist in PNG.

Despite the fact that the Code position on a number of important matters differs quite substantially from traditional Melanesian notions of criminal responsibility (Weisbrot forthcoming), and that, for example, there is a wide gulf between local attitudes and the Victorian morality of the Code's Ch.22 on sexual offences (ibid.:para.416, fn.17), no changes were made at all to these parts of the Code.

Thus the Constitution missed a crucial opportunity to ensure that there be established as part of the decolonisation process a systematic, comprehensive review to determine the suitability of the adopted Anglo-Australian legislation to the circumstances of an independent, Melanesian state. Given the fact that s.9 and Sch.2 (see below), in enumerating the sources of law and the components of an underlying law, make customary law and the NGDPs subordinate to positive law, and the fact that some key areas of the law, such as criminal law, are almost entirely statutory, the failure to review and revise the adopted legislation has ensured the entrenchment of Anglo-Australian law and process, and the stifling of initiatives to adapt and "customize" the law. With the scope and constitutional supremacy of written law, customary law is left - on those rare occasions when the judiciary sees fit to consider it as a source of underlying law - only with an interstitial role, filling in the gaps in legislative schemes, or in those increasingly few areas not covered by legislation. It should be remembered that the common law and equity provisions now relied upon by the courts were themselves developed in England during a period of relative inactivity by the then undeveloped legislative branch, and well before parliaments began to closely regulate so many areas of social and commercial relations.

THE CONSTITUTIONAL SOURCES OF LAW

Section 9 provides that:

The laws of Papua New Guinea consist of -
(a) this Constitution; and
(b) the Organic Laws; and
(c) the Acts of the Parliament; and
(d) Emergency Regulations; and
(e) laws made under or adopted by or under this Constitution or any of those laws, including subordinate legislative enactments made under this Constitution or any of those laws; and
(f) the underlying law, and none other.

Section 37(2) provides that no one "may be convicted of an offence that is not defined by, and the penalty for which is not prescribed by, a written law". Therefore purely customary offences may not give rise to criminal liabilities in the courts, even in the village courts - although the village courts may punish a breach of a lawful order made with regard
to a customary law, insofar as this involves an element of contempt of court.

Section 20 provides that an Act of Parliament shall declare, and provide for the development of, the underlying law of PNG. As no such Act has yet been promulgated - or even debated - the 'transitional' provisions of Sch.2 still apply. The purpose of Sch.2, according to s.21, "is to assist in the development of our indigenous jurisprudence, adapted to the changing circumstances of Papua New Guinea".

Schedule 2.1 provides that:

custom is adopted, and shall be applied and enforced, as part of the underlying law [except] in respect of any custom that is, and to the extent that it is, inconsistent with a Constitutional Law or a statute, or repugnant to the general principles of humanity.

The provision is similar in terms to the Native Customs (Recognition) Act (1963) s.6, which imposes two additional qualifications: that the custom not be against the public interest; and that it not adversely affect the welfare of a child. Schedule 2.1(3) also provides that an Act of Parliament may (1) provide for the proof and pleading of any custom; and (2) regulate the manner in which, or the purpose for which, custom may be recognised, applied or enforced; and (3) provide for the resolution of conflicts of custom. As the Parliament has not yet acted, those matters are all still governed by the provisions of the colonial era Native Customs (Recognition) Act.

Schedule 2.2 adopts the principles and rules of the common law and equity of England (including the Royal Prerogative, subject to special qualifications contained in sub-s.(2)) in existence at the time of Independence, notwithstanding statutory revision, as the other main source of the underlying law, except if, and to the extent that:

(1) they are inconsistent with a Constitutional Law or a Statute; or
(2) they are inapplicable or inappropriate to the circumstances of the country from time to time; or
(3) in their application to any particular matter they are inconsistent with custom as adopted by [Sch.2.1].

Notice that while the common law is made subject to a judicial determination of circumstantial applicability and appropriateness (see below), it is assumed that, unlike customary law, there will be no clash with "the general principles of humanity". (Followers of the opinions of the European Court of Human Rights may find this assumption somewhat ill-founded.)

An affirmative duty is placed on the National Judicial System, particularly on the Supreme and National Courts, to formulate an appropriate rule as part of the underlying law where neither custom nor the common law are applicable. In formulating such a rule, the Court must have regard to several factors, including the NGDPs and the Basic Rights under Sch.2.3.
The Law Reform Commission is given a "special responsibility" to report to the Parliament and the National Executive Council from time to time on the development of the underlying law (s.21 and Sch.2.13-2.14).

At first glance, with custom listed as the initial source of the underlying law, adoption of the common law made subject to consistency with adopted custom, the wide range of subsidiary sources available in formulating a new rule of underlying law, and the affirmative duty placed on the judiciary to develop the underlying law, the constitutional scheme regarding sources of law would appear to have made good the CPC's wish that customary law form the basis of the new legal system and that a uniquely Melanesian jurisprudence be developed. In practice, however, this is far from being the case (Weisbrot forthcoming; Narokobi 1977:52; and O'Neill 1976:245, 249, 252-58).

In essence, the constitutional scheme has failed to propel customary law to the fore because it did not fully take into account the pre-independence experience of the relative lack of impact on the legal system of the Native Customs (Recognition) Act (1963). Consideration of that experience would have pointed up several problem areas. First, that the written law, particularly in certain areas such as criminal law, is so extensive that there is often little room to manoeuvre in incorporating custom. Second, that the courts and counsel, still largely expatriate, have often been strongly antipathetic towards customary law, or, at best, unfamiliar with local custom. Third, where customary law "may" be taken into account it almost surely will not be. If it is the policy to encourage the use of customary law, an affirmative duty, without easy escape clauses and with appropriate sanctions, must be placed on the courts and counsel. Fourth, there are enormous difficulties inherent in ascertaining customary law on a case-by-case basis, and in separating customary "rules of law" from customary process, and in overcoming conflicts between different customary regimes, even where the courts and counsel act in the best of faith. Fifth, because of the problems of \textit{ad hoc} ascertainment described above, thought must be given to providing institutional assistance to the courts and throwing out ascertainment questions to the wider community, by the recognition of chiefly authority in appropriate cases, or through the use of assessors or referees, or by national or provincial or local governmental recognition (through legislation or other means) of general principles of customary law where possible, or by other means (Weisbrot forthcoming). And sixth, recognition of the inevitability of the common law being adopted where it "may" be, given the training and disposition of legal personnel and the customary law ascertainment problems described above.

THE JUDICIARY AND THE UNDERDEVELOPMENT OF UNDERLYING LAW

Schedule 2 does attempt to coax the judiciary into responsibility for the development of the underlying law. As discussed above, Sch.2.3 places a duty on the bench to formulate new rules of underlying law where necessary. Schedule 2.4 provides that:

In all cases, it is the duty of the National Judicial System, and especially of the Supreme Court and the National Court, to ensure that, with due regard to the
need for consistency, the underlying law develops as a coherent system in a manner that is appropriate to the circumstances of the country from time to time, except insofar as it would not be proper to do so by judicial act.

Schedule 2.5 provides that in their annual report to Parliament, under s.187, the Judges shall:

if in their opinion it is desirable to do so ... comment on the state, suitability and development of the underlying law, with any recommendations as to improvement that they think it proper to make (see, e.g., PNG SC 1976:1-2; 1977:2-3).

Even with the ascertainment problems listed above, the scheme contained in Sch.2 for the recognition of custom and the development of the underlying law, coupled with the duty placed on, and the trust placed in, the judiciary, could have enabled a progressive and innovative bench to move towards the fuller integration of customary law in the legal system, decreased reliance on the common law, and gradual development of new rules of underlying law particularly suited to the needs and conditions of PNG. In the words of the CPC:

In carrying out their judicial role, judges and magistrates must take full account of the goals of the society in which they live; they must be attuned to the wishes of that society and to that extent must be politically conscious (although not party politically conscious) (1974:8/1, 8/15-16).

The CPC did recognise that there were disadvantages in giving the main responsibility for legal development to the judiciary. In particular, it recognises that "courts tend to be formalistic and legalistic"; that the judiciary was predominantly expatriate; that the courts, as final arbiters of the Constitution, could overshadow "the powers of other institutions which express more directly and clearly the wishes of the people"; that the courts have a limited capacity to effect compromises (ibid.:8/15); and that a built-in tension exists between the courts' role as protector of individual rights and liberties and their role as determiners of public policy and facilitators of national goals (ibid.:8/1).

Even had the courts taken the CPC recommendations and the constitutional scheme (Sch.2) to heart, judicial development of an indigenous jurisprudence on a case-by-case basis would, of necessity, have been a slow process (PNG SC 1977:3). While the CPC did have its eyes open to the disadvantages listed above, I do not believe that they were prepared for what did, in fact, eventuate: the courts returned to business as usual after the formalities of Independence, applying the common law without hesitation - or indeed consideration, as required by Sch.2 - and almost entirely ignoring the NGDPs and customary law. This situation has corrected itself somewhat with the partial localisation of the Supreme Court and several new appointments in the wake of the 'Rooney Affair' resignations.
The following is a (by no means comprehensive) sample of cases in which the courts demonstrated remarkable narrowness and a predisposition towards finding the common law "applicable and appropriate" without any significant, or most-times even cursory, examination of custom.

In State v. Kewa Kai [1976] PNGLR 481, the Court considered the unwritten requirement of corroboration in rape cases under s.357 of the Code, and found that before Independence it amounted to a rule of practice falling short of a rule of law. Prentice DCJ (as he then was) held that after Independence if it amounted to a rule of law then it was consistent with the written law and applicable and appropriate to the circumstances of the country and "not inconsistent with established custom"; if it was still a rule of practice then it was consistent with the principles of natural justice. Without any real discussion of the customary situation, His Honour concluded that the corroboration rule's continued application would I think be in keeping with the development of the underlying law that is imposed as a duty upon the courts (at 482).


In Buka v. Lenny [1978] PNGLR 510, the question before the Court was whether a customary brother was a "nearest relative" for the purposes of bringing a complaint regarding adultery under Native Administration Regulation (New Guinea) 84(3) in the absence of the aggrieved spouse. Wilson J found that while the legislation applies only to indigenes, and Melanesian society is organised along kinship lines and characterised by extended families, that nevertheless the word "relative" in the regulation must be interpreted as "a blood relation" or "descended from a common ancestor".

In Constitutional Reference No.1 of 1977: Poisi Tatut v. Chris Cassimus [1978] PNGLR 295, the Supreme Court considered the question of whether an action for enticement was available in PNG. The Court found that the English common law on enticement was vacated by legislation in 1970 and could thus not have been adopted under Sch.2.2. Prentice CJ then interpreted Sch.2.4, which places a duty on the courts to:

ensure that, with due regard to the need for consistency, the underlying law develops as a coherent system in a manner appropriate to the circumstances of the country from time to time

as requiring that any custom adopted as part of the underlying law must obtain throughout the country:
before undertaking the duty of formulating an appropriate rule as part of the underlying law, in regard to a matter close-knit into the fabric of traditional village life, the Court would I think, need to have evidenced before it an appropriate almost country-wide custom (ibid.:298).

As baffled counsel could not adduce evidence of a national custom the Court refused to act at all. The Court did not advert to the Native Customs (Recognition) Act s.4, which obviously recognises that custom may vary according to "the place in relation to which that question arises", and establishes procedures for resolving conflicts of customary regimes (s.10). Given the 700 or more different tribal groups in PNG, each with its own customs and usages, this ruling makes it extraordinarily difficult for even the most enthusiastic and conscientious counsel to assert that a rule of underlying law should be based on custom. The ruling belies Raine DCJ's statement that:

In some quarters it is fashionable to suggest that the Supreme Court is shirking this duty [under Sch.2.3, to develop the underlying law]. It is not so. We are not given the tools with which to work (ibid.:299).

It is most ironic that the Court has used a queer interpretation of the very provision of the Constitution which imposes a duty on it to develop the underlying law in order to thwart this duty. Indeed, Saldanha J's judgment poses the classic Catch 22 situation: since there is no evidence of a national custom, custom may not be adopted (under Sch.2.1) as the underlying law, but "as long as there is a doubt that there may be a remedy at customary law...it would not be proper...to formulate a rule of [underlying] law on this subject" (under Sch.2.3). Despite the duty placed upon the Court by the Constitution, Saldanha J preferred to leave the matter to Parliament.

In State v. Misimb Kais [1978] PNGLR 241, the accused was charged with having carnal knowledge of a girl alleged to be his adopted daughter under custom (in accordance with the Adoption of Children (Customary Adoption) Act (1969) s.5(1)). Andrew J found after reviewing similar provisions in legislation from New Zealand, Queensland, Victoria, New South Wales, and Tasmania (but not looking to customary law) that "s.226...cannot be read so as to include the offence of incest between adoptive parent and child" (at 252).

The Supreme Court unanimously approved of this judgment in Sangumu Wauta v. State [1978] PNGLR 326, a case with parallel facts. Prentice CJ, having accepted Andrew J's interpretation of s.226, also pointed to the constitutional injunction (s.37(2)) against convicting a person for an offence not defined by a written law; the fact that under both the Native Customs (Recognition) Act (s.6) and the Constitution (Sch.2.2) custom is subordinate to the written law; and the limited purposes for which custom is available in criminal cases under s.7 of the Native Customs (Recognition) Act. Prentice CJ makes his lack of enthusiasm for "the incrustation of unwritten (variable) custom upon the pillars of the Criminal Code" plain:
Is the Criminal Code's provisions as to incest to take effect in the different societies and villages differentially according to what may be proved as the particular adoption process and its particular local effect in each particular case? Such a possibility would render the operation of the Statutory Criminal Law and its administration quite uncertain. Findings of guilt in each case, would depend not upon the terms of the Statute, but upon the evidence as to the particular "law" in each case. Availability of witnesses as to such "law", and the variable enthusiasm of prosecuting counsel and of police, in procuring their attendance, would surely prove an unsatisfactory basis for finding the law. Such a process would possibly militate strongly against the development of "a coherent system" of underlying law (Sch.2.4 of the Constitution) (ibid.:332-33).

In State v. Aabafu Feama & Ors [1978] PNGLR 301 "three very primitive village men from a remote part of the Western Province" were charged with improper or indecent interference with a corpse, in violation of s.241(b) of the Criminal Code, for removing some parts of a corpse and subsequently eating them. Evidence was placed before the Court that in the accused's impoverished village area, it was not uncommon to eat dead bodies for meat, but in recent years with increased government contact and influence the practice had gradually disappeared, or at least became more clandestine. Wilson J posed a test of "general community standards":

The average contemporary Papua New Guinean will be one with average attitudes to matters of life and death and to matters relating to food which is good to eat. He will not be a man given to histrionics or extreme abhorrent reactions, but, on the other hand, he will not be lacking in some emotional feeling and he will have the ability to think. He will be affected by the traditions of his ancestors and he will be aware that he is living in a changing world. He will be a villager in heart and in practice — a moderate Melanesian man (ibid.:309-10).

The advent of the 'moderate Melanesian' marks a sharp move away — but one that has not as yet been followed by Wilson J's brother judges — from the long line of decisions which have tended to measure reasonableness, decency, propriety and other like concepts against the standards of the accused's local community.10 As with the decision in the Poisi Tatut (enticement) case, the general community standard would make it very difficult to present a custom-based defence. In the present case evidence of custom was in fact presented, but Wilson J refused to adopt or apply it because:

such a custom, in so far as it condoned acts of cannibalism, could not be adopted and applied in this Court, because unquestionably it is repugnant to the general principles of humanity and ... is unlawful.
The accused were convicted and sentenced to fifteen months with hard labour (twelve months of which were served in pre-trial detention) out of a maximum liability of two years.

The recent case of *State v. Uname Auname & Ors* [1980] SC, No.190, highlights many of the problems already discussed. The case was widely reported as a:

landmark in justice in Papua New Guinea, one which encompasses the important questions of the suitability of Western-style justice in a non-Western country and the related question of "justice" versus "legality" (Byrne 1981:6).

In this case five accused, including the son of the deceased, were charged with the wilful murder of an old woman, who was alleged to be known in the community as a sorcerer responsible for the deaths of at least twenty people, at Porgera, Enga Province. The accused initially recorded pleas of guilty, but after reviewing the records of interview the trial judge, Mr Bernard Narokobi (see unreported decision of National Court, 4/6/80) declined to accept this plea in relation to the son, who was later acquitted in a separate proceeding. The four accused whose guilty pleas were accepted were each sentenced to three months' imprisonment with hard labour, and each was ordered to pay compensation of five mature pigs to the deceased's other son immediately upon release. The Public Prosecutor appealed against the inadequacy of this sentence, which set in motion the Supreme Court hearing. Narokobi AJ, who had been a legal adviser to the CPC and the first Chairman of the Law Reform Commission, arrived at his decision on sentence after a lengthy and detailed discussion of the public policy considerations involved in the case. He determined first, that "it is not uncommon, not only in the situation of Enga but throughout PNG, to kill sorcerers or sorceresses" and that "fear of sorcery is a reality" even amongst educated, church-going people (see ibid.:2). Narokobi J expressly resolved to sit "as a Melanesian Judge among Melanesians. I run a grave risk that I might put on Anglo-Australian cognitive lenses to see Melanesian situations and events" (ibid.:3). He then enumerated the specific matters taken into consideration, which included, *inter alia*, that the motive for the killing had not been material gain or elevated social standing, but rather was in the nature of self-defence against a feared sorceress; that the offence was committed under colour of customary perceptions, beliefs and obligations to the clan; that it was not done in open defiance of the legitimate authority of the state as evidenced by the fact that the accused immediately gave themselves up to their *tultul*, its local representative; that subsequent events showed signs of repentance, restitution and "restoration of human relations strained", as evidenced by the defendants' offers of compensation to the deceased's kin; and that the danger to the community posed by the accused was "largely set off by their cultural environment".

Narokobi J also considered the relevance of the NGDPs, and the constitutional duty to develop the underlying law. As to the former, he wrote in reference to the NGDPs of "Integral Human Development":

The struggle to bring about a nation in which all men will give and receive through co-operation and solid-
arity must be faced by the courts of law. We must ask the fundamental question. Do judges contribute towards justice by placing people behind bars for long periods? (ibid.:9).

The underlying law provisions of Sch.2 were raised in relation to the order for compensation. Relying on Schs.2.1 (recognition of custom) and 2.4 (judicial developments of the law) together with s.109(4) or alternatively on Sch.2.3 (development of a new rule of underlying law) coupled with s.109(4) and s.7(e) of the Native Customs (Recognition) Act (which permits a court to take custom into account in sentencing), Narokobi J wrote that:

Bearing in mind also the duty imposed on me by the Constitution to develop the underlying law, I would take the view that the circumstances of this country demand that compensation as a form of liability be recognized and applied. I do so in this case (ibid.:14).

As an indication of the importance of the issues involved, the Chief Justice, Sir Buri Kidu, listed five judges (as opposed to the normal three) to hear the appeal of the Supreme Court. The five judges unanimously upheld the appeal, quashing the order for compensation and imposing a six-year sentence on the four accused (less seven months time already served in custody). About half of the 39-page decision is devoted to discussion of a procedural point regarding temporal limitations on the institution of an appeal by the Public Prosecutor (under the Supreme Court Act (1975) and the Supreme Court Rules (1977)), including virtually all of the opinions of Greville-Smith and Kearney JJ, which is itself interesting, but the Supreme Court does as well consider questions of judicial development of the underlying law.

On the question of sentence all judges expressly agreed with the Chief Justice that the penalty imposed by the trial court was "grossly inadequate for the crime of wilful murder" (Uneame Uneame, SC, No.190, at 1). Kidu CJ wrote that while it was quite proper to consider cultural factors in sentencing, they:

should not override the clear dictates of the Parliament that those who commit the crime of wilful murder attract to themselves the possible penalty of imprisonment with hard labour for life. If Parliament represents the people of PNG and the laws it makes reflect the attitude of the people, then Courts must take heed (ibid.:3).

This last line was not meant to be rhetorical, apparently, although it does raise the point, left unmentioned by the court, that the legislation in question is the Criminal Code which, as discussed above, was adopted from Queensland with little modification.

The opinion which considers most closely the relevance of customary law and the propriety of judicial boldness is that of Mr Justice Kapi. While recognising the wide discretion and powers of the sentencing judge to
impose an appropriate penalty in a particular case, Kapi J found that of necessity this discretion may be exercised only within the bounds laid down by the relevant legislation. In this case, the court's power to punish was controlled by s.19 of the Criminal Code which specifies the types of punishments which may be applied and by s.309, which specifies the punishment for wilful murder. Kapi J referred to s.37(2) of the Constitution which ties criminal punishment to written law, and found that the underlying law as determined under Sch.2 did not amount to "a written law" for the purposes of s.37(2).

Kapi J also took exception to the trial court's use of s.7(e) of the Native Customs (Recognition) Act, finding that this provision entitles a court to look at custom and take it into account in sentencing (that is, in mitigation), but does not enlarge the power of the court to formulate qualitatively different punishments outside the controlling statutes. In conclusion, he found that:

There is no room for developing the underlying law in this case. The development of the underlying law under Sch.2.3 arises only when there appears to be no rule of law that is applicable. In this case the Criminal Code Act is applicable (ibid.:35).

This case illustrates several of the problems discussed above: the pre-emptive nature of the written law; the failure to adapt the adopted colonial legislation; the weak provisions in the Constitution regarding the role of customary law and the underlying law; and the triumph of strict legalism over creative judicial development of the law. In this case, might not the Supreme Court have said, in relation to the compensation order, something along these lines: (1) that the Criminal Code s.19 is silent on the matter of compensation orders; (2) or that in any event the award of compensation does not amount to a "penalty" within the meaning of s.37(2) of the Constitution or a "punishment" within ss.18-19 of the Code, given that the dominant motive is restitutional rather than punitive; (3) and that therefore the trial court did have the authority, if not the duty, to formulate a new rule of underlying law pursuant to Sch.2.3; (4) or to try another tack, that the trial court was, in addition to punishing the accused, enforcing a constitutional Basic Right on behalf of the victim — say s.35 regarding the right to life or s.53 on unjust deprivation of property — and thus could "make all such orders and declarations as are necessary or appropriate for the purposes" of enforcing the right, pursuant to s.57(3). Certainly the law has seen far greater fictions than these employed where policy considerations have warranted it, under circumstances far less closely associated with constitutional directives.

* * * * * * *

CONCLUSION

It was suggested at one time that a possible title for this paper be "Turning the Tide? The Impact of the PNG Constitution on Traditional Law". In fact, for the reasons discussed in this paper, there is not much
question that the Constitution has not turned the tide in regard to the expansion of the role of customary law in the legal system of PNG.

This is not to say that there have not been any reforms in PNG which have enhanced the role of custom, or created new legal institutions based on traditional laws and institutions, or simply softened the otherwise harsh effects of the imposition of alien laws and institutions. For example, the aforementioned Native Customs (Recognition) Act (1963) sets out the areas of civil and criminal law in which custom may be pleaded, recognised and enforced; the Marriage Act (1963) recognises customary marriages; the Local Courts Act (1963) permits that court to make orders regarding customary law; the Adoption of Children (Customary Adoptions) Act (1969) recognises customary adoption; the Wills, Probate and Administration Act (1966) (in force 1970) recognises customary succession, and stipulates that "traditional property" (e.g., shell money) must pass according to custom and succession so it may not be altered by will; the Workers Compensation Act (1979) extends benefits to persons who are regarded as customary dependants; the Business Groups Incorporation Act (1974) and the Land Groups Incorporation Act (1974) both allow for customary groups to form the basis of modern business associations; the Land Disputes Settlement Act (1975) provides for mediated solutions to land disputes with customary law as the basis; the Legal Training Institute (Amendment) Act (1976) requires law graduates to engage in the study of customary law before professionally qualifying; the Local Government Act (1963) empowers those bodies to pass ordinances setting out local custom; the Sorcery Act (1971) creates certain offences and recognises certain defences in criminal matters involving sorcery or attacks on alleged sorcerers; the Inter-Group Fighting Act (1977) introduces the traditional concept of group responsibility to the criminal law, as well as encouraging settlement by mediation resulting in compensation; and finally, perhaps most important of all, the Village Courts Act (1974), which established a court system bound only by natural justice and the Act, with the aim of ensuring:

peace and harmony in the area for which it is established, by mediating in and endeavouring to obtain just and amicable settlement of disputes.

With their emphasis on mediation of disputes (arbitration is available as a last resort), procedural and evidentiary informality, the banning of lawyers, election of magistrates by the local community, reliance on local customs and usages, blurring of the civil-criminal distinction, and recognition of group responsibility, the village courts represent a major step away from the reliance on the substance and procedures of the common law.

However, as noted earlier, most of these legislative initiatives were passed, or have their foundations in inquiries conducted, by the colonial administration or the local House of Assembly in the build-up towards Independence, with relatively little happening since Independence.

In Uname Auname, above, Andrew J found that the trial judge (Narokobi J) had erred by seeming to adopt the recommendations of the PNG Law Reform Commission "as being the relevant applicable law". While Andrew J's position is no doubt correct, the frustration of Narokobi J in seeing his
report on the role of custom in the legal system and the attached recommendations and draft bills on the underlying law and other matters, (PNG LRC 1977) languishing without even legislative consideration, is certainly understandable.

In my view, adoption of the Commission's Underlying Law Bill as the successor to Sch.2 of the Constitution would remedy many of the inadequacies found in the present scheme, and is of crucial importance if the CPC Report and the statements of political leaders about the need to return to "traditional ways" are to be given effect.

Clause 3(1) specifies that the underlying law shall apply if the written law does not apply, or applies in part only, to any matter. However, cl.3(2) says:

Where it is established before a Court, that a rule of customary law, which complies with the requirements of [Clause] 4(1) applies to a matter to which a written law is also applicable, if in the particular circumstances of the matter the court considers it appropriate it may apply that rule of underlying law in addition to or as an alternative to the applicable written law.

Clause 4 provides:

(1) Customary law is adopted and shall be applied, either directly or by analogy as the underlying law unless -
   (α) it is substantially inconsistent with any written law relevant to the subject matter; or
   (β) its application would be contrary to the National Goals and Directive Principles, Basic Rights and Basic Social Obligations under the Constitution.
(2) Nothing in this section shall permit the application of a law other than customary law to customary land.
(3) Where the court considers that part of a rule of customary law to be applied as the underlying law does not comply with the provisions of paragraphs (α) or (β) of Subsection (1) the Court may, in so far as is practicable to do so, modify that part of the rule in such a way as to make it comply with the provisions of this section.

Clause 5 further provides:

(1) Where the underlying law applies, in the absence of any developed principle or rule of the underlying law, and where under the provisions of Section 4, customary law does not apply to the whole or part of any matter before it, the court may consider the common law as a source of the underlying law, and if appropriate, adopt a rule of common law as a rule of the underlying law, but only if -
(a) it is consistent with the written law; and
(b) it is applicable and appropriate to the circumstances of the country; and
(c) its enforcement would be in accordance with National Goals and Directive Principles and Basic Rights and Basic Social Obligations under the Constitution.

(2) Where a rule of the common law is not adopted as a rule of the underlying law under Subsection (1), the court shall formulate a rule of the underlying law, appropriate to the circumstances of the country, having regard to-
(a) the National Goals and Directive Principles, Basic Rights and Basic Social Obligations under the Constitution; and
(b) analogies to be drawn from relevant written law and underlying law; and
(c) foreign law.

Thus the Bill would completely reverse the relative positions of customary law and common law as sources of the underlying law, as evidenced by judicial practice, and go much further than Sch.2 of the Constitution. Customary law would be the underlying law, while the common law would only be a supplementary source. The qualifications on the adoption of custom under the Native Customs (Recognition) Act s.6, and under Sch.2.1(2) of the Constitution are replaced by reference to the written law and the general principles contained in the preamble to the Constitution. While expressly discarding the repugnancy clause as a colonial relic, and basing legal development generally on custom, the Commission recognised the need to provide safeguards against the adoption of traditional values and practices deemed incompatible with desirable social goals, such as equal rights for women (ibid.:20). The NGDPs, Basic Rights, and Basic Social Obligations provisions in the preamble, are thus also given a specific role in legal development. The written law, as well, would be less pre-emptive, given the provision in cl.3(2) which permits the co-existence of a rule of underlying law on a matter dealt with wholly or partially in legislation. Further, cl.17(1) provides for a new rule of statutory interpretation:

When interpreting any provision of, or any word, expression or proposition in, any written law, the court shall give effect to any relevant customary law, practice or perception recognized by the people to be affected as a result of the interpretation.

Clause 8(1) of the Bill places an affirmative duty on the courts to ensure that:

with due regard to the need for consistency, the underlying law develops as a coherent system in a manner that is appropriate to the circumstances of the country.

This restates Sch.2.4 but cl.8(2) would also require that where a court decides that customary law shall not apply or where a rule of common law is adopted or where a rule of underlying law is formulated it must expressly provide reasons for so doing. This provision is aimed at the present heavy
reliance of the courts on English and Australian precedents and the consequent failure to consider custom:

At present the courts seldom discuss if the rule of the common law they apply is appropriate. They blandly state that it is. In some of these cases if the implications of the rule were analyzed in terms of the National Goals and Directive Principles, it may well be found unsuitable (ibid.:22).

The Underlying Law Bill must not be thought of as a panacea, however, for the scheme it sets up to develop the underlying law relies heavily on the ascertainment of customary law in the courts on a case-by-case basis, which will inevitably be slow and difficult. Further, the integrationist policy of utilising customary law in the Western-style courts involves the hazardous, if not impermissible, practice of divorcing customary law from its processes, as well as other ascertainment problems. For both of these reasons it is also important to pursue a strategy of extending official recognition to traditional institutions, or creation of "neo-traditional" institutions such as the village courts, and thereby return legal decision-making to the grassroots level as envisaged by the CPC.

NOTES

1Defined by Sch.1.7 of the Constitution as: "The question may not be heard or determined by any court or tribunal" except as otherwise specified.

2See, e.g., Public Curator of Papua New Guinea v. Public Trustee of New Zealand [1976] PNGLR 427 in which Prentice DCJ (as he then was) afforded a liberal interpretation of s.43 of the Wills Probate and Administration Act (1966) having regard to the NGDPs, so as to accept the validity of a will with several formal defects.

3The Government Paper (PNG Govt. Paper 1974) is silent on this point.

4The proposal regarding the establishment of the Permanent Committee is found in PNG CP 1974:5/1/20 at para.121. The Government Paper is again silent on this point (see 1974:18-19) and the only Permanent Committee expressly endorsed is the Public Accounts Committee (ibid.:22). See s.118 which establishes the Public Accounts Committee and "such other committees as are determined by the Parliament from time to time".

5In Papua, the Criminal Code Ordinance (1902) s.1. In New Guinea, initially, by the Laws Repeal and Adopting Ordinance s.16 and Sch.2. The Code was subsequently repealed, and then re-adopted with some minor amendments, by the Laws Repeal and Adopting Ordinance (1924). For further discussion of the criminal law in colonial and independent PNG, see Weisbrot forthcoming.
See Title 11, s.8 of the Trust Territory (Micronesian) Code, which allows for punishment of an "act made a crime solely by generally respected native custom", if the penalty does not exceed a fine of $100, or six months imprisonment, or both.

The express cut-off date for reception of the common law eliminates any earlier controversy over the effect English statutory modification had on PNG's received law. See Booth v. Booth (1935) 53 CLR 1 (High Court of Australia) and In Re Johns [1971-72] PNGLR 110, which both supported the proposition that statutory modification in England/Australia did concurrently alter the law in PNG, and Murray v. Brown River Timber Co. [1964] PNGLR 167, which strongly opposed that view. The express selection of the English common law, rather than the Australian variant, headed off another incipient controversy.

These factors also go a long way towards explaining the 'constitutional crisis' caused by the 'Rooney Affair' in 1979 (Bayne 1980:121; Weisbrot 1979:240).

See also Labian-Saiwen v. Yerei-Yautan [1965-66] PNGLR 152, 158-59. The Law Reform Commission's draft Adultery and Enticement Bill (1977) cl.15, specifically defines "relative" as "a person who is regarded by custom as a relative".

See, e.g., R. v. Noboi-Bosai [1971-72] PNGLR 271, with facts very similar to Aubafu Feama. In this case Prentice J (as he then was) acquitted the accused by localising the concepts of decency and propriety, and applying the standards "of the reasonable, primitive Gabusi villager ... in early 1971" (ibid.:283-84). For other examples, see Weisbrot forthcoming.

Which provides that "Each law made by the Parliament shall receive such fair, large and liberal construction and interpretation as will best ensure the attainment of the object of the law according to its true intent, meaning and spirit...".

See also the similar Solomon Islands case of Isak Tosika v. John Siho (Civil Appeal Case No.5/79) where the High Court overturned a lower court's compensation order, made in accordance with customary law, imposed on top of a life sentence for wilful murder.

Remedying the effect of Mary Gugi v. Stol Commuters [1973] PNGLR 341, in which benefits were restricted to the Western-style nuclear family.

Although this requirement seems to be perpetually waived.
21. JUDICIAL TECHNIQUE AND THE INTERPRETATION OF PACIFIC ISLAND CONSTITUTIONS

P.J. Bayne

The Constitutions of the independent Pacific Nations are, according to their terms, "supreme law", and thus any other laws inconsistent with them are to that extent void. To reinforce this supremacy, the Constitutions vest in the superior courts the function of constitutional review. Thus, these courts may review the constitutionality of legislative and other governmental (or private) action to determine whether it conforms to the supreme law of the constitution. There has been no great debate over the necessity for constitutional review. The Constitutional Planning Committee (CPC) of Papua New Guinea (PNG) did examine the matter, and proceeding from the premise that the notion that the people should be governed by the law underlay "the very idea of having a constitution at all" (PNG CPC 1974:8/1), it found that an independent judiciary should exercise the function of constitutional review.

The decision of a court in the exercise of its function of judicial review necessarily makes the court a political institution. Its decision shapes what the government can and cannot do, and thus bears on how resources are distributed in the society. The insight that courts are political institutions, however, is "not the end of the discussion, but its beginning" (Chase and Ducat 1979:56). While it certainly does not follow that the courts should behave in the same manner as other political institutions, it does raise the question of the legitimacy of the courts' authority, or, to put it another way, how the courts can distinguish their role from the roles of other, particularly the representative, political institutions.

The argument of this paper is that the manner in which a constitutional court justifies its review is critical to the legitimacy of that review in that particular case and, over time, to its legitimacy to exercise the function of review at all. Chase and Ducat put the point well in their argument that:

any difference which inheres in the judicial institution exists because of the justification which judges are compelled to offer for their decisions (1979:57).

The PNG CPC did to some extent perceive that the kinds of justification offered by the courts had a bearing on the efficacy with which their task of judicial review could be performed. It was prepared to accept the political role of the courts if they would take account of the
National Goals to be spelt out in the Constitution (PNG CPC 1974:8-15). Further, it recommended that the legal tie with the Australian legal system should be cut (ibid.:8-2) - achieved by devices that made the Constitution legally autochthonous - and that the courts be permitted to take account of the CPC Report and the debates in both the House of Assembly and the Constituent Assembly (see now s.24). The Constituent Assembly of PNG, which enacted the Constitution, added provisions designed to ensure that the common law of England should be applied only if conformable to the Constitution (Sch.2.2).

While such provisions are useful signposts, they do little more than restate the fundamental problem. The earlier, and some of the recent of the other, Pacific Constitutions provide much less guidance to the courts. The supremacy clauses in each of these Constitutions should be regarded as placing the common law in a position inferior to that of the Constitution; and the Western Samoan (WS) Constitution has an application of law provision (Art.111(1)), which is suggestive of this position. The Constitutions of the Solomon Islands (SI) (s.76 and Sch.3) and of Vanuatu (ss.45 and 93) provide more ample authority for the superior courts to develop a mode of constitutional interpretation free from the influence of common law principles. In all of these nations however, it is largely for the superior courts to work out modes of justification.

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The fact that constitutional review has political consequences has led many United States (US) commentators to dwell on the counter-majoritarian impact of the courts. The argument is that decisions which invalidate legislative action run counter to the wishes of a majority of the representatives of the people, and some commentators have been led to challenge the propriety of constitutional review. The Pacific courts do need to justify their power to review, but should they take into account the counter-majoritarian argument?

To answer the argument by claiming that the people have given the power of review to the judiciary is not sufficient, for, even if it may be said that this occurred when the constitution came into operation, the legislative action under challenge is a later expression of the majority of the representatives of the people. Another way to meet the argument is to challenge the proposition that a majority of the legislature is an adequate expression of the will of the people. Clearly, these members are not the people, but their representatives; furthermore, they represent only imperfectly the views of their constituents (even of those who elected them). Nevertheless, the courts obviously have even less justification to claim to represent the actual views of the people.

The best response to the counter-majoritarian argument comes back ultimately to a recognition that the Constitution did not intend that the validity of governmental action should be determined by majority rule. To adapt the words of the CPC, the very idea behind the PNG Constitution is to ensure that there are limits to what the majority may do (and, on the other hand, to give validity to what in other respects the majority may wish to do). While there are some difficulties with the argument that the Constitution is necessarily binding, this seems to be a workable answer to
the counter-majoritarian argument. But the argument is attractive, and may be used against a court and undermine its legitimacy. How might a court take it into account?

Clearly, a court would undermine its legitimacy were it to make a political decision, in the sense of one which was influenced by immediate political outcome, or which sought to influence the immediate political situation. Such an effect could follow a decision which explicitly accommodated current government policy, but there is also a risk that a decision which reflected an hostility to a current government policy, or to the current government, could also undermine the authority of the court. There has been no sign that the Pacific Island courts have made political decisions in favour of a government, but some judges of the PNG Supreme Court who delivered judgments in Re Rooney (No.2) [1979] PNGLR 448 may justly be criticised for somewhat excessive criticism of the Government, and the extra-curial statements and actions of a few judges could be seen to have exceeded the judicial function (see Hegarty 1979; Weisbrot 1979 and 1980).

It is not suggested that a court should avoid adjudication in cases where it is clear that the government attaches considerable significance to the outcome. The recent Fijian cases, Director of Public Prosecutions v. Attorney-General (Supreme Ct., Civil Action No.178, 10 April 1981) and Attorney-General v. Director of Public Prosecutions (Ct. Appeal, Civil Appeal No.18, 5 August 1981), would appear to be such an instance, yet the courts were able to find against the Government without the use of language which could lead to their being seen as involved in the controversy.

Nevertheless, it is inevitable that whatever judges say, their decisions in matters of high political controversy may lead to a public perception, or more likely a perception by those who lose ground by a particular decision, that the judges are making political decisions. Can the judges take account of such reactions at the same time as they pursue a principled interpretation of the constitution? Two possibilities are suggested: that the judges develop principles for the exercise of restraint in the use of the power of constitutional review, and that the review be more or less strict depending on the nature of the case. The first possibility is considered here, the second at the end of this paper.

In Re Rooney (No.2)[1979] PNGLR 448, 491, Kearney J. observed that "we may have had our Marbury v. Madison", and this analogy may be pursued. The US Constitution does not state clearly that the Supreme Court may declare legislation or other kinds of governmental activity invalid for breach of the Constitution, and the assertion of this power by the Court in Marbury v. Madison (1803) 5 United States Reports 137, caused great controversy; (the more so because the case involved a matter of political contest between the rival parties in the Congress, with one of which Marshall CJ had been identified). However, the Supreme Court averted a direct clash with the Government because it did not issue an order against the Government. In other cases until the present day, the Court has by a variety of means attempted to avoid ruling on constitutional issues. The reason for this policy of restraint is "the need to minimise friction between the branches of government". As one American commentator has explained:

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But, as he further argues, "restraint will have to come from sources outside of the judiciary as well", for there is a point at which "criticism and political challenges to courts" are not consistent with "viable constitutional government" (ibid.:35).

These remarks are pertinent to the recent situation in PNG where the politicians have shown a marked readiness to further political objectives by recourse to the courts. A private prosecution in September 1979 by a then Opposition leader, Mr Okuk, of the then Minister of Justice, Mrs Rooney, led to her conviction and sentence to eight months' imprisonment for contempt of court, precipitated a severe constitutional and political crisis. Not long afterwards the then Prime Minister, Mr Somare, attempted to obstruct a motion of no confidence in him moved by Mr Okuk by directing the Governor-General to refer to the Supreme Court questions concerning the legality of the motion. This tactic depended on an argument that once the matter was referred it became sub judice; and outside Parliament, Mrs Rooney argued that her own case was analogous. The Speaker indeed accepted this argument, and Parliament proceeded to vote on the motion only after a motion dissenting from his ruling was passed. Later in 1980, Mr Somare, now the Leader of the Opposition, sought declarations that a motion passed by Parliament that part of the Defence Force be committed to peace-keeping operations in Vanuatu, and the Defence Force (Presence Abroad) Act (1980), were invalid as in conflict with s.205 of the Constitution (see Bayne 1981:58-64).

It is suggested therefore that it is appropriate for Pacific Island courts to consider the various techniques for judicial restraint, for, as the US experience suggests, a timely use of such techniques may well preserve the role of judicial review. Much must be left to the judges, for too close a restriction of the power could compromise the function of constitutional review. The courts might address themselves to the questions of when constitutional issues can be raised (doctrines of standing, ripeness and mootness), how these issues should be raised (procedural requirements to require a clear showing of standing and of the precise issues raised; doctrines concerning referral of constitutional issues from lower courts or other bodies), and whether there are some issues that are not appropriate for judicial resolution (doctrine of political questions). Courts also possess discretion in the award of remedies. It is beyond the scope of this paper to analyse these questions closely (see Bayne 1981 for an examination in the PNG context), but it is suggested that such seemingly technical questions are at the heart of the efficacy of constitutional review.

The manner in which the PNG Supreme Court resolved Mr Somare's challenge to the Vanuatu peace-keeping operation shows too that the answers are not always clear. A majority of three judges (Kidu, CJ, Kapi and Miles JJ; Kearney DCJ and Greville-Smith J dissenting) held, on somewhat different grounds, that Mr Somare had standing to seek declaratory relief
(Supreme Court Reference No. 4 of 1980, SC 204, 3 August 1981). On the substantive question, a different majority, (Miles J joining Kearney DCJ and Greville-Smith J; Kidu CJ and Kapi J dissenting), held that Mr Somare had not proved that there was no "international obligation" being discharged by the Defence Force while in Vanuatu; (Supreme Court Reference No. 4 of 1980 (No.2), SC 220 1 March 1982).

But, while the answers may not be clear, the questions cannot be avoided, and it is, with respect, suggested that St. John CJ, of the WS Supreme Court did not address himself sufficiently to these questions in Saipa'ia Olomalu and others v. Attorney-General, (unreported, 5 April 1982). St. John CJ found that s.19 of the WS Electoral Act (1963) was void as contrary to Art.15(1) of the Constitution ("All persons are equal before the law and entitled to equal protection under the law"). Section 19 was invalid because it restricted the right to vote to matai title holders. However, St. John CJ added that:

This decision does not invalidate any previous election conducted pursuant to the Act; it speaks only to the future (ibid.:13).

The finding that previous elections were not affected reflects on awareness that constitutional rulings should not be such as to disrupt the political system to the point where an impasse results, and in similar cases in NZ (Simpson v. Attorney-General [1955] NZLR 271), and in Australia, (Victoria v. Commonwealth (1975) 134 CLR 81, Attorney-General for N.S.W. (ex rel McKellar) v. Commonwealth (1977) 12 ALR 129), the courts have found ways of preserving elections that took place according to laws that were invalid. But St. John CJ's finding that future by-elections may not be conducted according to the Act may create severe difficulties, for there were pending at the time of his decision a large number of election petitions challenging the return of particular Members of Parliament. If some of these petitions are successful, the new government formed after the general election may lose its majority, (see Pacific Islands Monthly, June 1982, 18-20), and although under the Constitution such of the new Parliament might meet and amend the Electoral Act, the political difficulties in bringing this about are immense. It is not, with respect, a sufficient answer to say, as did St. John CJ, that:

[t]he consequences flowing from giving effect to the provision [of the Constitution] are not the concern of the Court in making its decision (Saipa'ia Olomalu, at p.4).

It is legitimate for judges to take into account the stability of the constitutional system as a whole, and to so tailor the remedies they award so as to avoid impasse. This may be seen in the NZ and Australian cases cited above, (see also to Clayton v. Heffron (1960) 105 CLR 214, 247, (Australia), and F.S. Bus Co. Ltd. v. Ceylon Transport Board (1958) 61 NLR 491 (Ceylon)). In another case, the High Court of Australia accommodated the problem that by-elections, or extraordinary elections, might not be able to be conducted on new and constitutionally required boundaries, (Attorney-General for Australia (ex rel. McKinlay) v. Commonwealth (1975) 135 CLR 1).
The notion that the intention of the framers should be the primary criterion to resolve questions of interpretation commands wide support, and is on the face of it attractive to judges for the reason that it appears to offer them a value-free method of interpretation, (other than the value of following the framers' intent). While superficially attractive, there are considerable difficulties in the application of this notion.

The framers, of the Pacific Constitutions, have been groups of politicians from the island colonies who worked to greater or lesser extent with colonial officials. In PNG the whole of the pre-independence House of Assembly constitutes the founding fathers, and the authority of the Constitution derives from the votes they cast in the Constituent Assembly over twenty-six sitting days in May to August 1975. There are well-known difficulties in determining the intent of a collective body. Apart from the question whether the votes of dissenters should be entirely disregarded, it is obvious that those who voted for the inclusion of a particular clause may have done so for reasons quite different to others of the majority.

It is not suggested that this logical difficulty should render the preparatory materials of no value. In many cases these materials will give a clear indication of intention, and if there was no dissent expressed this indication is a persuasive argument for that intention to be applied to the constitutional provision. Nevertheless, even in such cases, there is an element of fiction in the notion that the intention of the framers has been adopted. On the other hand, it should be axiomatic that a clear statement in the preparatory materials cannot over-ride a clear constitutional provision.

The PNG Supreme Court has quite often referred to the preparatory materials, but this experience shows that even if they be regarded as authoritative the further difficulty arises of spelling out from them a clear statement of intention. In Reference No.1 of 1977 [1977] PNGLR 362 Frost CJ appears to have confused the intention of the CPC (which on the point in question was ultimately accepted by the Constituent Assembly) with that of a government paper (which was ultimately rejected), and thus brought to bear on the interpretation of a Basic Rights provision a narrow construction at odds with the CPC's intention (see Bayne 1982). On some critical questions, the CPC Report is quite obscure or contradictory and offers little guidance to the puzzled interpreter. These obscurities have allowed the justices to ignore the Report (e.g., in relation to s.41; see Bayne forthcoming); or to draw conflicting conclusions as to what it means (e.g., in relation to whether the Public Solicitor was a "governmental body" subject to the jurisdiction of the Ombudsman Commission; see Bayne forthcoming).

The difficulties of discerning a clear intent from the preparatory materials have led some judges to employ what are more clearly fictitious devices to ascertain that intent. One such device is to discern a similarity between the constitutional provision in issue, or between the constitution as a whole, and some other provision(s) in another constitution(s), and then to reason that the former is meant to follow the latter. Several Fijian judges appear to have employed this kind of reasoning in Director of Public Prosecutions v. Attorney-General, and Attorney-General v. Director of Public Prosecutions.
A notice made by the Governor-General under s.76(1) of the Fijian Constitution purported to assign to the Attorney-General "responsibility for the administration" of the Office of the Director of Public Prosecutions (DPP). The power in s.76(1) was by its terms subject to other provisions of the Constitution and the notice of assignment repeated this phrase. The drafters of the assignment were no doubt conscious that in several respects s.85 provided that the DPP should be independent, and that s.85(7) in particular provided that the DPP "shall not be subject to the direction or control of any other person or authority". Five of the six judges who considered the question of the validity of the assignment found it to be invalid. There do not appear to be any authoritative preparatory materials to elucidate the meaning of the Fijian Constitution, but most of the majority judges argued that it fitted the 'Westminster Model' described by de Smith (1964), that a feature of this model so described was that the DPP should be protected from ministerial interference, and that therefore the framers of Fiji's Constitution must be taken to have intended to achieve this result (see e.g., Director of Public Prosecutions v. Attorney-General, at 8-9, per Williams J). There are quite clearly some logical difficulties in the large steps taken in this line of argument, and the decision in the case was not based only on this reasoning.

Related to the notion that the framers' intent should govern is that the meaning of a constitution may be ascertained by reference to the historical context in which it was enacted. One justification for this approach is that the framers should be taken to have been aware of this context. Another is that laws should be understood to operate in conjunction with each other, and that therefore it is relevant to look for continuity or discontinuity between pre-independence laws and the constitution. This second justification would not be admissible where the constitution is legally autochthonous, for in such cases it may be argued that pre-independence law is part of another legal system (see Reference No.2 of 1976 [1976] PNGLR 228, 233, per Frost CJ). There can be no objection in principle to the first justification so long as it is put only as a persuasive element of reasoning to a particular conclusion.

In Director of Public Prosecutions v. Attorney-General and Attorney-General v. Director of Public Prosecutions several judges compared the Constitution to pre-independence laws of a constitutional nature in order to support their argument that the office of the DPP was intended to be independent of the ministry. In Lova v. Damena [1977] PNGLR 429 Prentice DCJ relied on the nature of the proceedings in the Constituent Assembly to support an interpretation of the relationship between the Constitution and the Organic Law on National Elections. The historical context referred to in both of these cases was persuasive.

Serious objection however can be taken to an argument that the historical background includes that body of common law that applied just prior to independence and that the Constitution incorporates it directly. The argument is exemplified in the reasoning of Greville-Smith J in Supreme Court Reference No.1 of 1980, SC 193, 6 March 1981. That case concerned s.37(4) of the PNG Constitution:

(4) A person charged with an offence —
(a) shall be presumed innocent until proved guilty according to law, but a law may place upon a person charged with an offence the burden of proving particular facts which are, or would with the exercise of reasonable care be, peculiarly within his knowledge;

Greville-Smith J began his analysis by reasoning that:

It seems clear to me that the intention of the Legislature must have been, subject to the proviso contained in the section, to adopt for the purposes of the Constitution the concept of the so-called presumption of innocence as it stood in the common law of England at the time of coming into force of the Constitution, a concept with which, in its generality, the framers of the Constitution, and the people of this country were familiar, and which had in its generality been in force in this country for a very long time. In my opinion "according to law" means in the context of Section 37(4)(a) according to the common law in England which embodied that concept (ibid.:4).

Thus, His Honour found that "the common law of England in 1975 became the law not because of the reception of law provisions of the Constitution, but directly by way of section 37(4)(a)" (ibid.:5). This reasoning which has not been uncommon in Pacific Island courts, is open to the fundamental objection that it is contrary to the intention of reception provisions (s.21 and Sch.2), according to which the common law of England must meet the tests of applicability stipulated in them. But the reasoning itself is fallacious, for it is clearly fictitious to assume that the framers (in the sense of those who gave authority to the Constitution) were aware of the details of the common law, and, even if this might be assumed, the very fact that the law was stated in an entrenched Constitution gives it a different quality to a common law rule.

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There is no other safe guide to judicial decisions in great conflicts than a strict and complete legalism (Dixon 1965:247).

It is useful to distinguish three senses in which legalism may be understood: a pejorative sense, a weak sense, and a strong sense.

In a pejorative sense, legalism may be equated with "mechanical jurisprudence", the notion that:

When we speak of "the law" we mean a set of timeless rules stocked in some conceptual warehouse awaiting discovery by the judges, and that when we speak of legal obligation we mean the invisible chains these mysterious rules somehow drape around us (Dworkin 1977:15).
This sense of legalism is described as pejorative because it is now almost universally rejected, and it is recognised that in the selection of legal rules (and moreover in the choice of facts that determine which rules apply) the judges have considerable room for choice (Twining and Miers 1976:148-49).

The determination of a rule is often problematic, even in areas of 'technical law'. The law of a constitution, and particularly one which contains a bill of rights, is quite obviously of an open texture. In reference to the US Bill of Rights, Judge Learned Hand observed in 1959 that:

[t]he answers to the questions which they raise demand the appraisal and balancing of human values which there are no scales to weigh (quoted in Brest 1975:958).

The weak sense of legalism recognises that rule selection requires choice, in part at least because the common law must change as society changes. This sense of legalism sees the common law itself - its substantive principles and its principles for rule creation - as the source of change. It is probably in this sense that Sir Owen Dixon employed 'legalism' (see Dixon 1965:152-65). The common law exercises a powerful influence on the minds of lawyers educated in its tradition and there are many instances where Pacific Island judges have read the constitutions, and in particular the bill of rights provisions, as if they merely stated the common law (most of the PNG cases are analysed in Bayne 1982; the Fijian cases of R. v. Mohammed Hanif (1972) and R. v. Butadroka (1977) are analysed in Aikman 1981; and see also the WS decisions Atlafo Ainu'u [1969] WSLR 203, and Ti'a Si'omia (unreported, Supreme Ct., 26 March 1971). This method of reasoning avoids the difficult questions of balancing competing interests which the constitutional provisions require.

As the developments in US law amply illustrate, one of the most controversial aspects of the Bill of Rights is its effect on the admissibility of evidence obtained by means of a violation of the rights of an accused or suspect person. These questions do not admit of only one kind of answer, but the Pacific Islands courts have avoided them by invoking the common law rules which lean heavily in favour of admissibility. In R. v. Mohammed Hanif (1972) (referred to in Aikman 1981:188), Grant J held that evidence obtained in breach of the guarantee that "no person shall be subjected to the search of his person or property" (s.9 of the Fiji Constitution) should not be excluded and the common law principle applied; (presumably that which permits such evidence to be admitted subject to a discretion in the trial judge to exclude). In PNG, the Supreme Court has held that confessions obtained by violation of the Basic Rights may be admissible according to common law principle (see Bayne forthcoming:35).

In many of such cases, it is apparent that many judges presume that the common law should govern and make at best only a cursory examination of its compatibility with the constitution.1 Such a presumption inverts the relationship between the constitution and the common law. The simple yet fundamental proposition that flows from the supremacy clauses of the constitutions, and specified in detail in some of them, is that stated by Kidu CJ in relation to PNG:
The common law has no application in post Independence Papua New Guinea if it is in conflict with statutes and the Constitution, (Avia Ahi v. The State, SC 195, 27 March 1981:8, per Kidu CJ).

It is not suggested that common law may not provide a guide to the content of the bill of rights provisions or other provisions of the constitution, and it may very well be the starting point for analysis. But what is further required is analysis of whether it conforms to the constitution and the values and principles it incorporates. At times the common law should be adopted. In in the Matter of Joseph Mavuk and others, SC 189, 5 December 1980, the PNG Supreme Court held that a defendant's right to counsel (s.37(4)(e)) did not embrace a right to a counsel who for ethical reasons as defined by common law should not appear; the specific ground being that the counsel had gained some knowledge of the prosecution case while employed in the prosecutor's office. Other cases however, such as those concerned with illegally obtained evidence, will require a balancing of competing social interests.

Allied to an acceptance of the common law is a ready willingness to apply English, Australian and NZ precedents and to reject those of other jurisdictions. With the passage of time, several of the Pacific Island judges have adopted a more eclectic approach to what the PNG Constitution calls outside decisions, and there is now frequent citation to Commonwealth and US cases as well as the jurisprudence of the European Commission of Human Rights.

But an eclectic approach does not solve all difficulties. Outside decisions do not simply state rules, but in addition incorporate the social values which those rules reflect, and there must always be a question whether those values are consonant with the Pacific Island society. The PNG school fees cases deserve an examination from this aspect. In Mileng v. Tololo [1976] PNGLR 447 and Mairi v. Tololo [1976] PNGLR 125, the Supreme Court held invalid, on the ground that they were not authorised by the relevant legislation governing their powers, actions taken by various education authorities to implement a National Executive Council decision that all children, except those of “expatriate servants of the Government”, should pay an "economic fee" of K400 for each child who attended a primary 'A' school or a multi-racial high school. The Court reached these conclusions by finding that the effect of s.209(1) ("the raising of...finance...is subject to authorization and control by Parliament...") was to be determined by reference to English cases, particularly Attorney-General v. Wilts United Dairies Ltd (1921) 37 TLR 884. Such cases reflect the attitude of hostility to taxation laws often manifested by English judges, as a passage from an English text-book quoted by Prentice DCJ and Williams J illustrates:

In a taxing Act, one has to look to what is clearly said. There is no room for intendment. There is no equity about a tax. There is no presumption as to a tax. Nothing is to be read in, nothing is to be implied, one can only look fairly at the language used (Mairi v. Tololo [1976] PNGLR 125, 139).
There is, it will be submitted below, a question as to whether this attitude to taxing laws is justified in PNG and, in particular, whether it was justified in this particular case.

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The weak sense of legalism is not adequate for the interpretation of the Pacific Constitutions. The strong sense of legalism recognises that legal rules are not fixed, but looks well beyond the common law for the source of development. Following Dworkin, there can be distinguished rules - which provide a clear statement as to the decision to be reached, from principles - which provide the sources of the rules:

When lawyers reason or dispute about legal rights and obligations, particularly in those hard cases when our problems with these concepts seem most acute, they make use of standards that do not function as rules, but operate differently as principles, policies, and other sorts of standards (1977:22).

Unlike rules, principles "do not set out legal consequences that follow automatically when the conditions provided are met"; rather they provide reasons to adopt a particular rule. Principles may conflict, and when they do it is necessary to have regard to their relative weight and importance (ibid.:25 -27).

Where do principles come from? Dworkin argues that:

The origin of these as legal principles lies not in a particular decision of some legislature or court, but in a sense of appropriateness developed in the profession and the public over time. Their continued power depends upon this sense of appropriateness.

We argue for a particular principle by grappling with a whole set of shifting, developing and inter-acting standards (themselves principles rather than rules) about institutional responsibility, statutory interpretation, the persuasive force of various sorts of precedent, the relation of all these to contemporary moral practices, and hosts of other such standards (ibid.:40).

In the case of the Pacific Constitutions it is possible to be more specific concerning the source of principle. The preambles to most of the constitutions state social values that are taken to underlie the constitutions, and the bill of rights provisions are of course a detailed statement of the individual's rights against the State.

It is suggested that it is appropriate and indeed desirable that the judges should explicitly resort to such principles to justify a decision on constitutional review. This process is not essentially different to the manner in which the common law has developed. Common lawyers have no difficulty working with principles as broad as that which presumes that
property shall not be taken without compensation. The argument is that other kinds of social values can be employed in the same manner. For example, to return to the two PNG school fees cases, it might have been considered whether the 'economic fee' reflected the second National Goal of Equality and Participation, and particularly of that Directive Principle which calls for "equalization of services in all parts of the country". Frost CJ considered that his conclusion that the Education Act (1970) did not authorise the economic fee was "solely a matter of law", and that the considerations which led to the fee were "of a political nature and not within the province of the Supreme Court" (Mairi v. Tololo [1976] PNGLR 125, 132). With respect, this approach nullifies the intention behind s.25 that account should be taken of the philosophy (which can be broadly described as political) inherent in the Goals. Of course, the Court may nevertheless have concluded that the principle of s.209 was, in these circumstances, superior to the principle in the Goal, but the decision would have been 'principled', and this, it is submitted, is critical to the legitimacy of decisions.

The principles in the National Goals or in the constitutional provisions have not been ignored by the PNG courts (see Bayne forthcoming:17-20). The Fijian cases concerning the conflict between the DPP and the Attorney-General also illustrate that a principle may be employed to lead to a result different to that which would have resulted by the application of ordinary principles of construction. The Attorney-General sought to justify the validity of the notice of assignment, by an argument that it was competent for the Governor-General to assign to him responsibility for the 'administrative' arm and requirements of the Office of the DPP. The Court of Appeal acknowledged that "applying ordinary principles of construction" (Attorney-General v. Director of Public Prosecution, at 34) it was possible to read down the notice of assignment so that it would apply to matters not within the DPP's express and implied powers. The Court rejected such a construction, and cited Privy Council authority that a constitution should be read generously according to principles not applicable to legislation governing private law (ibid., citing Ong Ah Chuan v. Public Prosecutor [1969] 3 WLR 855, 864 per Lord Diplock). From this point the Court then found that:

The manifest intention of the framers of the Constitution when enacting the words "subject to the provisions of this Constitution" [in s.76(1)] was to ensure that no assignment breached the Constitution. Much more is involved than the bare words of the Constitution ... The whole concept of the independent office of the DPP is involved and that includes the severance aspect (Attorney-General v. Director of Public Prosecutions, at 36, 37).

It was to further this principle that the Court refused to read the notice of the assignment in a technical or legalistic manner, and concluded instead that the drafting of the notice had denied s.76(1) its "full and proper effect" (ibid.:38).

The application of principles may be difficult because they can conflict. An instance of considerable difficulty is posed by the question whether a broad constitutional provision is subject to or on the other hand
over-rides custom. This problem may be illustrated by consideration of the
power of banishment exercised by the village councils of WS (see Powles
1973:16-18, 39, 110-11, 118-20). Powles' analysis shows the regular courts
of WS have been troubled by the exercise of this power. In recent times
the Land and Titles Court developed the notion that the power was an
incident of title to land which must be exercised reasonably (ibid.:62-3,
119) and Powles suggests that this accommodation and control of the
existence of the power of banishment is more satisfactory than a resort to
the regular courts (ibid.:119). He further suggests that the power might
be reconciled with Art.13(1)(d) - that all citizens have "the right to move
freely throughout Western Samoa and the right to reside in any part
thereof" - by reliance on Art.13(4), which permits limitation of this right
where a law imposes reasonable restrictions in the interests inter alia of
public order (ibid.:39-40, 119). He also refers to an untested argument
that the functions of the 'unofficial' village councils (see below) might
be rested on an argument that by Art.100, they have:

constitutio nal and legislative protection founded on
the concept of collective pule - an incident of the
holding of matai titles, and therefore exclusively
within the jurisdiction of the Land and Titles Court
(ibid.:117).

Despite doubts concerning their legality, the village councils have
thrived, and the Police and Prisons Report 1976 found that:

The Matai and the village council still have an
important part to play in law enforcement, and command
the respect of the majority of the Samoan people...
since approximately 80 per centum of the population is
under the Matai system (11).

The Report noted that the punishments meted out by the councils were often
more severe than those of the established courts (ibid.:7), and that many
of their rules were contrary to the substantive law. The Report
recommended that the village councils be given legislative recognition and
"jurisdiction to deal with specified offences as a judicial body"
(ibid.:11), although it conceded that the question required detailed
consideration, partly for the reason that:

with the improvement of education and the consequent
awareness by people of their rights under the law, the
legality of the operations of the Village Councils will
inevitably be questioned. To us, it is such a valuable
institution that its preservation must be ensured
(ibid.:11-12).

The current Chief Justice of WS appears to have taken a firm stance that
banishment is contrary to the Constitution. In Tariu Tuivaiti v. Sila
Famalaga and others 17 December 1980 (reported partially in Savili 30
January 1981), a person banished by a village council for his failure to
attend church brought suit for damages against four matai based on causes
of action in trespass, assault, civil conspiracy and intimidation. St.John
CJ awarded damages based on some of these causes of action, and in the
course of his judgment commented that:
The freedom expressed in Article 11 [that every person has the right to freedom of thought, conscience and religion] is the freedom not to have any religion at all ... Since independence, the village council has no power to enforce attendance at church ... If those in power in a village agree to punish in those circumstances it may amount to a civil conspiracy (ibid.:6-7).

In what seems to have been an extra-curial statement made shortly after this decision, St.John CJ declared that banishment itself was contrary to Art.13 of the Constitution (freedom of movement etc.). St.John CJ's view that the constitutional guarantees over-ride custom is also reflected in his decision in Saipa'ia Olomalu that Art.15(1) and (2) required universal suffrage (see discussion above).

His Honour may have overlooked that Arts.11(2) and 13(2) permit "reasonable restrictions...in the interests of...public order". There is thus a balancing of interests required which would focus attention directly on the role of the village councils in WS. Article 15(1) is not similarly qualified, but in analysing the scope of its protection (as well as in respect of Arts.11 and 13), account must be taken of Art.100, which provides simply that:

A matai title shall be held in accordance with Samoan custom and usage and with law relating to Samoan customs and usage.

As Powles suggests (see above), there is an argument that the powers of the village councillors, who are usually matai, might be seen as incidents of the matai title, and this might be extended to the right to vote. I do not suggest that the answer is clear, for it may well be that the matai system has undergone such change that it is not operating according to custom. What is suggested is that principled decision-making would require these matters to be addressed specifically and comprehensively, and that by so doing, the legitimacy of the decision will be the greater.

The argument that constitutional adjudication should pay particular attention to principles leads to a consideration of the second suggestion for judicial restraint to meet the counter-majoritarian objection. Many constitutional courts have adopted a presumption that legislation should be treated as valid, not only out of an awareness that it is difficult for the legislature to reverse a decision that it is invalid, but also out of a recognition that the expression of the legislator's will is, albeit imperfectly, an expression of majority opinion. Some US commentators have argued that this presumption should apply with more or less weight depending on the nature of the legislation. It is argued that it should apply strongly to national legislation alleged to infringe the powers of the states, for the states are represented in the legislature and can protect their interests (see Lockhart et al.:24). On the other hand, the presumption should apply only weakly to legislation which impinges on the rights of individuals (and particularly those in minority and disadvantaged groups), for they are not well placed to resist the legislature
This kind of reasoning may be suggestive of policies towards restraint for the Pacific Island courts.

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The argument of this paper is not concerned only with the aesthetics of judicial reasoning on constitutional review. To come back to the point made earlier, the kind of justification offered by courts for decisions on review relates to the legitimacy of the exercise of the function of review. A mode of interpretation based on principles will not yield an easy answer in the way the discredited theory of mechanical jurisprudence is said to yield an answer, and as the cases on custom and the constitution illustrate, it may sharpen a conflict. It offers no simple palliative, but it may serve not only to educate the public but to foster an acceptance by them of the authority of the constitutional court.

NOTES

1See Bayne 1980:153-56 for an examination of the rejection by the Supreme Court in Re Rooney [1979] PNGLR 448 that the freedom of expression provision in the PNG Constitution substantially qualified the law of criminal contempt.

2In Ong Ah Chuan v. Public Prosecutor [1969] 3 WLR 855, 864, the Privy Council, repeating a comment in Minister for Home Affairs v. Fisher [1980] AC 319, 328, advocated that a "generous" interpretation, rather than "the austerity of tabulated legalism", should be applied to the Singapore Constitution to give to individuals the full measure of the fundamental liberties.
All the fully independent Pacific Island States have human rights provisions in their constitutions. Tonga was the first. The Constitution granted by King George Tupou I in 1875 contains a Declaration of Rights running to twenty-nine sections. Since then Western Samoa (WS) (1962), Nauru (1968), Fiji (1970), Papua New Guinea (PNG) (1975), Solomon Islands (SI) (1978), Tuvalu (1978), Kiribati (1979), Vanuatu (1980) have followed with constitutionally established fundamental rights and freedoms — well ahead of their former colonial masters.

Until it joined the European Economic Community, the United Kingdom (UK) had no comprehensive set of legally established human rights. Instead it used to rely on what Lord Wright described:

> the good sense of the people and in the system of representative and responsible government which has been evolved (Liveridge v. Anderson [1942] AC 206, 261).

as well as on outmoded and largely irrelevant documents like Magna Carta and the Bill of Rights. In the meantime it has found that this approach has fallen short of the standards required by the European Commission of Human Rights and the European Court of Human Rights.

The records of Australia and New Zealand (NZ) have been even worse. Australia's Constitution contains a handful of isolated human rights provisions which have been interpreted into insignificance. It has a Racial Discrimination Act, the constitutional validity of which was recently upheld by the High Court in Koowarta v. Bjelke Petersen (unreported, 11/5/82) but its effect has been limited because the funds necessary for its enforcement have not been available. Since 1981, Australia has had a Human Rights Commission with limited powers. Its most useful functions are education and research in relation to human rights. Its value cannot be assessed at this early stage of its five-year life. It has been left to the States in Australia to legislate for human rights. So far only South Australia, New South Wales and Victoria have responded in the field of discrimination. New South Wales also has a Privacy Committee.
In NZ the Human Rights Commission Act (1977) established a Human Rights Commission under which it has power to promote respect for human rights through education and publicity. It also has power to take action in relation to unlawful discrimination and has special reporting powers in relation to privacy.

This paper takes up some of the issues raised by the human rights provisions of the nine Pacific Island nations named above. It does not pretend to be an exhaustive analysis of those provisions. Time, space and unavailability of materials have precluded consideration of the constitutions of the associated states and other self-governing territories in the Pacific.

ECONOMIC RIGHTS

The Constitutions of the nine named nations deal primarily with civil and political rights; but these rights are of no use if the economic rights of the people are not guaranteed. People who are subject to hunger and disease, whose existence is not based on a reasonable economic footing, cannot enjoy civil and political rights.

Some of the Constitutions address this problem. Those which have significant land areas compared with their populations, namely PNG, SI and Vanuatu, have guaranteed ownership of land to citizens only. Under s.56 of the PNG Constitution only citizens may acquire freehold land. Protection against unjust deprivation of property is given to citizens only by s.53. These provisions were intended to complement the established legal restrictions on the alienation of customary land so as to ensure that most of the alienated land was held and used either by Papua New Guineans or the Government. That goal does not appear to have been achieved — as Jim Fingleton relates in the conclusion of his chapter (see below).

Under Ch.XI of the SI Constitution, only Solomon Islanders may hold perpetual interests in land. Others may obtain fixed-term interests in land which has ceased to be customary land. In Vanuatu all land belongs to the indigenous custom owners and their descendants under Ch.12 of the Constitution.

Given that most citizens of these three countries rely on food or cash crops for their subsistence, these provisions offer considerable protection. But they do not protect against compulsory acquisition and alienation of customary land by a corrupt government in the case of SI or PNG, or against unwise selling of land by ignorant or venal land-owners with the consent of an uncaring government in the case of Vanuatu.

Part IX of the WS Constitution guarantees the continuance of ownership, according to custom, of customary land. It also places significant limitation on the alienation of customary land.

Whilst there are some internal inconsistencies in Pt.III of the Tongan Constitution which deals with land, the major proposition is that radical title to the land is owned by the King, that is essentially the feudal land ownership concept recognised by the English common law. But in Tonga everyone from the King down lacks the capacity to sell the land. However,
Cabinet does have the power to lease the land under s.105. That provision could limit the amount of land available for Tongan commoners to use.

Nauru with its 21 square kilometres for 7,000 people has had to find a different answer. Land is not its major resource, but rather the royalties from the phosphate taken from the island. It provides for the economic future of its people through its Long Term Investment Fund established under s.62 of its Constitution and by establishing a fund into which the phosphate royalties are paid under s.63.

In contrast to these Constitutions, the Constitutions of Tuvalu and Kiribati make no mention of the economic bases of those countries, and Fiji does not refer to land in its Constitution in a way that is intended to protect it as an economic resource, although other legislative arrangements protect the rights of racial Fijians to their land, 83 per cent of which is held under customary tenure.

THE MODELS FOR THE HUMAN RIGHTS PROVISIONS

Whilst the British do not have a written Constitution of their own, they did develop one for export. It has certainly had plenty of use. The model provisions for the "protection of fundamental rights and freedoms of the individual" are found (at least) in the Constitutions of Jamaica, St. Lucia and St. Vincent in the Caribbean, and in the Constitutions of Sierra Leone, Zambia and Zimbabwe in Africa. The same model was used for the Fijian Constitution as well as for those of SI, Tuvalu and Kiribati. Moreover, the St. Lucia Constitution was used in the development of the WS and Nauruan Constitutions. Neither of them follow the model as closely as the St. Lucia Constitution, but both were clearly influenced by it.

What is the approach of the model? It establishes a right in a short and succinct statement - as in s.5 of the Tuvalu Constitution which states: "No person shall be deprived of his personal liberty" - but then cuts it down in a series of limitations: for example, s.5 continues: "save as may be authorised by law in any of the following cases, that is to say...", listing eleven limitations which take up three-quarters of a page.

The British export model appears to be based in turn very substantially on the European Convention on Human Rights. That Convention too follows the 'establishment then limitation' approach. The way the human rights provisions in the export model are structured and worded is very similar to the European Convention. Some sections of the Constitutions (or at least parts of them) are identical in the wording with the European Convention.

PNG had a Human Rights Ordinance in force from 1972 until Independence. It provided the basis upon which its constitutional provisions were built.

The question of what human rights provisions, if any, should go into the Constitution was a major issue for PNG's Constitutional Planning Committee (CPC). It came out clearly in favour of the approach taken in the British export model. It was impressed by the view of the Constitution Commission of Trinidad and Tobago that brief and simple statements of
rights become subject to judge-imposed limitations (PNG CPC 1974:5/1/7). In the end PNG finished up with three fundamental rights in its Constitution, namely the right to life, freedom from inhumane treatment and protection of the law. It also has two types of qualified rights: rights of all persons and the special rights of citizens.

Whilst the drafting of the human rights provisions of the PNG Constitution reflects the use of the British export model provisions, as well as the European Convention on Human Rights, they are sufficiently different in structure, layout and wording to be significantly different from both these sources; for instance they contain the right to vote and stand for public office and the right to freedom of information which are not to be found in either model.

The human rights provisions in the Tonga Constitution are very different from those considered so far. They reflect the concern of nineteenth century humanitarians by outlawing slavery and by entrenchment of the then established due process rights. They also reflect the fact that Tonga had been recently christianised by a fundamentalist dissenter religion: both the freedom to practise religion according to conscience and the possibly contradictory obligation to keep the Sabbath Day sacred are set down.

Vanuatu has followed the United States (US) approach of stating constitutionally guaranteed human rights in brief terms and then leaving it to the courts to interpret these, to explain the circumstances in which they apply, and to lay down the limitations to which they are subject. However ss.5 and 6 do give some guidelines to the courts. Whilst rights are stated as single words or phrases like "life", "liberty", "security of the person" and "protection of law", they are to be subject to the rights and freedoms of others and to the legitimate public interest in defence, safety, public order and health.

THE INTERPRETATION AND ENFORCEMENT OF HUMAN RIGHTS

All nine nations provide that the human rights provisions in their Constitutions may be interpreted and enforced by the courts. The British export model attempts to set out the limitations that apply in relation to each of them. However this does not result in clear and fully comprehensive provisions. They still need interpretation as to the circumstances in which they apply and as to whether there are further qualifications or limitations. Perhaps it is cynical to suggest that there are few differences between the British export and US models when it comes to interpretation.

In relation to the former the limitations on human rights are established in statutory form and can only be removed or varied by statute law, but further limitations and interpretations may be applied as glosses by the courts. In relation to the latter, all limitations and interpretations are court-imposed, but they may be varied over time as the interpreting courts both change their compositions and respond to their changing perceptions of what are appropriate interpretations given the needs of the changing societies for which they are interpreting.
There are too few judgments available from the courts of the nine nations for any clear approaches to interpretation to be discerned. Only five directly relevant judgments were available to this author at the time of writing; two from PNG, one from Fiji, one from WS and a report of a judgment from Nauru.  

(1) In 1977 important aspects of PNG's rights of due process were put to the test. In Constitutional Reference No.1 of 1977 [1977] PNGLR 362 the Public Solicitor, exercising his constitutional power to approach the Supreme Court for an advisory opinion, put the question:

Does failure to comply with all or part of section 42(2) of the Constitution for that reason alone render subsequent admissions or confessions by an accused person as inadmissible as evidence at his trial?  

The Acting Public Solicitor and his Deputy, now Andrew J and Kapi DCJ respectively, argued that the Constitution, on its proper construction, impliedly forbade the use of material obtained in breach of s.42(2) and that the people of PNG had an inalienable right to have any confession rendered inadmissible if it was improperly obtained. They further argued that the effect of s.37(10) which states that "No person shall be compelled in a trial of an offence to be a witness against himself", on a breach of the provisions of s.42(2) was to render confessional evidence received in breach of its terms inadmissible against the person concerned.

The Public Prosecutor, Mr K.B. Egan, argued that there was no specific constitutional obligation on the Court to rule that all confessional material obtained without compliance with s.42(2) ought to be rejected for that reason alone and that the Constitution should not be interpreted as requiring this.

The Acting Principal Legal Officer (Secretary for Justice), now Kidu CJ, argued that that section was mandatory and must be complied with and that the only remedies for breach of the section were to be found in the Constitution. He further submitted that s.37(10) did not, on its proper construction, exclude any confession obtained before the trial commences.

Frost CJ accepted the argument that since the Constitution created the obligation to comply with s.42(2) and also provided statutory remedies, those remedies were the only ones available, so that there was no room for argument on the implied prohibition of the use of confessional material. He then placed a narrow interpretation on s.37(10), holding that because the term "the trial of an offence" had a technical meaning in the Criminal Code, its only effect was to give an accused person immunity from being called as a witness during the trial before a court, so that it did not operate in relation to pretrial confessions. The Chief Justice took comfort from the fact that this narrow interpretation had also been given to a similar, but not identical, provision in the Kenyan Constitution (see Republic v. El Mann [1969] EA 357). All five judges adopted this view of s.37(10) and answered the Public Solicitor's question in the negative.

* * * * * *
It should be added, however, that whilst the Chief Justice rejected the argument that s.42(2) impliedly prohibited the admission of any material obtained after its terms had been breached, he drew attention to the National Court's powers under ss.57(1) and (3) to protect the accused's rights and exclude from evidence any admissions by him obtained in breach of s.42(2).

Whilst this writer considers that the interpretation proposed for s.42(2) by the Acting Public Solicitor is the appropriate one - given that words, expressions and propositions in the Constitution are to be given their fair and liberal meaning - it is conceded that the position taken by the judges is understandable and can be argued, on technical grounds, as correct. It is also understandable given the desire of judges, sitting as arbiters of both fact and law, to have as much evidence as possible before them. Admissions by the accused make this task much easier, sweeping away doubts left by circumstantial evidence. Moreover, confessional evidence often makes up the greater part of the prosecution's case, and without it many prosecutions would fail. Further, the judges may have been concerned that if they adopted the Acting Public Solicitor's interpretation of s.42(2), they would have opened up a Pandora's box of possible arguments as to the extent to which s.42(2) had to be complied with before the implied prohibitions on the use of material gained after its breach came into force.

The most disappointing part of the decision was the interpretation placed on s.37(10). Given the position taken by the Court, that the remedy for breach of s.42(2) was to be found in s.57 (and probably s.58) and not elsewhere, there was no need to express any view about the effect of s.37(10). However, the Chief Justice said:

Further, I am quite clear on this, that having regard to the homegrown nature of the Constitution, no intention is shown that the notion of due process, developed in detail to meet United States conditions, should be introduced into the Papua New Guinea Constitution. It is true that the Committee refers to the "due process" as provided in the United States Constitution, and states that s.37 ... is "the equivalent" of that provision ... This indicates to me that s.37 deals with similar subject matter but not necessarily in the same terms. Reading the Constitution as a whole, s.37(10) cannot be taken so far as to constitute an indirect method of enforcement of s.42(2), for which specific provision as to enforcement is made at least in Division 3 (372).

It is submitted respectfully that the Court's view of that provision was both unnecessary for its decision and wrong. Conceding the point made by the Chief Justice in the last sentence, it does not follow that the Court was entitled to impose the narrow interpretation it did on s.37(10). After all the CPC Report (which can be taken into account in interpreting the Constitution under s.24) does state in relation to the protection of law provisions now found in s.38, "This is the equivalent of the "due process" provisions in the US Constitution (1974:5/1/10). Specifically in relation to s.37(10) the Committee goes on to state that:
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The recommendation specifically provides that a person shall be presumed innocent until he is proven guilty according to law, that no person should be compelled to be a witness against himself (ibid.).

There is nothing in the Report to limit the operation of s.37(10) in the way done by the Supreme Court. Indeed the words of the Report tend to fly in the face of the view expressed by the Chief Justice and it is almost universally accepted that the "Escobedo - Miranda doctrine" which takes the right against self-incrimination back to confessions and admissions made well before the trial commences, is an essential part of the due process rights guaranteed in the US Constitution. The Deputy Chief Justice's view (377 of judgment) that an explicit provision against conviction on the basis of confessional evidence obtained in breach of constitutional rights, should have been added to s.37(4), is, with respect, an excuse for avoiding acceptance of the real intention of the CPC's Report. That Report, intended to be read by people who spoke English as a second language and by people who were not legally trained or experienced, does not go into every issue in great detail. Its thrust in relation to s.37(10), however, is clearly in the opposite direction to that taken by the Supreme Court. It certainly does not give any ground for the Court to rely on an interpretation given to a provision of the Kenyan Constitution as the basis for giving a narrow interpretation to s.37(10).

(2) In 1968 a system of on-the-spot traffic and parking fines was introduced in PNG, but few people paid their fines and most alleged offenders had to be served with summonses, taking up large amounts of district and local court time. To streamline this process a law was enacted in 1981 introducing a traffic infringement summons. Under the legislation if an alleged offender did not appear at court or was not represented, all the police had to do was to prove that the person had been served with a summons. The court then would record a plea of guilty and proceed to consider its sentence.

In Supreme Court Reference IA of 1981 [1982] SC 223, the Public Solicitor questioned the constitutional validity of the legislation. The Court was of the view that the traffic infringement summons procedure was constitutionally invalid because it denied a defendant who failed to appear the right to a hearing in his or her absence as required by s.37(5). Further, the procedure, because it provided for the recording of a plea of guilty if the defendant did not appear, denied the defendant the presumption of innocence which was guaranteed under s.37(4)(a).

This decision is clearly correct even though it may be inconvenient for those who have to deal with traffic and parking infringements. It is up to those responsible to devise a legislative scheme which will streamline the court system without doing violence to the due process of provisions of the Constitution.

(3) The due process rights in the Fiji Constitution were considered by the Supreme Court within nine months of their coming into force. In Mam Chand v. R (1971) 17 Fiji LR 86, Mam Chand was charged with rape and granted bail. He did not appear at a hearing as required and a bench warrant was issued for his arrest. Meanwhile he borrowed another person's passport, forged it by substituting his photograph in it and then left Fiji. On his
return he was arrested. When the police tried to interview him in relation to the forged passport he refused. The police tried to interview him again whilst he was held in prison, but the prison authorities, knowing he did not wish to be interviewed, refused the police access. The police left the prison without charging him with forgery. Three days later the police formally laid a forgery charge in the Magistrate's Court. Mam Chand was brought before the Court that morning. The first he heard of the forgery charge was when he entered the dock and it was put to him. In answer to the charge, Mam Chand said "It is true". When the facts were outlined he admitted them. In his plea on mitigation, he effectively admitted the offence again. He was convicted and sentenced to twelve months' imprisonment on the forgery charge.

He appealed to the Supreme Court against the conviction and sentence on the grounds that there had been a breach of his rights under the Constitution. It was argued on his behalf that s.10(2)(c) provides:

> every person who is charged with a criminal offence ...
> shall be given adequate time and facilities for the preparation of his defence

and that these opportunities had been denied him.

Hammett CJ considered that s.10(2)(c) applied only when a defendant pleaded "Not Guilty" to a charge (ibid.:90), whereas here the defendant had entered an unequivocal plea of "Guilty". Thus the Court concluded there was no need to provide him with adequate time and facilities to prepare his defence having told the Court, by his plea of guilty, that he did not intend to make one.

Surely the constitutional provision was not intended to be confined thus? Does not every person charged with a criminal offence need adequate time and facilities to decide whether or not to defend the matter? Is not the fact that the defendant pleaded guilty when faced with the charge irrelevant to the question of whether or not he was provided with adequate time and facilities to consider his position, which it is submitted, is encompassed by the term "the preparation of his defence"?

(4) The Nauru Supreme Court's decision In re Jeremiah (Miscellaneous Cause No.2 of 1971) has been discussed in detail by Karen McDowell at this workshop. However it is appropriate to recapitulate it briefly in this context.

Jeremiah, a Nauruan, wished to marry a non-Nauruan. He required the consent of the Local Government Council before the marriage could be lawfully solemnised under Nauruan law. This consent was refused. Jeremiah approached the Supreme Court for an order that under Art.3 he had an inalienable right to marry and was entitled to marry the non-Nauruan woman. Article 3 states:

> Whereas every person in Nauru is entitled to the fundamental rights and freedoms of the individual, that is to say, has the right, whatever his race, place of origin, political opinions, colour, creed or sex, but subject to respect for the rights and freedoms of
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others and for the public interest, to each and all of
the following freedoms, namely:
(a) life, liberty, security of the person, the
enjoyment of property and the protection of the
law;
(b) freedom of conscience, of expression and of
peaceful assembly and association; and
(c) respect for his private and family life,
the subsequent provisions of this Part have effect for
the purpose of affording protection to those rights and
freedoms, subject to such limitations of that protect­
ion as are contained in those provisions, being
limitations designed to ensure that the enjoyment of
those rights and freedoms by a person does not
prejudice the rights and freedoms of other persons or
the public interest.

The Supreme Court took the view that Art.3 - which a marginal note
describes as a preamble - was not intended to refer to any pre-existing
rights and freedoms but only to those subsequently specified in the
Constitution. As the substantive provisions of Pt.II, Arts.3-14, did not
confer a right to marry, it therefore concluded that there was no right
which could be enforced on Jeremiah's behalf.

It is not appropriate to comment specifically on the judgment. It
should be noted, however, that none of the Constitutions based on the
British export model guarantee a right to marry. Nor do the Constitutions
of WS, PNG, Tonga and Vanuatu. Yet, the Constitutions of all the other
nations, except Tonga, contain anti-discrimination provisions which could
be relied on to put an argument that was not run in Nauru, namely, that a
statutory provision requiring nationals to obtain consent before marriage
when non-nationals did not require such consent was unconstitutional
because it amounted to discrimination on the basis of race.

(5) The most controversial decision on constitutional human rights
provisions in the Pacific Island nations was that given recently by
St. John CJ in WS.

A Mrs Moore was taken off the "individual" electoral roll when her
husband took a matai title. She complained to a lawyer about this and thus
began a chain of events which led to a full-scale constitutional challenge
to the WS electoral system and then to a full-scale political crisis in the
country.

Under the system established by the Electoral Act, approximately
15,000 matai are entitled to vote in the election for forty-five members of
the Parliament whilst the approximately 1,500 "individual" voters on
another roll are entitled to vote for the other two members of Parliament.
It was that system which was challenged in Saipa'ia Otomai and Others v.
Attorney-General (unreported judgment, 5 April 1982).

The challenge was based on Art.15 of the Constitution which states:

(1) All persons are equal before the law and entitled
to equal protection under the law.
(2) Except as expressly authorised under the provisions of this Constitution, no law and no executive or administrative action of the State shall, either expressly or in its practical application, subject any person or persons to any disability or restriction or confer on any person or persons any privilege or advantage on grounds only of descent, sex, language, religion, political or other opinion, social origin, place of birth, family status, or any of them...

(4) Nothing in this Article shall affect the operation of any existing law or the maintenance by the State of any executive or administrative practice being observed on Independence Day:

Provided that the State shall direct its policy towards the progressive removal of any disability or restriction which has been imposed on any of the grounds referred to in Clause (2) and of any privilege or advantage which has been conferred on any of those grounds.

Three other Articles were relevant: Art.2 makes the Constitution the supreme law of WS and makes any law whether brought into force before or after Independence which is inconsistent with the Constitution void to the extent of the inconsistency; Art.4 empowers the Supreme Court to give orders necessary to guarantee the enjoyment of the constitutional human rights; and Art.44 establishes the membership of the Legislative Assembly and continues:

(3) Subject to the provisions of this Constitution, the mode of electing members of the Legislative Assembly, the terms and condition of their membership, the qualifications of electors, and the manner in which the roll for each territorial constituency and the individual voters' roll shall be established and kept shall be prescribed by law.

It was argued that the Electoral Act, by giving only matai title holders and certain other individuals the right to vote, denied other Samoans equality before the law and equal protection under the law which was guaranteed to them under Art.15(1) as well as amounting to discrimination outlawed by Art.15(2). St. John CJ adopted the US Supreme Court view that legislation imposing limitations on the ability to vote violated constitutional equal protection provisions. He was of the opinion that the constitutional debates did not assist the Attorney-General's argument that those debates revealed a desire by the framers of the Constitution to preserve a system of voting by matais only and effectively to phase out the individual elector's roll. Indeed, his view was that because Art.44(3), which empowered the establishment of the electoral system by legislation, was to be read "subject to the provisions of this Constitution", it was subject to the equal protection and anti-discrimination provisions of Arts.15(1) and (2).
The Chief Justice described Art.15(4) as an admission by the framers of the Constitution that some laws existing at Independence offended Art. 15(2). He considered that Art.15(4) allowed for the postponement of some rights but he noted that the Article required the state to direct its policy towards the progressive removal of any disability or restriction which had been imposed on any of the grounds referred to in Art.15(2), and he further noted that nearly twenty years had elapsed since Independence. Thus to give effect to his view of Art.15(4) he was prepared in the exercise of the Court's powers under Art.4(2) to intervene and hold that the ability of others to obtain voting rights could no longer be postponed. He took the view that the Constitution was an integration of Samoan custom and modern national government which was, to a degree, democratic. The Constitution therefore did not prevent extending the franchise to non-matais. His Honour was not prepared to imply the word "reasonable" into Art.15(2) with the effect of allowing "reasonable discrimination". All these considerations led him to conclude that the electoral legislation infringed Arts.15(1) and (2). He continued:

The effect of this judgement is that, unless reversed on appeal, or the constitution appropriately amended in the meantime, the next election of a member or members of parliament in this country cannot take place on the basis of the Act as it now stands. The limits of the Court's function is to make that declaration making void those two sections of the Act, but I express the opinion that nothing short of universal suffrage for all citizens male and female, who have attained the age of 21 years will suffice to satisfy the constitutional stricures as they now stand. This decision does not invalidate any previous election conducted pursuant to the Act; it speaks only as to the future (at p.13).

The decision has already had enormous political impact in WS. An approach had been made by the Attorney-General to NZ to establish a Court of Appeal of three NZ judges; however, at the time of writing no appeal had been made. It is suggested there is scope for further testing the Chief Justice's views on Art.15(2), and its relationship with Art.44(3), the meaning of Art.15(4) and the power of the Court in the exercise of its powers under Art.4(2) to force progressive removal of disabilities and restrictions under Art.15(4). Nevertheless, the judgment does show the power that constitutional human rights provisions give to courts prepared to rely on them in requiring significant changes in the political structure of a country.

It should also be noted, however, that the Chief Justice has given those who presently hold political power in WS at least two years to decide what action to take if no appeal is lodged or it fails. A major option open is for the Constitution to be amended. Under Art.109 this is within the province of the Parliament which is dominated by matais.
AMENDING THE CONSTITUTION

In all nine nations the Parliaments are the initiators of changes to their respective countries' Constitutions. Apart from Tonga's, they have complete control over the amendment process, although in WS a referendum is required before any variation can be made to Art.102 which precludes the alienation of customary land or to the proviso in Art.109 which requires that referendum.

The Tonga provision makes constitutional amendment very difficult. Under Cl.79 the Legislative Assembly must pass the amendment three times.10 Thus the parliamentarians have great power over human rights. Experience has shown that whilst they may disagree on policies and disagree amongst themselves as to who should be in the government, they often have similar views on a number of matters relating to the exercise of power. They place great importance on the status of parliamentarians and on their "right" to govern according to their perceptions as to what is good for the country. These perceptions and the limitations placed on the exercise of executive power by human rights provisions can come into stark conflict. In such situations there are great temptations to reduce them by constitutional amendment.11

Many of the Pacific Island nations are made up of groups who were, and possibly still are, traditional enemies. Coalitions of the parliamentary representatives of these groups come together to form governments and exercise power. There is much scope for suspicion, fear and distrust both among those who are in power, and between those who are and are not in power. Such situations could give rise to a desire by those in power to remove or reduce the human rights of minorities not presently part of the power structure. So far there is no evidence that such moves have actually been considered. Nevertheless, it is worth asking whether the people have given their members of Parliament not only the power to amend their constitutions but also the power to replace those constitutions with fundamentally different ones?

This question has been addressed in India where some Supreme Court judges have developed the notion that there are essential features of the Constitution which cannot be changed by amendment. These include a democratic form of government, the separation of powers, the sovereignty of the country, a mandate to build a welfare state. In Keshavananda v. State of Kerela (AIR 1973 SC 1461) six of the fifteen judges held that fundamental human rights were amongst the essential features of the Constitution. The two judges who gave their reasons for this position added:

Despite these limitations, however, there can be no question that the amending power is a wide power and it reaches every Article and every part of the Constitution. That power can be used to reshape the Constitution to fulfil the obligations imposed on the State. It can also be used to reshape the Constitution within the limits mentioned earlier, to make it an effective instrument for social good. We are unable to agree with the contention that in order to build a
Welfare State, it is necessary to destroy some of the human freedoms. That, at any rate is not the perspective of our Constitution. Our Constitution envisages that the State should without delay make available to all the citizens of this country the real benefits of those freedoms in a democratic way. Human freedoms are lost gradually and imperceptibly and their destruction is gradually followed by authoritarian rule. That is what history has taught us. Struggle between liberty and power is eternal. Vigilance is the price that we like every other democratic society have to pay to safeguard the democratic values enshrined in our Constitution. Even the best of governments are not adverse to have more and more power to carry out their plans and programmes which they may sincerely believe to be in public interest. But a freedom once lost is hardly ever regained except by revolution. Every encroachment on freedoms sets a pattern for further encroachments. Our constitutional plan is to eradicate poverty without destruction of individual freedoms (ibid.:1628-29).

The alternative view was put by Ray J in the following terms:

The power to amend is wide and unlimited. The power to amend means the power to add, alter or repeal any provision of the Constitution. There can be or is no distinction between essential and inessential features of the Constitution to raise any impediment to amendment of alleged essential features. Parliament in exercise of constituent power can amend any provision of this Constitution (ibid.:1718).

Whilst it appears that this matter has been resolved in India (see Aikman 1978:357), the question arises as to whether there is room for such a doctrine of essential features in relation to the Constitutions of Pacific Island nations. The answer is probably negative, at least in relation to the human rights provisions. Those Constitutions lack the special protection given by Art.13 of the Indian Constitution which precludes either the Union or the State Legislatures from making laws to take away or abridge guaranteed fundamental human rights.

The PNG Constitution provides in s.17 for a three quarters, absolute majority of members before three of the major human rights sections (35, 36 and 50) and the major enforcement section (57) can be amended. Section 17(1) makes it reasonably clear that the other human rights provisions may be amended by a two-thirds absolute majority of members. The Fijian arrangements set out in ss.67 and 68 of the Constitution are similar. The other British export model Constitutions, including WS and Nauru, also appear to be amendable in their entirety by the required parliamentary majorities. In the case of Kiribati a two-thirds majority of both the members of Parliament and the voters is required to amend the human rights provisions. The requirement for a referendum destroys the basis for the 'essential features argument' in relation to Kiribati. The structure of the Tongan Constitution appears to be against such an argument. Despite
the opening words of Art.5(1) of the Vanuatu Constitution ("subject to any restrictions imposed by law on non-citizens, all persons are entitled to the following fundamental rights ...") there is little scope for denying the Parliament the right to amend the human rights provisions, because Art.4(1) provides that the national sovereignty which belongs to the Vanuatu people may be exercised through their elected representatives. Perhaps the most that can be made of the Indian experience is that there is at least one limitation on the power of the parliaments to amend the constitutions. It was put by Matthew J of the India Supreme Court this way:

The only limitation is that the Constitution cannot be repealed or abrogated in the exercise of the power of amendment without substituting a mechanism by which the State is constituted and organised (quoted in Aikman 1978:373).

CONCLUSION

Whilst this paper deals with only some of the issues raised by the constitutional human rights provisions of the Pacific Island nations, and is written without full access to material that could be relevant to the topic, it appears that the human rights provisions are accepted and not under threat. As yet there have been no (or no significant) amendments to these provisions in any of the Pacific Island nations. Perhaps one reason why the constitutional human rights provisions have so far not been an issue, is the tendency of judges brought up in the common law tradition of statutory interpretation to interpret constitutional provisions narrowly, thus giving them a very low profile. On the other hand, it is impossible to predict what might now happen in the wake of Saipai'ia Olomalu and Others v. Attorney-General — it could well lead to a weakening of human rights provisions not only in the WS Constitution.

NOTES

1Section 36 of the Human Rights Commission Bill provides for a five year "sunset" clause.


3Fijians of Indian descent comprise approximately 52 per cent of the population and even though they own less than 2 per cent of the land, they grow about 90 per cent of the country's sugar cane. They lease the land to produce from Fijians, the Crown and other landowners (see Nayacakalou in Crocombe 1971:206-26).

4For example the right to privacy, based on Art.8 — which is not part of the British export model.
PNG's Supreme Court References Nos. 1 and 2 of 1980, SC 193 and 192 respectively, were not available in Sydney. The Fiji law reports were available only to Vol. 18, 1972. Judgments from the other Pacific Island nations are virtually unavailable. One comes across them by chance or by them being made available by colleagues who have obtained them in the course of their research activities.

Section 42(2) states:

a person who is arrested or detained -

(a) shall be informed promptly, in a language that he understands, of the reasons for his arrest or detention and of any charge against him; and

(b) shall be permitted whenever practicable to communicate without delay and in private with a member of his family or a personal friend, and with a lawyer of his choice (including the Public Solicitor if he is entitled to legal aid); and

(c) shall be given adequate opportunity to give instructions to a lawyer of his choice in the place in which he is detained.

and shall be informed immediately on his arrest of his rights under this subsection.

The decision also seems to be out of line with current judicial opinions elsewhere (see R v. Thames Magistrates' Court, ex parte Polemis [1974] 2 ALL ER 1219 - although this is, admittedly, a case in which the defendant wished to present a defence but was denied adequate time to prepare it).

In a section of her paper not included in this volume.

As the author has been unable to consult the judgment he is relying on McDowell's report.

If it is then passed unanimously by both the Privy Council and the Cabinet, then, and only then, is it lawful for the King to sign it. When signed it becomes law. The law relating to the Throne and the titles of hereditary estates of nobles cannot be changed by this process. Nor can "the law of liberty" (and therefore, perhaps, the human rights provisions). But since this Constitution was granted by the King, there is an argument that the King could revoke, replace or amend any parts of it at any time.

For example, after the Bank Nationalization Case and the Emergency, the Indian Parliament removed the right to property in the fundamental rights part of the Constitution and placed it in a less protected form elsewhere in order to make it easier for the Government to achieve some of its social and economic objectives (see Aikman 1978:379, 382).
23. PACIFIC VALUES AND ECONOMIC DEVELOPMENT? HOW MELANESIAN CONSTITUTIONS DEAL WITH LAND

J.S. Fingleton

INTRODUCTION

On 18 February 1982 Father Walter Lini, Prime Minister of the Pacific's newest independent state, the Republic of Vanuatu, gave the keynote address at a conference in Canberra on relations between Australia and the Pacific. In his address he spoke of a coming "renaissance of Melanesian values" in his country, and of a new social, political and economic order under which Vanuatu could finally rid itself of "the inhibition of requiring foreign aid" (1982:25-28).

Between 1975 and 1980 three Melanesian countries - Papua New Guinea (PNG), Solomon Islands (SI) and Vanuatu - became independent. In their Independence Constitutions each of those countries committed itself to the protection and promotion of Melanesian values and customs; the Governments in all three countries aim at increasing economic development and national self-reliance. This paper will examine the role played by the three constitutions in seeking to realise these commitments and objectives.

A number of prefatory remarks are needed to indicate the scope of the paper. In the first place, it does not discuss the complex inter-relationship between land tenure, a society's values, and economic development. Nor is it concerned with identifying Melanesian values, or applauding or criticising economic development as an objective. Further, while the effects of social, political and economic forces external to law (and in particular beyond the workings of a constitution) on a nation's development are acknowledged, consideration of their importance will be largely left to the conclusion. The main purpose is to examine what a nation through its constitution says about goals and guiding principles and what contribution the constitutions themselves make to implementing them.

In the predominantly agricultural societies of the Pacific, land tenure is at the heart of social, political and economic organisation. Pacific Islanders earnestly believe that their attitude to land is fundamentally different from that of the Europeans who colonised them, and most Pacific Constitutions make special provision with respect to land. Just as one of the first acts of the colonisers was to provide for the acquisition of land and introduction of European land tenure concepts, so also was it a primary concern of many independence constitutions to provide for the reform of tenure to land alienated during the colonial period. Not only was alienated land the visible manifestation of imposed foreign tenure concepts, but it was also the sector where economic development and
Resource inputs were concentrated. Because the land provisions of the Melanesian Constitutions under consideration were concerned primarily with reforming the tenure of alienated land, this paper necessarily follows that emphasis. Thus, as with the constitutions, the paper does not attempt the task of articulating customary land tenure precepts with economic development objectives.

The treatment will commence with consideration of the constitutional assertions of cultural values, the purposes intended to be served thereby, and what their function might be. The impact of the Constitutions on economic development is next considered. From the central thesis that a Pacific society's values and institutions and its economic objectives will find their ultimate expression in land tenure, the roles of the constitutions in reconciling the contrasting claims of cultural identity and economic development through the provisions concerning land and associated factors is then considered. Finally, the nature of competing social, economic and political forces in the countries after independence is discussed, and tentative conclusions are drawn on the prospects for reconciling the dual commitments to preserving cultural values and promoting economic development.

THE ASSERTION OF CULTURAL VALUES

With the advent of colonialism in a country the colonising state, in the exercise of its self-proclaimed sovereignty, introduced the legislative power, and in exercise of that power enacted laws establishing the relationship between the introduced legal system and the indigenous legal systems. The effect was to subordinate the latter to the former, in two respects. First, indigenous legal systems thereby lost their autonomy, for henceforth the authority of custom and traditional legal institutions derived from the enactments which provided for their continued operation. Secondly, the indigenous legal systems were usually accorded only residual operation. There was no exclusive domain for the operation of custom, and its scope could be and was progressively reduced by legislative enactments. To the colonial authorities this was part of the 'civilising mission', in the process of replacing 'primitive' institutions with their 'modern' counterparts.

Decolonisation arrived late in the Pacific Islands, and, in the political sense, is yet to be completed for the region. An advantage of this timing was the opportunity it afforded constitutional planners to examine the experience of their Third World predecessors. In addition, mounting evidence of the limited exportability of Western legal systems and the values which they reflect presented a favourable climate for the legitimate assertion of indigenous institutions and values.

There is nothing remarkable about statements of values and principles in the introductory parts of a constitution. The earliest Independence Constitution in the Pacific Islands, that of Western Samoa (WS) in 1962, recites that:

Western Samoa should be a separate state based on Christian principles and Samoan custom and tradition.
The following Constitutions of Nauru in 1968 and Fiji in 1970 make no reference to custom, nor do the self-government Constitutions of the New Zealand (NZ) dependencies of the Cook Islands (CI) (1965) and Niue (1974). PNG seems to have revived the practice in 1975, and it was adopted in the remaining Constitutions of SI (1978), Tuvalu (1978), Kiribati (1979) and Vanuatu (1980).\(^3\)

The preamble to the PNG Constitution is very lengthy. In the part headed "Adoption of Constitution" is included the recital that the people:

acknowledge the worthy customs and traditional wisdoms of our people - which have come down to us from generation to generation [and] pledge ourselves to guard and pass on to those who come after us our noble traditions and the Christian principles that are ours now.

They assert themselves to "guard with our lives our national identity, integrity and self respect".

The second part of the preamble sets down the National Goals and Directive Principles (NGDPs), which are stated to "underlie" the Constitution. All persons and bodies are directed to be guided by the declared Directives, in pursuing and achieving the National Goals. The Fifth National Goal is headed "Papua New Guinean Ways", and is the one which most concerns this paper. The goal is "to achieve development primarily through the use of Papua New Guinean forms of social, political and economic organization". The supporting Directive Principles deserve setting out in full. They call for:

1. a fundamental re-orientation of our attitudes and the institutions of government, commerce, education and religion towards Papua New Guinean forms of participation, consultation, and consensus, and a continuous renewal of the responsiveness of these institutions to the needs and attitudes of the People; and

2. particular emphasis in our economic development to be placed on small-scale artisan, service and business activity; and

3. recognition that the cultural, commercial and ethnic diversity of our people is a positive strength, and for the fostering of a respect for, and appreciation of, traditional ways of life and culture, including language, in all their richness and variety, as well as for a willingness to apply these ways dynamically and creatively for the tasks of development; and

4. traditional villages and communities to remain as viable units of Papua New Guinean society and for active steps to be taken to improve their cultural, social, economic and ethical quality.

The next Melanesian country to gain independence was SI. The preamble to its Constitution is of a more conventional length. It recites the people's pride in "the wisdom and the worthy customs of our ancestors", and
agrees and pledges that they shall "cherish and promote the different cultural traditions within Solomon Islands".

The preamble to the Vanuatu Constitution is shorter still, only seventy words in all, but it contains elements, succinctly stated, which are present in many of the Pacific Constitutions, and so may usefully be reproduced here. It states:

WE the people of Vanuatu,
PROUD of our struggle for freedom,
DETERMINED to safeguard the achievements of this struggle,
CHERISHING our ethnic, linguistic and cultural diversity,
MINDFUL at the same time of our common destiny,
HEREBY proclaim the establishment of the united and free Republic of the New Hebrides founded on traditional Melanesian values, faith in God, and Christian principles,
AND for this purpose give ourselves this Constitution.

The common elements of the preamble (apart from the formal recitals in the first and last lines) are the cherishing of ethnic, linguistic and cultural diversity but recognition of common destiny, and the foundation of the new state on a continuation of indigenous values and Christian principles. "Cultural diversity" and "common destiny" are recited as facts, although the wording seems to acknowledge that there may be tension between them. In any case there is a clear commitment to the ideology of unity in diversity. The combination of "indigenous values" and "Christian principles" assumes their compatibility. As it is unlikely that they were regarded as identical, to the extent that they do not overlap they were apparently assumed not to conflict.

To gain an impression of the purposes intended to be served by these affirmations of values in the introductory parts, it is necessary to consider the circumstances and processes of constitution-making in the three countries. That they were all decolonisation constitutions is, of course, of fundamental importance. Many constitutions of the world make commitments to cultural and religious values and institutions, but in a decolonisation constitution such commitments must be accorded the additional significance of a concerted determination: (1) to replace, or at least to modify substantially, the values and institutions intruded during the colonial period; and (2) to do so by the reinstatement of the primacy, or at least equal primacy, of the indigenous values and traditions. Consideration of the constitution-making process reinforces the authenticity of this additional significance.

In the first place, all three Constitutions were preceded by reports from specially-formed bodies representative of the local population. Focussing on the affirmation of indigenous values and institutions in their application to the land tenure situation at independence, the three Melanesian Constitutions gain additional authenticity from the fact that they were preceded by reports from separate representative bodies specially established to consider land matters and conduct public consultation in anticipation of independence. In PNG the Commission of Inquiry into Land
Matters reported in 1973, the SI Select Committee on Lands and Mining reported in 1976 and Vanuatu's Ad Hoc Committee on Land Reform reported in 1979. In each case the nationalist thrust of the land reports was confirmed by the assertions of national identity in the subsequent constitutions, and as shall be seen below, special provision was made to implement, or facilitate the implementation of, recommendations for land tenure reform.

To a greater or lesser extent, then, the introductory parts of the three Constitutions contain commitments to a fundamental reorientation of values and institutions, reached upon the recommendation of bodies representative of indigenous opinion. The next matter to draw out from the Constitutions is how this purposive reorientation was intended to function. It might be appropriate at this stage to consider the Pacific Islands' practice within the literature on general constitution types. For present purposes it is felt that the most illuminating discussions consider the differences between utilitarian and programmatic elements of constitutions and between normative and nominal elements, and the importance of support factors to the degree of normativity of a constitution (see Wolf-Phillips 1972).

Applying these analytical devices to the three Melanesian Constitutions, it is apparent first of all that much of each Constitution is devoted to utilitarian concerns, setting out the mechanics of the governmental process in a division of political power largely derived from the constitutional pattern of the previously-responsible colonial power. Loewenstein refers to these elements as the "horizontal controls" of political power, for they operate either within a specific power-holder, or between the several power-holders (1957:18). In contrast are the controls which operate among the different levels of the state society, which he terms "vertical controls" (ibid.), and among which he includes the guarantees of individual liberties, which occupy much space in the constitutions of Pacific Island States and their Western predecessors alike. Those relating to the protection of property rights will be considered when examining the constitutional provisions specifically relating to land. The ground is still being prepared for this consideration, however, and the attention here is focussed on the programmatic elements which call for a fundamental reorientation towards indigenous values and institutions. How were these elements of the Pacific Constitutions intended to function?

The first point to consider is that the commitment to indigenous values and institutions usually appear in the preambles to the Constitutions. The traditional legislative function of a preamble is familiar: it explains the object of, or the reasons for, an enactment. It is, of course, an integral part of the enactment, and may be used as an aid to its interpretation, although not, generally, where the words of the operative parts of the enactment are free from ambiguity (Maxwell 1962:46). In the case of constitutions, statements of principles and directions of national policy in the preamble must be accorded the elevated status due to them as part of the supreme law of the nation.

Apart from the general rules for statutory construction, in PNG special provision was made for the future legal effect of the matters
contained in the preamble. Section 25 provides that, although in general the NGDPs in the preamble are non-justiciable:

Nevertheless, it is the duty of all governmental bodies to apply and give effect to them as far as lies within their respective powers.

To the non-justiciability there are two exceptions. The first requires laws to be applied, and powers conferred by law to be exercised, so far as possible as to give effect to the NGDPs. The second exception is that the jurisdiction of the Ombudsman Commission over the application of the Leadership Code (see Goldring 1978:189-203) is not subject to the limitation on justiciability, and in all such cases the NGDPs are to be taken "fully into account" (s.25(4)).

A further attempt was made in PNG to give the NGDPs some prescriptive effect. Section 20 requires the Parliament to enact legislation declaring the underlying law of PNG, and providing for its development. Until such enactment the underlying law and the manner of its development are to be as prescribed in the Second Schedule to the Constitution. It provides for the recognition of custom and the adoption of a common law as parts of the underlying law. It then provides that, if in any particular matter before a court there appears to be no applicable rule of law, it is the court's duty to formulate an appropriate rule as part of the underlying law, having regard "in particular" to the NGDPs and the Basic Social Obligations (see below). This provision gives only very limited residual and temporary (until Parliamentary enactment) scope for the incorporation of the NGDPs in the underlying law. Schedule 2 goes on to provide for the establishment of a Law Reform Commission and invests that body with the special responsibility:

- to investigate and report ... on the development, and on the adaptation to the circumstances of the country, of the underlying law, and on the appropriateness of the rules and principles of the underlying law to the circumstances of the country from time to time (s.14).

It is possible that, upon the report of this body, the NGDPs may be more effectively incorporated in the legal system of PNG, but the Constitution in no way ensures that this will occur.

Another device used in the attempt to give teeth to the programmatic elements of the Constitutions was the imposition of social obligations, in some respects as a countervailing force to the enumerated individual freedoms. This novel practice first appeared in the Pacific in the PNG Constitution. Its inspiration is found in the preceding Constitutional Planning Committee (CPC) Report. Appealing to pre-colonial precedents, it states:

Before there were any written laws in Papua New Guinea the unwritten constitutions of our various communities were based on the acceptance of the concept of mutual responsibility. Our responsibilities to each other and to our society stem from the recognition that in the long run the extent to which our rights and freedoms,
whether they are of a social, spiritual, political or economic nature, are protected, will depend on the extent to which we recognise and respect the rights and freedoms of others (1974:5/1/15-16).

It then proceeds to enumerate constitutional, political, social and economic obligations.

The list found expression in the fourth part of the preamble, under the heading "Basic Social Obligations". The one which concerns us here is the obligation "to respect, and to act in the spirit of, this Constitution". Although the obligations are addressed to "all persons in our country", and from their terms it is natural persons who are meant, s.63, having stated that in general the Basic Social Obligations are non-justiciable, proceeds (in the same vein as s.25 does for the NGDPs):

Nevertheless, it is the duty of all governmental bodies to encourage compliance with them as far as lies within their respective powers.

As with s.25, the non-justiciability qualification is excluded by the requirement to apply laws and exercise powers so far as possible in the way which enforces or encourages compliance with the Basic Social Obligations, and in the exercise of jurisdiction over the Leadership Code.

The PNG practice was adopted by Vanuatu, which followed its enumeration of fundamental rights with a list of fundamental duties which closely follow those of PNG. The first duty is "to respect and to act in the spirit of the Constitution", and, as with PNG, while the duties are in general non-justiciable, it is nevertheless "the duty of all public authorities to encourage compliance with them so far as lies within their respective powers" (Art.8). The SI Constitution contains neither explicit national goals nor fundamental social obligations.

If the general provisions were the only measures taken to ensure 'enforcement' of the reorientation of values and institutions which the Constitutions, to a greater or lesser extent, were seen to call for, then the prospects for realisation of this reorientation would be uncertain indeed. In examining the literature on comparative constitutions Wolf-Phillips counselled that programmatic elements of a constitution should be "backed up by 'confirmatory' (that is, confirmed and enforceable) obligations" (1972:39). Overprogrammatic constitutions, he observed, encourage cynicism (ibid.:40). To the extent that the commitment to reinstating the primacy, or at least equal primacy, of indigenous values and institutions fails "to concord" with the actual "exigencies of the power process", the Constitutions would qualify as "nominal", under Loewenstein's classification (1957:149). The primary object of such constitutions, he says, is educational, with the goal, at some indefinite time in the future, of becoming fully "normative" (ibid.).

The all-important elements of political reality which will determine whether the commitment to reorientation remains nominal or becomes normative are the support factors - the extent to which the social and economic forces in a country either stand behind and support preservation of the pre-independence status quo (rendering the reorientation commitments
enduringly nominal), or stand behind and support the post-independence reorientation (thereby allowing the commitments to become fully normative). So far the concentration has been on elements of the Constitutions asserting cultural objectives. The PNG Constitution explicitly recognises that these objectives are only attainable through a "fundamental reorientation" of social, political and economic organisation, and it commits all persons, corporations and governmental bodies to work towards that reorientation. In similar vein, the Constitution of Vanuatu calls on all persons and public authorities "to act in the spirit of the Constitution", and this requirement might be regarded as implicit in the SI Constitution's commitment to promote cultural values. To balance the survey of programmatic provisions it is now necessary to discover the constitutional commitments made to the goal of economic development, in preparation for examining the manner of reconciliation of these goals.

ECONOMIC DEVELOPMENT OBJECTIVES

Explicit commitments to economic development objectives are not usually found in constitutions, and this practice holds true for the Pacific Island States. The usual place for such commitments is in the rhetoric of political leaders, or more formally stated in development plans or strategies. Inherent in the three Constitutions, however, are elements which together can be seen as creating an environment which supplies the accepted prerequisites for economic development, and, indeed, two of the Constitutions at least may be seen as predicated on the understanding that economic development is a self-evident goal.

In the first place (and what is to some people their most important purpose), the Constitutions provide for a separation of powers, and control over arbitrary exercise of political power. This is vital to the economic environment for the stability and predictability which it is intended to produce. The constitutional elements are familiar, and include the provisions for representative democracy and the decentralisation of political power, the assignment of powers between legislature, executive and judiciary, and the operation of the rule of law.

The second main feature of the Constitutions as they effect the economic environment is found in the guarantees of individual liberties. All three Constitutions include among their "bill of rights" provisions a protection from unjust deprivation of property, supported by provisions for enforcement of the right, and for compensation for any infringement. The provisions will be considered in detail later, but suffice it to say at this stage that their antecedents may be found in the "sanctification of the right of property" which "justified the economic order of the laissez faire society" of European liberalism (Loewenstein 1957:320). Their economic significance is obvious.

The third general economic feature of the Constitutions, and one which qualifies the second, is the intervention of the state in the economic process. Loewenstein observes of its European origins that:

free-enterprise capitalism was compelled to grant…the demands of the masses for economic betterment and social justice [and the result was] the emergence...of
the state as the regulating, managing, directing, controlling, and supervising agency of socioeconomic life (ibid.:324).

Thus the constitutional provisions protecting property rights are qualified by the state's power to override them in the public interest (subject to payment of compensation). It has been observed, however, that the provision for state intervention has had the effect of legitimating existing economic interests (Fitzpatrick 1980:246). According to this argument, as the state has taken upon itself the responsibility of mediating in the economic process, then economic activities, provided that they meet the state's requirements, can claim the state's support in resisting social and economic pressures at large in the society.

If explicit constitutional commitments to economic development as an absolute value are absent, there are two constitutions which imply such a commitment, by making reference to the type of development which is sought. The SI Constitution simply states in the preamble a pledge to uphold "the equitable distribution of incomes". The PNG Constitution, as is its wont, elaborates in great detail. It has already been mentioned that the Fifth National Goal called for development to be achieved "primarily through the use of Papua New Guinean forms of social, political and economic organisation", and the supporting Directive Principles have already been enumerated. In addition there are the Second National Goal of Equality and Participation, and the Third National Goal of National Sovereignty and Self-Reliance.

The Second National Goal is "for all citizens to have an equal opportunity to participate in, and benefit from, the development of our country". The supporting Directive Principles include the calls for achievement of an equitable distribution of incomes and other benefits of development among individuals and throughout the country, equal participation of women in economic activities, and "the maximization of the number of citizens participating in every aspect of development".

The Third National Goal is "for Papua New Guinea to be politically and economically independent, and our economy basically self-reliant". Any attempt to paraphrase would lose the fervour of the commitment, so indulgence is sought for setting out some of the supporting Directive Principles in full:

(2) all governmental bodies to base their planning for political, economic and social development on these Goals and Principles; and
(4) Citizens and governmental bodies to have control of the bulk of economic enterprise and production; and
(5) strict control of foreign investment capital and wise assessment of foreign ideas and values so that these will be subordinate to the goal of national sovereignty and self-reliance, and in particular for the entry of foreign capital to be geared to internal social and economic policies and to the integrity of the Nation and the People; and
(6) the State to take effective measures to control and actively participate in the national economy, and in
particular to control major enterprises engaged in the exploitation of natural resources; and

(7) economic development to take place primarily by the use of skills and resources available in the country either from citizens or the State and not in dependence on imported skills and resources; and

(8) the constant recognition of our sovereignty, which must not be undermined by dependence on foreign assistance of any sort, and in particular for no investment, military or foreign-aid agreement or understanding to be entered into that imperils our self-reliance and self-respect, or our commitment to these National Goals and Directive Principles, or that may lead to substantial dependence upon or influence by any country, investor, lender or donor.

As if this litany of requirements is not enough, the preamble ends with the statement:

IN ADDITION, WE HEREBY DECLARE that all citizens have an obligation to themselves and their descendants, to each other and to the Nation to use profits from economic activities in the advancement of our country and our people, and that the law may impose a similar obligation on non-citizens carrying on economic activities in or from our country.

These excerpts are an eloquent testimony to the CPC's understanding of the fundamental importance of redirecting economic development in order that the social, political and cultural goals of the Constitution might be achieved. These commitments to economic reorientation gain prescriptive effect through the same 'enforcement' measures that have already been considered with respect to the commitment to a reorientation of values and institutions. But the same conclusion must be drawn that they are essentially 'programmatic', and that nothing so far considered would ensure that the commitment to economic reorientation would become "normative" rather than remain "nominal".

RECONCILIATION OF CULTURAL VALUES AND ECONOMIC DEVELOPMENT OBJECTIVES

Only in the case of PNG has an attempt been found in the introductory statement of goals and principles in the Constitution to reconcile the commitments made to restore and preserve indigenous values and institutions, with the realities of economic development. There are insistent demands for integrated human development (and equality of income distribution and economic opportunity to that end), national self-reliance (and state economic intervention to that end), and a "fundamental re-orientation" of development attitudes and institutions towards indigenous forms of social, political and economic organisation. But a critical commentator has observed:

Papua New Guinean ways were advocated but without facing the conflicts and compatibilities between them and capitalism. These ways provided a transcendent
path, a unique solution that seemed to make such issues irrelevant or subordinate (Fitzpatrick 1980:218).

In this context attention may now be turned to the body of the Constitutions, to see whether the provisions dealing with specific subjects might indicate the terms of convergence between commitments to indigenous values and economic development objectives. The most likely site where the terms of this convergence might be found is in the constitutional provisions relating to land. The provisions affecting land in the Pacific Islands Constitutions up to 1975 were either variants (in long or short form and content) of the conventional balance between an individual's rights to the protection of property and the state's power to override it in the public interest, or were concerned with the preservation of a customary tenure regime over land which was customary land at the date of the Constitution. No concerted attempt to establish the terms of convergence between indigenous values and economic objectives can, however, be discovered, unless it be in the apparent confinement of each to its exclusive sphere of influence. There appears to be little, if any, attempt to modify the status quo through the Constitutions themselves. New restrictions might be imposed on the (temporary or permanent) alienation of land from customary tenure but what was customary land remains customary land without any constitutional provision for its adaptation to the new demands of the cash economy and commercial agriculture, while the already alienated land is left virtually unaffected by the assertion of indigenous interests and values implicit, at least, in self-government and independence.

In 1975 the PNG Constitution made its clamorous appearance on the scene. From its preamble we are left in no doubt that a "fundamental reorientation" of values and institutions is demanded, and that economic objectives are to be harmonised with indigenous values and institutions in the pursuit of "integral human development". What active role do the land provisions of the Constitution play in promoting this reorientation? The short answer is, virtually none.

The only direct references to land in the Constitution appear in the "Basic Rights" Division of Part III, "Basic Principles of Government". Uniquely in the Pacific, the PNG Constitution ascribes different ranks to its "bill of rights" provisions. Thus the "Fundamental Rights" are the right to life, freedom from inhuman treatment, and protection from the law. The remaining rights are "Qualified Rights" and are further divided between "Rights of All Persons" and "Special Rights of Citizens". The familiar property rights protection is within the latter category. There are a number of special features of the protection which distinguish it from its Pacific Islands' counterparts.

First there is the fact that the right is a "qualified" rather than a "fundamental" right. While no other Pacific Constitution explicitly makes this distinction, the paramountcy of property (and the other) rights is usually indicated by their inclusion under a heading such as "Fundamental Rights". We have seen, however, that in all these cases the right is qualified, by the ability of the state to intervene and compulsorily acquire property in the public interest. How, if at all, is the situation different in PNG?
Under the constitutional scheme, the practice is for the "Qualified Rights" to be subject to a general qualification that they may be regulated or restricted (but not over-ridden) by a law which complies with certain requirements. The very detailed requirements in s.38 do not, however, concern us here for, although the property rights protection is included in the "Qualified Rights" subdivision, it is not subject to this general qualification. Rather it is subject to particular qualifications, which are set out in the section itself. In general effect, these qualifications turn out to be little different from those providing for the intervention of the state to acquire property in the public interest, found in all the Pacific Constitutions which predated 1975.

The second distinguishing feature is of real significance. This is the confinement of the constitutional protection to citizens. No such distinction is found in the pre-1975 Constitutions. Furthermore, by s.68(4) this protection is withheld for a five-year period from Independence Day from persons who gain citizenship by naturalisation. The only protection non-citizens and naturalised citizens are afforded is that their property can only be compulsorily acquired in accordance with an Act of the Parliament (ss.53(4) and 68(4)). In theory, this provision offers considerable scope for socio-economic reorganisation by enabling virtually unfettered alienated land reform, but the provision is only facilitatory, and whether such reform eventuates depends entirely on further state action.

A third distinguishing feature is the refinements in the Constitution of the normal obligation on the state to pay upon a compulsory acquisition. The first such aspect is the fact that the question of adequacy of compensation is independent of the question of legality of acquisition. In other jurisdictions, if the compensation requirements are not satisfied the acquisition is invalid. In PNG it is clear that in such circumstances the acquisition still stands (although there remains the duty to satisfy the compensation requirements). This has important practical effects, for it allows the public purpose for which the land is acquired to proceed even though the question of adequacy of compensation is still unresolved.

The second refinement is that in considering the justness of compensation and its terms for payment, "full weight" must be given to the NGDPs, and "due regard" must be paid "to the national interest and the expression of that interest by the Parliament, as well as to the person affected" (s.53(2)). The question of adequacy of compensation is clearly relative, rather than absolute. The third refinement is an expanded provision for manner of payment of compensation. Section 53(3) provides that:

compensation shall not be deemed not to be just and on just terms solely by reason of a fair provision for deferred payment, payment by instalments or compens- sation otherwise than in cash.

Section 54 is headed, "Special provision in relation to certain lands". It was specifically designed to allow implementation of recommend- ations (some already legislated for) in the 1973 Report of the Commission of Inquiry into Land Matters. Its effect is to exclude from the operation of the protection from unjust deprivation of property a law "that is
reasonably justifiable in a democratic society that has a proper regard for human rights", and that provides:

(1) for the recognition of the state's title to disputed government land purportedly acquired before independence, provided the land is needed for a particular public purpose;

(2) for the extra-judicial settlement of disputes over ownership of customary land, where a judicial settlement does not seem practicable; or

(3) for the prohibition or regulation of the holding of certain interests in land by non-citizens.

The first exclusion is a minor enlargement of the state's powers to intervene in property rights, while the second is more notable for its over-riding of the due process protection in s.37. The third exclusion is the one relevant to the present discussion, but, given the general dilution of non-citizens' property rights, it is doubtful if this provision takes the matter much further.

Finally, s.56 provides that only citizens may acquire freehold land, and it enables Parliament to legislate on the forms of ownership that are to be regarded as freehold, and the corporations that are to be regarded as citizens, for this purpose. The prohibition only applies prospectively from Independence, and has no effect on the freeholds held by non-citizens at Independence, except by limiting their negotiability. Section 56 also enables Parliament to legislate for further rights and privileges to be reserved for citizens.

In summary, despite the fervent commitments in the preamble, the PNG Constitution's only contribution to a "fundamental reorientation" through use of the land provisions is facilitatory. It excludes the operation of the property rights protection from non-citizens, and from naturalised citizens for a five-year period after Independence, and in its application to citizens the state's duty to compensate for compulsory acquisitions is liberalised in a number of ways. The land provisions play no active role, however, in effecting the reorientation called for, and in particular they make no contribution to reconciling customary tenure precepts with the implicit economic objectives in the Constitution. The assumption seems to be that customary tenure will be compatible with the reoriented development environment, and that customary institutions will retain their viability and functions in the face of developmentalist fences.

In the SI Constitution of 1978, the familiar property rights protection again appears, spelt out in considerable detail as was the fashion for former British colonies. The only significant innovation is that, instead of the usual requirement for "prompt payment of adequate compensation", the requirement is for "payment of reasonable compensation". Payment may "take the form of cash or some other form", and "may be payable by a lump sum or by instalments", but payment must be "within a reasonable period of time having due regard to all the relevant circumstances" (s.8(1)(c)(i)). Also included in the fundamental rights and freedoms is a protection from discrimination, but the protection is excluded in the case of laws with respect to non-citizens, and laws "with respect to land, the tenure of land, the resumption and acquisition of land and other like
purposes" (s.15(5)(b), (e)). Such a provision allows future positive discrimination in favour of citizens, but in no way over-rides the constitutional protection of property rights already held.

Chapter XI of the SI Constitution deals specifically with land. SI had followed the PNG example in setting up a special body to report on land matters before Independence, and certain land reform legislation had already come into operation prior to the Constitution. This mainly concerned the reservation of freeholds (called "perpetual estates") to Solomon Islanders, and the substitution of fixed-term leases for freeholds owned by non-Solomon Islanders. The provisions in Ch.XI in part confirm that approach.

Section 110 reads:

The right to hold or acquire a perpetual interest in land shall vest in any person who is a Solomon Islander and only in such other person or persons as may be prescribed by Parliament.

Section 111 deals with "non-customary land", and enables Parliament to provide for the conversion of perpetual interests held by persons not entitled to hold them under s.110 to fixed-term interests, to provide for the compulsory acquisition of non-customary land, and to prescribe the compensation criteria for such conversion or compulsory acquisition. The compensation criteria:

may take account of, but need not be limited to, the following factors: the purchase price, the value of improvements made between the date of purchase and the date of acquisition, the current use value of the land, and the fact of its abandonment or dereliction.

Section 112 makes special provision with respect to compulsory acquisition of customary land, requiring Parliament to legislate requirements that there be prior negotiations with the owner, that the owner have a right of access to independent legal advice, and that so far as practicable only a fixed-term interest be acquired.

These provisions were designed to meet the special wishes of the SI constitutional delegation with respect to land. However the report of the Constitutional Conference shows that agreement was reached "that all land in the Solomon Islands belongs to the citizens of Solomon Islands" (SI CC 1977:8) and if s.110 was intended to implement this principle, there is considerable doubt that it does so. It is curiously expressed as a "vesting" of "the right to hold or acquire a perpetual interest in land", and the vesting is "in any person who is a Solomon Islander" and "only in such other person or persons" as Parliament may prescribe. It has the effect of confining the holding or acquisition of a perpetual interest to Solomon Islanders and any other prescribed persons, but, whatever the nature of the right which is vested, it is certainly not a right in land. Nor does the declaration in the preamble that "the natural resources of our country are vested in the people and the government of Solomon Islands" confer any land rights.
The conference also agreed that the legislature should be enabled to lay down special criteria for the assessment and payment of compensation for the compulsory acquisition of alienated land (ibid.:9). If this is what s.111 was intended to do, then it must be flatly stated that it does not. The final provision of Ch.XI of the Constitution, s.113, provides that nothing in the Chapter:

shall be construed as enabling Parliament to make any provision which is inconsistent with the provisions of section 8(1)(c),

the property rights protection. The general requirement is for "payment of reasonable compensation", and while any criteria prescribed by Parliament under s.111 may, or may not, be relevant to the question of reasonableness, the general requirement must be satisfied in all cases.

In terms of a socio-economic reorientation, the lands provision of the SI Constitution have little impact, either of themselves or in what they facilitate. Without actually vesting any land in Solomon Islanders, they do confine the ownership of land to them (and to any other persons prescribed by Parliament), but any future land reform in the cause of reorientation is clearly limited by the liability to pay compensation for loss of property rights. Some liberalisation of the state's power to intervene in existing property rights is afforded by the fact that the test of compliance with the compensation requirement is "reasonableness", a test which presumably incorporates consideration of the national interest, as well as that of the property owner.

The 1980 Constitution of Vanuatu has been described as:

[I]n many vital respects a programmatic, rather than a prescriptive, document: it tends very much to set out requirements for parliamentary action, and to leave important matters to be worked out by the courts, and does so sometimes with and sometimes without statements of principles to be applied (Lynch 1981a:48).

Although Ch.12 of the Constitution, headed "Land", is in some respects programmatic, it is in many fundamental respects prescriptive, and at last we find a Constitution which actively implements the socio-economic reorientation called for in its introductory parts.

In keeping with its general brevity the fundamental rights are simply stated in Art.5. The list of rights is prefaced by the general provision that they are recognised "subject to any restrictions imposed by law on non-citizens", and "subject to respect for the rights and freedoms of others and to the legitimate public interest in defence, safety, public order, welfare and health". Included among them is "protection for the privacy of the home and other property and from unjust deprivation of property".

Chapter 12 contains nine articles. The first two are absolutely crucial to the assertion of Melanesian Values found in the preamble. They state:
71. All land in the Republic belongs to the indigenous custom owners and their descendants.

72. The rules of custom shall form the basis of ownership and use of land in the Republic.

While the approach invariably taken elsewhere in the Pacific was simply to facilitate the future introduction of reforming laws, Vanuatu's approach has been to go behind the whole land tenure system imposed during the colonial era and reinstate the pre-colonial land tenure system. It did this by probably the only means available to a country which adheres to rule of law principles, that is by accomplishing it under its Independence Constitution. As the "supreme law" which speaks "for all time", the Constitution has in a real sense rewritten the history books so far as the land tenure situation in Vanuatu is concerned. The situation is now, and is taken always to have been, that all land in the Republic belongs to its customary owners and their descendants. Furthermore, as a result of Art.72 the customary land tenure system must be regarded as the permanent framework for all future economic development in the country.

The reversion to customary tenure is further implemented by Art.73, which provides:

Only indigenous citizens of the Republic who have acquired their land in accordance with a recognized system of land tenure shall have perpetual ownership of their land.

Having established the basic principles, Art.74 requires Parliament to provide for the implementation of Arts.71, 72 and 73 "in a national land law". It is possible to see Arts.71, 72 and 73 as programmatic, indicating the broad framework within which government policy is to be formulated and implemented, and Art.74 lends support to this view in calling for legislation to implement these articles. This is not, however, the view which has been taken by the Vanuatu Government, which has treated the articles as having the positive legal effect of vesting all land in Vanuatu in its particular customary owners. Article 74, in requiring a "national land law" to implement the preceding articles, is seen as providing for the elaboration of the principles enunciated, in order that they may be fully implemented. The Government's view of the effect of these articles has not been challenged in court.

As a result of this approach a number of consequences occur. In the first place, all introduced titles which purport to be titles of ownership and the land administration system which created and supported them are regarded as having been abolished. Secondly, the Constitution implicitly recognises that persons whose interests are "adversely affected" by legislation implementing the reversion of alienated land to customary ownership are entitled to compensation, although Parliament is able to:

prescribe such criteria for the assessment of compensation and the manner of its payment as it deems appropriate (Art.75).

It is noteworthy that the Constitution does not envisage an entitlement to compensation as arising directly from the restoration of customary tenure;
rather, the entitlement would only arise in the event of an actual loss suffered under any implementing law, over and above loss of land.

The following four provisions circumscribe the state's powers to intervene in land tenure matters. Article 76 deals with land disputes. It requires the Government to hold formerly-alienated land which is the subject of dispute among the customary owners until the dispute is resolved, and requires the Government to "arrange for the appropriate customary institutions or procedures to resolve disputes concerning the ownership of custom land". By Art.77 the Government's approval is necessary for all land transactions "between an indigenous citizen and either a non-indigenous citizen or a non-citizen". The approval must be given unless a proposed transaction is prejudicial to the interests of the customary owners, the indigenous citizen where he is not the customary owner, the local community, or the Republic. Article 78 enables the Government to own land acquired by it in the public interest, and the final provision in the Chapter, Art.79, enables the Government to "buy" land from customary owners in order to redistribute it to indigenous citizens or communities from over-populated islands.

The Constitution of Vanuatu is truly remarkable in a number of respects. The first is its use as an instrument to achieve a fundamental reform of land tenure. The latter Pacific Constitutions facilitated reform by enabling parliaments to legislate for the modification of the inherited land tenure system, but of themselves they play no active part in achieving a reorientation towards indigenous values and institutions as reflected in land tenure. This leads to the second distinctive feature of the Vanuatu Constitution. Whereas most other countries were reluctant to interfere with the pre-constitution status quo on land tenure, Vanuatu interfered in the most absolute way possible. It abolished all titles created during the colonial era, and reinstated the pre-colonial land tenure situation. If the problem in other countries is how there can be a socio-economic reorientation if pre-independence commercial interests are preserved and protected, the problem in Vanuatu is how there can be economic development if the socio-economic reorientation completely abolishes the basis of most existing commercial activities.

Apart from specific provisions relating to land, the Constitutions deal with other subjects which may effect the terms of convergence between commitments to indigenous values and economic development objectives. The two main ones considered briefly here, are the provisions on citizenship, and those dealing with the place of custom in the legal system and the role of traditional authorities.

In general, the situation in the Pacific Island States at Independence was that commercial activities were concentrated on alienated land, which was mainly owned or held on lease by expatriate individuals or corporations. Citizenship is an obvious matter to deal with in an independence constitution, and most Pacific Constitutions provide for automatic citizenship, and the gaining of citizenship by naturalisation. Whereas the earlier Constitutions took an expansive approach to the question of who qualified for citizenship, the qualifications became progressively more restrictive in succeeding Constitutions. The recognition of citizenship as a vital economic factor is more evident, and, together with more restrictive provisions for qualification, came the reservation of certain
important economic rights and freedoms to citizens or "indigenous" citizens, and the creation of special privileges allowing positive discrimination in their favour, as has been seen in the treatment of the land provisions of the three Melanesian Constitutions.

The incorporation of custom in the legal system and the involvement of traditional authorities in the processes of government may have the effect of promoting indigenous values and institutions and the post-independence socio-economic reorganisation. Where their authority is confined to custom and customary land it is unlikely that they will exert much pressure for change on the pre-independence status quo. On the other hand, in countries where their authority has been extended beyond the "traditional" area (in Vanuatu, for example, where the rules of custom are the basis of ownership and use of all land in the country, and where the National Council of Chiefs must be consulted in forming the national land law), custom and traditional authorities are likely to have a determining influence on the nature and extent of future economic development.

CONCLUSIONS

In this review it has been seen that the three Melanesian Constitutions make a commitment to preserve and promote indigenous values and institutions as a conscious reassertion of their distinctive cultural identity, probably perceived by most Pacific Islanders as having been suppressed and devalued during the colonial era. The demand for economic development, and improved public services and welfare which this allows, is general, and is at least implicit in the goals and principles of government in the Constitutions. Common constitutional elements have the function of creating a climate favourable to economic development.

The Constitutions were found to say or do very little to establish the terms of reconciliation between the commitments to preserve indigenous values and institutions and to achieve economic objectives. The introduction to the PNG Constitution does contain a long list of principles intended to harmonise economic objectives with the primacy of national self-reliance and Melanesian cultural identity in the pursuit of "integral human development", but very little contribution to this end is made by the operative provisions in the body of the Constitution. The general picture there and in SI is for minimal intervention by the Constitutions in the pre-independence socio-economic framework, and for prescriptive effect to go little further than facilitating future state intervention to mediate between private and public rights in the national interest - an accepted prerogative and duty of all sovereign nations.

The Vanuatu Constitution is a singular exception, for it is itself the instrument by which a major socio-economic reorganisation has been effected. Almost in despair of the prospects for gradual reform, this most recent of the Pacific's independence constitutions attempts a restoration of the pre-colonial status quo, in virtual defiance of the socio-economic conditions left as its colonial legacy at independence. It must be acknowledged that this approach is essentially regressive rather than progressive, and that the guidelines for the new nation's future orientation are still to be formulated. This is, after all, the most difficult task.
For the other two States, are their calls for cultural identity to remain only educational and inspirational, to be taught to the youth of the country, and given lip-service by the leaders, before pressing on with yet another drearily familiar 'development' plan? Is culture to be something for the depressed rural villages, the occasional arts festival and the tourist ships, while economic activity remains concentrated in the towns and on the foreign-dominated plantation estates - that archetypal creature of colonial settlement? Or may distinctive Melanesian institutions emerge, which blend indigenous values and institutions with economic imperatives, allowing for self-sustaining growth and the social needs and material aspirations of the Melanesian peoples to be realised? Because the Constitutions have no determining influence on these questions, the key to their resolution will be found in the support factors - the social, political and economic forces in the country which either stand behind and support preservation of the pre-independence status quo, or stand behind and support the demanded post-independence reorientation.

The post-independence history of PNG is a salutary example of how these forces operate to determine the normativity or nominality of reorientation goals. That country's Constitution was most explicit in its demand for a "fundamental reorientation". At Independence the PNG Government had adopted policies for a major land reform, and the Constitution made special provision to facilitate their implementation. The radical reform of alienated land was tentatively commenced, but after five years' desultory operation, has been abandoned by a new government, which has moved to increase the security of foreigners over alienated land in order to promote export earnings (see Larmour 1982:44-45). The five-year period of grace allowed in the Constitution to facilitate the adjustment of the titles of naturalised citizens has been let pass with no remedial action being taken. The conversion of non-citizens' freeholds to leases has not occurred. The courts have circumvented the relaxation of compensation requirements provided in the Constitution with respect to state acquisition of the land of non-automatic citizens (see Minister of Lands v. Frame S.C. 186, unreported, and the comments by Bayne 1981:38-39).

So far as the achievement of the NGDPs through other devices is concerned, implementation of the Leadership Code has been frustrated, and the move for a more strict code was defeated in Parliament, and was partly responsible for the fall of the Somare Government in 1980. The courts have made a trifling effort to incorporate custom in development of the underlying law (see the chapters of Sakora and Weisbrot in this volume), and the Law Reform Commission's recommendation that customary law should be adopted as the underlying law has been ignored. In general, despite an auspicious beginning, the pre-independence socio-economic framework has emerged from the transition virtually intact, and the prospects of a fundamental reorientation rapidly recede.

In global geopolitical power terms, the Pacific Islands States are characterised by their extreme social and geographical fragmentation, smallness of population, and narrowness of resource base. There is no doubt that external factors, pressing in as a consequence of their strategically weak position in the international political and economic order, exert a powerful influence on the policies that such peripheral countries may adopt in seeking self-sustaining economic growth. The forces for sustaining the pre-independence status quo include the need for export
earnings, and the central position of overseas and resident business interests in the national economy. The politically powerful minority of the citizenry capture and monopolise what limited economic opportunities fall from the table of the foreign businessmen, and contrive to consolidate them. The inherited colonial bureaucracy resists change (see Singleton 1981:233-34).

The support factors for reorientation are difficult to find. Political and pecuniary advancement seem inevitably to run in tandem, and measures for the equalisation of economic opportunities seem unlikely to emerge from the legislatures. Incorporation of custom in the legal system and traditional authorities in the processes of government may lead to greater influence by indigenous values. Strong 'grass roots'-based political parties can be a compelling factor for change, as has been the experience in Vanuatu. It is too early to see whether the socio-political 'renaissance' in this country can be articulated with the new nation's desire for economic growth and national self-reliance. On the Pacific Islands' experience so far the choice is between cultural distinctiveness and economic development, for no nation has yet managed to reconcile their contrasting requirements. The ultimate conclusion drawn from the Pacific Islands' experience is that unless the basic elements of reorientation goals are actually implemented (and not just facilitated) in the body of the Constitutions brought in at Independence, the likelihood that the goals will ever be integrated into the post-independence society seems doubtful.

NOTES

1Father Lini, for example, in the address referred to above, called Vanuatu a 'land-using' culture, and Australia a 'land-owning' culture. He continued: "The Western concept of land as a marketable commodity is not just alien to the Melanesian, but is considered impractical and immoral in the very best sense that the terms can be applied" (ibid.:26).

2PNG's Constitutional Planning Committee (CPC), for example, while asserting that its recommendations were 'home grown', freely acknowledged the diverse origins of many of them (PNG CPC 1974:Pt.I, para.9, at 1/2).

3Of the other Pacific Island countries, the 1875 Constitution of the Kingdom of Tonga is silent on the matter of custom, but the three entities of the American-administered Trust Territory of the Pacific Islands make important assertions of custom in the Constitutions of the Federated States of Micronesia (FSM) (1978), the Marshall Islands (MI) (1979) and Belau (1981).

4Found in varying forms in the Constitutions of Fiji, PNG, SI and FSM.

5Found in the Constitutions of WS, PNG and Tuvalu, and, less directly associated, in the Constitutions of Tonga, SI, Kiribati, MI and Belau.

6The PNG Constitution specifically provides to this effect: Sch.1.3.(1).
Although the Constitution of Tonga associates the right to protection of property with a recognition that "it is right for all people to support and contribute to the Government according to law" [Cl.18].

This reflects an agreement reached at the conference to allow Gilbert Islands settlers in SI to retain their perpetual estates (ibid.:29).
24. TRADITIONAL INSTITUTIONS IN PACIFIC CONSTITUTIONAL SYSTEMS: BETTER LATE OR NEVER?

G. Powles

RELEVANCE OF TRADITIONAL LEADERSHIP

Constitution-making is over and new paths are being trod. The past remains part of the present, however, and any constitutional stock-taking in the 'post-independence' Pacific involves a re-appraisal of the place of traditional and neo-traditional concepts of political power and decision-making. The scope of this paper does not extend beyond 'Pacific constitutions', which expression is taken to refer to the fourteen states which have become independent (nine) or have adopted 'free association' (five) during the past twenty years.

'Post-colonial' scene

It is dangerous to make generalisations about the 'post-colonial' scene in the Pacific but certain elements stand out.

The first is undoubtedly a sense of satisfaction in the attainment of political aspirations and the reassertion of cultural identity. National independence, or an acceptable degree of autonomy, has been accompanied in each case by the assumption of political power by the predominant leadership group, in a relatively smooth transition. (It is debatable whether self-congratulation should be shared by 'colonial' nations whose major considerations often appeared to have been to keep discord, censure and, above all, expense, in the transfer process to a minimum.) But, while satisfaction is felt by those who have assumed political control under constitutions which they, as politicians, are learning to employ to their advantage, traditional leadership also has enjoyed renewed support on the wave of cultural revival.

Such feelings draw attention to the inescapable fact of the termination of colonial authority - and to the sober reality that, short of revolution, major political and legal change in the new states must have regard to the terms of the constitutions which have been adopted. Wielders of power soon appreciate the significance of the new status. For the villager and labourer, the face of central government has probably altered little, and it will be a very long time before they learn the real rules of the new game.
Another part of the scene has been familiar for over two centuries - the clash of Pacific and Western cultures. The new constitutions - as further developments in the continuing saga - do not purport to resolve fundamental inconsistencies between cultures except in relation to the institutions of central government, where, in most countries, a Western model or its variant has been adopted. Generally speaking, political autonomy means that it is left to the new leaders to find policies and techniques which will reduce cultural conflict and will produce workable compromises - in such areas as the maintenance of order, dispute settlement, land tenure, family law and succession and local government. It is the vulnerability of chiefly power, however, in the light of its hitherto remarkable persistence in the face of the Western onslaught, which constitutes perhaps the most sensitive and difficult factor for the leaders of countries with chiefly systems.

A pervasive element in the scene is therefore the relevance of past events and historical depth in determining the extent of change and the acceptance of compromise. In Tonga, the nineteenth century introduction of ideas of monarchy and parliament, followed by adaptation during a long period of relative isolation, has ensured that today's constitutional institutions are regarded as traditional (see Powles 1979). Nauruan socio-political organisation, on the other hand, was virtually destroyed by events associated with successive colonial and military occupations and phosphate mining - capped, now, by a phosphate economy. It is not surprising that the Constitution of Nauru and related legislation today takes no account of a system of district chiefs which may have been short-lived (see Alkire 1977:83-84). The early formal recognition of chiefs in Fiji as instruments of central authority - and particularly the massive Fijian Administration of 1943 to 1967 which involved chiefs at every level (see Nayacakalou 1975) - established relationships and attitudes between chiefs and government which continue to have a profound effect on Fijian politics (see Nation 1978).

Incidence of incorporation of chiefly authority in the constitutional framework

Surveys of constitutional provisions often provide sterile information, but such a survey would establish two things. First, in only two countries, Western Samoa (WS) and Tonga, can chiefs rely on the constitutional structure to play a clearly dominant role at the national level. Secondly, the significance of chiefship is by no means restricted to Polynesia, and the notion that chiefs should have a voice, whether merely in an advisory capacity or a decisive voice in certain areas such as customary law, land tenure and local affairs, appears to be widely accepted in parts of Melanesia and Micronesia.

When one looks further into practical politics, of course, it is usually more significant to know the extent to which chiefly authority is not provided for in constitutions and related documents - and is accordingly free from the limitations which such documents might impose on it. By and large, and as will be discussed below, chiefs in the Pacific are 'free' to operate at sub-national levels and particularly in the crucial areas of land tenure and local government.
A matter of life or death?

Just as the question of whether or not to provide for chiefly authority perplexed pre-independence constitutional advisers, difficult decisions are now to be faced in many countries. The Solomon Islands (SI) and Vanuatu must consider the function of chiefs in relation to land and local government, and the role of chiefs is very much to the fore in relation to local dispute-settlement and law-and-order issues in (to the writer's knowledge) Fiji, WS and Ponape. The place of unimane (elders) in local government is under consideration in Kiribati (see Neemia 1981:62).

Chiefship and traditional decision-making cannot survive incorporation into imported authority systems which, in order to achieve their purpose, are required to retain their Western function and style. To those who regard chiefship - and particularly chiefship in respect of which inherited status plays a significant role - as inconsistent with the egalitarian principles upon which participatory democracy should be based, the sooner chiefship receives 'the kiss of death' the better. For others, it seems that small-scale non-Western societies lacking expensive infrastructures cannot afford to lose too quickly any institutions which contribute to the quality of daily life in a manner acceptable to the people concerned.

Chiefs: legitimacy, reciprocity and 'law'

Although Pacific cultures have produced many types of chiefship, certain common elements distinguish this form of leadership. The scope of this discussion ranges from the dynastic lineage heads of the older Polynesian societies in the district, village and family chiefs found throughout Polynesia and in many parts of Melanesia and Micronesia.2

Chiefship is an office, the institutional character of which is today more highly developed in societies where chiefs historically wielded greater power. In the Samoas and Tonga, the office is identified by a title borne by successive incumbents. A chief is the head of a group to which the office belongs. Land in which the group has rights and which is administered by the chief is usually appurtenant to the office. The relationship between chief and group is founded in kinship and descent, but chiefship becomes territorial when the dominance of one group over others in an area establishes its head as area chief. Offices confer defined status which is ranked inter se. While tension between competing notions of kinship, residence and territoriality is almost universal in the Pacific, preoccupation with status rivalry is a feature of chiefly systems.

Chiefship is further distinguished from other forms of leadership by the fact that the ideology of qualification for office emphasises the closeness of inherited ties with, and active membership of, the group. While cultural variations are wide - as is the gap between ideology and practice - chiefly succession involves examination of actual or mythical common ancestry and relationships built upon service to the group. Today, strict primogeniture functions only in Tonga, and elsewhere importance of blood-line has diminished relative to other relationships.
Chiefly authority is sometimes associated with the mana of ancestors, and ritual and deference indicators may still define and perpetuate chiefly status. However, the legitimacy of that authority requires public recognition and reinforcement, for which the chief is dependent on the group. As succession increasingly turns less on inherited characteristics and more on group assessment, the group's role in chiefship is enhanced. In societies where the stratification of status within hierarchies of offices has distanced more powerful families and groups from the rest of the population (in Tonga, Fiji and the Samoas, for example), the dependence of the chief on his own group is linked with factors involving the maintenance of group status.

Chiefly power is a function of the reciprocal nature of the services rendered between chief and group. The chief provides leadership in furtherance of the group's interests and relies upon its support. Consequently, the vulnerability of the mutual dependence of chief and group constitutes the most vital feature of modern chiefship. The erosive effects of access to competing sources of power—such as personal income and the accumulation of disposable wealth, and political and government office—apply to both the chief and members of the group. The latter seek independence through these alternatives. The chief, whether in an endeavour to restore authority, or simply to pursue ambitions for greater power, uses his initial advantages to improve his position by the same means. The reciprocal basis of the relationship is undermined.

His word is 'law'

The exercise of chiefly authority is essentially a political function. The chief is policy-maker and administrator, but not adjudicator in the Western sense, as a brief reference to decision-making in customary law will show. Chiefs (and, where they exist, chiefly councils) do not apply rules of law as they are understood by Western lawyers. Conventional thinking about the nature of the function is misleading. For example, Hart's approach is based upon the assumption that the primary unofficial rules of obligation which pre-legal societies understand through their "internal" perception are capable of determining outcomes (see Hart 1961:89-90, 113-14; Roberts 1979). Such a view pays too little attention to the role of power in the resolution of conflict. The chief is required to take into account a range of recognised considerations in relation to the matter in hand—and then to exercise his discretion. Such considerations may be internally perceived but, where chiefs wield more extensive public power, the considerations are expressed and debated—and, indeed, are they not matters of public policy?

Some societies achieved a degree of specificity in the articulation of so-called 'rules' of customary law, but these are principles which, as Dworkin puts it "argue ... in one direction but do ... not necessitate a particular decision" (1978:24, 26). Probably the best examples in the Pacific are the principles applied by the WS chiefly councils and the Land and Titles Court, particularly in the areas of appointment to chiefly office, rights to land, service to family and village, and the preservation or order (see WS 1976). In a given case, not only will there be conflicting principles applicable to succession to title but considerations of public harmony will be relevant. Other characteristics of traditional
decision-making are that it is not intended to produce immutable judgments and binding precedents, and it is concerned not to exercise an isolated transgression or dispute from its context of on-going relationships.

Generally speaking then, the exercise of chiefly power involves the consideration of recognised principles rather than the application of decisive rules. As in the case of the Western administrator or administrative tribunal, the power is discretionary, and reviewable only where there exists a higher level of acknowledged authority. Areas of jurisdiction may be territorial or functional. Some Pacific societies developed a duality of authority so that in each locality the two types of chief would interact in a system of checks and balances - for example, the ali'i and tulafale in Samoa, and the namwarki and naniken in Ponape.

Where chiefs consult with their groups or with other chiefs, collective decisions are achieved by a type of consensus intended to exhibit outward unity - but which usually involve more conformity than unanimity. Opinions are weighted according to the status of the holders, and those held by the highest ranks are usually known in advance. Unless open conflict is envisaged, there may be no statement of intention to dissent from the collective decision (which may not be reached for days or weeks, and, in Samoa at least, binds those who attend).

CHARACTERISTICS OF CURRENT CONSTITUTIONAL SYSTEMS

In the space of only twenty years, fourteen Pacific societies have changed their status under constitutional charters which appear to represent a remarkably wholesale adoption of Western thinking. With the assistance of some generalisations, the following analysis indicates how, in fact, the adoption has been less than wholesale.

Ingredients of the importation

Those ingredients which confront chiefship and are relevant for this discussion may be summarised:

1. the nation-state, in which political and legal organisation is centralised and extends across a national framework;

2. the citizen-isolate, who bears rights and obligations in relation to the state and amongst fellow citizens - on the footing of equal political and legal status for citizens;

3. law-making bodies, which are responsible to an electorate comprising the adult population co-extensive with their jurisdiction, and the legitimacy of whose decisions depends upon the opinion of not less than the majority of equally weighted voices;

4. an administration, which is accountable to such bodies or, through its head, to the electorate;
5. a court system, which administers law and tests the exercise of power against the constitutional charter.

Absence of concomitants

By their nature, constitutions express only certain essentials, and the Pacific importations have indeed been limited to the bare bones of the constitutional models from which they derive. One must look elsewhere for the flesh and blood necessary to enable the constitutional skeleton to function effectively. Those components which are usually missing in the Pacific States (yet, ironically, are now increasingly regarded as essential in those countries which have exported the models) are concerned with participation and decision-making and the review of government action. Generally lacking are the mass media and investigative information services, the procedures for public examination of proposed legislation, budgets and economic plans, and the procedures for the review of administrative rules and decisions, which are needed for public participation and the checking of government power. A more obvious result of the development of 'stripped down' central government in the Pacific has been the lack of attention paid to participation in local government and to links between village and capital town. The 'bare bones' leave spaces which are open to exploitation.

Lack of penetration of constitutional precepts, and protection of customary law

Constitutions, also characteristically, do not purport to deal with such matters as local government and land tenure. In Western societies, however, the values and attitudes behind the constitution are pervasive. In the Pacific they stop short, and it is important to see where and how this occurs in each society. In this paper there is scope to refer only to the two most obvious techniques for formally delineating the ideological boundary.

Some constitutions impose a set of priorities on the adoption and use of sources of law which are intended to regulate the extent to which the country retains unwritten customary law: PNG (ss.9, 20, and Sch.2), WS (s.111), SI (s.76 and Sch.3).

Vanuatu (ss.49 and 74) and Marshall Islands (MI) (Art.X) require their Legislatures to consider further and make provision for the content and status of customary law. PNG places the obligation, in the first instance, on the courts and Law Reform Commission (s.21 and Sch.2). The other constitutions ignore the question, leaving it to the legislature and the courts to decide whether to interfere with the pre-constitution priorities of firstly, statute; then common law and equity; and finally customary law. While the distinction between written and unwritten law has no legal significance, unwritten customary law is believed to be seriously disadvantaged in public competition with the superior status of the written word and with courts trained to apply common law and equity. It remains to be seen to what extent constitutional support will encourage the use and viability of customary law. While the early momentum of the PNG Law Reform Commission in the development of underlying law appears to have halted (its
The second technique is to declare that certain areas of law shall be
the exclusive domain of customary law - subject only to the constitution.
The post-independence vitality of WS's chiefly system owes much to the bald
statement in the Constitution that matai titles "shall be held in
accordance with Samoan customs and usage" (Art.100) - and similar provision
for customary land in Art.101. It is a feature of Pacific countries that
most of the land is subject to customary tenure. While prohibition
of alienation to non-citizens is common, effective constitutional protection
of the basis of the tenure requires prohibition of change of status per se,
and is rare (e.g., WS Art.102). Vanuatu declares that the rules of custom
shall form the basis of all land ownership and use (s.72). Fiji achieves
protection of customary land as a chiefly domain by entrenching the
relevant legislation (Native Lands Ordinance (1905) and Native Lands Trust
Ordinance (1940)) so that amendment requires the support of three-quarters
of the appointees of the Council of Chiefs (s.68).

A further consideration for chiefs operating within customary law
areas is the extent to which they may be subject to the jurisdiction of
courts. The topic would require more space than this paper permits. As to
special courts with exclusive customary jurisdiction, recent creations
(such as the MI Traditional Court) may have difficulty maintaining status
in competition with conventional superior courts - while the long-standing
and extensive powers of the WS Land and Titles Court have enabled it to
retain its influence.

Conflict between different sub-systems of law is inevitable, and
occurs at different levels. For example, much depends on approaches taken
by judges to the interpretation of constitutional "bill of rights"
provisions. Judicial restraint, and not a little diffidence on the part of
short-term expatriate judges have usually prevented such conflict from
crystallising. In WS, eighteen years elapsed before the expatriate judges
felt obliged to state publicly that, in their opinion, the common practice
of banishment from the village was inconsistent with Art.13 guaranteeing
"freedom of residence". The latest Chief Justice, however, having awarded
punitive damages against three chiefs whose decision in village council constituted "a high-handed demonstration of power" (Tariu T. v. Sila,
F. and ors (SC) 17 December 1980 R.St.John CJ) appeared to have no
hesitation in finding that the limitation of the right to vote to men and
women of chiefly status is unconstitutional and void (Saipa'ia Olomalu
v. Attorney-General (SC) 5 April 1982 R.St.John CJ). In this last case, he
accomplished at a judicial level what parliamentary commissions and
committees, and Parliament itself, have resolutely set their faces against
since the UN General Assembly approved independence for WS on the basis of
matai suffrage 21 years ago.

At the level of implementation, where central authority, represented
by the police force, confronts local leadership in village councils,
conflict may remain unresolved for some time (e.g., the writer has been
informed that the plaintiff and law enforcement officials had, by April
1982, been unable to recover the damages awarded in Tariu, T., referred to
above).
Depth of compromise and persistence of unincorporated institutions

Over time, many Pacific societies have modified the constitutional models derived from Westminster and Washington, and, in some cases, have achieved remarkable amalgams. The persistence of chiefship as a fact of life has been responsible for much of this adaptive process and it is noticeable that chiefly leadership has, if anything, reasserted itself under post-colonial administrations.

The fourteen Pacific systems of today are characteristic not only for the diversity of their historical experience but also for the variety of arrangements which have been adopted in this area of compromise between 'old' and 'new'. Factors which have played a part include the nature and strength of traditional leadership at the time of arrival of missionaries and colonial administrators; the policy of the newcomers in dealing with such leadership; the fluctuation of colonial interests over several generations, often in response to perceived local imperatives; and, in the lead-up (sometimes a 'run-up') to independence, the extent of political expediency involved in recognising local leadership.

The cases of Tonga, Nauru and Fiji have been mentioned above. WS and Ponape provide examples of chiefly systems parts of which have avoided formal incorporation into new governmental structures. The WS village councils have actively resisted the central administration several times this century - and continue to do so. Yet, everywhere it exists, chiefly power seems to have been too sensitive a subject to be adequately considered in the constitution-making process and is today seldom debated in the context of political and economic planning in the countries most concerned. A thorough study of each such society is called for before decisions involving the future of chiefship are made (see Powles 1979).

INCONGRUITIES AND ABUSES

It may be helpful to highlight some of the areas of concern - and to draw attention to the conceptual conflicts and erosion of values implicit in any fusion of chiefly and Western systems.

Chiefs as public servants

The political nature of chiefly authority and power renders the chief unsuitable as an instrument of modern government. As has been shown, the customary law and decision-making of chiefs are inappropriate for the needs and style of such government. Colonial administrations sought to engage chiefs in administrative and judicial roles. They were required to apply and enforce regulations which would usually exclude the broader considerations which have been described above as traditionally relevant. Also - they were seen as owing some allegiance to an authority outside their system - and a mere suggestion of such allegiance was sufficient to begin the erosion of group support.

Nevertheless, the case for the adoption and supervision of chiefly power in the aid of a formal structure of village government has had persuasive advocates, such as Ratu Sir Lala Sukuna in 1942 (see Davidson
1950). Fiji's structure lasted for fifteen years and vestiges remain. In WS, where proposals under German and New Zealand administrations in the 1900s and 1920s, respectively, were, like Professor Davidson's, never accepted, the resistance of chiefs, both in the villages and at the centre, is still successful. The intention of the Minister of Justice in 1977, as expressed in a paper to a meeting of Commonwealth Law Ministers at Winnipeg in August of that year (1977:28) - to confer judicial authority on the village councils - was subsequently regarded by his colleagues as politically unacceptable. Chiefs correctly sense that, if the inherent conflicts are exacerbated, the values supporting their system have poorer prospects of survival.

Local levels of chiefship

Chiefly authority was traditionally limited to groups and local territories. Today, in some countries, chiefs are forced onto the wider district or national stage, particularly if, as local chiefs, they are required to exercise functions at higher levels of government. Chiefly power is thus artificially extended in Tonga, Western and American Samoa, Fiji, Belau and MI. In Tonga, where monarch and 'noble' chiefs have national powers, it may be argued that all-powerful chiefly dynasties existed traditionally, but it was an accident of history that, over 100 years ago, froze a short period of dominance by an outstanding leader into hereditary rule perpetuated by a constitution. Conversely, one might say that, on the national scene in WS, it is the chiefs who have moved to force government and commerce into a chiefly mould. People in the public service and business, formerly areas outside the chiefly system, have in large numbers sought and taken titles - to close the gap between Samoan and part-Samoan status.

Loyalty to whom?

A fundamental incongruity in the notion of chiefly leadership in the service of the state is that such leadership is predicated upon service to the chief's traditional group. In retrospect, the unceasing battle on the part of colonial administrators to encourage chiefly impartiality would seem comic if it had not resulted in the adoption of 'acceptable' double standards. Clearly, one could not impose the type of 'leadership code' envisaged in PNG, SI and Vanuatu on government leaders and officials who hold their positions in government by virtue of their chiefly office. Let us take the case of a hypothetical district system under which local government is in the hands of the traditional chiefs from villages in which they are traditionally selected. If any such chief were to hold administrative or judicial office, his "conflict of interest" would be of the same order as a person with "personal and business incomes and financial affairs" whose activity "might be expected to give rise to doubt in the public mind" as to whether "the fair exercise of his official duties might be compromised" (SI ss.93-95).
DOUBLE STANDARDS ARE ALSO SEEN IN THE ELECTORAL PROCESS. HOW SHOULD CHIEFLY CANDIDATES AND THEIR SUPPORTERS CONDUCT THEMSELVES? LEAVING ASIDE THE QUESTION OF SUFFRAGE REFERRED TO EARLIER, ONE OF THE MOST DIFFICULT TASKS FACING THE WS GOVERNMENT, E.G., IS TO DEVISE ELECTORAL RULES WHICH ARE SUFFICIENTLY ACCEPTABLE TO BE ENFORCEABLE. ELECTORAL PETITIONS FOLLOWING EACH ELECTION HAVE PERPLEXED A SUPREME COURT TRYING TO APPLY STANDARD 'BRITISH' DEFINITIONS OF ELECTORAL OFFENCES. DESPITE THE SEEMING IMPOSSIBILITY OF FITTING THE WESTERN AND TRADITIONAL CONCEPTS INTO ONE PROCESS (SEE ALA'ILIMA 1966), THERE IS NO ALTERNATIVE BUT TO ENDEAVOUR TO RESOLVE THE CONFLICT AS FAR AS NATIONAL ELECTIONS ARE CONCERNED.

REACTION TO CHANGE

TO WHAT EXTENT ARE CHIEFS THEMSELVES RESPONSIBLE FOR INEQUITIES AND ABUSES? THE PACIFIC HAS EXPERIENCED NO DIRECT CLASH BETWEEN CHIEFS AND 'COMMONERS' SINCE THE DOWNFALL OF THE HAWAIIAN MONARCHY (WHEN ARMED CITIZENS DEPOSED QUEEN LILIUOKALANI IN 1893). IN THE THREE MAJOR 'CHIEFLY' STATES OF TODAY - TONGA, WS AND FIJI - HOWEVER, REACTION TO THE THREAT OF INEVITABLE CHANGE HAS INTENSIFIED.

THE PRESENT KING OF TONGA HAS, SINCE SUCCEEDING TO OFFICE IN 1967, Sought to associate in his people's minds the awesome presence and power of the traditional Tu'i Kanokupolu and the ancestral Tu'i Tonga with the position of 'constitutional' monarch and the role of educated and worldly-wise leader. Growing business and professional sectors support the status quo, as does of course the small class of constitutionally-protected nobles and hereditary land-owners (about twenty-nine individuals) and their families. With control of cabinet, parliament, police, army and communications, the King and his 'establishment' have little to fear, except perhaps from industrial action in the public service. Tongan society remains organised politically 'from the top downwards'. The recent proposal to increase the number of members of parliament from fourteen elected members (seven representatives of the people and seven of the nobles) to eighteen such members (nine representing each class) - to which are added the Prime Minister and six Cabinet ministers appointed by the King - must be regarded as a cynical exercise if it is claimed that it will afford significantly greater popular participation in government. The reasons for the absence to date of open challenge and repressive reaction are complex (see Powles 1979) and it would be dangerous to think that Tonga has learned how to deal with demands for wider political expression.

CHIEFS IN FIJI OFTEN COMBINE GOVERNMENT POSITIONS WITH SOME PERSONAL WEALTH AND UNTIL RECENTLY HAVE BEEN REGARDED AS SYMBOLIC OF THE STRENGTH OF FIJIAN CULTURE AND POLITICAL ORGANISATION IN THE FACE OF COMPETITION WITH THE INDIAN, CHINESE AND WHITE POPULATIONS. THE DRAMATIC RISE AND FALL OF Sakeasi Butadroka and the Fijian Nationalist Party in the two elections of 1977 demonstrated first, that the (thither to dominant) Alliance Party had been paying insufficient attention to its 'grass-roots', and, subsequently, that Ratu Sir Kamisese Mara and the Fijian leadership could swiftly and firmly employ traditional associations with chiefship to put down and shame those who sought advancement in an 'upstart' fashion. The following quotations illustrate criticism:
Most of the Fijian chiefs no longer serve their people. In fact most of them think that the people have nothing to do with their privileges and status. What they are forgetting is that they are what they are because they have people below them. In other words, a chief is a chief because he or she is supposed to have some people to lead (quoted in Nation 1978:1).

and reaction:

We in Fiji are fortunate to see again in Lakeba [meeting of the Great Council of Chiefs in May 1978] all of the good things we can achieve if we continue to adhere to the true foundation of Fijian leadership, that is mutual reverence, mutual respect, and mutual regard for one another in sincere adherence to the Chiefs (quoted ibid.:146).

Chiefship in WS exhibits greater adaptability and strength than elsewhere in the Pacific, but the pre-occupation of the Samoan people with status rivalry in all spheres of life has brought about profound change in the traditional system. On the one hand, chiefs have used their rank to secure national political advancement and commercial success, while untitled politicians, public servants and businessmen have sought chiefly titles to enhance their prospects. With the creation and splitting of titles, the system has been 'watered down' - and, after the removal of some 2,500 titles conferred 'contrary to custom', there remain over 11,000 registered matai (about 9,200 of whom went to the polls in the recent election (see Savali, 10 March 1982)) or a ratio of one in every five adults as compared with one in nine in 1961.

Proposals for sharing chiefly authority with the untitled (as in the control of land and income from land) have been firmly rejected, however (see Powles 1979) and a parliamentary committee report recommending the introduction of universal suffrage (for matai candidates) was dismissed by a clear majority of members of Parliament as recently as February 1981 (see Samoa Times, 27 February 1981)."
LETHAL STATUTORY CLOTHING

In many Pacific societies, if the relationship between chiefs and people is interfered with, both will suffer. Nayacakalou puts it:

[Chiefs'] positions are inextricably interwoven with the structure of their group so that the goals for which the groups organise under the leadership of their chiefs remain common goals (1975:115).

Where statutory authority is conferred on the chief, he becomes less reliant on the support of his group and the reciprocal basis of the relationship weakens. Ultimately, the chief in statutory clothing may disappear from within. With the loss of chiefly status, only the trappings of government office remain - and, in the meantime, the incumbent has been under pressure to abuse both positions.

FUTURE OF CHIEFSHIP

Traditional chiefs will compete for power with those who enjoy other sources of influence, such as political office, the public service and commercial enterprise. In countries where the sources of power have already been combined under the constitutional system it is too late to suggest any modification at the national level. In Fiji, Tonga and WS, constitutional entrenchment impedes reform.

Throughout the Pacific, the use of chiefship in an unincorporated capacity at local level, and perhaps with other functions, deserves further consideration. There are several matters to be taken into account:

1. Viability of chief-group relationships; ideally, this requires thorough investigation by suitably experienced personnel.

2. Local patterns of power and participation; in a particular society, or section of it, it may be necessary to assess the extent to which the chiefly system contributes to, and/or impedes, participation and representation by the adult population in local decision-making. Interaction between social groups and levels, and the mobility of individuals, may be looked at. This area involves matters of social scale and an understanding of the roles and functions employed (see Benedict 1967; Roberts 1979).

3. Cost of new or replacement services; some countries may have little choice but to seek ways of taking advantage of the chiefly system in local government. For the foreseeable future, the economy cannot meet the cost of the whole infra-structure involved in the introduction and support of, elected councils and administrative and judicial officers.
The types of function which chiefs might be encouraged to carry out but without statutes which would associate chiefs, as a class, with those functions may be discussed in general terms, subject to the above considerations.

1. To begin with, those traditional functions which help to maintain and stimulate the operation of traditional mechanisms of social control through kinship responsibilities and inter-group relations could be left unaffected – or, where appropriate, encouraged.

2. Chiefly tasks in relation to the administration of customary land could be approached similarly. It may be desirable to reassure those with customary land responsibilities that government does not propose to interfere in this vital and sensitive area.5

3. In the complex scene of local politics, where chiefs traditionally represent the interests of groups and villages on councils, it may be desirable not to interfere legislatively. Where such councils fail to administer local government adequately, supplementary and/or supervisory positions may be created by government. The role of chief as representative may be stimulated where government officials regularly call meetings of such leaders.

4. Dispute settlement as a natural chiefly function is particularly valuable where the formal court system has not fully penetrated.6 As an integral part of the traditional process, the chief's role should not be interfered with. It is necessary to allow people ultimate access to the courts (and constitutional 'declarations of rights' usually require this), legislation may provide that traditional methods of settlement should be exhausted or declared inappropriate before a matter - without distinction between 'criminal' or 'civil' - will be admitted to the courts on the certificate of a 'gatekeeper' (which was the technique proposed by the writer and favoured by the Judicial Advisory Council of the Ponape State Legislature at its planning seminar in April 1981).

5. Chiefs act naturally as the repositories not only of group and local history but also of important information in village, island and district affairs. This function might be further developed informally to promote the upward movement of information and opinion - from group to local council, and from region to centre. Indeed, the advisory function of councils of chiefs at district or national level is adopted in the Cook Islands (CI) (the House of Ariki has been active in the clarification of customary law in relation to tribes, clans and chiefs, but perhaps over-concerned to re-assert chiefly authority (CI Legislative Assembly
There is scope for chiefs in an advisory capacity under the Constitution of the Federated States of Micronesia (FSM) which authorises Congress to establish a "Chamber of Chiefs", and the Constitution of a State having traditional leaders may provide "an active functional role" for them (Art.V).

The above discussion appears to have particular relevance for SI (where Parliament is required by the Constitution (s.114) to consider "the role of traditional chiefs" in the government of the provinces), for Vanuatu (custom chiefs make up the National Council of Chiefs and Parliament is required to make provision for "the role of chiefs" at the village, island and district level and in village or island courts, and for the "representation" of custom chiefs on regional councils (ss.29, 50 and 81), for FSM (see above) and for other societies where the place of chiefs is now being considered. In the constitutionally more established chiefdoms, such as WS, Fiji and MI, the function of chiefs at the local level remains an important subject for policy-making. For Tonga, the fate of leadership remains in the hands of the paramount chief.

In the light of what is seen as the inevitable sweep of egalitarian thinking, the perpetuation by statute of a leadership system based upon elements of inherited status or 'class distinction' would appear short-sighted and anachronistic. To supplement chiefly with statutory power seems contrary to the interests of both systems - and of greater public participation in the decision-making which affects daily lives. As an institution competing freely with government and commerce, however, independent chiefship contributes to a wider and more inter-active field for the exercise of power, the expression of opinion and mobility in the achievement of aspirations.

NOTES

1 Such reliance in WS has been somewhat shaken by the very recent Supreme Court declaration (under appeal at the time of writing) that chiefly suffrage is henceforth void as inconsistent with the anti-discrimination provisions of Art.15 (Saipa'ia Olomalu v. Attorney-General (SC), 5 April 1982 R.St.John CJ).

2 Chiefship is still often regarded as a Polynesian specialty - but see now Douglas 1979 (for Melanesia) and Alkire 1977 (for Micronesia). In fact the similarities between, e.g., the chiefly systems of Ponape and Samoa are remarkable (see Fischer 1974 and Gilson 1970).

3 Of course, each system has its strengths and weaknesses. Legislative committees are generally inadequate and ineffective. Only Fiji, Papua New Guinea (PNG), SI and Vanuatu have ombudsmen. Tuvalu (s.60) and Kiribati (s.68) provide time for consideration of bills by island councils.
4This was in the form of a direction by Sir Gaven Donne CJ as President of the Land and Titles Court to the Samoan Judges of that Court of 17 April 1980, as explained in a public statement by B.S. Johns ACJ, Samoa Times 23 January 1981.

5In the light of increasing WS Government activity in the compulsory acquisition of land for public purposes - for which compensation was held by the public trustee in trust for the land owners - the chiefs in Parliament overreacted in 1970 to require all such compensation to be paid direct to the chief concerned "as the only person entitled" and without mention of customary obligations (Taking of Land Amendment Act (No.1) (1970)).

6How far is such a system capable of penetrating in any society? The clear need in Western societies to bring dispute-settlement techniques to the people is seen in the remarkable growth of ombudsmen, domestic conciliators, small claims tribunals and community mediation centres.
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