Decentralisation and the Constitutional Status of Local-Level Government in Papua New Guinea

Joseph Peasah

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AUTHOR'S NOTE

Given that some provinces have "local governments" while others have "community governments" (and that provinces have the right to call their sub-provincial governments by any name of their choice), the expression "local-level governments" very aptly encompasses all the forms of government at the local level; that is, below the provincial level. The Papua New Guinean constitutional laws are sufficiently clear on this. Section 187I of the national Constitution states the following:

"(1) Until a provincial law of a province makes provision for government at the local level, the Local Government Act 1963 as in force from time to time continues to apply in respect of such government in the province.

(2) An Organic Law may make provision for the respective powers of the National Government and of provincial governments concerning local-level government" (my emphasis underlined).

Also, subject to Section 187I of the National Constitution, s.24(1)(i) of the Organic Law on Provincial Government lists among the primarily provincial subjects --

"local, community and village governments and other local-level governments within the meaning of that section" (my emphasis underlined).

The constitutional laws therefore envisage three levels of government, and they significantly and understandably assume that the expressions "government at the local level" or "local-level government" refer to any government at a level below the provincial level.

JOSEPH PEASAH
Introduction

"Indeed, in our experience of political systems in Africa and the Caribbean, we have not come across an administrative system so highly centralised and dominated by its bureaucracy" (Tordoff and Watts 1974: 2/2).

"Decentralisation of economic activity planning and government spending, with emphasis on agricultural development, village industry, better internal trade and more spending channelled through local and area bodies" (Third Point, Eight-Point Improvement Plan 1972).

"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" (Constitutional Planning Committee (CPC) 1974).

All three quotations concerned the political and administrative systems in Papua New Guinea on the eve of independence. The first was by two consultants, who were appointed to report on national/provincial government relations, purported to be a factual statement about the situation as it was then. The second was by the first government led and dominated by indigenous people and was one of eight policy guidelines which were expected to direct government actions for the foreseeable future. It underscored the government's strong commitment to the policy of decentralising decision making and administration. The third was by the CPC (whose report was the single most important document which determined the post-independence Constitution) and recommended the basic practical ways in which decentralisation should take place in order to solve the existing problem of over-decentralisation.

The history of post-independence decentralisation in Papua New Guinea is so well-documented and elaborated elsewhere that it may not serve much purpose going over the same ground here (see for example, Premdas and Pokawin 1978; Coneyers 1975 and 1976; McKinsey and Company Inc. 1977; Specialist Committee 1984; Ghai 1982; Regan 1985; Axline 1986). Consequently only brief outlines of this history are given where it is necessary to do so. Suffice it to say, that after considerable hesitation and tremendous pressure from North Solomons Province (previously Bougainville District), which even threatened secession, a firm action was taken in 1977 to establish nineteen provincial governments, apart from the National Capital District. The latter was to be administered as determined from time to time by an Organic Law or Act of Parliament (National Constitution s.4; Constitutional Amendment No.1 (National Constitution Part VI A); and the Organic Law on Provincial Government (OPLG) 1977).

Among the things which determined the form of this post-independence decentralisation, two concerns were of crucial significance. First, it was envisaged that decentralisation would lead to a "form of government within a unitary system, subject to political control at the district level" (Tordoff and Watts 1974).
This policy of decentralisation within the framework of a unitary system of government (as explained by the CPC) was largely in reaction to the enormous, contemporary political difficulties which seemed to be associated with federations in developing countries (especially in Africa) in the early 1970s.

The unitary nature of the general constitutional framework is borne out by the ultimate pre-eminent position of the national government and the Parliament in all things relating to the ways in which powers and functions are divided between the levels of government, and even to the very form of the Constitution itself. For example, all the constitutional laws (the Constitution and the Organic Laws) can be changed by the National Parliament without necessarily seeking the opinion, let alone prior concurrence, of the provincial governments and assemblies; nor is Parliament required to consult the electorate at large through, say, a referendum, or to act after a clear popular mandate expressed through general elections conducted specifically or mainly for that purpose.

The second concern was that the division of powers and functions among the levels of government ought not to be unduly encumbered with legalistic and technical complexities. Underlying this concern was the hope that intergovernmental relations would evolve flexibly and adapt to changing circumstances on the basis of pragmatic compromises among the various levels of government. Partly for this purpose, a great deal of fluidity has been deliberately built into the Papua New Guinean constitutional arrangements, including such things as:

- the pragmatic determination (by Ordinary National Acts) of the vast array of provincial powers in the fields of concurrent national and provincial legislative competence (OLPG ss.27, 28 and 29);
- the ambiguities surrounding the respective roles of national and provincial bodies regarding the public service (National Constitution, ss.190, 191 and 194; and OLPG ss.49 and 50); and
- the use of such concepts as "national" or "public" interest, and "exhaustive" laws in determining the respective powers of the national and provincial governments.

The fluidity brought about by these constitutional provisions has also been matched by very volatile political alignments both in and outside the Parliament.

Hence, unlike federal systems in which at least two levels of government have coordinate powers and functions and none can unilaterally alter the basic elements of the constitutions without the involvement of some specified external body or bodies, the National Parliament of Papua New Guinea has no restrictions other than the stipulated procedural ones relating to the making of its own different types of laws. This being the case, in the final analysis, even the very existence of provincial governments depends on what the National Parliament considers to be politically possible, desirable and expedient.

On the other hand, as long as the powers and functions of provincial governments are defined and provided for under the constitutional laws, the provincial government system enjoys much greater security than would ordinary local-level governments.

That is, as the alteration or repeal of constitutional laws requires much more "rigid" procedures than ordinary Acts of Parliament, there is reasonable
ground for presuming that the provincial government system (along with the present division of powers and functions) is entrenched by the present constitutional arrangements. This may be so, despite all the flexibility and fluidity already referred to and the fact that the Constitution has indeed been changing other than by the formal passage of legislation. The fate that has befallen the National Fiscal Commission and the extra-constitutional developments regarding the arrangements for intergovernmental fiscal relations are two such examples.

Although the provinces have representative legislative and executive bodies, they do not share coordinate powers with the national government as a federal constitution would require. Yet, the provincial governments cannot be said to be without substantial powers and responsibilities.

On such considerations, the Papua New Guinean constitutional arrangements have been correctly described as "a politically decentralised unitary system with clearly marked federal features" (Axline 1986:53). It is in the light of this "quasi-federal" system that the constitutional and political status of local-level governments in Papua New Guinea can be properly examined.

General Principles

Two main considerations have shaped the constitutional status of local-level governments in Papua New Guinea. The first is the liberal democratic principle of popular consent and free participation in government. The second is the political and administrative expediency of not making any constitutional distinction between the jurisdiction of provincial and local-level governments.

The principle of popular consent and free participation in government is explicitly spelt out in the Preamble to the Constitution, especially the second of the "National Goals and Directive Principles" which unequivocally stresses equal opportunity for all citizens "to participate in and benefit from the development" of the country. To this end, a declared objective of the Papua New Guinean political system is to create conditions in which there is equal opportunity to participate in the "political, economic, social, religious and cultural life of the country". Put more explicitly in political and institutional terms, this goal calls for:

"the creation of political structures that will enable effective, meaningful participation by our people in that life, and in view of the rich cultural and ethnic diversity of our people for those structures to provide for substantial decentralisation of all forms of government activity" (my emphasis underlined) (Constitution, Preamble s.2(2)).

These political structures in a decentralised system should, then, afford every citizen the opportunity either directly or through his or her representative, to participate in considering public matters affecting his or her interests or community. These principles enunciated in the Preamble are given further underpinning in Part III of the Constitution dealing with certain basic rights and principles of government.

In their earlier final report, the Constitutional Planning Committee had emphasised the need for strong links between the national government, provincial governments and villages and had also argued for the "very greatest
importance" to be attached to "government at the village level". However, it was obvious that government at the village level would lack the capacity for viable existence unless considerable assistance was forthcoming from higher levels of government.

This largely explains the second consideration which has determined the constitutional status of local-level governments in Papua New Guinea. That is, what has been labelled as the political and administrative expediency of not drawing any distinction between the jurisdiction of provincial and local-level governments. The difficulties encountered by local government councils and the experience of village and community governments in the early 1970s outside the framework of the council system established by the Australian Administration, drove home one very important, indelible political lesson. That is, given the great diversity of local conditions in the country, the pursuit of a uniform local government system which was supposed to be viable and equally applicable in every part of the country was a futile exercise. Hence, a much more realistic policy seemed to be one which showed sufficient flexibility to take effective account of local differences and peculiarities.

Two main realisations flowed from this. First, provincial governments were considered better placed than the national government to devise forms of local-level government suitable to the different localities, and then manage and offer the required assistance to them. This was because, being relatively closer to the localities in terms of area of jurisdiction and the nature and scope of responsibilities, provincial governments were presumed to be more likely than the national government to be sensitive to local problems and peculiarities. Second, because of the need to flexibly take account of the presumably bewildering diversity of local conditions, it was considered best not to spell out the details of relations between provincial and local-level governments in constitutional laws.

This has led to a situation in which the powers, functions, forms and (to an overwhelming extent) even the resources of local-level governments in the post-independence period are as determined by individual provincial governments. Thus, in respect of powers and functions, relations between provincial and local-level governments are much more "organic" than between the national and provincial governments. Therefore, a good deal of the problems and issues of local-level governments in the post-independence period largely depend on the capacities and peculiarities of the individual provinces in which the particular local-level governments are located.

The relevant provisions establishing the general constitutional framework, within which local-level governments operate, are found mainly under ss.187T and 187J of the National Constitution and s.24 (1)(i) of the Organic Law on Provincial Government (OLPG).

The National Constitution

Essentially s.187T of the Constitution addresses itself to three important interrelated issues:

- Area Authorities;
- the level of government under whose legislative jurisdiction local-level government should operate; and
Section 187I(1) stipulates that until a province makes its own provision for government at the local level, the national Local Government Act 1963, as in force from time to time, continues to apply in that province; while s.187I(2) provides that the respective powers of the national and provincial governments regarding local-level government would be determined by an Organic Law. Under s.187I(3), Area Authorities were deemed to be automatically abolished on the establishment of provincial governments in the relevant districts, as the role of these authorities was already implied in what was envisaged for the provincial governments. Finally, in an attempt to ensure the existence of local-level governments in one form or another, s.187I(4) provides that a Local Government Council or a Local Government Special Purposes Authority cannot be suspended or abolished except with the concurrent consent of either the Parliament or the National Executive Council (NEC) and either the Provincial Assembly or the Provincial Executive Council (PEC) concerned.

It is, however, important to note here that s.187I(4) applies to only suspension or abolition of local government councils and special purposes authorities established under national legislation. That being the case, once the National Parliament or government, as the case may be, has already consented to the abolition of these bodies and the province concerned, in turn, has provided for the establishment of its own local-level government the constitutional limitation under s.187I(4) ceases to apply to that province. For this reason, thereafter it is at least theoretically arguable that that province can do away with its local-level governments, if this suits its purposes. But, as is argued later, the situation is not that simple. As at August 1988, only West Sepik Province had not as yet passed its own local-level government Act, while Milne Bay Province operated on the National Act as well as its own provincial Community Government Act.

Section 187J does no more than provide for annual reports by the Minister responsible for Provincial Affairs to be presented to Parliament on the working of provincial and local-level governments. These reports are meant not so much for supervisory purposes as to help Parliament make policy in regard to the whole scheme of decentralisation from time to time.

Other sections of the Constitution which mention local-level government are:

- Section 26(3) which authorises the Parliament either by an Organic Law or an Act to add any office in a local government body to the list of offices subject to the Leadership Code as provided for under Division III.2 of the Constitution;
- Section 31(1)(c) which prohibits a person dismissed from office for breach of the Leadership Code from being appointed to a local government body;
- Section 43(2)(e) which provides that, subject to the approval of a local government body in the area where a person is required to work, "labour reasonably required as part of reasonable and normal communal or other civic duties" ought not be considered as forced labour; and
Section 219, to ensure some measure of propriety and justice in the running of local-level governments, lists local government bodies as falling within the investigatory competence of the Ombudsman Commission.

The Organic Law on Provincial Government (OLPG)

The Organic Law on Provincial Government (hereafter the Organic Law) places responsibility for local-level government firmly in the hands of provincial governments. Section 24(1)(i) categorises "local, community and village governments and other local-level governments" among the class of "primarily provincial" subjects. Hence, to the extent that a province has passed exhaustive laws on local-level government, the National Parliament's law-making power is excluded. What constitutes an exhaustive law in relation to any matter is very elaborately defined in s.23 of the Organic Law.

The implications of legislative exhaustiveness as applied to the primarily provincial subjects are examined in the discussion of provincial legislative powers. Suffice it to say that, along with other sections of the Organic Law, the effect of ss.23 and 24(1)(i) is that, as a rule, local-level governments established under provincial legislation cannot exercise any more powers or perform any more functions than are constitutionally and legally available to provincial governments themselves.

Despite all this, in very unusual circumstances, such local-level governments may conceivably operate simultaneously under provincial and national laws. This may happen on the conditions that:

- there is a subject matter which by characterisation is a local-level government matter;
- the absence of provincial legislation on that matter is considered to be significant evidence of failure to pass exhaustive provincial legislation on local-level government; and
- the national government's law is not inconsistent with any provincial legislation on local-level government.

However, such a situation will most likely be no more than academic as once a provincial local government Act has been passed, the view may be rightly taken that, given the usual comprehensiveness of the provisions of such a law, the Act in itself is sufficient evidence of exhaustiveness.

Finally, one other issue which is relevant to this discussion and is dealt with by the Organic Law is the status of local-level government rules. The Organic Law defines "provincial law" to include not only a provincial constitution and a law made by a provincial legislature but also:

"a subordinate legislative enactment made under that constitution or any such law" (OLPG s.1).

Therefore, on strict interpretation of the Organic Law, rules made by local-level governments established under provincial legislations may also be subject to the same conditions as are prescribed under Division VI.6 for provincial law-making. These include the requirements that:
notice of a proposed law should be given to the national Minister for Provincial Affairs;

- thirty days must elapse between the notice and commencement of the law; and

- the National Parliament could disallow a provincial law, if it so wishes.

This interpretation is given further plausibility by the usual provisions in provincial local government Acts to the effect that local-level government constitutions take effect as if they were Acts of the provincial assemblies (for example, East New Britain, Community Government Act 1979, s.5). That being the case, local-level government council rules may be even more clearly seen as "subordinate legislative enactments made under" provincial laws.

However, it is probable that the implications of the definition of a "provincial law" as regards the status of local-level government rules were unintended and that the definition was aimed at including only regulations or legislative instruments made directly under provincial Acts. Whatever the case, there is no current evidence of the division already referred to being applied to rules made by local-level governments.

Our general conclusion is that constitutional guarantees for the independent existence and operation of local-level governments appear to be tenuous. This conclusion is further confirmed in the following discussion.

The Weak Constitutional Position of Local-Level Government

Only three specific references are made to local-level government in the Organic Law, all of which are scarcely guarantees for that level of government. First, the Organic Law simply makes local-level government one of the nine "primarily provincial" subject areas. Second, it is stipulated that, should a provincial constitution provide for members of the provincial assembly to be either appointed or nominated by local-level governments, they should be regarded as elected members for purposes of the composition of provincial assemblies as outlined in s.16(2) (OLPG ss.24(1)(i) and 16(3)). This also can hardly be regarded as a guarantee for the existence of local-level government. Third, as well as other provincial government taxes and sources of income, as prescribed by the Organic Law, provincial legislatures have been given the power to impose or provide for the imposition of any other tax which could have been imposed by local government councils immediately before the commencement of the Organic Law (OLPG s.57(h)). Although the power to levy some of these taxes or harness some of the other sources of revenue can be devolved to local-level governments, this also presupposes the existence of local-level governments but is not in itself a guarantee for such existence.

In contrast, while the national Constitution categorically states that "there shall be a system of provincial government", it merely provides for the continued application of the national local government Act (as in force from time to time) in a province which has not as yet made its own provision for "government at the local level" (my emphasis underlined) (Constitution ss.187A and 187(1)). But as already argued, any constitutional obligation to maintain local-level governments ceases once a provincial government has gone through the required motions of establishing its own local-level governments under its laws. Thus, it
is conceivable that a provincial government may effectively organise its field administration system in a way that may dispose of local-level governments without much loss (if any) of general governmental efficiency or political legitimacy.

In addition to being set out in greater detail in the Organic Law and elsewhere, some of the matters concerning provincial governments have been specifically incorporated into the Constitution. Among these are the basic structure and form of provincial constitutions; conditions on which and procedures by which provincial governments could be suspended and re-established; and the machinery for dealing with relations between the national government and provincial governments. As a result, the status of these matters has the legal assurance and support of the highest law of the land. On the other hand, one would search the constitutional laws in vain for any similar matters relating to local-level governments.

Hence, neither the form, powers, functions nor resources of local-level governments are specifically outlined in the constitutional laws, despite all the rhetoric about the need for government at the local and village levels. These are left to the discretion of provincial governments with the result that the role of local-level governments is essentially a residual one which has to be pragmatically determined by provincial governments and legislatures.

There is nothing inevitable about this imprecision concerning local-level government. It is not unusual where powers and functions are constitutionally shared among levels of government that, at least, some aspects of the general outlines of the structures, powers, functions or resources of each level are provided. In this way, some minimum level of assured operation and existence of each level of government is constitutionally underpinned. In the Papua New Guinean constitutional arrangements, this has been done for both the national government and provincial governments, but not for local-level governments. Granting the peculiar difficulties under which the post-independence processes of decentralisation were initiated, the absence of any constitutional guarantee such as even a simple and unambiguous provision that there shall be local-level governments could only be unfortunate.

The implications of this situation are clear. First, whatever guarantees there are for the existence and role of these governments ought to be found more in the realm of politics than law. Second, the performance and usefulness of local-level governments depends on the capacities and policies of the individual provincial government under whose law they operate.

Guarantees for Local-Level Government

At the Provincial Level

The existence and role of the local-level governments hinges on the extent to which provincial governments see them as useful political and administrative bodies. Despite this, there are considerations which conceivably could make the abolition of that level of government impractical and improbable in any province, even if the provincial government so desired. The following discussion deals with local-level government generally and not with any particular, individual, local-level government, in which case its abolition may probably have no significant political or other repercussions beyond the boundaries of its own area.
To begin with, as a matter of routine, the provincial constitutions specifically provide for local-level government. Consequently, the complete abolition of that level of government cannot be achieved without relevant amendments to the constitutions. Under normal circumstances, this could be politically and constitutionally more difficult to effect than the passage of an ordinary provincial Act. Moreover, local-level government in one form or another has had a long history in the country, and many ordinary villagers have not only grown accustomed to some form of local-level government but also have invested material and other resources and expectations in it. It is therefore very likely that the formal abolition of the entire government system at the local level could unleash a considerable political backlash especially in the rural areas. In the process, apart from the likely confusion which would be created by such abolition, the vacuum may be filled (as it was in the pre-independence period) with a plethora of insufficiently structured and independent so-called community and village governments exerting diffuse yet intensive pressures on the same provincial government for resources and direction.

At the National Level

There is also an array of powers at the disposal of the National Parliament and national government to thwart (if they are so minded) any attempt by a provincial government or assembly to do away entirely with local-level government. The elimination of this third tier of government in any province is impossible without some concurrence of policy between the relevant provincial assembly, the national government and the Parliament. However, this agreement of policy is very improbable under present circumstances. Hence, ultimately it is partly due to this political fact and not any hard and fast constitutional guarantee that the existence of local-level government owes its assurance.

Three types of constitutional power are available to the National Parliament and national government to forestall attempts by provincial governments to eliminate the third tier of government. These are:

- the power to disallow provincial laws;
- the authority to amend provincial constitutions; and
- the authority to suspend provincial governments, and the powers consequential to such suspension that are available to the National Parliament and national government.

Although none of these powers is expected to be easily and frivolously exercised, there is reason to believe that there would not be undue difficulty in using any of them especially in defence of local-level government.

The National Parliament has power to disallow provincial laws, "if in its opinion the disallowance is in the public interest". Included among such laws are "any amendments to the constitution of a province or to be made otherwise than by an Organic Law". The exceptions are provincial laws imposing taxation or matters relating to delegated powers as under Part VIII of the Organic Law or a provincial constitution as originally adopted. Disallowance can be effected if, by a resolution, it is approved by an absolute majority vote. This is provided that at least two months before the resolution, Parliament has, by a simple majority vote, resolved to consider the matter of disallowance; and that, at least, 30 days
before the resolution, the Minister for Provincial Affairs has consulted with the provincial executive on the issues necessitating the decision to disallow the law involved (OLPG ss.34(1) and 37(1)).

As regards the power to disallow provincial laws, the following points are noteworthy. First, Parliament acts in accordance with its own opinion as to what the "public interest" is and decides on the propriety or otherwise of disallowance in the particular instance. Second, unlike some other sections of the constitutional laws, the expression used is the "public" and not the "national" interest meaning that the "public" whose interest is expected to be protected need not be nationwide. Moreover, it seems that what the Parliament considers to be the "public interest" and its final decision to disallow the relevant provincial law cannot be justiciable. Third, the power to disallow is not affected by how long the law has been on the provincial statute book. Lastly, the procedures for disallowance are designed to guarantee effective consultation with the provincial government concerned as well as to ensure a reasonable measure of deliberation and circumspection by the Parliament, before action is taken.

In short, once the necessary procedures have been complied with, the Parliament has a virtually unfettered hand in disallowing provincial legislation, including any that purports to abolish local-level government. The fact that this power has never been used is due more to compromises arising out of consultations than to limitations on the capacity of the Parliament to disallow provincial legislation.

Apart from the power of disallowance, the procedures for making provincial laws afford the national government ample chance to scrutinise and assess the merits or otherwise of each provincial law. The provincial executive is required to make its proposed laws available to the Minister for Provincial Affairs either by registered post or by the quickest means available (OLPG s.35). Although failure to comply with this provision does not necessarily invalidate the law, persistence in this sort of behaviour may constitute one of the grounds for the suspension of the provincial government concerned. In addition to this, a provincial law does not come into effect until 30 days after a copy of the text of the law has been forwarded to the Minister for Provincial Affairs (OLPG s.36). The important point about these procedural requirements is that, even prior to the decision to disallow a provincial law (including a law purporting to abolish local-level governments), the national government has ample opportunity at least express its opinion on either a proposed provincial law or an already passed provincial law, before it comes into effect.

Similarly, concerning amendments to provincial constitutions, the supremacy of the Parliament is undoubted. There are two ways in which provincial constitutions can be amended by the Parliament:

1. when a provincial government is in existence, the provincial constitution can be amended either in accordance with its own provisions or by an organic law passed by Parliament (OLPG s.11); and

2. when a provincial government is under suspension, the National Executive Council has powers to make laws (including amendments to the provincial constitution) for the province concerned; any law so made expires at the end of the period of seven sitting days of Parliament after it is made, unless within the period, Parliament by resolution confirms it (OLPG Part XII).
In addition to the other prescribed procedures, to amend a provincial constitution by Organic Law, a two-thirds absolute majority is required. Even more significantly, there is nothing in the constitutional laws specifically requiring the Parliament or the National Executive Council to even consult with the concerned provincial government or assembly before the passage of any such Organic Laws. Consequently, similar to the case of disallowance, a determined Parliament can, in its discretion, amend a provincial constitution. Therefore, even if a provincial government should succeed in passing the necessary constitutional amendments in order to abolish all local-level governments in that province, the Parliament could reinstitute the provisions requiring the establishment of local-level governments. Furthermore, should that provincial government persist in not setting up local-level governments despite the amendment by the Parliament, then, as is discussed later, this could constitute one of the grounds for the suspension of that provincial government.

Parliament’s freedom in handling the affairs of a province is at its most extensive when the provincial government has, for one reason or another, been suspended. Apart from the fact that the National Executive Council can suspend a provincial government which cannot perform its functions effectively because of either war or a national state of emergency, a provincial government may be suspended if:

"(a) there is widespread corruption in the administration of the province; or
(b) there has been gross mismanagement of the financial affairs of the province; or
(c) there has been a breakdown in the administration of the province; or
(d) there has been a deliberate and persistent frustration of, or failure to comply with, lawful directions of the National Government" (Constitution ss.187E(1) and 187E(4)).

The actual procedures for suspending a provincial government have been simplified since 1983 to the point of permitting the National Executive Council to provisionally suspend that government, subject to later confirmation by the Parliament. Even the previous Commission on Proposed Suspensions of Provincial Governments on which an ad hoc member served to represent the interests of the province concerned has been replaced with a Permanent Parliamentary Committee on Provincial Government Suspensions consisting of six members of Parliament (OLPG ss.90, 91, 91(A) - 91E and 92 - 94). As already indicated, once a provincial government is under suspension, the National Executive Council has, and may exercise and perform, all the legislative and executive powers, functions and responsibilities of both the provincial legislature and government, subject to provisions as specified in the Organic Law (OLPG ss.97 and 98).

The important issues regarding the suspension of provincial governments are as follows. First, there are very few procedural difficulties in suspending a provincial government once sufficient grounds have been adduced in support of this line of action. Since 1984, no less than seven provincial governments have been suspended for one reason or another and for varying periods. Second, should a provincial government which has abolished its local-level governments
persistently refuse instructions by the national government to re-establish them, this may be sufficient ground for suspending that provincial government, especially because of the importance of that level of government. Third, once a provincial government is under suspension the national government and the Parliament have virtually unlimited power to directly legislate for and manage the affairs of the province concerned. This power extends to even amending the constitution of the province. Any legislation initiated by the National Executive Council under the circumstances is subject only to an affirmative resolution by the Parliament. The power has been used not only to make laws for but also to amend the constitutions of provinces whose governments were under suspension, as was the case of Enga Province.

It is arguable, then, that unless there is agreement between the national and provincial levels of government, it may be technically impossible for the latter to completely abolish the local-level of government. The reasons that this concurrence of opinion will very probably not be forthcoming, at least, for the foreseeable future, lies in the perhaps trite yet noteworthy fact that, ultimately, the political institutions and laws of a country reflect the constellation of social group interests and distribution of power. With specific reference to the survival or otherwise of local-level government, quite apart from the usual arguments for that level of government, the matter (in Papua New Guinea) largely hinges on the attitudes of the national government and politicians towards the whole system of provincial and local-level government. This is because, in the ultimate, the national government and the Parliament have sufficient power (if they so wish) to override the policies and actions of the sub-national levels of government.

The Political Attitudes of the Various Levels of Government

On the whole, the national government and politicians have inherited the mantle of the national bureaucracy’s antagonism towards the provincial government system. As a result, the envisaged cordial relations between the national and provincial levels of government in the pragmatic sorting out of matters has many a time been marred by this legacy which is now subsumed in a generalised power struggle between national and provincial politicians. The evidence is amply demonstrated in the following matters:

- the scant regard normally given by the national government to recommendations of the Premiers' Council conferences;
- the emasculation of the National Fiscal Commission (NFC), one of the most important aspects of the constitutional machinery for overseeing national-provincial relations (Axline 1986);
- the extra-legal accretions and even sometimes arbitrariness on the part of the national government in the fiscal relations between the national government and provincial governments (Regan 1988a);
- the lack of adequate consultation and notification (contrary to constitutional recommendations) in passing national or provincial laws;
the unconstitutional establishment and retention of provincial administrative departments despite a court decision on the unconstitutionality of these departments (NCR No.1 of 1984);

the foisting of national parliamentarians on provincial assemblies (OLPG Amendment No.1); and

the increasingly free hand assumed by the national government and the Parliament in suspending provincial governments (OLPG Amendment No.2).

The impasse in the relations between the two levels of government, at times, has even expressed itself in open, strident demands by some national politicians for the abolition of the provincial government system itself; or recommendations to the effect that the Organic Law should be converted into an ordinary Act of Parliament which would reduce provincial governments essentially to a status scarcely more than that of glorified local governments (General Constitutional Commission 1983); or such proposals, as by the National Government in October 1984, for a referendum to test the popularity of the provincial government system. The threat to either reduce the constitutional status or abolish the system of provincial governments became a major cause of conflict between the national government and provincial premiers at the Premiers' Council conferences in 1983 and 1988.

In contrast, such antagonism is rarely shown by national politicians towards local-level governments. Rather, the difficulties of the third tier of government are a favourite ground for national politicians to berate provincial governments for "incompetence". This attitude, in turn, contrasts with the general disposition of provincial politicians towards local-level governments. While provincial politicians very often upbraid local-level governments for their alleged "inefficiency", local-level governments, in turn, equally tend to look upon their provincial politicians as the villains standing between them and success. The former is indicated by threats to abolish local governments, as demonstrated by the outburst of the West Sepik Provincial Premier in 1988; and the latter was consistently expressed in the sometimes almost implacable antipathy of councillors towards provincial governments (in their conversations with the author). From experience in the Papuan provinces as research officer for the Parliamentary Select Committee on decentralisation, Regan (1985) further confirmed (in his conversations with the author) the existence of this mutual antagonism between provincial and local-level governments.

The real lessons from these observations are that:

- national politicians are, on the whole, not well disposed towards provincial politicians, and that this feeling could well be mutual;

- similarly, at best, there is only a sort of love-hate relationship between provincial and local-level government politicians;

- provincial politicians are much more likely than national politicians to call for the abolition of local-level governments; and

- national politicians most probably would defend local-level governments in any fundamental confrontation between the second and third tiers of government.
What reasons account for these complex attitudes among politicians of the three levels of government? In Papua New Guinea, where politics is not particularly characterised by distinctive ideologies and political platforms, and where the political party system has consistently remained inchoate and fluid, the success of politicians largely depends on their individual efforts rather than on the popular image of the political group(s) to which they supposedly belong.

In such an atmosphere, national politicians may very well be inclined to regard the provincial level of government as a nuisance or, at best, a necessary evil. In that, possessing the powers and authority to visibly discharge microfunctions of immediate concern to the electorate at both the provincial and local levels, provincial governments may be seen by national politicians as an unnecessary intermediate layer between them and their electorates, and thereby obfuscating the usefulness of national politicians in the eyes of the voters. That is, it is the provincial governments that normally build or directly help to build such facilities as feeder roads, bridges, schools, health centres and water supply systems – all of which are tangible and of immediate importance to the voters especially in the rural areas.

On the other hand, in such a three-tier system of government, the national level's responsibilities normally relate to such "remote" things as managing the national currency, national income and production, foreign relations and trade, import and export taxes, defence, and the esoteric realms of higher education and research. The relevance of all these to voters' interests requires a highly sophisticated understanding of the intermeshing of national and local interests in a well-integrated national society. It is precisely this sort of appreciation that is not usually readily available in rural Papua New Guinea, or any rural area of a comparable developing country, for that matter.

Moreover, in Papua New Guinea, this attitude of confrontation between levels of government has also been complicated and reinforced by the tendency on the part of the electorate to look upon their members of legislatures more as delegates than free representatives. As delegates, they are not only usually seen principally as "local creatures" but also are expected to be seen to be personally delivering goods and services to their localities. This tendency follows logically from the weakness of the political party system and the absence of clear-cut political platforms and ideologies as well as from the fragmented and localised nature of group interests. Under the circumstances, the political process tends to be characterised by intensive, individualistic, political competition as well as by a heightened anxiety on the part of each level of government to tangibly demonstrate its distinctive usefulness to the electorate. Hence, it should be expected that relations, especially between proximate levels of government, should tend to be ambivalent, at best.

Furthermore, as local-level government is the constitutional responsibility of provincial governments, the significance of that level of government to provincial (in contrast to national) politicians goes well beyond the expediencies of electoral politics. Provincial governments in Papua New Guinea do not as yet have sufficient administrative, manpower and other resources to effectively deliver goods and services to the grassroots without a viable system of local-level government, while local-level governments, in turn, cannot perform well without a considerable transfer of resources to them by provincial governments. As a result, quite apart from individual politicians' concern for electoral success, the performance of local-level governments is unsurprisingly one good measure of the performance of provincial governments themselves. Undoubtedly, many provincial governments are very much aware of this fact; and yet, local-level
governments have on the whole not lived up to expectation. Hence, there tends to be a symbiotic and yet uneasy relationship between provincial governments and their local-level governments.

The situation, as already outlined, is the main explanation for earlier observations that the most strident criticisms of local-level governments have been and are more likely to be made for a considerable time yet by provincial rather than national politicians. For that reason, pressures to abolish local-level governments almost invariably emanate more from provincial than national politicians. Also, the national level of government may be inclined to defend local-level governments in any fundamental confrontation between the latter and their provincial governments. Regardless of any misgivings that any provincial government may have about local-level government, the politics of the situation and the constellation of constitutional power and authority are such that the third tier of government cannot, as a practical proposition, be abolished.

This being the case, an important issue is the role which is envisaged for local-level governments. Apart from everything else, this role can be deduced from the kinds of powers and functions which are expected, even if theoretically, to belong to the third tier of government.

The Power-Sharing Arrangements

Introduction

To examine the powers and functions of local-level governments in Papua New Guinea, it is important to remind ourselves that despite all the apparently strong commitment to some forms of decentralisation as far down as the village and local levels, the provincial level of government was arguably conceived as if it was to replace the pre-independence local governments. That is, although the constitutional laws, even as of now, clearly envisage three levels of government, in the comprehensive sharing of powers, functions and even resources, only the national and provincial levels were and are still taken into consideration. The result is that the powers, functions and resources of local-level governments are an integral part of the package allocated to provincial governments. Any discussion of local-level governments regarding these issues, therefore, involves an examination of this package.

In the following sections, this package is examined more closely than was done earlier. However, it is necessary to make some preliminary, general observations about the principles underlying the ways in which powers and functions are usually allocated among levels of government in a unitary political system. Hopefully, this will clarify some of the shifts in principle between the pre- and post-independence systems of decentralisation as well as offer some guidelines for a comprehensive analysis of the post-independence period.

Principles in the Sharing of Powers and Functions

There are two possible ways in which powers and functions (and for that matter, anything else) can be shared between two or more levels of government. Powers and functions may be allocated either exclusively to one level or another, or may be made available for concurrent use or performance by two or more levels of government. All power-sharing arrangements are essentially variations on either or both of these two ways. Therefore, as regards power sharing what may distinguish types of multi-level government systems from one another are
the ways in which specific powers and functions are identified, classified and allocated in accordance with one or the other of the two possible ways of power sharing. They may also be distinguished by the principles used in identifying sources of conflict and dispute, and in resolving such conflicts by either amending the power-sharing arrangements, abolishing them, or keeping the levels of government within their "proper" respective jurisdictions. For our purposes, the significance of these observations is that they may help in identifying and classifying the respective powers and functions of the national government and provincial governments in Papua New Guinea as well as indicating possible implications of the peculiar constitutional and political arrangements in the country.

At independence, Papua New Guinea inherited the British tradition of sharing powers and functions among levels of government in a unitary political system. In this tradition, lower levels of government are expected to exercise only the powers and perform only those functions which are specifically given to them. For instance, it is usual to presume that unless lower levels of government have been specifically authorised to, say, build and manage primary schools, they have no right to do so. However, whatever the case, the national government retains full authority to either withdraw any power or perform any function already given to lower levels of government; or exercise any such power or perform any such function concurrently with the lower levels of government. For instance, in the example cited here, the national as well as lower levels of government may have their own primary schools at the same time and even in the same localities; or in its own discretion the national government may decide to withdraw, entirely, the authority to run such schools, from the lower levels of government.

Therefore in the British tradition the authority of the national government remains constitutionally completely unfettered at all times and for all purposes. Hence, while many powers and functions may fall within the exclusive jurisdiction of the national government, all the powers and functions of sub-national governments are concurrently shared with the national government. In this case, any rule of the sub-national government that is incompatible with national legislation is, to the extent of the incompatibility, null and void. The concept of "exclusive jurisdiction" of sub-national governments not being a feature of this tradition, any decision by the national government not to traverse fields of sub-national government jurisdiction is therefore a matter essentially of self-restraint and prudence rather than a necessary requirement of the power-sharing arrangements.

Since the establishment of provincial government between 1977 and 1979, Papua New Guinea has introduced one important modification to this British system which was inherited at independence. Attempt has been (and is still being) made in various ways to constitutionally carve out fields of exclusive jurisdiction for provincial governments within the framework of the ultimate authority of the national government and the Parliament as required by the idea of unitariness. For this reason, the post-independence scene in Papua New Guinea is witnessing a very complex (and in many respects, confusing) set of power-sharing arrangements between the national government and the provincial governments. Bearing in mind the earlier observation that the powers and functions of local-level governments are subsumed in those of provincial governments, these provincial powers and functions can now be examined more closely.
Provincial Legislative Powers

It has already been stated that the ways in which powers and functions are divided between the national government and provincial governments confirm the observation that the Papua New Guinean constitutional arrangements can best be described as a decentralised unitary system with some strong tendencies towards federalism (Axline 1986:53). The point of unitariness is unambiguously made by the Constitution in vesting the entire legislative power of Papua New Guineans in the National Parliament (Constitution s.100(1)). Also, the inalienability of the Parliament's legislative sovereignty is emphatically underscored by the provision that nothing:

"in any Constitutional Law enables or may enable the Parliament to transfer permanently, or divest itself of, legislative power" (Constitution s.100(3)).

Finally, the Constitution further enjoins the Parliament to use this legislative sovereignty:

"for the peace, order and good government of Papua New Guinea and the welfare of the people" (Constitution s.109(1)).

Therefore, apart from the logical impossibility of repealing the entire Constitution, all laws can be altered, amended or even repealed by the Parliament, provided the necessary procedures and other requirements are followed. The following discussion is accordingly conducted subject to this legislative sovereignty of the National Parliament.

The Organic Law gives a general legislative power to provincial governments to make laws "for the peace, order and good government" of the provinces, subject to the provisions of the Organic Law itself and the other Constitutional Laws (OLPG s.20(1)).

Nowhere are legislative or executive powers directly vested in local-level governments. Their powers are subsumed in those of provincial governments. Hence, any limits on or uncertainties and complexities about provincial legislative powers, ipso facto, apply to local-level governments as well.

As already indicated, there are two basic ways in which powers and functions may be shared among levels of government. That is, some may be given exclusively to specified levels of government, while others may be concurrently shared by two or more levels of government. However, in order to promote orderly government and administration and to avoid uncertainties, such concepts as inconsistency or incompatibility, exhaustiveness, national or public interest, and local or national relevance may be employed to delineate the jurisdiction of the various levels of government in accordance with these two basic ways. With this in mind and following a very useful taxonomic scheme suggested by Whimp (1986, Mimeo.), the respective legislative jurisdiction of the national government and provincial governments as outlined in the constitutional laws are classified into the following five categories:

(a) exclusive national legislative competence;

(b) exclusive provincial legislative competence;

(c) primarily provincial legislative competence;
(d) primarily national legislative competence; and
(e) concurrent national and provincial legislative competence.

Brief outlines of some of the issues entailed by each of these categories are offered here, in order to, at least, highlight the complexities involved in any attempt to determine the precise legislative powers and functions of provincial governments, and, by implication, of local-level governments as well. The following discussion is greatly indebted to the very insightful analysis by Whimp (1986), which has been referred to already.

**Exclusive National Legislative Competence**

As a general proposition, the areas of exclusive national legislative competence are defined by the general limits imposed on provincial legislative powers. That is, the Parliament has exclusive legislative powers in areas which are either exclusively given to the Parliament, as such; or areas from which provincial assemblies are excluded specifically or by necessary implication; or subjects such as the management of the national currency, which by their very nature can only be properly dealt with at the national level.

This general proposition is substantially expressed in the provision of the Organic Law which states that without prejudice to the division of legislative powers as provided for:

"where this Organic Law or any other National Constitutional Law makes specific provision for an Act of the Parliament as to any matter, a provincial legislature has no power to make laws for the purpose of that provision, but this subsection does not affect the operation of Subsection (3)" (OLPG s.20(2)).

Section 20(3) of the Organic Law begins by stating that provincial laws may be passed:

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

It also lists the relevant sections which deal with provincial legislative competence. An examination of these sections clearly reveals that the apparent wide legislative latitude given to the provincial assemblies by s.20(3) is subject to such qualifications as to make that section almost superfluous except that it aims principally at removing any possible lingering doubts about the exclusive legislative competence of the Parliament in areas specifically reserved for Acts of the Parliament.

The relevant sections are:

- those dealing with the field of primarily provincial competence;
- areas of concurrent competence with the National Parliament;
any field where there is competing national legislation as provided for by Division VI.5;

judicial matters as stipulated under Part VII;

delegation by the National Parliament as prescribed under Part VII; and

taxation as provided for by Division X.2.

For present purposes, two points are significant about this list. First, the list indicates the British tradition that, unless a lower level of government can find some reasonably specific legal authorisation for its laws and actions, such a provision as s.20(3), which apparently grants wide "residuary" powers, may not be of much avail. Second, by indicating the limits of provincial legislative competence, the list can be said to define areas within the exclusive legislative competence of the Parliament by treating such areas as those which are outside the limits of provincial competence.

These points are illustrated by the following examples from the list. With limited exceptions, Part VII of the Organic Law prohibits provincial governments from passing laws relating to the establishment or administration of courts, or the exercise of judicial power. The implication here is that by defining the limits of provincial competence by the process of exclusion, the exclusive legislative competence of the National Parliament is thereby also defined. Similarly, Division X.2 specifically outlines the exclusive provincial taxing powers, with the probable implication that all other powers of taxation fall exclusively within the domain of the Parliament. Also, Division VI.5 purports to give additional legislative powers to the provinces in unoccupied areas where the National Parliament has not passed exhaustive legislation. These powers, however, do not for instance extend to laws that can only be passed as emergency laws within the meaning of s.226 of the National Constitution nor to laws that relate to "matters that are necessary or convenient to be prescribed for carrying out and giving effect" to the National Constitution. Hence, the implication is that emergency laws and such other laws as purport to give effect to the National Constitution are within the exclusive legislative competence of the National Parliament.

**Exclusive Provincial Legislative Competence**

The exclusive legislative competence of provincial governments is rather limited in scope. In the main, it covers the eight kinds of "exclusively provincial taxes" listed in s.57 of the Organic Law. With respect to these, it is categorically stated that the:

"National Parliament has no power to impose or to provide for the imposition of taxation",

of the types in the list (OLPG s.56(2)).
Primary National or Provincial Legislative Competence

The essential distinguishing feature of these categories of legislative competence is that the legislative competence of the level of government, which does not have primary responsibility for a relevant subject matter, exists only to the extent that "exhaustive" legislation has not yet been passed on that subject matter by the level of government whose primary responsibility the subject matter is. Moreover, the law which is passed to fill such a lacuna (where it exists) should not be inconsistent with relevant legislation passed by the level of government exercising its primary legislative competence. This type of legislative competence contrasts with the category of exclusive legislative competence. In the case of the latter, the excluded level of government has no legislative competence whatsoever regarding the relevant subject matter(s).

Therefore, in order to establish the respective legislative competence of the national and provincial legislatures regarding areas of primary legislative competence, three processes are necessary. First, it ought to be established that the particular law deals with a subject matter which can be characterised as a subject matter falling within the primary legislative competence of one of the two levels of government. This is usually referred to as the process of characterisation. Second, if the subject matter is so characterised, then, the next step is to find out whether the level of government with primary legislative competence has passed exhaustive legislation covering the subject matter. Finally, if there is no such exhaustive legislation on the subject matter, then a law(s) not inconsistent with relevant laws passed by the level of government with primary legislative jurisdiction may be passed by that level without primary legislative competence to fill the gaps.

Each of these three steps could be very intricate and may require some expert knowledge to resolve. However, perhaps the most difficult one in the Papua New Guinean situation is the issue of "exhaustive" legislation. The complexity of the concept of "exhaustiveness" is brought out by the elaborate and intimidating way in which it is defined by the Organic Law. The Organic Law says that a law is exhaustive in relation to a matter if:

"(1) (a) its subject matter; or
(b) the method of dealing with the matter that has been adopted by it or by any other law that should be considered with it; or
(c) the form of complexity of it or of any other law that should be considered with it,

that the legislature has intended to set out completely, exhaustively or exclusively -

(d) the statutory requirements of the matter; or
(e) the statute law to govern the matter; or
(f) the policy on the matter.

(2) The operation of Subsection (1) is not affected by reliance placed on the law on -
(a) any principle or rule of the underlying law; or
(b) any other statute,

for the purposes of definition or interpretation, or for procedural, evidentiary or other ancillary or adjectival purposes.

(3) For the purposes of this section, a statement in a law that it is or is not intended to be exhaustive is not conclusive on the point.

(4) The fact that a law is exhaustive in its relation to a matter does not of itself involve inconsistency with any other law" (OLPG s.23).

As at 1988, in the absence of judicial decision on the issue of exhaustiveness, there was no concrete indication how these various complex arms of the definition may be given operational substance in case of dispute.

Section 24 of the Organic Law (Division VI.3) lists nine matters (including local, community and village governments and other local-level governments) as falling within the primary legislative competence of provincial legislatures. As already indicated, s.26 of the Organic Law unambiguously emphasises that provided there is an exhaustive provincial law in relation to a matter in the list, the National Parliament "has no power to make an Act of the Parliament on a subject to which" that Division applies. Parliament may pass only laws not inconsistent with relevant provincial laws to fill gaps where they exist. Hence, exhaustive provincial laws on any of the listed matters effectively place that matter within the exclusive legislative jurisdiction of the province(s) concerned.

However, the situation seems to be further complicated by national laws relating to primarily provincial subjects prior to the establishment of provincial governments. Section 114(2) states, that:

"(2) when a provincial law is made in accordance with Division VI.3, all Acts of the Parliament that were -
(a) made with respect to a subject or subjects to which that Division applies; and
(b) continued in force in relation to the province by Subsection (1),

cease to have effect, to the extent of any inconsistency, in relation to the province as if they had been repealed, in relation to the province, by another Act."

This being the case, if inconsistency is given the narrow meaning of incompatibility, then it appears that despite provinces passing their laws in accordance with Division VI.3, some pre-provincial government national laws on primarily provincial matters may conceivably continue to be operative. On the other hand, there appears to be little reason to given inconsistency such a narrow interpretation once it is considered that, although exhaustiveness may not be a test of inconsistency, it aims at ultimately creating areas of exclusive jurisdiction.
The areas covered by the primary national legislative competence are found in the so-called "unoccupied" legislative fields (OLPG ss.32 and 33). In some other constitutions, these are known as residuary powers or functions. With the specified exceptions to which attention was drawn in the discussion of exclusive national legislative competence, all subjects not otherwise dealt with in the sharing of legislative powers are within the legislative competence of provincial legislatures only to the extent that there is no exhaustive national legislative on them, and the provincial laws are not inconsistent with the relevant national laws.

However, in order to find out what legislative fields are unoccupied, it may not be sufficient to take account of only the Organic Law but also of the provisions of the Constitution itself and all existing national laws. But, given the comprehensiveness of the constitutional laws and the extensive coverage of current national laws, it is not easy to estimate the extent of such unoccupied areas let alone the possible practical nature of the so-called additional provincial legislative powers. Consequently, ss.32 and 33 of the Organic Law are likely to remain no more than a mere cosmetic safety-valve for the very rare (if at all), unforeseen circumstances, rather than a meaningful source of additional legislative competence for provincial legislatures.

It remains, then, to point out that an important feature of the subjects within the provinces' primary legislative competence is that, on the whole, they are simple and of primarily local relevance. Therefore, despite difficulties with such concepts as exhaustiveness and inconsistency, they are not likely to offer too many arguments about the extent of provincial legislative jurisdiction. The subjects within the concurrent competence of both the national government and provincial governments are likely to be much more contentious.

Concurrent National and Provincial Legislative Competence

There are twenty-five subject areas in which the national and provincial governments can exercise concurrent legislative powers. These range from such an imprecise pot pourri as "community development and rural development" through such other more reasonably definable ones as agriculture, stock and fisheries, health, public works, commercial and industrial investment and development, high schools, town planning, land and land development, family and marriage laws, communication and mass media, labour and employment, to renewable and non-renewable natural resources (OLPG s.27, Division VI.4).

Within these areas, provincial governments may make laws to the extent that they are not inconsistent with relevant national laws. Also, the National Parliament, in turn, is empowered to exercise legislative jurisdiction in so far as the "national interest" so requires (OLPG ss.28 and 29). The question as to whether there is inconsistency or not is non-justiciable except at the instance of either the national or a provincial government, while the issue as to what the National Parliament considers to be of "national interest" is absolutely non-justiciable. Hence, in case of conflict or dispute over jurisdiction in the fields of concurrent legislative competence, the issue is very likely to be resolved in favour of the National Parliament especially if the Parliament decides to plead its non-justiciable right to determine what the national interest is.

However, all this does not imply that provincial governments are entirely helpless in deciding what aspects of the subjects should be assigned to them. There are important procedures which at least ensure that the opinions of
provincial governments are given some hearing. Section 30(2) of the Organic Law states that:

"(2) The Minister responsible for Provincial Affairs shall, if so requested by the head of a provincial executive, consult with the provincial executive on any proposed Act of Parliament relating to a subject in the concurrent list."

Although failure to comply with this provision does not invalidate the Act of Parliament involved, there is very little doubt that it may not be good, practical politics for the Minister to refuse such a specific request once it is made by a provincial government.

A much more definite assurance for provinces to express views is provided by s.32(4) which states that:

"Not less than two months before an Act of Parliament is made concerning a subject to which this Division applies, the Minister responsible for Provincial Affairs shall give each Provincial Government notice by registered post of the proposed Act."

Three points are noteworthy about this provision. First, it makes a right to information available to all provincial governments. Second, the time lag of two months before the making of the Act is clearly meant for necessary consultations with provincial governments, and opinions to be expressed (if any) although this is not specifically spelt out. Third, non-compliance by the National Parliament is justiciable at the instance of a provincial government (OLPG s.31(5)). Therefore, while consultation with one provincial government is not mandatory, prior notice of a relevant Act to all provincial governments seems to be.

Finally, s.114(3) stipulates that:

"(3) As soon as practicable after receiving a request from a Provincial Government to do so, the National Executive Council shall take whatever action is in its power to secure the repeal, in relation to the province, of a law dealing with a subject to which Division VI applies to the extent that it does not concern matters of national interest."

This provision also gives further opportunity for provincial governments to have some impact on the way the National Parliament determines which aspects of the subjects are or are not of national interest.

Before the establishment of provincial governments, statutes (including those relating to matters which may now be subject to concurrent legislation) were all passed by the national legislature. Moreover, a perusal of s.27 of the Organic Law reveals that the list of concurrent subjects includes almost all matters of major concern to modern governments, regardless of level. Therefore, apart from national statutes prior to the establishment of provincial governments, it is inevitable that both the national government and provincial governments may (and indeed do) show considerable desire to have what they consider to be sufficient jurisdiction for their separate purposes in the fields of concurrent legislative competence.
However, it should be re-emphasised that in the final analysis the National Parliament has an almost entirely unfettered discretion in deciding the role of the provincial governments in the fields of concurrent jurisdiction. The National Parliament may amend or repeal its previous laws or pass new ones taking account of the distinctions between national and "non-national" interests in the relevant subject matter(s). Further, it may even change its mind and subsequently reoccupy any area previously vacated by it, if it considers that either there was an error of judgement on its part in the first instance or that new circumstances have changed what used not to be of national interest into a matter of national interest. In either case, its subsequent judgement or change of mind as to what is of national interest still remains non-justiciable. Hopefully, this sort of caprice will not occur unduly often.

The Rationale of the Categories of Legislative Competence

The basic concern when considering all these categories of legislative competence seems to be a search for some ways of pragmatically matching capacity with responsibility. In the case of primary legislative competence, the overall concern appears to be to select subject areas over which the various levels of government may ultimately and appropriately exercise exclusive legislative jurisdiction, when they shall have demonstrated their capacity and willingness to do so. This capacity and willingness is evidenced by the passage of relevant exhaustive laws. However, to the extent that they have not as yet done this, other levels of government may offer some assistance in the interest of overall good administration of the country by passing laws to fill gaps, as long as these laws are not inconsistent with the legislation of the level of government whose exclusive responsibility the relevant subjects will ultimately be.

On the other hand, with respect to the fields of concurrent legislative jurisdiction, the intention is that, once provincial governments especially demonstrate their capacity and willingness, they should be allowed to perform those aspects of the listed subjects, which are not of national interest. However, because of the vital importance of the subjects, the national government (whose capacity may not be as suspect as that of the provincial governments), in turn, has been given authority to keep continuous vigilance on provincial governments and to change the distribution of legislative competence as and when necessary to suit changing circumstances. This seems to be one rationale of the flexibility entailed in the non-justiciable right of the Parliament to ultimately determine what the national interest is in each case.

In regard to the fields of exclusive jurisdiction, a significant point is that the only areas clearly and initially assigned exclusively to provincial governments relate to certain types of taxation and sources of income. This is to ensure that provincial governments have some independent, additional sources of revenue (from the very beginning) to enable them, at least, to perform the functions within their primary legislative competence. It now remains to look at one other possible source of provincial legislative authority which is subject to specific arrangements and agreements between individual provinces and the National Parliament.
Delegated Legislative Powers

Section 43(1) of the Organic Law provides that:

"(1) An Act of the Parliament may make provision for or in relation to the exercise and performance in or in relation to a province-

(a) by the provincial legislature; or

(b) as provided by a provincial law not inconsistent with any Act of the Parliament, by or by direction of the provincial executive or a member of the provincial executive,

of -

(c) any legislative power or function of the National Parliament, including a power to make subsidiary legislation but not including a power to make -

(i) an amendment to the National Constitution; or

(ii) An Organic Law; or

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Apart from four specified exceptions, the section empowers the Parliament to delegate either legislative or executive power to a provincial legislature, or the provincial executive, or a member of the provincial executive, or any other body, subject to direction by the provincial executive. Section 43(2) also makes similar arrangements for the delegation of a provincial "legislative power or function" to the national government.

In order to prevent arbitrariness and undue disruption of legislative and executive programmes and actions, it is further stipulated that a law delegating a power or function to another level of government cannot be repealed or altered without reasonable notice in the National Gazette. Moreover, the reasonableness or otherwise of the notice is justiciable at the instance of the delegate government.

It is also important to realise that, except in the case of direct delegation to a provincial legislature (more likely to be a legislative than an executive power), a power delegated by an Act of the Parliament requires a corresponding provincial enabling Act to put it into operation in the province concerned. The main concern is to ensure that staff and bodies under the control and direction of provincial governments perform their duties on the authority of provincial laws. In this way, each act of delegation by the National Parliament has the knowledge and consent of the representative legislature of the province, which in turn may thereby be in a position to properly order its programmes and actions accordingly.

Unfortunately, as Regan (1988b) points out, staff and other bodies under provincial government control and direction are in many instances exercising national government delegated powers and functions without proper adherence to the provisions of §43 of the Organic Law. He further observes that only five provinces (North Solomons, Central, Gulf, Simbu and West New Britain) have passed Provincial Executive Acts — a provision of which requires that such
powers and functions may only be assumed with the approval of the provincial assembly. A practical result of this non-adherence to the provisions of s.43 of the Organic Law is, for instance, that possibly many health inspectors (who are under provincial control) exercising powers under the Public Health Act (Chapter 226) in, say, closing down schools and foodshops, may be doing so without authority (Regan 1988b). In order to avoid the cumbersome procedure of scrutinising each and every delegation from the National Parliament and passing appropriate enabling law, a provincial government may solve the problem with a general enabling Act authorising the initial exercise and performance of delegated national powers in their original form subject to any subsequent lawful direction by the provincial executive.

Finally, an obvious yet significant point about delegation is that the power being delegated should in the first place be within the jurisdiction of the delegating level of government. The significance of this point is that provincial governments started with very few powers and functions of their own as specified in the short list of primarily provincial subjects and the list of exclusively provincial taxes. As a result, a large proportion of provincial powers and functions may hinge very much on the willingness of the national government either to vacate some areas within the concurrent jurisdiction of both the national government and provincial governments or delegate powers and functions to provincial governments in its own discretion in accordance with s.43.

Obviously, the probability of delegation from the National Parliament, being a significant source of legislative power for provincial governments, depends on several factors. The basic issue is the dilemma posed by the loss of control by the delegating authority over the related activity, on the one hand, and, on the other, the need for a certain minimum trust in the capacity of the delegate government to perform that activity tolerably efficiently. In short, the need for delegating the relevant power to a provincial government ought to be objectively established. The national government, which is to delegate the power, must be willing and ready to do so, having assessed the capacity of the delegate provincial government and the delegate government, in turn, has to demonstrate good faith and capacity in order not to betray the trust implied by the delegation.

This last condition is of utmost importance because practical action is the surest measure of trust in such matters. Trust once betrayed in practice is not easy to restore. In this connection, it is precisely the indifferent performance of the average province to date in Papua New Guinea that perhaps constitutes the greatest hindrance to delegation being a significant source of provincial legislative power. For example, responsibility for such a vital function as capital works had to be withdrawn by the national government in 1981 from the Oro and Simbu Provincial Governments because of lack of satisfactory performance by the latter governments. Also, between 1984 and 1988, no less than seven provincial governments were suspended for varying periods for lack of one important significant capacity or another.

Implementing the Division of Legislative Powers

It is evident from the provisions concerning primarily provincial subjects, concurrent subjects, the so-called "unoccupied" areas, the delegation of legislative powers, provincial taxation, and other sections of the Organic Law, that provincial activities are envisaged to be based mainly on provincial
legislation (OLPG ss.24, 27, 33, 43, 57 and 114-116). In this connection, there is very little problem with provincial leeway to legislate on matters primarily within their legislative competence and matters concerning provincial taxation. In the final analysis, these are all matters within the exclusive legislative competence of provincial governments and therefore the position is that, without undue let or hindrance, legislation (OLPG ss.25 and 26, and s.114(2)).

However, the real problems are the more extensive subjects within the concurrent legislative competence of the national government and provincial governments, and the unoccupied areas. This is principally because even before the establishment of provincial governments, national legislation very comprehensively covered all, or most, of the relevant subjects. As a result, it is not conceivable that provincial governments can legislate on the subjects without the National Parliament somehow deliberately vacating aspects of the subjects and delegating or transferring legislative competence over those aspects to the provincial governments. Experience to date indicates that this necessary act of self-abnegation on the part of the National Parliament has been anything but spectacular, the only significant exception being in the field of education.

The way in which most activities have been "transferred" to provincial governments hardly accords with the Constitutional Laws, and as a result offers, at best, a very dubious basis for provincial let alone local-level government legislative powers in these areas. In order to appreciate this, it is crucial to realise that, apart from direct delegation to provincial legislatures, the Constitutional Laws do not envisage the transfer of legislative and executive powers to provincial governments without some enabling legislation at both the national and provincial levels. Section 43(1) of the Organic Law is sufficiently clear on this issue. It is also significant that s.116(2) of the Organic Law states that for primarily provincial subjects:

"(2) where an Act of Parliament made before the grant to a province of a Charter...deals with a matter that could be dealt with by a provincial law to which Division VI.3 applies, the Head of State, acting with, and in accordance with, the advice of the National Executive Council given at the request of the provincial executive or the provincial legislature, may, by notice in the National Gazette, declare that the Act shall apply in a province as if it were a provincial law (my emphasis underlined).

Despite this need for legislation, the National Executive Council (Cabinet) approved, in January 1977, a list of activities which were to be handed over to provincial governments (NEC Decision No.19 of 1977). Encouraged by the recommendations of consultants on ways to transfer powers to the provinces, the National Executive Council, by another decision, transferred the identified activities to the provinces (McKinsey and Company Inc. 1977; NEC Decision No.10 of 1977). These activities were provincial affairs, provincial works (capital works, maintenance, and Rural Improvement Programme), primary industry, education, health, information and business management. In 1978, the Bureau of Management Services was added to the list. By transferring these activities through executive rather than legislative action the National Executive Council has created considerable uncertainties about provincial legislative powers outside the primarily provincial subjects. By the same token, it is doubtful whether provincial governments can constitutionally transfer legislative power on aspects of these activities to their local-level governments.
In order to eliminate the uncertainties about provincial legislative jurisdiction, Acts of the Parliament have to be passed, delineating the aspects of the subjects within the concurrent jurisdiction of the national government and provincial governments that should be left to provincial governments. As already indicated, this has been done in the field of education. Before the Education Act 1983 (No.11 of 1983), the national law on education so comprehensively covered all aspects of education that, apart from primary schools and primary education, provincial governments had virtually no legislative competence in the field of education. The 1983 Education Act essentially reproduces the provisions of the pre-1983 law as the law applicable in the National Capital District and the provinces which decide not to pass their own Education Acts. For provinces which want to pass their own laws, the 1983 Act has sorted out those aspects of education which presumably are not of "national interest" and therefore should properly fall within provincial legislative competence. On the basis of this delineation, a model provincial Education Act has been prepared by the Office of the Legislative Counsel for possible adoption or adaptation by provincial governments as they wish.

What the 1983 Act demonstrates is that it is not impossible to demarcate in reasonably clear terms the respective responsibilities of the national government and provincial governments in areas where they share concurrent legislative jurisdiction. Although it is a rather slow and hesitant process, there is evidence of serious attempts to extend the delineation exercise to other areas, especially health, and land and land development.

Local-Level Government Powers and Functions

Until the respective legislative competences of the national government and provincial governments (especially in areas where they have concurrent jurisdiction) are streamlined, the powers and functions of local-level governments established under provincial legislation will remain not only restricted but also nebulous. This fact is brought out by the contrasts in the powers and functions of local government councils still operating under national legislation, on the one hand, and those of local-level governments established under provincial laws, on the other.

The case of the former is unambiguously stated by the National Constitution which is the highest law of the land. Section 187I(1) of the National Constitution states that:

"(1) Until a provincial law of a province makes provision for government at the local level, the Local Government Act 1963, as in force from time to time, continues to apply in respect of such government in the province" (my emphasis underlined).

There are several implications of this constitutional provision. There is nothing preventing either the national government or provincial governments from transferring some of their own powers and functions to such local government councils. For instance, a provincial government may constitutionally, in its laws, transfer to these councils some powers and functions relating to, say, the control by licensing of mobile traders (other than mobile banks), sale and distribution of alcoholic liquor, and licensing of public entertainments and of places of entertainment -- all of which are within the primary legislative competence of provincial governments. It may also empower the councils to collect retail sales
tax, and fees for licences to operate or carry on gambling, lotteries and games of
chance, both of which are among the exclusively provincial taxes.

Also, in addition to whatever powers and functions are given by
provincial governments, Acts of the National Parliament may from time to time
give to these councils any powers and functions which are constitutionally
within the jurisdiction of the Parliament. A great number of the powers and
functions of local government councils operating under the national law are of
this nature. Some of these are derived directly from the provisions of the Local
Government Act 1963 (Chapter 57), while others are made possible by either that
Act or other national laws or the transitional provisions of the Organic Law
(OLPG ss.114, 115 and 116).

Schedule 1 of the 1963 Act gives to such councils a set of wide-ranging
functions including such areas as roads, public parks, health, buildings, markets,
commercial enterprises and hawking, town planning, advertising, agricultural,
pastoral, horticultural and forestry industries, aerodromes, fire prevention,
education, census and statistics and omnibus and transport services. All of these
are within the concurrent jurisdiction of the national government and provincial
governments. Hence, in accordance with what we have labelled as the British
tradition, the councils may perform any of them as long as this is not inconsistent
or incompatible with any national law.

Within certain specified limits, s.57 of the 1963 Act also provides for the
councils to act as agents of other bodies either on the authorisation of the Head of
State acting on advice or on the authority of the relevant regulations. On the
basis of this provision, some councils operating under the national legislation
have acquired, for instance, licensing powers under the Trading Act (Chapter
324) and the Licences Act (Chapter 112). Although the establishment of
provincial governments and its consequential administrative changes have
rendered the licensing powers of local government councils a complex issue, it
seems that councils, which obtained these powers prior to the establishment of
provincial governments and are operating under the national law, still have at
least some of them.

Similarly, in accordance with s.141(2) of the 1963 Act and s.23 of the Local
Government Regulations (Chapter 57), councils are empowered to collect fines
imposed in proceedings instituted by or by the direction of a council for an
offence against certain prescribed national law. Section 23 of the Regulations
lists no less than twenty such prescribed laws.

Furthermore, under certain national laws, councils acquired and may
acquire some specified powers and functions.

These include, for instance, the possibility of councils:

* being made Local Medical Authorities under the Public Health Act
  (Chapter 226);

* being made building authorities under the Building Act (Chapter
  301);

* having power to make rules on the ownership and registration of
dogs and other prescribed animals under the Animals Act (Chapter
  329); and
having authority to install parking meters under the Motor Traffic Act (Chapter 263).

Finally, under the Village Courts Act (Chapter 44), a village court may hear cases involving breaches of council rules. Two things are noteworthy about this provision. First, according to the Organic Law, the jurisdiction of the village courts is determined only by or under an Act of the Parliament (OLPG s.39(2)). Second, the authority of village courts to hear cases involving council rules is undoubtedly very important in rural areas where the absence of other courts with that sort of jurisdiction can easily lead to breaches of council rules with virtual impunity. In addition, any fines resulting from village court proceedings in respect of offences involving breaches of council rules and certain specified laws (as prescribed under s.23 of the Local Government Regulations (Chapter 57)) may be paid into the accounts of the appropriate councils.

Evidently, barring lack of capacity to take advantage of these extra powers and functions provided under national legislation, councils operating under the national law have considerable powers and functions. This fact is brought out by the contrasts between these councils and those set up under provincial laws. First, the Interpretation Act (Chapter 2) defines a "local government council" as a local government council established under the national Local Government Act. This means that the extra powers and functions conferred by national legislation on councils are not automatically transferable to local-level governments established under provincial laws. A possible solution to this problem is to amend the definition of local government council to include all local-level governments recognised as such by provincial governments. Subsequent to this, all the existing extra powers and functions and future ones of the local government councils operating under national legislation could be transferred by the national government to local-level governments operating under provincial laws through the procedures under s.43 of the Organic Law.

Second, for as long as a large proportion of the possible legislative jurisdiction of provincial governments is hedged around with restrictions and qualifications and the national government is not easily persuaded to transfer legislative powers to the provinces, local-level governments under provincial legislation shall continue to operate on a very narrow base of legislative power. There can be no simple solutions to this particular problem as it is linked with the extent of trust which the national government has in the capacity of provincial governments to satisfactorily exercise and perform powers and functions. Moreover, in instances where the provinces are themselves aware of their incapacity to perform additional functions because of lack of resources, they in turn have clearly demonstrated reluctance to assume further responsibilities without transfer of commensurate additional resources by the national government. This is exemplified by their unwillingness to accept certain health functions unless the necessary extra funds were made available by the national government (Regan 1988c). However, as the case of local-level governments is one in which the national government itself has already deemed it proper to give powers to councils established under its law, hopefully the issue of trust or reluctance may not be an undue impediment to the transfer of the same powers and functions to local-level governments set up under provincial law. Thus the general solution of redefining 'local government council', as already suggested, has even further justification.
Summary and Conclusions

The impressive political emphasis in Papua New Guinea on decentralisation has been (and still is) expressed in constitutional arrangements that can best be described as a unitary political system with very marked tendencies towards federalism. Within this set of arrangements, local-level governments (that is, the third tier of government) have been made the primary responsibility of provincial governments in a way that provides them with no separate identity from provincial governments in the sharing of powers, functions and resources among the levels of government.

One major consequence has been that the existence of local-level governments seems to depend critically on the policies and even perhaps dispositions of provincial governments. However, despite the unease and love-hate relationship which often tends to develop between them and their local-level governments, it would be impossible (especially for practical political reasons) for provincial governments to abolish the third tier of government even if they so wished.

Another outcome of the constitutional arrangements is that the legislative and executive powers and functions of local-level governments (except those still operating under national legislation) are in the main directly derived from those of provincial governments. Unfortunately apart from the subjects within their primary legislative competence and the exclusively provincial taxes, the powers and functions of provincial governments are to date circumscribed with complex qualifications. They have been pragmatically determined in ways that are, in some cases, even constitutionally questionable with the result that the powers and functions of local-level governments are similarly bewildering.

Finally, the Constitutional Laws give provincial governments almost completely unfettered freedom to determine and establish forms of local-level governments in line with their own policies and suitable to the peculiar conditions of their localities. The examination of provincial government initiatives in this connection is the principal theme of another discussion paper.
References


