

LAW REFORM COMMISSION
OF PAPUA NEW GUINEA

CONSTITUTIONAL REVIEW JURISDICTION IN PAPUA NEW GUINEA

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The Law Reform Commission of Papua New Guinea was established by the Law Reform Commission Act 1975 and began functioning in May 1975.

The Commissioners are -

Joseph Aisa, Acting Chairman

Fr. Cherubim Dambui

Rosa Au

Hosea Mina

Michael Vee

Pastor Timothy Palitu

Ross DeVere is Acting Secretary to the Commission.

The Commission's office is on the second floor of the Development Bank Building in Waigani. The postal address of the Commission is -

Law Reform Commission

P O Wards Strip

WAIGANI

PAPUA NEW GUINEA

Telephone: 258755/258941

PREFACE

This paper was first written in late 1979 and presented as a lecture at the University of Papua New Guinea in February 1980. A year later, a revised version was presented at a seminar of the General Constitutional Commission. This third version has incorporated some of the comments made at that seminar. It is written in the hope that it will assist both the Law Reform Commission and the General Constitutional Commission to grapple with matters of detail concerning the constitutional review jurisdiction of the courts.

These matters of detail are, it is suggested, of considerable significance to the effectiveness of the protections of the Constitution. I quote in the text the view of the Constitutional Planning Committee that underlying the very idea of having a constitution was the notion that people should be governed by the law. How the people might ensure that they are so governed is a matter of great importance.

As this paper evolved, there have been several major decisions of the Supreme Court which deal with the issues considered. The most recent - The Vanuatu Case - was decided after the paper was written and is analysed in a postscript to the paper. In this case, Kidu C.J. and Kapi J. emphasised that the source of legislative and judicial power derived, as the Preamble to the Constitution says, from the people, and were thus led to find that any person should be allowed to challenge action considered by him or her to be unconstitutional. The Chief Justice made clear in another case, Avia Aihi, (see page 12 infra), that the courts must be bold in stating their powers.

This paper will reveal that there are many points at which the Constitution is very unclear or indeed contradictory in the ways and means whereby the people may seek relief from the courts. Clarification of these matters may assist the courts to fulfil their duty to the people.

For convenience, I will list here the recommendations which flow from the analysis. My major point is that there should be, in one place in the Constitution, a statement of the jurisdiction and remedial powers of those courts and bodies which may be called upon to exercise the function of constitutional review. To this end, these recommendations are made.

Recommendations

- (i) Clarify whether the Supreme Court has either or both concurrent and appellate jurisdiction in instances where another court or body may decide a constitutional question : 13-14.
- (ii) Clarify the power of the Supreme Court to declare legislation invalid when acting under section 18(1) : 14.
- (iii) Consider whether the National Court (or some other court) should have jurisdiction to decide questions concerning Organic Laws : 15.
- (iv) The procedure for references from a court or other body to the Supreme Court should be addressed, for the Premdas case indicates that it is uncertain as to whether the reference should be made by the court or other body, or by the parties : 17-18.
- (v) Clarify the uncertainty which arises by comparing section 19(1) to 19(4) : 19.
- (vi) Consider the policy issues involved in the retention of section 57(2) : 20-21.
- (vii) The referral provisions - sections 18(2) and 57(4) - are at several points different, yet there is no apparent justification for these differences. It is suggested that the policies behind the different approaches be evaluated, and, unless a difference is justified, that the two sets of provisions be brought into line, preferably by a single statement in the Constitution : 22-26.
- (viii) Clarify whether the National Court may declare legislation invalid on the ground of unconstitutionality : 27.
- (ix) Clarify the relationship between jurisdiction of the National Court under section 42(5) and the reference procedure in section 57(4) : 28-29.
- (x) The relationship between and effect of sections 155(3)(a), 155(3)(e), and 155, is quite complex and might be clarified and simplified : 29-30.

- (xi) Clarify whether the referral sections (18(2) and 57(4)) apply to bodies which by the Constitution may consider constitutional questions : 31.
- (xii) Clarify whether the Supreme or National Courts may review a determination of a constitutional question by a body which may by the Constitution consider such a question : 32.
- (xiii) Clarify whether section 159 permits the Parliament to confer on a body other than a court the power to determine constitutional questions : 33.
- (xiv) It is suggested that it be made clear that section 59 and 60 (concerning natural justice issues), do not raise constitutional questions : 33-35.
- (xv) Evaluate the policies behind section 41, and clarify whether its application gives rise to a constitutional question : 35-37.
- (xvi) Evaluate the scope of the powers given to the courts in section 10 (severance) : 37-40.
- (xvii) Clarify the effect of section 86(4) on the extent of court review of the legality of action taken by the Head of State on advice : 41-44.
- (xviii) The effect of section 134 should also be clarified.
- (xix) Clarify the scope of section 155(4), and provide a single statement of the remedial powers of the courts : 46-50.
- (xx) Clarify whether the Supreme Court may award remedies or inflict punishments under sections 22 and 23 : 51-52.
- (xxi) The scope of application of sections 22 and 23 should also be considered : 52-57.

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In any constitutional system in which the courts are given the power to review the validity of government action there is potential for conflict between the judiciary and the government, a potential which increases relative to the scope of review. Under Papua New Guinea's Constitution, the Supreme and National Courts have the primary responsibility to determine whether other governmental bodies have exceeded the powers allocated to them by the Constitution. As a corollary, the independence of these courts from other governmental bodies is guaranteed by the Constitution. In the years since Independence both courts have on a number of occasions held invalid legislation or executive/administrative action of significance to the government's policies without leading to any clash with the government. But in late 1979 the Premdas [1979] P.N.G.L.R. 329 and Rooney (No. 2) [1979] P.N.G.L.R. 448 cases did lead to a serious clash, and these cases illustrate too how constitutional challenge may involve the courts in matters of great political controversy. Such controversies may well arise in the future, and it is therefore timely to consider the scope for constitutional review in Papua New Guinea.

It should be emphasised that it is not my concern that the government, (understood to mean the present and all future governments, both national and provincial), should be insulated from constitutional challenge. The paper accepts that the basic role of courts under the Constitution should be preserved. What it seeks to do is to subject to critical analysis the manner in which this jurisdiction is conferred and exercised, for the provisions in the Constitution are at many points ambiguous and in some places inconsistent. Clarification may serve to reduce the area of potential conflict and misunderstanding and thus serve to strengthen the judicial role.

1. Some basic concepts underlying the role of the courts

In the view of the Constitutional Planning Committee (C.P.C.), the Constitution was to serve a number of related purposes. It would create the institutions of government and provide a philosophy to be pursued by those institutions and by each member of the society.

In addition, it would limit the powers of government, both by dividing powers between a national government on the one hand and provincial governments on the other, and by setting limits, primarily by means of the Basic Rights provisions, to the powers of all governments. It is this third aspect which is of critical significance to this paper, and it leads to three basic concepts which are inherent in both the C.P.C. Report and the Constitution. Firstly that:

The Constitution sets legal limits to the powers of government in Papua New Guinea.

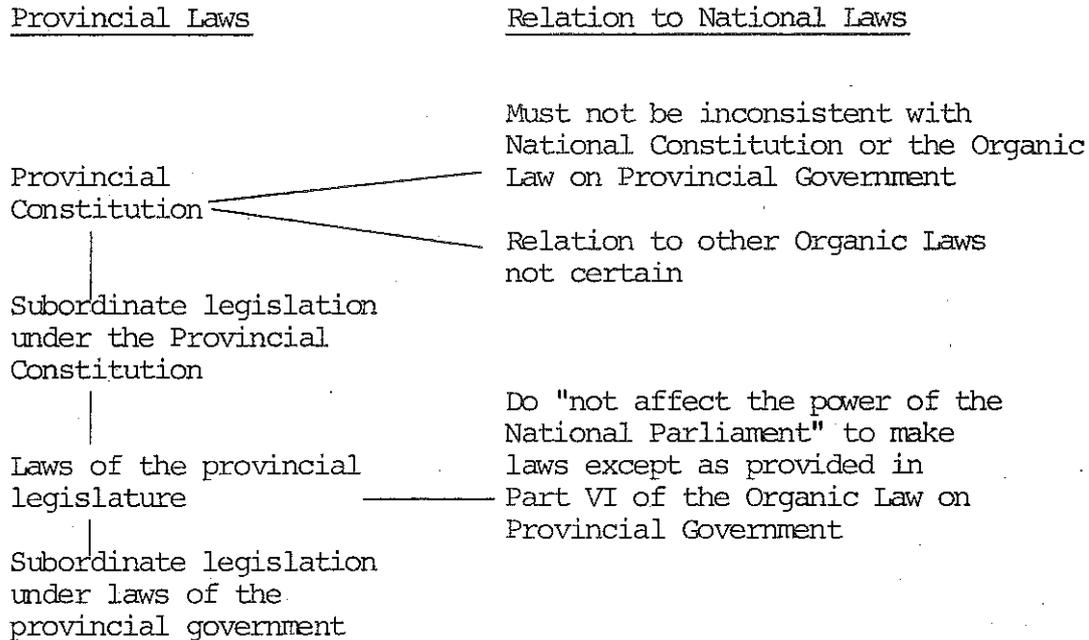
This concept is implemented by the provision in the Constitution that it is superior to any other law. (The Constitution can, of course, be changed, but this is not a qualification of the basic concept). The supremacy of the Constitution is stated in a negative fashion by section 11(1):

This Constitution and the Organic Laws are the Supreme Law of Papua New Guinea, and, subject to section 10 (construction of written laws) all acts (whether legislative, executive or judicial) that are inconsistent with them are, to the extent of the inconsistency, invalid and ineffective.

Section 10 provides that the Organic Laws must be read and construed subject to the Constitution, and thus the result of sections 10 and 11 is that the Constitution is the highest law and is superior to other laws. Thus, the Constitution would prevail in the case of a conflict between it and either an Organic Law, or an Act of the National Parliament, and this other law would be invalid to the extent that it was inconsistent with the Constitution. Further, the Organic Laws are superior to Acts of the National Parliament. Thus it can be seen that there is a basic principle inherent in this hierarchy: that a law of one category must not conflict with a law of a category higher than it in the hierarchy. (The other categories or national law are the emergency laws and national subordinate legislation. The relationship of these categories of laws to each other and to the other national laws is extremely complex and will not be investigated here.) For judicial recognition of the supremacy of the Constitution and the hierarchy of laws, see Rakantani Peter [1976]P.N.G.L.R. 537, 540 per Frost C.J.; 553-554 per Prentice Dep. C.J.; Rooney (No. 2) [1979]

P.N.G.L.R. 448, per Kearney J; Frame 1980, SC 186, 23 per Kapi J; and Aihi 1981, SC 195, 25 per Andrew J.

There is also a hierarchy of laws at the provincial level. This hierarchy and the relationship between it and the national system, are illustrated somewhat imperfectly in this diagram:



Unfortunately, the diagram does not take an understanding of the relationship between provincial and national laws very far. A full exposition of this relationship would be very lengthy and would not in any event produce a definitive statement, for there are some fundamental uncertainties in the system which will only be resolved through litigation, through the development of constitutional convention, or by amendment; for a review of some of these difficulties, see J. Goldring, The Constitution of Papua New Guinea (1978), 70-110.

However, it can be seen that the Constitution establishes a hierarchy of laws in Papua New Guinea, and the basic principle expressed in section 11 that laws "inconsistent" with Constitutional laws are "to the extent of the inconsistency, invalid and ineffective" is fundamental to an understanding of the role of the courts.

The question 'who may find laws to be invalid?' leads to a second basic concept, that:

The courts, and in particular the Supreme and National Courts, bear the primary responsibility for ensuring that the legal limits to the powers of government are observed.

Thus, the Constitution contains several provisions which regulate

- (i) the scope of the power (that is, the jurisdiction) of the courts to review the actions of government or of citizens to determine whether they are in conformity with the Constitution;
- (ii) access to the courts by persons and governments to challenge the actions of other governments and persons; and
- (iii) the remedies that the courts may award if they find some breach of the Constitution.

These provisions are very complex, and, unfortunately, are in some respects ambiguous and inconsistent with one another. In some instances, the policy behind a provision should perhaps be reconsidered. It is the main purpose of this paper to discuss these provisions, to point to problems of their interpretation, and to make suggestions for reform. Before turning to this task, account should be taken of a third basic concept, that:

The courts should discharge their task of implementing the Constitution conscious of the need to do so in the social environment of Papua New Guinea.

That people should be governed by law underlay, in the C.P.C.'s view, "the very idea of having a constitution at all" (Final Report of the Constitutional Planning Committee (1974) 8/1). To give effect to this notion, the C.P.C. accepted that the judiciary should be independent of any other person or authority and that it should exercise the power of constitutional review. However, the C.P.C. was acutely aware of some of the problems inherent in such a judicial role.

The C.P.C. acknowledged several disadvantages of judicial review: that the courts "tend to be formalistic and legalistic ... [and] approach the Constitution as if it were like ordinary law ... [and] sacrifice the spirit for the letter of the Constitution"; that judges "are not free of their biases and emotions"; that "the courts become the final arbiters of the Constitution"; and finally, that the courts "have a limited capacity to effect compromises", particularly in situations that call for political solutions, and that by entering such areas, "the role and functions of the courts themselves become controversial", thus leading to "serious damage" to their role (*ibid.* 8/15). The C.P.C. argued too that the courts did not "exist in a vacuum", and that they must be "politically conscious" to the extent that they must take account of the goals and wishes of the society in which they live. The C.P.C. stated the dilemma that this approach posed for the courts

They must on the one hand avoid appearing to encroach upon the role of the legislature or to act as a brake on the executive government's legitimate efforts in trying to promote development; yet on the other hand they must endeavour to ensure that an injustice is not done in a particular case, and that the rights of individuals or minority groups are not reasonably overridden.
(*ibid.* 8/1)

One solution recommended by the C.P.C. was to withdraw from the courts the power to resolve some constitutional issues, although the only example it cited was that the courts should not adjudicate on questions relating to the procedures of Parliament; (see now Constitution section 134). More generally, the C.P.C. felt that the courts could be assisted to arrive at decisions in conformity to society's goals by a provision directing them to take account of the National Goals in cases of doubt, and by the cutting of the legal tie between "our judicial system and that of Australia", so that Papua New Guinean law could then "reflect, to a much greater degree than at present, our own

values and circumstances" (ibid. 8/2)

These general considerations as to the context in which the courts function and the manner in which they were expected to perform, may provide a guide to the resolution of some of the issues with which this paper deals.

Before delving into the detail of the Constitution, it is necessary to clarify the meaning of the phrase 'constitutional review'. We may take as a starting point the phrase used in Section 18(1), which speaks of jurisdiction "as to any question relating to the interpretation or application of any provision of a Constitutional Law". The power to decide such questions is what is referred to as constitutional review. There are problems, to be dealt with later, in determining the extent of the range of such questions, but at this point, in order to provide an introductory context for the discussion, it should be noted that in performing the task of constitutional review the courts may be called upon to consider the validity of both legislative and administrative action.

The decision of the Supreme Court in Inter-Group Fighting Act [1978] P.N.G.L.R. 421 provides a well-known example of the exercise by that Court of its power to declare legislation invalid. The power extends to declare invalid Organic Laws which may conflict with the Constitution; see Lowa [1977] P.N.G.L.R. 429.

Constitutional review includes also the power to examine administrative action; that is, action taken pursuant to a power or duty conferred or imposed by legislation on some person or body. Administrative action must of course be within the scope of the power or duty as it is defined in the authorising legislation. In addition, such action must conform to any law (such as a Constitutional law) superior to the authorising law. This latter principle flows from the principle that the authorising law cannot authorise administrative action which is in conflict with a superior law; if it purported to do so, the authorising law would be invalid to that extent. However, it will only be infrequently that an authorising law will confer a power to take some kind of

administrative action which can according to the terms of the authorising law be seen to be invalid because it is in conflict with a superior law. The more common situation will be where the authorising law confers a discretionary power to do something, and the authorising law is itself not in conflict with a superior law, but the power is exercised in a particular case in a way which is alleged to be in conflict with a superior law. A hypothetical example will illustrate this point.

Suppose that a provincial legislature passes a 'Liquor Licensing Law' which requires that all businesses selling liquor in the province must be licensed, and which empowers a Liquor Licensing Board to grant or refuse a licence "in the public interest". Such a law would be valid according to the Organic Law on Provincial Government. Suppose then that the Liquor Licensing Board refused a licence to a person because he or she did not belong to a certain political party. If this occurred a court might declare the action of the Board invalid on the ground that it was contrary to section 47 of the Constitution, (freedom of assembly and association). This example shows that the validity of administrative action must be assessed by looking at the authorising statute (in the example the provincial "Liquor Licensing Law") and all the other laws which are superior to that law (in this example, the Constitution).

The two school-fee cases, Mairi v Tololo [1976] P.N.G.L.R. 125, and Mileng v Tololo [1976] P.N.G.L.R. 447, are not strictly speaking cases of constitutional review, for in them the Supreme Court held that the imposition of the fee could not be justified under the laws which authorised action by the Boards which managed the schools in question, and thus the question of conflict with the Constitution did not arise. However, the Court did interpret the scope of action authorised by reference to Section 209(1) of the Constitution, and the cases illustrate how administrative action can be affected by the Constitution.

2. The Objectives of reform

This paper raises a large number of questions and makes several suggestions concerning reform of many provisions of the Constitution which govern constitutional review, and it is desirable that at the outset I state what I see to be the general objectives behind these various questions and suggestions.

In the first place, the objective is to clarify and simplify the Constitution. I point to several instances where provisions are ambiguous, and could easily be clarified. There are other instances where the same topic is dealt with more than once in the Constitution, which adds both to its complexity and to its ambiguity. Further, provisions which are allied to one another should be adjacent to each other in the Constitution.

Secondly, the paper assumes that it is undesirable that there should be 'too much' constitutional challenge, and that where it does occur, the issues for the judiciary should be defined clearly. What is 'too much' is of course a subjective judgment, and mine is that by mid-1981 the point had been reached where political controversies were being converted into Constitutional challenges. Why this is undesirable may be approached by taking account of the experience in the United States of America.

In the Rooney case, Kearney J. observed that "we may have had our Marbury v Madison", [1979] P.N.G.L.R. 448, 491 and this analogy may be pursued. The Constitution of the United States does not state clearly that the Supreme Court may declare invalid legislation or other kinds of governmental activity for breach of the Constitution, and the assertion of this power by the Court in Marbury v Madison (1803) 5 United States Reports 137, caused great controversy; (the more so because the case involved a matter of political contest between the rival parties in the Congress, and because Chief Justice Marshall had been identified with one of these parties). However, the Supreme Court averted a direct clash with the government because it did not issue an order against the government. In other cases until the present day, the Court has by a variety of means attempted to avoid ruling on constitutional issues. The reason for this policy of restraint is "the need to minimise friction between the branches of government". As one American commentator has explained:

Most of our judges have similarly avoided constitutional rulings whenever possible, as their contribution to harmonious relations between the branches (of government), usually because of their belief that a society constantly riven by crises produced by constitutional ruling cannot endure: Gunther, 'The Constitution of Ghana - An American's Impressions and Comparisons', (1971) 8 University of Ghana Law Journal 1, 32.

In the Rooney case, a serious immediate clash was averted because the government was able to use the release and pardon powers, although there may have been long-term damage to the constitutional system as a result of the clash. But such devices may not always be available to governments.

It is suggested therefore that it is appropriate to consider the various techniques for judicial restraint, for, as the United States experience suggests, a timely use of such techniques may well preserve the concept of judicial review. Much must be left to the judges, for too close a restriction of the power of review could compromise the basic function; but as this paper suggests there are many points at which amendment of the Constitution might be considered. Underlying these suggestions are several general issues.

- (i) When should constitutional question be raised? The basic principle employed in most constitutional systems is that a person who is directly and immediately affected by the action in question may initiate the challenge. Obviously, this principle should not be modified, at least insofar as Basic Rights questions are in issue. However, should other persons be permitted to challenge, and should the challenge be made before the action has had a direct impact on the person making the challenge? In relation to this, it is to be noted that section 19(3) allows advisory opinions to be sought by persons not under the control of the government, and that section 57(2) and (5) permit Basic Rights issues to be raised by persons whose own interests are not affected by the action, and in situations where the action may have had no direct impact on any person.

- (ii) How should constitutional issues be raised? Plaintiffs appear to be using a variety of public law remedies, and while the technical distinctions between these remedies may have been swept away by section 155(4), there still remains the question of just how the issues should be stated, how notice should be given to the other parties, how facts should be proved, and so forth.

It is submitted that the task of the courts would be facilitated were the rules of procedure designed to require from the plaintiff a real showing of his or her standing to bring the action, and a clear statement of the issues that are raised. Moreover, the failure to clarify the constitutional issues could well lead to public misunderstanding of the role of the court called on to decide the issues. In the Premdas case for example, Pritchard J.'s judgment of 4 July 1979, (incorporated in Rooney (No. 1) [1979] P.N.G.L.R. 403, 416-418), indicates only that Premdas' constitutional challenge was that "the procedures laid down in the Migration Act are in breach of the Constitution", (*ibid.* 417). The failure at this stage to clarify the issue may well have contributed to the initial misunderstanding by the Minister for Justice of what the courts were being called upon to do.

- (iii) When should constitutional issues be referred to the Supreme or National Court? This question follows from (ii) and is dealt with at some length in this paper. I should indicate here that I consider it generally desirable that other courts and bodies should pass on constitutional issues before they reach the Supreme or National Courts. This question is of particular importance to attempts to devise means of resolving constitutional questions concerning provincial government without resort to the courts.

3. The source of judicial power

Section 158 provides that:

- (1) Subject to this Constitution, the judicial authority of the People is vested in the National Judicial System.

- (2) In interpreting the law the courts shall give paramount consideration to the dispensation of justice.

It is now clear that section 158, which might have been thought to be mere rhetoric, does have legal consequences for the nature and extent of the jurisdiction of the courts.

This was made apparent to Wonom [1975] P.N.G.L.R. 311, the first constitutional case to come before the Supreme Court. The specific issue was whether indictments should be brought in the name of "The Queen" or in the name of "The State". A majority of the Supreme Court, (Raine and Williams JJ) classified the power to prosecute as part of the judicial power, and found that as this power resided in the people and had been vested by them in the National Judicial System, it was appropriate that prosecutions be brought in the name of "The State" which was, as Williams J. put it, "the collective corporate name" of the people, (ibid. 320). (Frost C.J. classified the power as executive but arrived at the same conclusion, ibid. 317).

On the question of the source of judicial power, Raine J. commented that

Reading the Constitution as a whole it is clear to me that in no sense does her Majesty become invested with the power to dispense justice (ibid. 317) The People of Papua New Guinea have that power lodged in them and have vested it in the National Judicial System. See ss 158 and 155 of the Constitution, (ibid. 318)

Another early decision, Monomb Yamba v Geru [1975] P.N.G.L.R. 322, indicated how the reasoning in Wonom affected the nature of the jurisdiction of the courts. In that case Frost C.J. held that the National Court's power to sanction a compromise on behalf of an infant did not derive from the Royal Prerogative "whereby the Queen is *parens patriae*" because

the judicial power of the people is as plenary as the Royal prerogative ... and is amply sufficient to support the well-established rules for the protection of infants, (ibid. 323).

Frost C.J. found in effect that Wonom had overruled the earlier case of Bradford v Bradford [1975] P.N.G.L.R. 305 in which Prentice Dep. C.J. had relied upon the prerogative power. Frost C.J.'s analysis has been confirmed by Narakobi A.J.:

as *parens patriae* or as parent of the child, it is more accurate to say that this special relationship emerges from s.158 of the Constitution which vests the judicial authority of the people in the National Judicial System of which the National Constitution is a part, (In the Matter of an Application for access to welfare reports, N221, 23 May 1980, p. 3).

These decisions have been noted to emphasise that the nature of judicial power may be affected by section 158. In Avia Aihi, SC 195, 27 March 1981, Kidu C.J. saw that the concept that judicial power flowed from the people had a more general effect:

We cannot cut down the powers of this court if the Constitution has invested it with extra jurisdiction or power. If this court has been granted inherent powers by the people through the Constitution, we must be bold in stating the fact. The inherent power of the Supreme Court to review all judicial acts of the National Court emanates from the people through the Constitution. Whatever the nature or extent of this power might be, it does not derive from any statute or the common law or any prerogative powers of persons or bodies outside Papua New Guinea.

These comments are of course applicable to the exercise of the judicial power of constitutional review.

4. The jurisdiction of the courts to exercise the function of constitutional review

(a) The Supreme Court

(i) General constitutional jurisdiction

Sections 18 and 19 are the starting point for analysis, although, as will be seen, they give a somewhat misleading picture if read without reference to other sections of the Constitution. Section 18(1) provides:

Subject to this Constitution, The Supreme Court has original jurisdiction, to the exclusion of other courts, as to any question relating to the interpretation or application of any provision of a Constitutional law.

Section 18(2), provides that, subject to the Constitution, where any such question arised in "any court or tribunal" it shall "unless the question is trivial, vexatious or irrelevant", refer "the matter to the Supreme Court". There are a number of points of interpretation which need to be considered.

Firstly, section 18 suggests that the Supreme Court has exclusive and original jurisdiction over constitutional questions, but its opening words - "subject to this constitution" - indicated that the Constitution might vest the power of review in other courts or bodies, and, as shall be seen, it does vest significant jurisdiction in the National Court. Does this vesting of jurisdiction over certain matters in another court or body deprive the Supreme Court of appellate or concurrent jurisdiction over those matters?

With respect to appellate jurisdiction, the answer seems fairly clear. Section 155(2) (a) states that the Supreme Court "is the final court of appeal", and it is hardly likely that the Supreme Court would find that it had been deprived of appellate jurisdiction; the remarks of Kearney Dep. C.J. in Avia Aihi SC 195, 27 March 1981, p. 13 suggest that His Honour would take this view. Moreover, in Lowa [1977] P.N.G.L.R. 429, Pritchard J. addressed this issue and came to the view that while section 135 vested the National Court with jurisdiction to determine questions relating to the validity of elections, sections 18(2) and 155(2) (b) made it "desirable that this [Supreme] Court should consider the problems of Constitutional interpretation or application which arose in the National Court", (ibid. 443).

Section 155(2) (b), which provides that the Supreme Court "has an inherent power to review all judicial acts of the National Court", may be construed a grant of power to review the exercise of such constitutional jurisdiction as is vested exclusively in the National Court, and in relation to instances, such as section 135, where the National Court is given jurisdiction, the Supreme Court can review under section 155(2) (b). However, it is not abundantly clear that reliance can be placed on section 18(2) to achieve this result, for while it is expressed to be "subject to this Constitution", section 135 is not, and it could be argued that section 18(2) thus gives way.

Thus, in cases where bodies other than the National Court are given jurisdiction the situation is more difficult. If the National Court had reviewed the action or decision of the other body, (which it could do under section 155(3) and (5), Supreme Court jurisdiction to review could be based on section 155(2) (b); otherwise its appellate jurisdiction might be based on sections 18(2) and 155(2) (a).

Does the Supreme Court retain a concurrent jurisdiction to decide constitutional questions which are vested by the Constitution in other courts or bodies? The answer to this question is not so clear, and it may have been out of concern for such an argument that the draftsman vested a specific jurisdiction in the Supreme Court to enforce the Basic Rights provisions (see below). It was probably not intended that the Supreme Court should lose jurisdiction in these cases, but the matter should be clarified.

Reform suggestion: clarify the effect on Supreme Court jurisdiction of a vesting of constitutional jurisdiction in another court or another body.

Secondly, sections 18 and 19 leave some doubt as to whether when exercising jurisdiction under section 18 the Supreme Court has the power to pass on the validity of a law. Section 18(1) refers only to the Court having jurisdiction "as to any question relating to the interpretation or application of any provision of a Constitutional law" and read by itself does not indicate whether the Court can declare a law invalid. However, section 19(1), which governs the Court's jurisdiction to give advisory opinions upon special references, does state that the phrase quoted above includes "any question as to the validity of a law or proposed law". This further statement in section 19(1) could be taken to indicate the scope of the phrase in section 18(1), or, contrawise, could be taken to indicate that the phrase has a wider meaning in section 19(1) than in section 18(1). It is true that the Supreme Court has seen no difficulty in exercising under section 18(1) a power to declare legislation invalid, but it is undesirable that there should be any doubt on such a fundamental matter.

Reform suggestion: clarify the ambiguity that arises by comparing section 18(1) to section 19(1).

Thirdly, Schedule 1.2 defines 'Constitutional Law' to mean "this Constitution, a law altering this Constitution or an Organic Law". Thus, section 18(1) stipulates that questions relating to the interpretation of the various Organic Laws are, "subject to the Constitution", within the exclusive jurisdiction of the Supreme Court. The Constitution does not in clear terms vest jurisdiction over questions relating to Organic Laws in any other court, although this is perhaps the result where it vests jurisdiction over a topic in another court, (such as section 135(b) which gives the National Court jurisdiction to determine the validity of elections), and the exercise of this jurisdiction would necessarily involve the interpretation of an Organic Law, (such as, in relation to section 135(b), the Organic Law on National Elections). In Milne Bay Provincial Government v Evara and The State N286, 17 March 1981, Andrew J. considered the effect of section 84 of the Organic Law on Provincial Government in the context of a claim which required His Honour to consider the effect of section 187(H) of the Constitution.

Reform suggestion: consider whether the National Court might not have a general jurisdiction over all Organic Laws. The question of jurisdiction in relation to the Organic Law on Provincial Government might need special attention.

Fourthly, it should be noted that in two reported cases the courts have considered the meaning of the phrase "trivial, vexatious or irrelevant" in section 18(2). In Cory v Blyth (No.1) it was argued that section 46 of the Constitution, which provides that "Every person has the right to freedom of expression and publication ...", had a limiting effect on the scope of the law of defamation. Section 46 does not include any saving of this law and in some other countries the freedom of expression clause has been held to have a limiting effect. However, Raine J. found the argument "vexatious" and possibly "trivial" within section 18(2) and refused to entertain it as a constitutional question, (ibid. 277, 279). With respect, His Honour's view is hardly sustainable, and the view of two Justices in Rooney (No.2) that the law of contempt was affected by section 46, ([1979] P.N.G.L.R. , per Kearney J, , per Wilson J), indicate other opinion that section 46 will affect common law or statutory provisions which bear on freedom of expression. In Rakatani Peter [1976] P.N.G.L.R. 537, a District Court referred to the Supreme Court under section 18(2) the question whether the District Courts Act

should be referred to as having been enacted in 1963, (the year of its enactment by the House of Assembly), or 1975, (the year of its repeal and adoption by the Laws Repeal Act 1975 and Schedule 2.6(2) of the Constitution). Frost C.J. found that the question "ought not to be referred" (ibid. 551), and Prentice Dep. C.J. found that it was "trivial" (ibid.), although His Honour then answered the question by finding that the 1963 date should be used, (ibid. 552).

Fifthly, it should also be noted that Justices have affirmed in several cases that privative clauses in statutes cannot have no effect on jurisdiction conferred on the courts by the Constitution. A clear illustration is Premdas [1979] P.N.G.L.R. 329. Section 61AA of the Migration Act 1963 provided that

No act ... or decision of the Minister relating to the ... revocation of an entry permit ... nor any decision of a Committee of Review ... is open to review or challenge in any court on any ground whatsoever.

The Supreme Court held unanimously that this provision could not bar review of a revocation by the Minister on constitutional grounds. It was reasoned that the Constitution conferred on both the National and Supreme Courts the power to enforce the Basic Rights provisions and that an Act of Parliament could not qualify or remove this jurisdiction in any way; see ibid. 337 per Prentice C.J. as illustrative of the Supreme Court's analysis. Both Saldanha and Andrew JJ. found further that section 61AA should be read down under section 10 of the Constitution (the severance clause) so as not to apply to cases where review was sought on grounds which involved the interpretation of the Constitution; (ibid. 361, per Saldanha J, 401, per Andrew J.) In Lowa [1977] P.N.G.L.R. 429, Prentice Dep. C.J. found that section 220 of the Organic Law on National Elections, which purported to make decisions of the National Court "final and conclusive and without appeal" and not to "be questioned in any way", could not affect the Supreme Court's jurisdiction under section 155(2)(b) of the Constitution to review decisions of the National Court, (ibid. 432). The overriding effect of section 155(2)(b) has been affirmed in Avia Aihi SC195, 27 March 1981, p.13 per Kearney Dep. C.J., p.33 per Kapi J.

The sixth issue to consider is the effect of a reference by a National Court Justice (and presumably any other court or body) to the Supreme Court under section 18(2) on the law of criminal contempt. This point was raised squarely in Rooney (No. 1), and is discussed fully in Peter Bayne, 'Judicial Method and the Interpretation of Papua New Guinea's Constitution', (1980) 11 Federal Law Review 121, 156-158; the comments made here deal with the matter more briefly.

On 3 July Premdas (the plaintiff in Premdas [1979] P.N.G.L.R. 329), sought from the National Court an injunction to restrain the Minister for Foreign Affairs and Trade from taking action to deport him; (Pritchard J.'s decision is appended to the judgment of Kearney J. in Rooney (No. 1) [1979] P.N.G.L.R. 403, 416-418). The main ground of the application was stated by Pritchard J.:

it is claimed that the procedures laid down in the Migration Act are in breach of the Constitution of the Independent State of Papua New Guinea and the Applicant is seeking a declaration from the Supreme Court that this is so, (ibid. 417).

Pritchard J. was satisfied that there was a genuine argument involving the interpretation of the Constitution and issued a restraining order to operate until the last day of the next Supreme Court sittings, and ordered Premdas "to take steps immediately to have this matter set down for hearing in the Supreme Court", (ibid. 418). Premdas did not take any such steps, and it was not until 20 July that Pritchard J. prepared a reference to the Supreme Court of six questions that he saw were raised by the argument before him in the National Court. In Rooney (No.1) the Supreme Court considered whether Pritchard J.'s reference was pending in the Supreme Court on 11 July so as to attract the law of criminal contempt.

Raine Deputy C.J. (with whom Saldanha, Wilson and Greville-Smith JJ. agreed) said that he would assume that on 4 July Pritchard J. "imagined that some separate application was to be made by Premdas to the Supreme Court on constitutional grounds", (ibid. 406). However, his Honour found that this did not "matter a scrap", because Pritchard J. had taken the view that an arguable constitutional

point had been raised and "[t]hus by reason of s. 18 [of the Constitution], it was inevitable that the Supreme Court would become involved", (ibid.). He dismissed as "no answer" an argument that the applicant may not have pursued the matter, and concluded that:

The Supreme Court simply had to become involved, the Constitution enjoins us to, it is our very duty, we are the only ones who can perform that duty, (ibid.).

This last comment is incorrect, for by section 57(1) the National Court has a jurisdiction concurrent with that of the Supreme Court to enforce the Basic Rights provisions, and the only constitutional issues in the Premdas case involved sections of the Constitution relating to the Basic Rights. Nevertheless, even on the basis that the reference was under section 57(4) rather than under section 18(2), there is some authority which could justify the majority view, (see Bayne, supra, 157).

Kearney J. dissented on this issue, finding that "the conclusion is irresistible" that Pritchard J. considered only the question of interim relief in the National Court, and that there was no suggestion that he was asked to refer any constitutional question to the Supreme Court, (ibid. 412). Thus, he concluded that no question was referred by Pritchard J. on 4 July, and that section 18(2) required "prior consideration by the judge and the determination of the nature of the question in issue - whether it is trivial, vexatious or irrelevant, before a reference can be instituted", (ibid. 414).

Section 19 allows the Supreme Court to give 'advisory opinions' on constitutional issues; that is, that it can, (but only on an application by the persons listed in section 19(3), "give its opinion" on any question as to the interpretation or application (including the validity) of "a law or a proposed law". "Proposed law" means "a law that has been formally placed before the relevant law-making body" (19(5)). This power is a significant extension of the jurisdiction of the Supreme Court, and it is to be noted that the Court can be asked to give an opinion by some persons or bodies that are not subject to N.E.C. control. Whether this allows of the possibility that constitutional issues might be raised in a way that could embarrass and frustrate the government is a matter of policy. (To put the question in this way

might be thought to suggest the answer; however, it must be noted that any person or body affected by a law may challenge by remedies apart from section 19).

In one important respect, the drafting of section 19 could be clarified. Section 19(1) states that the Court "shall" give its opinion on a question referred to it, but this is subject to section 19(4), which allows the Supreme Court, by rules, to make provision for "cases and circumstances in which the Court may decline to give an opinion", and although wide, this power could probably not be used to prohibit such opinions altogether, (see Schedule 1.20). This result is intelligible to a lawyer, but the section might read more easily if the word "shall" in section 19(1) were changed to "may". (Another question that might be clarified is how far an Act of Parliament made under section 19(4) could limit the Court's power to make Rules; could it for example require the Court to accept references from one or more of the persons or bodies listed in section 19(3)?).

There have been cases where the section 19 procedure has been invoked to obtain an opinion of the Supreme Court, (for example, Reference No. 1 of 1977 [1977] P.N.G.L.R. 363). Furthermore, there are several instances where the Justices have offered advice on constitutional issues or on how laws might be drafted so as to avoid unconstitutionality; (for example, Sasakila [1976] P.N.G.L.R. 491, 502-503 per Frost C.J.; Rakatani Peter [1976] P.N.G.L.R. 537, 549, per Prentice Dep. C.J.; Inter-Group Fighting Act [1978] P.N.G.L.R. 421, 427 per Prentice C.J.; the Corrective Institutions case [1978] P.N.G.L.R. 404, 409-410 per the Supreme Court; Premdas [1979] P.N.G.L.R. 329, 390 per Wilson J.).

Although sections 18 and 19 vest jurisdiction over all constitutional questions in the Supreme Court, sections 57 and 39(2) specifically confer on the Court a jurisdiction to enforce the Basic Rights section of the Constitution. This would appear to be unnecessary duplication. However, because sections 57 and 39(2) vest this same jurisdiction in the National Court, the intention may have been to rebut an argument that the vesting in the National Court negated jurisdiction in the Supreme Court. Such an argument could have been based on the words "subject to this Constitution" in section 18(1); this matter was

discussed above. The jurisdiction conferred by sections 57 and 39(2) on both the Supreme and National Courts will be considered at this point.

(ii) Basic Rights jurisdiction

Division 3 ('Basic Rights') of Part III ('Basic Principles of Government'), comprises sections 32 to 58 and consists almost solely of provisions which limit the powers, (whether legislative, executive/ administrative, or judicial), of all persons and bodies in Papua New Guinea. So far as the governments are concerned, these provisions will be one of the two major sources of limitations on power; (the other being the demarcation of powers in the Organic Law on Provincial Government). Judicial power to enforce the Basic Rights provisions is therefore of considerable significance. Section 57 governs this matter, but it must be read with sections 39 and 58.

Jurisdiction

Section 57(1) provides that "a right or freedom" in Division 3 "shall be protected by, and is enforceable in, the Supreme Court or the National Court or any other court prescribed for the purpose by an Act of Parliament, either on its own initiative or on application by a person who has an interest in its protection and enforcement, or in the case of a person who is, in the opinion of the court, unable fully and freely to exercise his rights under this section by a person acting on his behalf, whether or not by his authority".

Standing

If 57(1) provided no more than what has just been stated, it could be expected that only a person whose rights or freedoms were directly and immediately threatened would have standing to invoke the jurisdiction of the courts. In Reference No. 1 of 1977 Frost C.J. cited section 57 and held that: "Plainly a person who claims that his right is infringed is a person who has an interest in its protection and enforcement" [1977] P.N.G.L.R. 362, 367. However, in a number of ways, section 57 extends considerably the opportunities for court intervention.

Section 57(1) provides that a court having jurisdiction to enforce the Basic Rights may act "either on its own initiative or on application by any person who has an interest in [the] protection and enforcement [of the right or freedom]", or, in certain cases, by a person acting on behalf of such a person. Without limiting the scope of 57(1), 57(2) provides (in effect) that certain persons are deemed to have a sufficient interest in the protection and enforcement of the Basic Rights. These persons are

- (a) the Law Officers of Papua New Guinea; and
- (b) any other persons prescribed for the purpose by an Act of the Parliament; and
- (c) any other persons with an interest (whether personal or not) in the maintenance of the principles commonly known as the Rule of Law such that, in the opinion of the court concerned, they ought to be allowed to appear and be heard on the matter in question.

One question which arises is whether in the light of Frost C.J.'s view section 57(2) is necessary. The policy in section 57(2) (a) that the Law Officers be able to refer questions concerning the Basic Rights to the courts would seem desirable, but it is expressed also in section 19(3) (c) which permits them to seek advisory opinions from the Supreme Court (but not the National Court), and it was this course which was adopted by the Acting Public Solicitor in Reference No. 1 of 1977. In view of the wide terms of section 57(1), section 57(2) (b) and (c) do not appear to add to the protection of the individual and it should be noted that under section 57(5) individuals may seek protection in situations where the infringement of a right was not "actual or imminent" but was reasonably probable, etc.

What this leaves are two other situations. Firstly, where for some reason individuals may be unwilling to seek judicial protection of their rights, and, secondly, where no individual would have personal standing to challenge some action. In both cases however, there would be the danger that the court would be called upon to adjudicate without the legal issues being defined sharply and clearly.

Reform suggestion: consider the policy issues involved in the retention of section 57(2).

Referral provisions

Both sections 18(2) and 57(4) provide for the referral to the Supreme and National Courts of constitutional questions by courts and other bodies before which such questions may arise. These provisions, while dealing with the same subject, are in some important respects different, and should perhaps be brought in line with each other.

There is no direct inconsistency between the two provisions.

Section 57(4) governs Constitutional questions which concern the interpretation of the Basic Rights provisions, while section 18(2) governs all other Constitutional questions. There are, however, some significant differences.

(1) Section 18(2) provides that "a court or tribunal shall, unless the question is trivial, vexatious or irrelevant, refer the matter to the Supreme Court", and it is thus mandatory for the court or tribunal to refer the matter. (However, in Milne Bay Provincial Government v Evara and The State N286, 17 March 1981, Andrew J. in the National Court gave an interpretation to section 187(H) of the Constitution and apparently did not consider whether he was bound to refer this question to the Supreme Court; the National Court is vested with jurisdiction only with respect to Basic Rights questions and certain other specific questions). In contrast, 57(4) is permissive, for it provides that a "court, tribunal or authority may ... adjourn, or otherwise delay ...". Given this contrast, it would seem that the correct interpretation of section 57(4) is that the "court, tribunal or authority" may decide the Basic Rights issue; in which case, of course, a party could then take action to have the issue decided by the National or Supreme Courts under section 57(1). On the other hand, section 57(4) could be interpreted to mean that a court, etc. should not refer the Constitutional question only if it is "trivial, vexatious or irrelevant", which interpretation would reconcile section 57(4) with section 18(2); however, there is the obvious rejoinder that if the Constitution meant this result it would not have used different words in section 57(4).

I suggest that the policy expressed in section 57(4) is preferable to that in section 18(1). To use the words of the Supreme Court in The State v Kaputin, there is firstly "the principle that applies in all countries, that it is highly undesirable that a court of appeal

(especially a final court of appeal such as this) should unnecessarily become seized of a matter before it had been argued in front of a judge at first instance and his study thereof (with the assistance of counsel) and his conclusions thereon became available for its assistance" [1979] P.N.G.L.R. 532, 534. Of course, these remarks are not directly applicable to all the situations where constitutional issues may arise. A constitutional issue may arise before an administrative tribunal, or a village or other court, before which counsel may not appear, (either generally or in the particular case). However, the general point remains that if the issue is considered before the tribunal, etc., the court which decides the constitutional issue will have a clearer idea of what is at stake.

The second consideration is that a duty to refer all constitutional issues could result in much delay and aggravation in the administration of the legal and administrative systems. All tribunals and authorities must consider the scope of their legal powers before they exercise them, and, given the broad reach of the Basic Rights provisions, and the division of powers introduced by the Organic Law on Provincial Government, the question of constitutional limits on statutory powers will arise frequently. If the raising of any such question must lead to an adjournment and a delay until the National or Supreme Courts can consider the issue, the delay that will thereby be caused to the conduct of affairs in and with the administration should be obvious.

Thirdly, such references will also lead to delay in the judicial system. This point was made by Prentice Dep. C.J. in Lowa in the context of an exercise by the National Court constitutional jurisdiction under section 135 of the Constitution:

I consider that as a general rule the Supreme Court should not interfere with a National Court hearing until it had reached a conclusion - unless, in an exceptional case, the National Court itself referred a case for decision before finality. That finality should normally be obtained in the National Court before appeal were sought therefrom, is called for, in my opinion, by the geography and circumstances of this country, and the organisation of its superior courts, [1977] P.N.G.L.R. 429, 432.

The Supreme Court in The State v Kaputin referred to this problem in the context of a case where a point of law which arose at a criminal trial

was referred to the Supreme Court under section 20 of the Supreme Court Act. The Supreme Court said:

it has always been the view of the judges that the trial judge should decide the facts and issues involved in the case before him prior to making a reference under s.20. The reasons are obvious. The Supreme Court can be assembled only at monthly intervals. Accused persons cannot readily be transported across the country's great distances, [1979] P.N.G.L.R. 542, 534.

These remarks are applicable also to the situations under discussion here. It is for example clear that whether many of the Basic Rights provisions have been observed or not will depend very much on questions of fact; (see the comments of Prentice Dep. C.J. in The State v Joseph Maino [1977] P.N.G.L.R. 216, 220).

Related to this discussion is the question of whether a tribunal established by the Constitution and empowered to take action which involves the interpretation of the Constitution is bound to refer such matters to the Supreme Court under section 18(2). In Sasakila the Leadership Code Tribunal gave an interpretation to sections of the Constitution and the Organic Law on the Duties and Responsibilities of Leadership in coming to its decision, [1976] P.N.G.L.R. 491, 493 - 4, and in the Supreme Court Kearney J. did question whether section 18(2) had any effect on the Tribunal's interpretation, (ibid. 506).

However, it is with respect submitted that it is not correct to regard bodies such as the Leadership Code Tribunals as subject to section 18(2). This section is "Subject to this Constitution", and where the Constitution contemplates that some other body may decide a constitutional question, it should be taken to have qualified section 18(2). In Leo Morgan [1978] P.N.G.L.R. 460 a Leadership Code Tribunal did refer questions concerning the meaning of the Organic Law to the Supreme Court under section 18, but the questions referred did not exhaust the range of questions concerning the meaning of the Organic Law raised by the case and the Tribunal appears to have assumed that it did have power to decide these other questions.

(2) Section 18(2) provides that a court or tribunal shall refer the matter to the Supreme Court; section 57(4) speaks only of a "question concerning the effect or application" (my emphasis) of the Basic Rights Division of the Constitution being determined by the National and Supreme Courts under section 57(1). This difference might suggest that section 18(1) required the whole matter before the court or tribunal, embracing both the constitutional and non-constitutional issues, to be referred to the Supreme Court; whereas section 57(4) gave a discretion to the court, etc. to adjourn, etc. so that the constitutional issue might be considered by the Supreme or National Court. This interpretation is not consistent with the practice adopted in Reference No. 1 of 1980, SC193, 6 March 1981, in which the Supreme Court determined only a constitutional issue on a section 18 reference. However, the constitutional issues in that case in fact involved a Basic Rights issue (section 37(4) (a), and a reference under section 57(4) would have been more appropriate. Cases such as this appear to indicate that the differences between sections 18(2) and 57(4) are not appreciated or are ignored.

(3) A third point of difference, although of less significance, is that while section 18(2) refers to any "court or tribunal", section 57(4) refers to any "court, tribunal or authority". The difference is not readily explicable, and the two provisions should be reconciled.

(4) Section 18(2) suggests that the court or tribunal must itself refer the question to the Supreme Court, while section 57(4) suggests that the reference should be made by a person who has standing under section 57(1) (and presumably 57(2)) to raise the question in the Supreme or National Courts. Again, it is not easy to appreciate why there should be this difference in wording. This difference may also affect the operation of the law of criminal contempt. While Rooney (No.1) [1979] P.N.G.L.R. 403 was not it seems a case where section 18(2) was relevant (see above), the reasoning of the majority, that once it appears that the Supreme Court will become involved because of section 18(2) the matter is pending before it would apply to such matters as do come within section 18(2). However, in respect of section 57(4) questions, the case may not be pending before the Supreme Court until the reference is made by one of the parties.

Reform suggestion: evaluate the policies behind the differences in approach of sections 18(2) and 57(4). Unless a difference is justified, bring the two provisions into line, preferably by having only one statement of the law in the Constitution.

(iii) Additional jurisdiction

Section 57(6) provides that: "The jurisdiction and powers of the courts under this section are in addition to, and not in derogation of, their jurisdiction and powers under any other provision of this Constitution". So far as Basic Rights issues are concerned, the only provision to note so far as the Supreme Court is concerned is section 39(2), which provides that the Court has power to determine whether a law is "reasonably justifiable ..." as that phrase is used in section 39(1). This would appear to be redundant in view of section 57(1).

(iv) Other constitutional jurisdiction

Section 137(3), which provides that the Supreme Court must advise the Speaker that a proposed Act of Indemnity complies with section 137, and which specifies the conditions under which such Acts may be enacted, is, as section 137(3) indicates, a special instance of the section 19 jurisdiction. However, in this case, the Court must exercise its discretion in order for the Speaker to take action, and thus in effect gives the Court a veto over this kind of legislation and makes it part of the legislative process for this purpose.

(v) Non-constitutional jurisdiction

The basic provision is section 155(2):

The Supreme Court:

- (a) is the final court of appeal; and
- (b) has an inherent power to review all judicial acts of the National Court; and
- (c) has such other jurisdiction and powers as are conferred on it by the Constitution or any other law.

Section 155(2) (b) may be the basis for Supreme Court jurisdiction to review an exercise by the National Court of its constitutional review jurisdiction, (see above, page 13, and further in Lowa [1977] P.N.G.L.R. 429, 432 per Prentice Dep. C.J.). Section 155(2) (b) has

been considered in general in Avia Aihi SC195, 27 March 1981, but the analysis does not relate to constitutional review jurisdiction and is not considered in this paper. Section 155(2)(c) is confirmed by section 162(1), and there is some duplication here.

There are several instances where the Constitution vests jurisdiction over questions which do not appear to involve the interpretation of the Constitution. Briefly, these are:

section 42(7): power to release a person denied bail;

section 177(2)(b): power to give a direction to the Public Solicitor to provide legal aid; and

section 177(3): power to hear an appeal by a person aggrieved by a refusal of the Public Solicitor to provide legal aid.

(b) The National Court

(i) Constitutional jurisdiction

The Constitution vests the National Court with a significant jurisdiction to interpret and enforce the Constitution, thus qualifying the purportedly exclusive grant of constitutional review to the Supreme Court in section 18(1) and (2); see The State v Peter Painke (No.2) [1977] P.N.G.L.R. 141, 145 per Frost C.J.; The State v Kwambol Embogol N91, 7 April 1977, p.6 per O'Meally A.J.; Prai and Ondowane [1979] P.N.G.L.R. 42, 45-46 per Greville-Smith J.

An important question is whether these grants of power to the National Court include the power to declare laws invalid, for none of these grants specifically includes this power. On the other hand, section 19(1) does vest this power in the Supreme Court in respect of advisory opinions, and it has been argued above that the power can be read into section 18(1) because of the similarity in wording between the two sections. However, as will be seen, National Court jurisdiction over constitutional questions is conferred in terms different to those used in sections 18(1) and 19(1), and this could be taken as an indication that the National Court cannot determine questions of the validity of laws. Such a view is consonant with the exclusive terms of section 18(1).

Reform suggestion: clarify the powers of the National Court with respect to declaration of the invalidity of legislation.

(ii) Jurisdiction to enforce the Basic Rights

By section 57(1), a "right or freedom" in Division 3 "shall be protected by an and is enforceable in, the Supreme Court or the National Court...". It is noted that the National Court could discharge this function without declaring a law to be invalid, (although it would need to find that it did not have any operation in the circumstances of the case).

Aspects of jurisdiction, standing and referral under section 57 in relation to Supreme Court have been considered above and the discussion applies equally to the National Court. The National Court, like the Supreme Court, has jurisdiction to interpret section 39(1).

However, in one respect, the National Court has jurisdiction over a Basic Rights which is not conferred directly on the Supreme Court. This arises out of section 42(5), which empowers "the National Court or a Judge" to inquire into a complaint that "a person is unlawfully or unreasonably detained" and, unless satisfied that the detention is lawful, and, in the case of a person on remand, that the length of the detention is not unreasonable, order the release of the person unconditionally or on conditions. The exercise of this jurisdiction would appear to necessarily involve an interpretation of section 42(1), which prohibits a deprivation of personal liberty, except on those conditions enumerated in the section. That this is so has been recognised by Greville-Smith J. in Prai and Ondowane [1979] P.N.G.L.R. 42, 46, where His Honour commented that:

I hold that I am not obliged by s. 18 [of the Constitution] to refer the matter of these two complaints [under section 42(5) and (6)], or either of them, to the Supreme Court and that I am authorised and indeed required by the imperative terms of s. 42(5) as a Judge of the National Court to hear to conclusion and, subject to appeal, finally determine the matter of these two complaints. I would not, I think, be precluded from seeking the guidance of the Supreme Court under the provisions of s. 5 of the Supreme Court Act 1975, on a matter of law only ... (ibid.).

His Honour therefore rejected a submission that he was bound to refer these complaints to the Supreme Court under section 18 and, it seems, a further submission that he had a discretion to refer the complaints under that section. However, His Honour was not asked to consider a

reference under section 57(4), which seems to be the more appropriate section, but it is possible that the "imperative terms" of section 42(5) would be held to preclude a reference under section 57(4).

Reform suggestion: the relation of the jurisdiction under section 42(5) to section 57(4) should be clarified.

(iii) Other constitutional jurisdiction

Section 135 provides that:

The National Court has jurisdiction to determine any question as to

- (a) the qualifications of a person to be or to remain a member of the Parliament; or
- (b) the validity of an election to the Parliament.

The exercise of this jurisdiction could involve the interpretation of the Constitution; (see Iowa [1977] P.N.G.L.R. 429, 432 per Prentice Dep. C.J.). Section 103 provides for the qualifications of Members of Parliament, and constitutional questions could arise in a challenge to the validity of an election.

(iv) Non-constitutional jurisdiction

Section 155(3) defines the jurisdiction of the National Court.

Paragraph (b), which provides that the Court "has such other jurisdiction and powers as are conferred on it by Constitution or any law", will be the primary basis for its jurisdiction, and it is beyond the scope of this paper to examine the scope of this jurisdiction. The relationship between section 155(3) (a), 155(3) (e), and 155(5) also involves non-constitutional jurisdiction, but a brief note is warranted because of the complexity of the Constitution.

Section 155(3) (a) provides that: "The National Court - (a) has an inherent power to review any exercise of judicial authority...".

However, section 155(3) (e) then provides for an exception to this general grant where "the power of review is removed or restricted by a Constitutional Law or an Act of Parliament", although this is in turn qualified by the provision in section 155(5) that in such cases "the National Court has nevertheless an inherent power of review where, in its opinion, there are over-riding considerations of public policy in the special circumstances of a particular case ...". It is not difficult to see in these provisions the influence of separation of powers theory, and it should be noted too that by section 159(1),

subject to certain limitations, "judicial authority" may be conferred on "a person or body outside the National Judicial System".

In Premdas [1979] P.N.G.L.R. 329, the Supreme Court was unanimous in holding that the powers of the Minister and of the Committee of Review under the relevant sections of the Migration Act 1963 (P.N.G.) did not involve the exercise of "judicial authority". Prentice C.J. drew a distinction familiar to systems which must grapple with separation of powers concepts:

The exercise of power by administrative bodies is not normally regarded as an "exercise of Judicial Authority", though sometimes such bodies are required by their creating statutes to "act judicially", (ibid. 337).

Two other Justices classified the powers under the Act as administrative, or executive, or even as ministerial, but did not provide any elaboration as to how these distinctions would be drawn. In his analysis, Prentice C.J. observed that by Schedule 1.2(1) of the Constitution a "judicial officer" was defined as "a Judge or Magistrate of a court within the National Judicial System" (ibid.), and this might be taken to suggest that his Honour regarded judicial authority as limited to the authority of such persons and bodies. However, section 159(1) suggests that judicial authority has a broader connotation, for it contemplates that it can be conferred on persons and bodies outside the National Judicial System.

It should also be noted that in Milne Bay Provincial Government v Evara and The State N286, 17 March 1981, Andrew J. held that the National Court would have jurisdiction under 155(5) of the Constitution if the procedures under the Provincial Governments (Mediation and Arbitration Procedures) Act 1981 should fail, (ibid., p. 3). The exercise of such jurisdiction would necessarily involve interpretation of the Organic Law on Provincial Government, which is not otherwise vested by the Constitution in the National Court. His Honour might be suggesting that 155(3) (a) and 155(5) vest constitutional review jurisdiction in the National Court.

Reform suggestion: clarify the drafting of these sections and their relationship to constitutional review.

In addition, there are several sections which confer jurisdiction over questions which do not appear to involve the interpretation of the

Constitution. Briefly, these are:

section 42(7), 177(2)(b) and 177(3): (see earlier discussion of Supreme Court);

section 74(2): power to hear an appeal by a person aggrieved by a decision of the Minister responsible to deprive a child of his citizenship; and

section 126(7)(d): power to hear appeals "in electoral matters" (as must be provided for by Organic law).

(c) Other courts and other bodies

Courts. Sections 57(1) and 39(2) permit an Act of Parliament to prescribe that, in addition to the Supreme and National Courts, any other court may be vested with jurisdiction to protect and enforce the Basic Rights. To date, no such vesting has been made.

Other bodies. How far may bodies other than the courts within the National Judicial system (i) determine questions relating to the interpretation or application of a Constitutional Law, and (ii) be vested with the power of constitutional review, that is, the power to review the action of other bodies on constitutional grounds? The answers to these questions are far from clear and there is scope here for clarification of the Constitution.

(i) The determination of constitutional questions

In at least three respects, the Constitution provides that a body other than a court may determine questions that could involve the interpretation of the Constitution. These are: a Leadership Code Tribunal established under section 281(1)(2), which may need to interpret section 27 in order to determine whether a leader has been guilty of misconduct in office; a tribunal established under section 245(1)(e), which may need to interpret provisions in Division 5 (internment) in Part X (emergency powers) in order to determine whether an internment was wrong or without sufficient reason under section 245(g); and a tribunal established under section 181, which must interpret section 178 (grounds for removal of a Judge, etc.). These provisions raise a number of questions.

Firstly, I have argued above that the referral provisions of sections 18(2) and 57(4) do not apply to those bodies. However, this is a position which is not abundantly clear from the Constitution, and could be clarified.

Secondly, may the Supreme and National Courts review a determination of a constitutional question by one of these bodies? Insofar as the interpretation of any of the Basic Rights is concerned, it would appear that the jurisdiction of the Supreme and National Courts is preserved, because section 57(1) is not expressed to be "subject to this Constitution". However, the matter is not altogether free of doubt, for it could be argued that the vesting of particular jurisdiction in the tribunals qualifies the general grant of jurisdiction in the courts under section 57(1).

The difficulty arises with respect to the determination of constitutional issues other than those that fall within section 57. Section 18(1) applies to these issues, and provides that: "Subject to this Constitution, the Supreme Court has original jurisdiction, to the exclusion of other courts ...", and both of the underlined phrases give ground for arguing that the jurisdiction vested in the tribunals is exclusive of that of the Supreme Court. That is, it can be argued that section 18 is subject to these particular jurisdictional provisions, and that by referring only to "other courts" section 18 contemplated that bodies other than courts might have jurisdiction. On the other hand, it could be argued that these arguments arise only by implication from section 18(1) and that the intention of the section that the Supreme Court should be the final arbiter of constitutional questions should not be so easily displaced. The answer to this question might also be clarified.

There is also the possibility that the National Court could under section 155(3) (a) review the decisions of the tribunals, on the basis that the tribunal had exercised "judicial authority", and that the Supreme Court could review the National Court decision under 155(2) (b). However, it may not be correct to see 155(3) (a) as a source of power over constitutional questions, (contra Andrew J. in Milne Bay Provincial Government v Evara and The State (see above)?), and, moreover, this argument could not apply to the Leadership Code Tribunals because of section 28(5).

(ii) The vesting of other bodies with the function of Constitutional review

It could be argued that, apart from section 57, the Constitution permits a statute to confer constitutional review jurisdiction on bodies other than the courts. This argument is based on the words of section 18 discussed above, which permit of exceptions to the exclusive jurisdiction of the Supreme Court, and Section 159(1) which provides that:

Subject to Subsection (3), nothing in this Constitution prevents an Organic Law or a statute from conferring judicial authority on a person or body outside the National Judicial System, or the establishment by or in accordance with law, or by consent of the parties of arbitral or conciliatory tribunals, whether ad hoc or other, outside the National Judicial System, (my emphasis).

The argument succeeds only if "judicial authority" can be said to include the function of constitutional review, and on the face of it, it would seem that such review is an exercise of "judicial authority". However, the Supreme Court could take the view that this would undermine too far the purportedly exclusive grant of jurisdiction in section 18(1), and construe section 159(1) more narrowly. Moreover, even if section 159 does permit tribunals to exercise the function of constitutional review, Supreme Court review under section 18(1), and National Court review of the tribunal under section 155(3) (a), would not be excluded. However, the effect of section 159(1) in this respect should be clarified.

(d) Two problems in determining the scope of review

It was noted above that the phrase in section 18(1) - "any question relating to the interpretation or application of any provision of a Constitutional law" - describes the range of Constitutional questions that may arise, and, as I indicated, questions relating to the Basic Rights provisions are likely to arise frequently. However, there are two sections of the Constitution - 41 and 59 - which are allied to the Basic Rights provisions, but in respect of which there is (or, should be) a question as to whether their interpretation gives rise to a constitutional question. The judgments in the Premdas case address themselves to this question, although in a somewhat inconclusive manner.

Premdas argued that the Minister and the Committee that had made or affirmed the revocation of his entry permit had failed to observe the rules of natural justice, and that on that account the revocation was invalid. The C.P.C. recommendations on Basic Rights made no reference to natural justice, although it may be inferred from the report that the Committee assumed the principles would apply as part of the received common law. However, drafts of the Bills for the Constitution included an attempt to state the conditions under which these principles would apply and their basic content, but in the face of arguments that these clauses did not capture the subtlety of the common law, they were redrawn and the Constitution provides in section 59 only that:

- (1) Subject to this Constitution and to any statute, the principles of natural justice are the rules of the underlying law known by that name developed for control of judicial and administrative proceedings.
- (2) The minimum requirement of natural justice is the duty to act fairly and, in principle, to be seen to act fairly.

Section 60 provides further that in the development of the underlying law the courts should give particular attention to "the development of a system of principles of natural justice and of administrative law specifically designed for Papua New Guinea". The definition of "principles of natural justice" in Schedule 1.2 makes it clear that the content of those principles was to be ascertained by reference to the underlying law as it may have been altered under section 60 or by any statute.

The Justices in the Premdas case were clear that the content of the principles of natural justice were to be determined by reference to the underlying law, but they were not clear beyond doubt on the question of whether a natural justice claim should be regarded as raising a question of the interpretation of the Constitution. The language used by Prentice C.J., viz., that section 59 defines the principles "for the purpose of construing the phrase in the application of the Constitution", [1979] P.N.G.L.R. 329, 342, suggests that he did see a constitutional issue involved. Wilson J. found that to determine whether the Committee

was bound to observe natural justice required an interpretation of the Constitution, (ibid. 375), and Saldanha J. seems to have accepted the applicant's contention that natural justice was guaranteed "under the Constitution", (ibid. 361). The comment may be made that if natural justice claims do raise questions involving the interpretation of the Constitution, a large category of administrative law challenges are converted to constitutional questions. While section 59 clearly recognises that the principles of natural justice can apply in Papua New Guinea, it is clear too that it and section 60 contemplate that the content of those principles is to be determined under the underlying law and may be altered by the courts or by a statute. Thus, it is somewhat artificial to regard natural justice claims as raising issues of interpretation or application of the Constitution. Section 59 was not part of the recommendations of the C.P.C., not because the Committee was opposed to natural justice, but because it was assumed that the principles would continue to apply in P.N.G. as part of the underlying law. It is submitted that section 59 should be read only as a statement that these principles should continue to apply as part of the underlying law. The "minimum requirement" stated in section 59(2) might be regarded as entrenched by that section.

Reform suggestion: it could be stated that sections 59 and 60 do not raise constitutional questions falling within section 18(1).

Section 41 raises a more difficult problem. It provides:

Proscribed Acts.

- (1) Notwithstanding anything to the contrary in any other provision of any law, any act that is done under a valid law but in the particular case -
 - (a) is harsh or oppressive; or
 - (b) is not warranted by, or is disproportionate to, the requirements of the particular circumstances or of the particular case; or
 - (c) is otherwise not, in the particular circumstances, reasonably justifiable in a democratic society having a proper regard for the rights and dignity of mankind,is an unlawful act.
- (2) The burden of showing that Subsection (1) (a), (b) or (c) applies in respect of an act is on the party alleging it, and may

be discharged on the balance of probabilities.

(3) Nothing in this section affects the operation of any other law under which an act may be held to be unlawful or invalid.

This section appears in the qualified rights subdivision of the Basic Rights division of the Constitution, and together with sections 38 and 39 dealing with the general qualification, and section 40 dealing with emergency laws, forms a group of four sections headed "General" which come before the more specific qualified rights. Thus, as a matter of textual analysis, it would seem that section 41 should be seen as having some general effect on the qualified rights. The C.P.C. report provides guidance as to how section 41 could be interpreted. The specific recommendation that provided the basis for section 41 was expressly limited to action taken under a law under which a person was "arrested, detained, questioned or searched, or his property entered upon or searched", and it was recommended that such action should be unlawful "insofar as the force used or the conduct of the persons taking the action is excessive or oppressive in the actual circumstances of the case", (Final Report of the Constitutional Planning Committee 1974, 5/1/33). The C.P.C. also referred to this recommendation in the general discussion which preceded the recommendations, and indicated that its objective was "to provide a safeguard against abuse of or excessive use of a legal power provided for in this Part", (ibid. 5/1/20). (The reference to "this Part" should be construed as a reference to the whole of the Basic Rights provisions.)

In the Premdas case it was argued that the revocation of the entry permit was invalid as contrary to section 41. It would seem reasonably clear that this was not the sort of case that the C.P.C. had in mind, and that the Supreme Court could have resorted to the C.P.C. Report in order to interpret the scope of section 41; (see section 24 of the Constitution). Prentice C.J. did cite the C.P.C. Report, but held that section 41 "should be regarded as of general application", [1979] P.N.G.L.R. 329, 344, and, with the exception of Andrew J. whose judgment is far from clear, the other judges appear to have also taken this view; (see in more detail, Peter Bayne, 'Judicial Method and the Interpretation of Papua New Guinea's Constitution', (1980) Federal Law Review 121, 138-142).

Nevertheless, on the facts in Premdas, the whole Court found that on the facts section 41 did not apply. However, all regarded the section as relevant, and, with the possible exception of Andrew J., regarded it as of general application. This view could have the consequence that most challenges to administrative action of governmental and statutory authorities, whether national, provincial or local, could be maintained as a section 41 challenge. The principle stated in section 41(1)(b) is similar to the basic grounds for challenging the exercise of administrative discretion, and the Justices acknowledged this by their citation of the leading English cases in this area.

If a challenge to administrative action based on section 41 is regarded as a constitutional issue, the matter must be decided by the Supreme or the National Courts. While it is still true in Papua New Guinea that the orthodox administrative law remedies are available only in the National Court, there are other ways, such as a defence to a prosecution, or a civil action against an official, whereby the lawfulness of administrative action can be raised in the lower courts. If a section 41 challenge raises a constitutional issue, these courts cannot decide the matter. In addition, to label a dispute "constitutional" gives it a more serious aspect than most administrative law challenges deserve.

It is thus suggested that the effect of section 41 be considered closely. It should be emphasised that even if section 41 were not in the Constitution, persons such as the plaintiff in Premdas, or anybody else who wishes to challenge governmental action, can do so by relying on general administrative law principle and by means of administrative law remedies.

Reform suggestion: evaluate the policy behind the inclusion in the Constitution of section 41 in its present form, and clarify whether its application gives rise to a constitutional question.

(e) The severance provision

Section 10 of the Constitution provides that:

All written laws (other than this Constitution) shall be read and construed subject to -

- (a) in any case - this Constitution; and
- (b) in the case of Acts of Parliament - any relevant Organic Laws; and
- (c) in the case of adopted laws and subordinate enactments - the Organic Laws and the laws by or under which they were enacted

or made,
and so as not to exceed the authority to make them properly given,
to the intent that where any such law would, but for this section,
have been in excess of the authority so given it shall
nevertheless be a valid law to the extent to which it is not
in excess of that authority.

The question of the scope of the power that section 10 gave to the courts to modify legislation so that it might accord with the Constitution arose first in Ex parte Moses Saskila [1976] P.N.G.L.R. 491. Both the Ombudsman Commission and an Independent Tribunal had found Sasakila, then Minister for Culture, Recreation and Youth Development, guilty of misconduct in office in that he had failed to provide the Ombudsman Commission with a statement of his income, assets and other interests. Section 28(2) of the Constitution provided that in this situation the Tribunal should make its recommendation on penalty to the Head of State, who "shall act in accordance" with its advice. However, section 27(5) of the Organic Law on the Duties and Responsibilities of Leadership provided that the Tribunal itself should dismiss the leader from office. The Tribunal recognised this difficulty, and therefore made a recommendation for Sasakila's dismissal as both Minister and Member of Parliament to the Head of State. The Governor-General made these orders, but stated that he had acted with "the advice of the Prime Minister and having received a recommendation from the appropriate tribunal ...", (*ibid.* 492). The Court found that the difference between the Constitution and the Organic Law was fatal, Frost C.J. holding that "in the absence of an Organic Law which is fully authorised by the Constitution, no recommendation for dismissal can have any valid effect", (*ibid.* 499).

The major question before the Court was whether section 10 of the Constitution enabled the Court to 'read down' section 27(5) of the Organic Law so as to leave the Tribunal a power to recommend dismissal of the Head of State. Frost C.J. disposed of this argument by accepting that the scope of section 10 was governed by the Australian law concerning an analogous provision in the Australian Acts Interpretation Act, and citing only a 1914 Privy Council decision on the Australian provision, held that "the Court cannot re-draft or alter a statute when applying a severability clause ... or convert it into a measure with a different purpose in order to save the provision in part", (*ibid.* 497). He conceded that there "may be little practical difference" between the

provisions of the Organic Law and the Constitution, but "the two functions in law are quite different" and that

it cannot be said that the notion of a power to dismiss can be construed as involving as one part of that function a power also to recommend dismissal, so that once the power to dismiss is removed as unauthorized there could be said to remain the residual power to recommend dismissal, (ibid.).

That another view of section 10 was possible was demonstrated by the next case, Rakatani Peter [1967] P.N.G.L.R. 537. Section 35 of the Constitution guarantees that "the trial [of any person] shall not take place in his absence"; however this is subject to certain exceptions, including situations where the person consents, and, in respect of offences for which imprisonment is not a penalty, where it is established that he has been served with a summons. Section 131 of the District Courts Act allowed for the summary trial of 'simple offences', but defined these to include offences punishable by imprisonment.

The majority of the Supreme Court in Rakatani Peter, (Frost C.J. and Kearney J.), found that section 10 permitted the Court to 'read down' section 131 so that it applied only to offences not punishable by imprisonment. Adopting Australian cases, Frost C.J. (and semble Kearney J.) held that while section 10 permitted the Court to give to a general phrase in an Act a limited operation, so that 'read down' it conformed to the Constitution, it could not add words to the Act. Frost C.J. pointed to the similarity between section 10 and the Australian legislation, and argued that the view expressed in the Australian cases that a court could not legislate when applying their legislation was relevant in Papua New Guinea:

The restriction that in no case can the Court be required to legislate cannot be excluded under s.10, for this Court has no function in relation to the legislative power which is vested in the National Parliament. Constitution, ss.99 and 100, (ibid. 546).

Later his Honour referred specifically to section 100(1), which reads: "Subject to this Constitution, the legislative power of the People is vested in the National Parliament". Kearney J. also relied on a separation of powers argument, citing section 99(3), which reads:

"In principle, the respective powers and functions of the three arms [of the National Government referred to in section 99(2)] shall be kept separate from each other".

Prentice Dep. C.J. was prepared to go further than the majority and added a phrase to section 131 to allow it to apply to imprisonment offences if the accused consented to trial in his absence. His Honour interpreted it without reference to the Australian cases. His Honour referred to the National Goals and to section 32 (the right to freedom) to come to a view that the policy behind the legislative provision in question was desirable, and was clearly influenced by this policy to find that the provisions could be wholly saved under section 10. Prentice Dep. C.J. met the separation of powers argument by saying that "any solution which saved the operation of s.131" (by which he included the view of the majority) "may frankly be recognised as "judicial legislating" of a permissible kind", (ibid. 558).

In later cases, the courts have followed the approach of the majority; see the Inter-Group Fighting Act 1977 case, [1979] P.N.G.L.R. 421, 436, per Andrew J.

Reform suggestion: the question whether the powers given to the courts under section 10 are adequate should be considered. One reform would be to permit the operation of a law in a particular situation despite that in other situations it might be invalid.

5. Exclusion of jurisdiction

I considered above the question whether the vesting of power in a court of body other than the Supreme Court deprived that Court of jurisdiction to determine constitutional questions. There are in addition a number of ways in which the Constitution appears to exclude or reduce the scope of constitutional review by any court or body. All these instances involve non-legislative action and there are difficult problems of interpretation involved.

(a) There are several sections of the Constitution which declare certain questions to be "non-justiciable", (for example, sections 86(4), 134, 143(3), 153(2), (3), (4), 169(5) and 170(4)). Schedule 1.7 provides that such questions "may not be heard or determined by any court or tribunal". This seems clear enough, but it will be difficult in some cases to determine the range of questions which are non-justiciable. Sections

86(4) and 134 have created problems for the Supreme Court.

(i) Section 86(4)

In Sasakila, a Leadership Code Tribunal made recommendations for Sasakila's dismissal as Minister and Member of Parliament to the Head of State, and the Governor-General, stating that he acted on the advice of the Prime Minister and on the recommendation of the Tribunal, made orders of dismissal; (see above). It was argued that section 86(4), which provides that "[t]he question, what (if any) advice was given to the Head of State, or by whom is non-justiciable", operated to protect the Governor-General's orders from review by the Court. The Court held that this section protected the order which dismissed Sasakila from his Ministerial office, for section 144(4)(b)(i) gave to the Prime Minister a power to advise the Head of the State to dismiss a Minister; [1976] P.N.G.L.R. 491, 500 per Frost C.J.

The argument about the order of dismissal of Sasakila as a Member of Parliament presented a greater difficulty. This order was made under section 28(2), which prescribes that the Head of State shall act "with the advice of the independent tribunal". If the word 'advice' was "given its constitutional meaning as provided in section 86(4)" (Frost C.J., ibid.), then the recommendations acted on by the Head of State were not justiciable. Frost C.J. found that this would produce the discriminatory result that leaders under section 28(2) would be left with no redress if the recommendation were invalid, whereas leaders who fell under section 28(3) would have a remedy (ibid.). Further, the provision in section 28(5), that proceedings against leaders should be in accordance with natural justice, would be ineffective unless the order of the tribunal could be impugned (ibid. 501). Frost C.J. concluded that:

In an endeavour to find a solution I do not consider that this Court should proceed to cut down the force of the meaning of non-justiciability. The answer, I consider, is to be found by looking at the purpose of s. 86(4). That provision is certainly to be given the plenary operation of putting beyond the scrutiny of the Courts the question of what advice (if any) is given by the National Executive Council to the Head of State. But the provision seems inappropriate to the proceedings of an independent Tribunal which acts judicially, conducts its hearings in public, and makes public its decision supported by reasons.

The conclusion I have come to is that so far as the obligation of the Head of State to act on the recommendation of such a Tribunal is concerned, special and exclusive provision is made for that subject-matter in s. 28, and the general provisions of s. 86, except possibly sub-s. (3) which is concerned with the form of instruments, have no application, (ibid.).

The scope of the protection accorded to actions of the Governor-General (acting for the Head of State) also troubled the Supreme Court in Minister for Lands v. Frame SC186, 28 November 1980. Section 20 of the Lands Acquisition Act 1974 provided that the Governor-General in Council might, after receiving a report from the Valuer-General, fix by regulation a factor to be used in the calculation of compensation to a person whose land was acquired under the Act. It was argued that section 86(4) protected this regulation and the factor from judicial review.

Kapi J. found that the Governor-General was not obligated to act on the report of the Valuer-General, and that therefore he was obliged to under section 86(2) follow the advice of the National Executive Council, (ibid. 38-39). His Honour then concluded that:

S.10 of the Constitution requires that all Acts are to be read subject to the Constitution. As far as the functions of the Head of State are concerned, the provisions of the Constitution will override any Act which might be inconsistent with it. It appears from s.86 of the Constitution that the Head of State shall act only with the advice of the National Executive Council under the Lands Acquisition Act. Under s. 86(4) and Schedule 1:7 of the Constitution the advice according to which the Head of State is required to act cannot be questioned by any tribunal or court of law. In other words, the advice received cannot be questioned by any tribunal or court of law. In this case the advice received was that the factor should be 4. In so far as appealing against this factor is concerned, if the Act gives the right of appeal this would be against the Constitution (s. 86, Schedule 1:7).... the legislature intended that the determination of the factor be given to the Head of State. The non-justiciability of this advice under s.86 and Schedule 1:7 of the Constitution overrides any other contrary intention under the Act, (ibid. 40).

Pratt J. (and perhaps Greville-Smith J) rejected the argument based on section 86(4). His Honour argued that:

It is not the advice, or what was contained in that advice, or who gave that advice which forms the point of contention before this Court. What is contended is that the final figure,

determined upon by the Governor General is an incorrect figure. It is the result of the advice, the conclusion reached following consideration of whatever, if any, advice the Governor General received which is the point in issue. In my view, the question of non-justiciability simply does not arise.

The Governor General, of course, must act on the advice which he receives. There is no discretion vested in him as Head of State (the Constitution, s. 86(2)). Having received advice, the Governor General then gazettes the result of that advice - in this instance a figure to be used as a multiplier, by way of regulation to operate under the Act. Like any other regulation, it is of course subject to the Act and must not be ultra vires the Act. It is this figure which the Minister is obliged to use under s. 22 of the Lands Acquisition Act for the purpose of arriving at the amount of compensation payable to the claimant. To maintain that because the Governor General has caused a regulation to be published in the Gazette following on advice, and because the advice received by the Governor General is non-justiciable means that no consequent regulation can be challenged as ultra vires, is a proposition of law so fundamentally misconceived as to warrant no further consideration, (ibid. 48).

This judicial disagreement raises a fundamental problem. If Kapi J.'s views were correct it would be possible to insulate administrative action from judicial review by the device of vesting the power to take the action in the Head of State, who would be of course obliged to act in accordance with the advice of the National Executive Council or other body prescribed by the legislation authorising the Head of State to act. It is, with respect, suggested that His Honour may not have considered the possible consequences of his ruling. The views of Pratt J. are to be preferred, and, as His Honour states, Section 86(4) should be regarded as precluding examination only of what was contained in advice given to the Head of State, or who gave that advice. (Although, if the courts were to have regard to Australian law, there is authority that the actions of a Governor-General are not reviewable according to ordinary principle; see P.W. Hogg, 'Judicial Review of Action by the Crown Representative', (1969) 43 Australian Law Journal 215.) Section 86(4) appears to be aimed at precluding examination of the relations between the National Executive Council and the Head of State, (in practice the Governor-General). Should these relations deteriorate, the Council may suspend the Governor-General and initiate his dismissal if it feels that this immunity has created a problem.

Reform suggestion: consider whether the effect of section 86(4) might be clarified.

(ii) Section 134

Of some significance is the reach of the protection from judicial review of section 134, which provides:

Except as specifically provided by a Constitutional Law, the question, whether the procedures prescribed by the Parliament or its committees have been complied with, is non-justiciable, and a certificate by the Speaker under section 110 (certification as the making of laws) is conclusive as to the matters required to be set out in it.

In its context, the reference in section 134 to procedures might be taken as a reference to section 133 (Standing Orders), and section 134 must also give way to specific provision (presumably as to procedures to be followed by Parliament) in the Constitution. Nevertheless, in Mopio [1977] P.N.G.L.R. 420, the Supreme Court relied on section 134 to sustain its holding that it had no jurisdiction to determine whether the procedure prescribed in section 142(4) had been followed. The Mopio decision can be rested on other grounds, but a broad view of the operation of section 134 must be qualified in some situations; for example, when the question is whether Parliament has observed the procedures for the alteration of the Constitution (sections 13 to 17).

(b) The decision in Mopio illustrates too that section 115(2) and (3) can affect the justiciability of questions concerning the procedures of Parliament. It also points to another qualification of general significance on the reach of constitutional review. The Court did not consider whether section 142(4) had been observed, but it added that the plaintiff Mopio would have also needed "to establish that the procedure was mandatory and not merely directory and that non-compliance would have the effect in law of invalidating the appointment" (ibid. 421). The courts might well find that many sections of the Constitution are "merely directory" and thus preclude reliance on them for the purposes of challenging action based on those sections; for an example, see the Lowa case, [1977] P.N.G.L.R. 429, 435, 445-6, in relation to section 126(7).

(c) There are a number of sections which are declared to be only "in principle". This is the case with some committees in respect of which the Constitution provides a principle for determining membership. Section 118(4) provides that "membership of the Permanent Parliamentary Committees

should be spread as widely as practicable among the backbenchers"; and see too section 119 (2) on Chairmen and Deputy Chairmen of such Committees, and section 240 (4) on the composition of the Emergency Committee. Other examples are section 99 (3), that "the respective powers and functions of the three arms" of government "shall be kept separate from each other"; section 254, on the filling of constitutional officers, and section 255 on the scope of consultation. Schedule 1.6 establishes a rule for the effect of an "in principle" provision:

Where a provision of a Constitutional Law is expressed to state a proposition "in principle", then -

- (a) an act (including a legislative, executive or judicial act) that is inconsistent with the proposition is not, by reason of that inconsistency alone, invalid or ineffectual; but
- (b) if the act is reasonably capable of being understood or given effect to in such a way as not to be inconsistent with the proposition it shall be so given effect to.

(d) The scope of judicial review on constitutional grounds may also be affected where, in the words of section 62(1), "a law provides or allows for an act to be done in the "deliberate judgment" of a person, body or authority". Section 62(2) provides that with three exceptions, the act is "non-justiciable". Firstly, the principles of natural justice apply to such acts but only "to the extent that the exercise of judgment must not be biased, arbitrary or capricious" (section 62(2) (a) and 62(1)). Secondly, the National Court could review such an act under section 155(5), (section 62(2) (b)), but this could only apply where the act involved an exercise of "judicial authority". Thirdly, a Constitutional law or Act of Parliament could provide for review, (section 62(2) (c)).

The Constitution provides that some acts are in the "deliberate judgment" of a person, for example sections 65(6) and 67(1) relating to certain decisions made by the Minister responsible for citizenship matters. However, any law could make similar provisions. Is the effect of section 62(2) that, subject to the three exceptions, such acts are "non-justiciable", and operate to exclude constitutional review of such acts, (which includes review to determine whether a Basic Right has been infringed)? This is a question which might be clarified.

6. Remedies

This part of the paper is not an exhaustive statement of the remedies that may be awarded by the courts in the exercise of the function of constitutional review. The courts may award any remedy which they consider to be appropriate to the case according to the reviewed common law. Furthermore, some Justices have been prepared to find that the general provision in section 158(2), that "In interpreting the law the courts shall give paramount consideration to the dispensation of justice", is a source of power to mould remedial law to the circumstances of particular cases; (see Mauga Logging Company Pty. Ltd. v Okura Trading Company Ltd. [1978] P.N.G.L.R. 259, 260 per Kearney J.). Rather, this part will consider those sections of the Constitution which deal particularly with the remedies that may be awarded by the Supreme and National Courts in the exercise of their powers of constitutional review. The analysis will consider, firstly, those sections which apply to both courts, and, secondly, sections 22 and 23, which on their face vest power only in the National Court.

The Common Provisions

i) Section 155(4) liberalises the law on remedies in relation to constitutional as well as non-constitutional matters, and if interpreted broadly by the courts could be the basis for far-reaching judicial reform of remedies law. It provides that:

Both the Supreme Court and the National Court have an inherent power to make, in such circumstances as to them seem proper, orders in the nature of prerogative writs and such other orders as are necessary to do justice in the circumstances of a particular case.

That section 155(4) could expand the remedies available in constitutional challenges was indicated by Sasakila [1976] P.N.G.L.R. 491. The plaintiff obtained an order nisi for a writ of certiorari to remove into the Supreme Court and quash an order of the Leadership Code Tribunal dismissing him as a Minister and as a Member of Parliament; (although, the Tribunal's order in fact recommended dismissal; see discussion of this case above).

The Court made an order absolute for a writ of certiorari, and made orders quashing the orders and recommendations of both the Tribunal and the Head of State; (in the latter case the order related only to the dismissal of Sasakila as a Member of Parliament).

The significance of the case is that the remedies awarded were more extensive than would have been available if common law principles had been followed. It is not altogether clear that at common law a writ of certiorari could be made against the Crown, (see H. Whitmore and M. Aronson, Review of Administrative Action [1978], 421), but the Court issued the writ against the Head of State. Perhaps the Supreme Court has altered this aspect of the law relating to certiorari. Moreover, the Court made a declaration that Sasakila remained a Member of Parliament and, again, such a mixing of certiorari and a declaration was not possible at common law. However, despite these aspects of the case, only Kearney J. made any comments on the Court's remedial power. His Honour did not consider either of the points noted above, but did say that:

Constitution ss. 60, 155(4) and Sch. 2.4 enlarge the scope of certiorari beyond that which it has in the common law of England, and enable the thickets of technicality and inconsistency to be cut away, with the beneficial result that the law concerning judicial control is not here bedevilled by complex restrictive procedures and practices, (ibid. 505).

In Sasakila, the Supreme Court appears to have relied on section 155(4) to alter the law concerning the prerogative writs or, perhaps, to make orders "in the nature of prerogative writs". The final words of the section - "and such other orders as are necessary to do justice in the circumstances of a particular case" - raise a more difficult problem. Must these "other orders" be of the same general character as the prerogative writs, (that is, remedies against public authorities for excess of power), or may these words of section 155(4) be the basis for any kind of remedy in any kind of legal action?

There are some non-constitutional cases which appear to accept this latter broader interpretation of section 155(4). In Mauga Logging Company Pty.Ltd. v South Pacific Oil Palm Development Pty.Ltd. (No. 1) [1977] P.N.G.L.R. 80, Frost C.J. relied on section 155(4) to find that the National Court could

make an order in the nature of an interlocutory injunction although no such jurisdiction existed under the principles of common law and equity. It is significant that Mauga Logging was an action between two companies for damages for breach of contract, which suggests that Frost C.J. did not consider that the words "such other orders as are necessary" were limited by reference to the words "prerogative writs".

Narakobi A.J. has also given a broad interpretation to the section. In The State v Kapua Ungi N252, 14 August 1980, His Honour relied in part upon section 155(4) to find that before a criminal circuit closed he could recall a sentence he had imposed and make a fresh order (ibid. 5). However, His Honour relied primarily on section 155(3) (a), and found that the words "any judicial authority..." in that section included a decision of the National Court itself (ibid. 6). Furthermore, in State v Luku Wapulae and four others N233, 4 June 1980, Narakobi A.J. held that he could impose a customary punishment under section 155(4). On appeal, the Supreme Court did not consider this aspect of the case, but in Avia Aihi SC 195, 27 March 1981, Kapi J. expressed the view that Narakobi A.J.'s opinion was wrong (ibid. 32). Nevertheless there are cases where section 155(4) has been cited to justify remedies in the criminal process which bear little resemblance to the prerogative writs: see Saki v The State, SC173, 2 April 1980.

The Supreme Court in Avia Aihi considered section 155(4) at some length, and although the Court was not asked to exercise the function of constitutional review, the judgments reveal differences of opinion between the Justices which do bear on the extent to which section 155(4) may be a source of remedial power in the constitutional review jurisdiction. Avia Aihi applied to the Supreme Court for leave to appeal against a sentence of life imprisonment well beyond the time allowed for such an appeal under section 27 of the Supreme Court Act 1975. Aihi relied on section 37(15), which provides that: "Every person convicted of an offence is entitled to have his conviction and sentence reviewed by a higher court or tribunal according to law". The Court held that this section could not apply, and that "according to law" embraced laws such as the Supreme Court Act 1975. Thus, there was no right which could be protected by the Court under section 57(3).

In the alternative, Aihi relied on section 155(4), but the Court also rejected this basis for an appeal. Kidu C.J. held that section 155(4) "has no application in cases where specific provisions of the Constitution

provide for the enforcement of guaranteed rights", (SCL95, 27 March 1981, 6), and that here section 57(3) did so provide. His Honour then held that because section 57(3) could not apply, (see above), the Court had no power to make an order under section 155(4).

Kearney Dep. C.J. approached the issue somewhat differently. His Honour found that:

I agree with the views of Prentice C.J. and Andrew J. in [Premdas [1979] P.N.G.L.R. 329, 337, 401] that Constitution s. 155(4) involves at least a grant of power to the courts. I consider that the sub-section gives unfettered discretionary power both to this court and the National Court so to tailor their remedial process to the circumstances of the individual case as to ensure that the primary rights of the parties before them are protected, (ibid. 11).

However, His Honour held too that section 155 (4) "cannot affect the primary rights of the parties: these are determined by law" (ibid. 12), and in this case the applicant had lost her right to appeal under the Supreme Court Act 1975.

Kapi J. came to the same conclusion as his brother Justices, but His Honour's reasoning appears to be based on a narrower view of section 155(4). His Honour stated that section 155(4) did "not give this court the power to do anything contrary to what the law says" (ibid. 30), and further that the section did not give the Supreme Court "the right and the power" to make an order (ibid. 31). The law relevant to the matter before the Court was the source of the applicant's right and the Court's power. To hold otherwise, His Honour found, would be contrary to "the doctrine of separation of powers under s. 99 of the Constitution" (ibid.). If an order under section 155(4) could be made contrary to s. 27 of the Supreme Court Act 1975,

then this would have the peculiar effect in that this court would have power to disregard or override clear provisions of the statutes. This, in effect, would amount to amendment or repeal of legislation by judicial power. Such an interpretation would put this court above the legislature and it could make orders against the clear provisions of legislation if it thought the legislation was unfair or did not do justice. Such an interpretation would violate the doctrine of separation of powers (ibid.).

His Honour agreed with Kidu C.J. and Kearney Dep. C.J. that section 155(4) could not be the basis for a right to appeal, but, it seems, disagreed with at least Kearney C.J. that section 155(4) was a source of power to make orders to give effect to rights.

Furthermore, Kapi J. appears to take the view that orders under section 155(4) should be in the nature of prerogative writs. His Honour found that the section was the source of the Supreme Court's power to review by way of prerogative writ the proceedings of bodies other than the National Court, (the power in that latter respect deriving from section 155(2)(b)). In relation to these powers,

The procedure to obtain such a writ and grounds for granting such writ still remain the subject of Rules of Court and the common law as may be adopted or rejected under Sch. 2:2 of the Constitution. The only difference now is that no Act of the Parliament can take this power away (ibid. 33).

These remarks of Kapi J. contrast sharply with those of Kearney J. in Sasakila, (see above), and suggest that the current Supreme Court bench is far from taking a settled view of the scope of section 155(4).

Reform suggestion: clarify the scope of section 155(4), in conjunction with other provisions of the Constitution which relate to remedies.

In relation to other provisions, see the reliance placed on section 185 in Sasakila [1976] P.N.G.L.R. 491, 494 per Frost C.J., (where the reference to section 184 is a mistake); Evangelical Lutheran Church of New Guinea v Peninsula Hotels Pty. Ltd [1977] P.N.G.L.R. 147, 151, per Williams J.; In Re the Corrective Institutions Act 1957 [1978] P.N.G.L.R. 404, 409; Minister for Lands v Frame SC 186, 28 November 1980, 42 per Kapi J; and in relation to section 158(2), see Mauga Logging Company Pty. Ltd. v Okura Trading Co. Ltd [1978] P.N.G.L.R. 259, 260 per Kearney J.

ii) Sections 57(3) and 58 amplify the remedies that may be awarded by the courts vested with jurisdiction to enforce the Basic Rights provisions. Section 57(3) permits a court to make "an order or declaration in relation to a statute at any time after it is made (whether or not it is in force)", and section 57(4) permits relief to be granted in cases where there is a reasonable "probability", likelihood or "fear" of internment.

Clearly, sections 57(3) and 57(4) would permit the courts to act in situations where a person was not under any actual adverse impact of a statute or administrative action.

Section 58 allows for compensation, ("reasonable damages" or "exemplary damages"), to be awarded to a person whose rights or freedoms are infringed. Although the common law does allow damages to be awarded to a person affected by unlawful administrative action, the section 58 remedies are expressed very generally and would appear to have extended the common law. In Rebeka Ambi v Mary Rabi N279, 16 December 1980, Narakobi A.J. found that those Native Regulations which made adultery an offence were contrary to section 37(2) of the Constitution, and in exercise of powers under section 58(4) (b) awarded exemplary damages against the State, (ibid. 5).

iii) Section 42(7) confers power on the Supreme and National Courts to release a person on bail, and section 42(5) empowers "The National Court or a judge" to release a person in detention. "Judge" means a judge of both the Supreme and the National Court, (see Schedule 1.2). Section 42(5) has an obvious effect on the law relating to habeas corpus, but it should be redrafted to refer to the Supreme Court.

Sections 22 and 23

Both sections are expressly limited to the National Court. However, some Justices have held (or assumed) that the Supreme Court could exercise these powers. In Sasakila [1976] P.N.G.L.R. 491, Kearney J. appears to have held that the order for a writ of certiorari made by the Supreme Court, quashing the order of the Head of State dismissing Sasakila as a Member of Parliament, could be justified under section 22, (ibid. 507). This case was not of course an appeal from the National Court or a review of a decision of that court, and His Honour may simply have overlooked the limitation. There are other cases where Justices have assumed that the powers in section 22 and 23 may be invoked in the Supreme as well as the National Court; see The State v Peter Painke (No. 2) [1977] P.N.G.L.R. 141, 145 per Frost C.J., and Constitutional Reference No. 1 of 1977 [1977] P.N.G.L.R. 362, 365 per Frost C.J.. In Constitutional Reference No. 2 of 1978 [1978] P.N.G.L.R. 404, the Supreme Court indeed relied on section 22 to fix rules for appeals from visiting justices to the National Court, (ibid. 409).

Only Sir William Prentice seems to have been aware of the problem. In Constitutional Reference No. 1 of 1977 His Honour noted that the injunction of section 22 was directed at only the National Court, but in a rather obscure observation stated that:

Without intending to be definitive, this to my mind is indicative of the devising of court procedures such as injunctions (anticipatory, prohibitory and mandatory), declarations, orders and the methods of enforcing the sanctions. It would not, I think, lend itself to be interpreted as a direction to the Supreme Court to, in effect by way of interpretation, extend the list of Constitutional Rights, (ibid. 378).

In Lowa [1977] P.N.G.L.R. 429, Prentice Dep. C.J. held that "presumably" the Supreme Court could on review of a decision of the National Court act under section 22, (ibid. 436). However, it is not clear whether His Honour meant to suggest that this was the only basis on which the Supreme Court could act under section 22.

It is not immediately apparent that the Supreme Court can act under sections 22 and 23, for neither section is "subject to this Constitution" so as to permit other sections which confer general remedial power to operate. The Supreme Court might plausibly argue that these other sections do embrace the powers in section 22 and 23, but it would be helpful if this were made clear.

Reform suggestion: clarify the Supreme Court's powers under sections 22 and 23.

There are also difficulties as to the scope of sections 22 and 23.

What is the scope of the phrase in section 22 - "The provisions of this Constitution that recognize rights of individuals (including corporations and associations)..."? At the least, it may be taken to refer to Division 3 of Part III, (i.e. the Basic Rights), and in Constitutional Reference No. 1 of 1977 [1977] P.N.G.L.R. 362 at least Prentice Dep. C.J. made this clear, (ibid. 377-378).

His Honour held too however that section 22 could not be the basis for a claim to a right, (in that case, a claim that confessional evidence obtained in breach of section 42(2) should be automatically rejected); rather, the right must be found elsewhere in the Constitution, (ibid.). Williams J. appears to have taken the same view, (ibid. 382). In Constitutional Reference No. 1 of 1978 [1978] P.N.G.L.R. 404 the Supreme Court relied on section 22 to aid the protection of the Basic Right in section 37(15), (ibid. 409).

There are provisions of the Constitution other than those in the Basic Rights (Part III, Division 3), which might be found to grant rights which fall under section 22. For example, a 'right' to, for example, legal aid, or to complain to the Ombudsman Commission, might be spelt out of sections 177(2) and 219 respectively. In Lowa [1977] P.N.G.L.R. 429, Prentice Dep. C.J. held that section 22 could be the source for power "to provide the necessary machinery and procedures to ensure that a citizen may stand for Parliament, and not to have his right to be elected defeated by a candidate lacking the necessary Constitutional qualifications, or by one who had indulged in illegal or grossly unfair practices.." (ibid. 436).

The rights referred to are to be found in Part VI, Division 2 - "The National Parliament", as well as in the Basic Rights provisions.

The next phrase in section 22 "as well as those that confer powers or impose duties" - is more difficult to comprehend in the context of that section. There are many sections of the Constitution which impose duties on a wide range of public bodies and officials.

Sometimes a duty is cast on the Parliament which "shall" enact certain legislation, for example, on matters relating to the integrity of political parties (section 129), and candidates (section 130), and on appeals to the National Court or electoral matters (section 126(7)(d)). Section 51(3), which provides that: "Provision shall be made by law to establish procedures by which citizens may obtain ready access to official information", is an example of a more general exhortation to the Parliament.

Sometimes the duty is cast on a political figure or a Constitutional office-holder; for example, section 14(2) requires that a "proposed law (to alter the Constitution) must be published by the Speaker in full in the National Gazette", and section 37(14) provides that in certain circumstances the Chief Justice "shall" make a report to the Minister responsible for the National Justice Administration.

There are some provisions which are reasonably precise as to the nature of the duty imposed. In many respects, the Basic Rights provisions require public officials and perhaps persons and bodies to accord rights to other persons; section 37 contains several such provisions. The basic Leadership Code provision (section 27) states clearly that leaders have certain duties. Other statements of duty are more nebulous. The Basic Social Obligations are a statement of the obligations of "all persons in our country", although the extent to which these obligations are judicially enforceable is affected by section 63. Section 6 provides for the Declaration of Loyalty, which contains a promise to uphold "the Constitution and the laws of Papua New Guinea".

This enumeration is far from exhaustive, but it illustrates the variety of duties, (or what might be argued to be duties), imposed by the Constitution. Which of these duties could be enforced under section 22? The same question may be asked concerning the reference in section 23 to a provision of a Constitutional Law which "imposes a duty".

Some Justices have answered some particular questions; for example, in Constitutional Reference No. 1 of 1977 [1977] P.N.G.L.R. 362, Prentice Dep. C.J. thought that violation of section 42(2) could lead to the imposition of sanctions under section 23, (ibid. 378). More generally, a court could be guided to two considerations.

Firstly, whether the Constitution provides for an alternative mode of enforcement, and it is suggested that in such cases where there is a specific provision for the enforcement of a duty, a court might decline to invoke sections 22 and 23. The wording of these sections indicates that the existence of alternative remedies should result in

their displacement. Section 22 indicates that it should operate only if there is a "lack of supporting, machinery or procedural laws", and section 23 that it should not apply if "a Constitutional Law or an Act of Parliament provides for the enforcement" of a provision which "prohibits or restricts an act, or imposes a duty". (Of course, the existence of an alternative remedy might also justify a court declining to enforce a right, as well as a duty, under section 22).

There has been some discussion in the courts concerning this issue. In Constitutional Reference No. 1 of 1977 [1977] P.N.G.L.R. 362, both Prentice Dep. C.J. (ibid. 378) and Williams J. (ibid. 382) held that section 22 should not apply because sections 23, 57 and 58 could be involved; in The State v Peter Painke (No. 2) [1977] P.N.G.L.R. 141, Frost C.J. seems to have thought that section 22 could be concurrent with jurisdiction under sections 57 and 58, (ibid. 145); in Mopio [1977] P.N.G.L.R. 420, the Supreme Court held that section 22 could not apply because section 134 rendered the issue non-justiciable, (ibid. 423). On the other hand, in Constitutional Reference No. 1 of 1977 [1977] P.N.G.L.R. 362, Prentice Dep. C.J. and Williams J. appear to have considered that sanctions under section 23 could be invoked concurrently with jurisdiction under sections 57 and 58, (ibid. 378, 382). Frost C.J. was aware of the difficulty that the wording of section 23 indicated that it should give way to sections 57 and 58, but observed that all counsel involved had agreed that section 23 was applicable to enforce section 42(2), (ibid. 366).

Prentice Dep. C.J. addressed more directly the issue of the effect of alternative remedies on the operation of sections 22 and 23. His Honour noted the wording of section 23, and stated that:

It is conceivable that an argument could be erected to the effect that ss. 57 and 58 make provision for "enforcement otherwise", as envisaged by s. 23; and that s. 23 is not therefore applicable to the protection of rights. Another view (in relation to which s. 57(6) is relevant) would have it that both s. 23 and ss. 57, 58 are so available. The latter view would see ss. 57, 58 as providing for the protection of rights directly; and

s. 23 as providing for such protection indirectly by the enforcement (by sanctions) of co-relative duties to provide such rights - making two sides of the one coin. In this reference, as I mentioned above, all counsel seemed to assume the latter view. The question therefore of whether the method of enforcement of rights ought to be regarded as provided for exclusively by ss. 22, 57 and 58; or whether s. 23 should also be taken to be available to protect them indirectly through enforcement of duties implicitly laid on citizens and authorities by the provision for and definition of rights, was not argued - and may be left for the future, (ibid. 378 - 379).

Obviously, these questions might be resolved by amendment of the Constitution.

Secondly, it is suggested that as a more positive guide to sections 22 and 23, a court should ask whether the scope of the duty permits of judicial determination, and whether it permits of judicial enforcement. Most of the duties placed on Parliament are clearly outside this formula, and so too may be the duties cast on high public office-holders such as the Speaker and the Chief Justice. However, the duty on Parliament in section 126(7)(d) to provide for appeals in electoral matters could well fall within section 22; see Lowa [1979] P.N.G.L.R. 429, 436 per Prentice Dep. C.J.. The duty in section 51(3) (freedom of information) is specified clearly, but to enforce it a court would need to formulate standards and rules as to who might gain access to what kind of information, and would then need to supervise their implementation. These tasks would necessarily involve the courts in matters of public policy and it is unlikely, and probably undesirable, that they should be so involved.

Duties imposed on individuals are more capable of enforcement, but some, (for example, those in section 6), are expressed so generally as not to be susceptible to judicial determination. However, those specified in section 37 are clear and could fall within sections 22 and 23.

Reform suggestions: these provisions concerning remedies overlap and in some crucial respects are quite ambiguous. I suggest that consideration be given to:

- (i) providing a single (rather than scattered statement) of the law on remedies;
- (ii) the exercise by the Supreme Court of its power to make Rules (under section 184, assisted, if necessary, by sections 185 and 224(2), to undertake a reform of the law of remedies; and
- (iii) the desirability of retaining sections 22 and 23, at least in their present form.

This last suggestion is perhaps quite controversial and should be explained briefly. Firstly, the scope of the sections is so uncertain and must be subject to so much qualification, that their presence in the Constitution adds greatly to its uncertainty and thus the difficulty of its comprehension. Secondly, it does not appear that the sections add greatly to the scope of public law remedies covered by other sections, such as 57, 58 and 155. Thirdly, the criminal penalties in section 23(1) are so severe that a clear case should be shown for their retention. It is undesirable that the criminal law should be so uncertain. In addition, some acts that would fall under section 23(1), would come under the general criminal law (for example, contempt of court), and account should be taken of section 58 so far as compensation is concerned. The penalty/deterrence aspect of section 23 is, I suggest, covered adequately by other parts of the Constitution or by the general criminal law.

It may be desirable to include in the Constitution a provision which allows the Supreme or National Court to require a person to perform a duty imposed by a Constitutional Law, but perhaps the range of such duties should be more limited than at present. For example, duties which relate to the operation of the machinery of government under the Constitutional Laws might be enforceable, for while on the one hand the courts might thereby be involved in disputes which are political, lack of enforcement procedures could lead to impasse in the constitutional system.

POSTSCRIPT

Supreme Court Reference No. 4 of 1980; Re Somare (The Vanuatu case) SC 204,
3 August 1981.

Supreme Court: Kidu C.J., Kearney Dep. C.J., Greville Smith, Kapi, Miles JJ.
Section 205(1) of the Constitution provides in part that:

- (1) Except for the purposes of defence against attack,
The Defence Force or part of the Defence Force -
 - (a)
 - (b) may be sent out of the country only by the authority
of and on conditions imposed by the Head of State
acting with, and in accordance with, the advice of the
National Executive Council.

- (2) The Defence Force or a part of the Defence Force may not
be ordered on, or committed to -
 - (a) active service; or
 - (b) an international peace-keeping or relief operation,
outside the country without the prior approval of the Parliament.

On 6 August 1980 the National Parliament passed a motion for part of the
Defence Force to be committed for peace-keeping operations in Vanuatu, and
later in 1980 passed the Defence Force (Presence Abroad) Act 1980.

Mr Somare, the Leader of the Opposition in the National Parliament, by
way of a petition, made an application to the National Court for certain
orders based on a claim that the motion and the Act were null and void
because they were in conflict with sections 205 and 206 of the Constitution.

It is not clear in these judgments what orders were sought. The
petitioner's attempt to rely on section 23 was rejected by the Supreme Court.
Kidu C.J. thought ad hoc directions under section 185 might be given to
facilitate the question coming before the Court (SC 204, 10), and Miles J.
treated the application as one for a declaration that the Act was
unconstitutional (ibid.).

The effect of the reasoning of a majority, (Kidu, C.J., Kapi, Miles JJ;
Kearney Dep. C.J., Greville Smith J. dissenting), was that the petitioner
had standing to seek a ruling from the Supreme Court on the
constitutionality of the motion and the Act. All the Justices approached
the question of standing by considering whether it could be based on

(i) section 19, and (ii) apart from section 19.

Section 19

All Justices held that Mr Somare's application could not be treated as a special reference to the Supreme Court under section 19(1) on the quite simple ground that the Leader of the Opposition was not, in terms of section 19(3), one of the "authorities entitled to make application". The most difficult question was whether section 19 operated to exclude 'public interest' suits, but before analysis of the judgments on this question, some remarks of the Justices on other points should be noted.

Kidu C.J. pointed out that, contrary to the recommendation in C.P.C. Report 8/16 para. 155, section 19(2) provided that advisory opinions had the same binding effect as any other decision of the Supreme Court, (SC 204, 4). His Honour went on to indicate how section 19 expanded the common law:

One other purpose of s.19 was to ensure that certain authorities were not hindered by rules relating to locus standi - rules formulated by common law courts in England based on proprietary interests. The common law is quite clear on the question of locus standi relating to public interest - only the Attorney-General or a person who has obtained his fiat can invoke the jurisdiction of the courts. In Papua New Guinea, where there is no Attorney-General the Principal Legal Adviser submitted that only authorities enumerated in s.19(3) can come to this court. In England there is no law which allows courts there to give advisory opinions. In common law, therefore, advisory opinions cannot be given. Section 19 allows the Supreme Court of P.N.G. to do so. It was included in the Constitution to get over this obstacle, at least as far as constitutional law is concerned, (ibid. 4).

However, Kidu C.J. also stated that

my own experience is that those authorities [in section 19(3)] will only get involved if they consider that the question or matter involves or affects their own areas of operation or responsibilities, (ibid. 5),

and with reference to the case before the Court noted that the Ombudsman Commission had refused Mr Somare's request to it to refer the matter to the Supreme Court, and further that neither the Parliament or the Principal Legal Adviser had made a reference, (ibid.).

The Principal Legal Adviser argued that section 19(3) should be seen as standing in the place of actions by the Attorney-General either on his own motion or at the relation of private individuals, so that the only way a 'public interest' action could be brought was by way of a reference under section 19. Otherwise, it was argued, an individual needed to show that his or her interests were affected in some way different to the interests of the general public; (see Miles., ibid 40).

A majority (Kidu C.J., Kapi and Miles JJ.) rejected these arguments. Miles J. rejected the analogy between the English Attorney General and the authorities in section 19(3); the nub of his reasoning is to be found in his statement that

The giving of an advisory opinion is radically different from deciding a piece of litigation between parties and it is quite outside the function of the courts as they exist in the common-law equity system of England; (ibid. 41).

(See further Kidu C.J., 4-5, Kapi J., 26.)

The minority (Greville-Smith and Kearney JJ.) did find that section 19(3) 'covered the field' with respect to public interest actions, and therefore

no room remains for the deriving of "locus standi", in a case like the present, from custom or under the terms of Schedule 2.3 or, so far as concerns the Leader of the Opposition in his official capacity, from a "development", if such were otherwise possible, of the English rules and principles ... (ibid. 21 per Greville-Smith J., see further Kearney J., 12-13).

Standing apart from section 19

Because they held that section 19(3) was not exclusive, the majority did consider how they should determine rules for standing to mount a constitutional challenge under section 18(1) in cases where the applicant's personal interests were not affected in any particular way.

This question was seen largely as one to be resolved by reference to the underlying law, and following Schedule 2, the majority considered whether custom (Schedule 2.1), common law (Schedule 2.2.), or a new rule (Schedule 2.3.) was the appropriate source of the underlying law. (There was disagreement between Kapi J. (at 24) and Miles J. (at 43-44) as to the significance to be attached to the order in which the Schedule 2 listed these possible sources, but there is insufficient space here to analyse this matter).

(a) Custom. The majority Justices, and the one dissenting Justice who considered the issue, rejected custom as a source, although for somewhat varying reasons; see Kidu C.J. 8; Greville-Smith J. 18; Kapi J. 26-29; Miles J. 43-44.

(b) English common law and equity. The majority, and Greville-Smith J., found that the petitioner Mr Somare would not have standing if the English law were applied, but the majority, Greville-Smith dissenting, found also that this law should not be applied. The majority stressed that unlike the Papua New Guinea Supreme Court, the English courts could not consider whether legislation was invalid, (Kidu C.J. 6-7; Kapi J. 30-31; Miles J. 43, 45; compare Greville-Smith J. 18). Kapi J. also relied on general reasoning:

the legislative power belongs to the people and this power is vested in the Parliament (see s.100 of the Constitution). Such provisions would raise different principles so far as locus standi is concerned. Similarly, the judicial power belongs to the people and this power is vested in the National Judicial system (s.158). Under s.158(2) in interpreting the law the courts shall give paramount considerations to the dispensation of justice. These are but only a few references to the constitutional provisions which to my mind enable this court to approach the question of locus standi on an entirely different basis to the principles enunciated by the English courts, (ibid. 30-31).

A new rule under Schedule 2.3. Each of the majority Justices formulated a new rule of the underlying law and applied the rule to find that Mr Somare did have standing. There is insufficient space here to analyse the reasoning of each of these Justices, but their conclusions are noted.

(i) Kidu C.J. found that "in cases where the constitutionality or otherwise of an Act of the National Parliament arises, locus standi should not be restricted to any particular group" (9), and His Honour's analysis suggests that he would allow any person (possibly only any citizen) to have standing; see 9-10.

(ii) Kapi J. adopted as a new rule the principle in Order 53 rule 3(5) of the Rules of the Supreme Court of England, "that the applicant has a sufficient interest in the matter to which the application relates", (quoted at 33). His Honour accepted the test adumbrated by Lord Denning M.R. in R v Inland Revenue Commissioners, ex parte National Federation of Self-Employed and Small Businesses [1980] 2 All England Law Reports 378, 391, that an applicant must have a "genuine grievance" and not be a "mere busybody", (see at 34).

Kapi J. found that Mr Somare did have a genuine grievance, citing as relevant factors that he was a member of the Parliament, and, as an independent ground, that he was a citizen, (35). Thus, Kapi J.'s conclusion on the new rule to be made under Schedule 2.3. seems identical in its effect to the view taken by Kidu C.J.

(iii) Miles J. also allowed Mr Somare standing, but on grounds narrower than those of Kidu C.J. and Kapi J. His Honour thought that standing did not depend on petitioners showing that their "interests" were affected, for the notion of an interest was part of nineteenth century common notions of locus standi based on public nuisance and property law, (46). Miles J. does not indicate as clearly as he might have done the test he would apply, but his conclusion that Mr Somare had standing indicates his position:

To borrow from the Canadian and United States cases, the legislation may be said to "strike at" the Leader of the Opposition "in its central aspects", and that he has such a "personal stake" in the outcome of the present proceedings as to assure the proper presentation of the precise issues to this Court if and when it eventually comes to determine whether the Defence Force (Presence Abroad) Act 1980 is within the legislative competence of the National Parliament, (52-53).

The test implicit in this conclusion is drawn from Baker v. Carr (1962) 369 U.S. 186, 204, and quoted by Miles J. at p. 49.

His Honour laid emphasis on a number of aspects of the case: the importance to the nation of the commitment of the Defence Force abroad (51); that Mr Somare led the opposition in the Parliament to the Act when it was a Bill (51); and that he had explored another avenue of challenge through the Ombudsman Commission (51). Furthermore, it should be noted that Miles J. added that he did not automatically reject the argument that "the petitioner is entitled to bring the present proceedings by reason of his position as a taxpayer", (53), and noted that Canadian and United States courts allowed standing on this basis.

Thus, Kidu, C.J. and Kapi J. held that any citizen might challenge a law on the ground that it is unconstitutional, and while Miles J. decided the case on a narrower principle, His Honour did not reject the proposition that a 'taxpayer' might have standing.

Kearney Dep. C.J., in dissent, did not consider this question, but Greville-Smith J. held that if a new rule were to be adopted, it should be that expressed in the English decisions, (19). Both minority Justices also took the view that

if this application is to be heard on its merits, it is essential that all those persons whose civil rights and obligations may be affected by a declaration of invalidity, be afforded an opportunity to appear and be heard on that question (22).

Greville-Smith J's view was that "all members of the Defence Force who went to Vanuatu would be so entitled" (ibid.). The order of the court did not make provision for such persons to appear, and it remains to be seen whether any such persons will seek to intervene.

Thus, the majority took a very liberal view of standing under section 18(1). Kidu C.J. and Kapi J. were influenced by the consideration that the people

should be entitled to challenge unconstitutional action to allow almost unrestricted challenge, and their Honours' position makes imperative the need to clarify both the manner in which challenges may be made and the remedial powers of the courts. That these matters are obscure is illustrated by the manner in which this litigation was commenced, which may be considered by reviewing the attempt here to rely on section 23(2).

Section 23(2)

Mr Somare sought to rely on section 23(2) of the Constitution as a source of power in the Supreme Court to rule on the constitutionality of the motion and the Act. Kidu C.J. rejected this argument, and pointed to the difficulty of sanctioning Parliament by a jail term or a fine. His Honour concluded that

To me it seems that using s.23 to punish or penalise Parliament is not what the provision was intended to do. Although the court has power to rule acts of the Parliament unconstitutional, it has no power to penalise it, nor does it have power to order it to pay compensation. (See s.115 of the Constitution). It has no power to stop the Parliament from making laws. The Court has power only to determine whether a law made by Parliament is constitutional or unconstitutional, (1-2).

Kearney Dep. C.J. agreed, holding that "s.23(2) does not deal with standing; I consider that it is directed to making effective the remedial process of the Court", (11). A further point to mention is that while Kidu C.J. recognised that section 23(2) referred to the National Court, neither Justice dealt with the question of how the Supreme Court could exercise the powers in section 23.

This case would appear to demonstrate that the reference in section 23 to only the National Court is confusing litigants and their legal advisers. Mr Somare, seeking to invoke the remedies in section 23, took action in the National Court, yet the Justices, (with perhaps Kapi J. taking a different view (36)), found that the action fell within the jurisdiction of the Supreme Court under section 18(1): see Kidu C.J. 2; Kearney Dep. C.J. 11; Miles J. 53-54. It does not appear to be sufficiently appreciated that the National Court's jurisdiction over constitutional questions is limited, and that section 23 does not confer a general jurisdiction on the National Court. However, it is with respect suggested that Kearney Dep. C.J. may not be correct in his statement that "the National Court has no power to declare a law invalid". (11), for such a power may be implicit in its power to decide constitutional questions under section 57 and other sections which confer such jurisdiction, (see p. 27 of this Occasional Paper).