RESPONSIBILITY OF THE EXECUTIVE GOVERNMENT: TO WHOM AND FOR WHAT

BY

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PART I: PRELIMINARY: NATURE AND LOCATION OF THE EXECUTIVE POWER

(a) The Nature of the Executive Power

In the Constitution of Papua New Guinea, there is no definition of "executive power". In the Australian Constitution, Section 61 provides that the executive power of the Commonwealth "extends to the execution and maintenance of this Constitution, and of the laws of the Commonwealth". The High Court of Australia has said on several occasions that the power goes beyond what is stated in Section 61 [1] and covers a wide range of governmental activities. The definition given by Wynes seems appropriate to the position in Papua New Guinea:

> "The "Executive" may be broadly defined as the authority within the State which administers the law, carries on the business of government and maintains order within and security from without the State". [2]

Wherever there is a written Constitution, that Constitution must be seen as a source of executive power, and it is in this sense that the High Court has read the Australian Constitution. In Papua New Guinea, where the Constitution is the sole source of power and authority, it

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1 See, for example, *Le Mesurier* v. *Connor* (1929) 42 C.L.R. 481, 514; *Victoria* v. *The Commonwealth and Hayden*(A.A.P. Case) (1975) 134 C.L.R. 338 *per* Mason J. at 396-398 and *per* Jacobs J. at 404-406.

2 W. A. Wynes, Legislative, Executive and Judicial Powers in Australia 5th ed. (Sydney 1976) 387.

is a fortiori the only source of executive power and, where apart from the Constitutional provisions relating to Provincial Government, the executive power will not be, as it is in Australia, limited by the nature of a federal system. However, there may be a problem if the source of the power does not itself set out the limits of the power. Such limits must be implied from the terms of the Constitution. Schedule 2.2(2) also gives some assistance, as it provides that rules and principles of the English common law relating to the Royal Prerogative are adopted. These rules, in England, referred to the residue of power remaining in the King or Queen, which had not been affected by the making of any Act of Parliament, for a fundamental rule of English law provided that where Parliament enacted a law which conflicted with the rules relating to the Royal Prerogative, the common law rules were 'abrogated'.[3] Certainly the executive power also includes functions specifically conferred by legislation on a Minister or some other person.

In Australia, some Justices of the High Court have suggested that the executive power also includes inherent powers to protect the Constitution from subversion [4] and certain power to act in the "National Interest" though this is less clear. [5]

In practical terms, the nature of the executive power in Papua New Guinea would seem to include: -

- the carrying out of laws made by, or under the authority of the National Parliament (including pre-Independence laws continued in force); and the doing of 'incidental' acts which must be done in order to carry out the laws even though the laws themselves make no express provision;

- the making of policy, which either becomes embodied in legislation, or is observed by the executive in carrying into operation the Constitutional Laws

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3 Attorney-General v. De Keyser's Royal Hotel Ltd. /1920/ A.C. 508; see Goldring, "The Impact of Statutes on the Royal Prerogative" (1974) 48 Australian Law Journal 434.

4 Esp. in Australian Communist Party v. The Commonwealth (1951) 81 C.L.R. 1 per Dixon J at 187; per Fullagar J. 259, 260.

5 Mason and Jacobs JJ in the A.A.P. case, op. cit.

and Acts of the Parliament; and

- the general operation of the machinery of government including the provision of those services which are essential if society is to continue to operate in a normal way.

This power covers a wide range of activity, and it is possible that different considerations apply to different aspects of executive government. Yet the same basic principles apply in a consideration of the place of executive government in the overall system of government.

(b) Location of the Executive Power

The Constitution of Papua New Guinea provides for the separation of powers "in principle" by establishing three arms of government, the National Parliament, the National Executive, and the National Judicial System. [6] Implicitly, this represents an adoption of a combination of the division of political power first exemplified in the Constitution of the United States, as a means of preserving rights and liberties by preventing the concentration of political power in the hands of a single individual or institution. Yet the system of government adopted by the Constitution also draws on the British or "Westminster" system of representative and responsible government; representative in that those responsible for the exercise of political power are elected by the people to represent the people and are removeable from office if they lose the support of a majority of the people's representatives.

Section 138 provides that "Subject to this Constitution, the executive power of the people is vested in the Head of State to be exercised in accordance with Division V. 2 (functions, etc., of the Head of State)." The Head of State is the Queen of England, but her powers are exercisable by the Governor General [7]. For the purposes of the exercise of executive power Section 86 is the key section. It reads:

86. Functions, etc.

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6 Section 99

7 Section 82

(1) The privileges, powers, functions, duties, and responsibilities of the Head of State are as prescribed by or under Constitutional Laws and Acts of the Parliament.

(2) Except as provided by Section 96(2) (terms and conditions of employment), in the exercise and performance of his privileges, powers, functions, duties and responsibilities the Head of State shall act only with, and in accordance with the advice of the National Executive Council, or of some other body or authority prescribed by a Constitutional Law or an Act of Parliament for a particular purpose as the body or authority in accordance with whose advice the Head of State is obliged, in a particular case, to act.

(3) Any instrument made by or in the name of the Head of State shall recite that it is made with, and in accordance with, the advice of the National Executive Council or of any other body or authority in accordance with whose advice the Head of State is obliged, in the particular case, to act, but failure to comply with this subsection does not affect the validity of an instrument.

(4) The question, what (if any) advice was given to the Head of State, or by whom, is non-justiciable.

The National Executive Council (henceforth "N.E.C.") is established by Section 149. Its advice is required in all cases where the Head of State must act, unless an Act of the Parliament or a Constitutional Law requires the Head of State to act on the advice of some other person or body. It consists of all the Ministers, and the principal function given to it by the Constitution is the responsibility for the executive government of the State. The National Executive consists of the Head of State, acting in accordance with Division V.2 and the N.E.C.

The nature and appointment of Ministers is the subject of Division VI.4.B of the Constitution. The first section in this subdivision, Section 141, provides expressly for the 'collective responsibility' of the Ministry, and thus of the N.E.C. Section 141 provides: -

141. Nature of the Ministry: Collective responsibility.

The Ministry is a Parliamentary Executive, and therefore -

(a) no person who is not a member of the Parliament is eligible to be appointed to be a Minister, and, except as is expressly provided in this Constitution to the contrary, a Minister who ceases to be a member of the Parliament ceases to hold office as a Minister;

(b) it is collectively answerable to the People, through the Parliament, for the proper carrying out of the executive government of Papua New Guinea and for all things done by or under the authority of the National Executive; and

(c) it is liable to be dismissed from office, either collectively or individually, in accordance with this Subdivision.

Sections 142-148 of the Constitution provide for the method of appointment and removal of the Prime Minister, the Acting Prime Minister, and other Ministers. These sections, in effect, spell out the details of the general principles which are stated in Section 141.

The effect of these provisions may be summarised thus: -

(a) The Head of State, in whom the executive power is vested, can only act with, and in accordance with, the advice of the N.E.C., unless there is a Constitutional Law or an Act of the Parliament providing that she should act on the advice of some other person or body. This means that there is no possibility that the Head of State can act on her own initiative for any purpose. The Head of State is thus removed from the arena of party or parliamentary politics.

(b) Membership of the N.E.C. depends on the Prime

Minister from time to time, as Section 144(2) provides that Ministers shall be appointed from among the members of Parliament by the Head of State on the advice of the Prime Minister and may be removed in the same way. [8] The Prime Minister also assigns duties and responsibilities to each Minister. [9]

(c) The Prime Minister is appointed by the Head of State in accordance with a decision of the Parliament [10] and shall be dismissed by the Head of State if the Parliament passes a motion of no confidence in accordance with Section 145 [11]. There are other ways in which the Prime Minister may lose office (e.g., for a breach of the *Leadership Code*), but these are not relevant here. He may also resign from office [12] in which case the Parliament must make a decision as to his successor whom, under Section 142(2), the Head of State must appoint to office. He holds office until his successor is appointed.[13]

(d) A motion of no confidence must comply with the provisions of Section 145 as to notice and must name the person proposed to replace the existing Prime Minister. It is decided in accordance with Section 114, i.e., by a majority of the members of the Parliament present and voting. The effect of this is that if the Prime Minister cannot command the support of a majority in the National Parliament, and the National Parliament can agree on the

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8 Section 144(4) (b) (i)

9 Section 148(1)

10 Section 142(2)

11 Section 142(5) (a)

12 Section 146

13 Section 147

> person it wishes to succeed to the office, not only the Prime Minister, but also the other Ministers, and thus the N.E.C. will lose office.

The persons who, in effect, control the exercise of the executive power therefore depend upon the support of a majority of members of the Parliament for their tenure of office. They must also be members of the Parliament. Thus the Constitution does not provide for a strict separation of powers as does the American Constitution, for those who exercise the executive power are also members of the legislature; they sit and vote in the Parliament and depend on the Parliament for their support; they exercise the legislative as well as the executive power. In this respect the system of Government resembles that in the United Kingdom, Australia, and other nations who have adopted the British system of representative and responsible government.

We have seen that the executive power involves the carrying out of the business of government, the putting into operation of the laws, and the making of policy. The ministry as a whole and individual Ministers do not carry out all the tasks of government on their own, and it would be physically impossible for them to do so. They rely upon the advice and assistance of the State Services, especially the National Public Service, established by Section 188. An ordinary person dealing with the government will not normally deal with a Minister, but with a public servant. In a very real sense, public servants are part of the executive arm of the government, and their actions are the actions of the government which are most familiar to the people. If a person complains that he has been treated badly by the government, in most cases, he is complaining not about the policy of the government (though this may be so at times); more likely he is complaining about the way a public servant has carried a law into effect or has done something connected with the normal operations of government.

The Constitution of Papua New Guinea states much more explicitly than most other Constitutions what the relationship is between the executive and the legislature. Yet even the express provisions of the Constitution do not tell the whole story. For some of the principles which describe the relationship more fully, it is necessary to look at the underlying law, which imports into the law of Papua New Guinea, among other things, some basic principles of English constitutional law and possibly certain English constitutional conventions and

practices. [14]

PART II: RESPONSIBILITY, ACCOUNTABILITY, AND ANSWERABILITY

(a) "Responsible Government" - Individual and Collective Responsibility

Under a system of respresentative and responsible government, the Minister in charge of a particular branch of government is said to be individually responsible for the operation of that branch of government, normally a department. The responsibilities of the various Ministers are published from time to time in the *Gazette* as what are called "Administrative Arrangements". This responsibility of a Minister is said to include the duty of the Minister to provide information to Parliament and to individual members of the Parliament about the activities of their departments and the public servants who are employed in them and to take the blame if anything goes wrong. In the last resort, a Minister may be required to resign from office if public servants in his department act improperly, and this has happened in England. [15] In Australia, a senior minister has expressed the view that unless the Minister is personally at fault, there is no need for him to resign, though he will have to accept the political consequences. [16]

The traditional notion of the collective responsibility of the Ministry as a whole for its policies and general conduct of the affairs of government is well expressed in Section 141. In this sense, "collective responsibility" means simply that unless the Ministry retains the support of a majority of the members of the Parliament, it will lose office.

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14 See L.J.M. Cooray, Conventions, The Australian Constitution and the Future (Sydney 1979) Ch. 3.

15 The most recent notable example of this is the so-called "Crechel Down" affair, of which the best account is probably in S. E. Finer, "The Individual Responsibility of Ministers" (1956) 34 Public Administration 494.

16 See B. M. Snedden, then Attorney-General, in remarks to the Fund Commonwealth and Supreme Law Conference, Sydney 1965, quoted in S. Encel, Cabinet Government in Australia, 2nd ed. (Melbourne 1974) 117.

Both individual and collective ministerial responsibility are related to control: control by the Minister of the public servants for whose acts he is responsible, and control of the Ministers and the Ministry by the Parliament.

The Constitution is not entirely clear in its division between the individual responsibility of Ministers for the acts of public servants in their departments and the collective responsibility for policy of the Ministry, as a whole. Section 145 provides that a motion of no confidence may be moved in an individual Minister; and Section 144(4) states that if such a motion is passed, the Head of State shall dismiss the Minister. However, Section 141(b) provides that the Ministry as a whole "is collectively answerable to the People, through the Parliament, for the proper carrying out of the executive government of Papua New Guinea and for all things done by or under the authority of the National Executive." Section 148 requires that the actions of every branch of the government shall be the political responsibility of some Minister, and if no specific responsibility is assigned, the Prime Minister is deemed to be responsible. This section does, to some extent, clarify the situation, for while collective responsibility is maintained for every action of the executive government, a single responsible Minister can be identified.

Because Sections 141 and 148, as well as other provisions of the Constitution, use the word "responsible", it is very important to understand that, even in the Constitution, "responsible" is a word which has many meanings. In one sense, it refers to the range of tasks which a person is expected to perform when he or she is said to be "responsible". In another sense it may mean "accountable" or "answerable". It is in the sense of "answerable" that it appears to be used in Sections 141 and 148. Indeed, paragraphs (b) and (c) of Section 141 amplify the meaning of "responsibility" as used in that section. Paragraph (b) specifically refers to "answerable" and implies that the Ministry must inform the Parliament of the conduct of government, the execution of the laws and the making of policy. If it fails to fulfil this obligation, paragraph (c) states that the Ministry is liable to be dismissed from office. Here it is using another sense of "responsible", i.e. where a person who is responsible for the performance of certain tasks does not carry out those tasks, that person is liable to some sanction, just as a person who fails to perform some duty imposed by law is liable to the penalty provided by law.

The use of the word 'responsible' also denotes that a person is responsible to another person, to a person or institution which has some power over the responsible person, and that the responsible person

is also responsible for some activity. In many systems of responsible government neither the nature of the relation between the responsible person and his superior, nor the area of responsibility, is clear. However in Papua New Guinea, this is not the case, for Section 141 makes it clear that the Ministry is responsible to the Parliament for the proper carrying out of the executive government of the nation. It is clear that the superior organ of Government is the Parliament, for not only does it have the final say over what activities the national government can undertake, because of its control of the raising and spending of revenue [17], but the power of Parliament to remove a Minister or the whole Ministry from office is clearly stated.

There is probably another sense in which "responsibility" is relevant to a consideration of the functions of the executive government. It is often said that public servants are administratively responsible. The area of a public servant's responsibility is, in general, laid down in the Public Service Act and Regulations, and in other Acts and subordinate legislation. Thus, under a particular Act of the Parliament dealing with agriculture, a specified officer may be given the task of issuing licences to do certain things. It is proper to say that that officer is responsible in circumstances where he should do so, for issuing the licence. If he fails to issue the licence, the law may be used to compel him to do so. He has a task and the performance of this task may be enforced, firstly, by his public service superiors under the provisions of the public service legislation, and secondly, through the Courts, by an aggrieved member of the public with a sufficient interest in the issue of the licence, for example, an applicant for a licence which has been wrongly refused.

All officers of the executive government, both Ministers and public servants, can be spoken of as being "responsible" (or "irresponsible") in yet another sense. This is when the way in which they behave conforms (or does not conform) to an expected standard of behaviour. An officer or Minister who grants privileges to his *wantoks* while denying them to the traditional rivals of his own *lain* can be said to be acting irresponsibly, even though the law may give him a complete discretion as to the persons to whom those privileges can be granted.

Given that "responsible" can have a wide range of meanings, and provided that, in any case, we are quite certain in which sense or senses we are using the term, we can then go on to speak of the consequences of such responsibility.

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17 Constitution, Part VIII.A

Section 148 speaks expressly of "political" responsibility. This means that a person, specifically a Minister, who is responsible in this sense, will be obliged to accept the political consequences of his action or failure to act. This may mean, ultimately, that he, or the Ministry of which he is a part, may be removed from office through a vote of no confidence. It may also mean that he, or his Ministry, must face the electors who may decide that the act, or failure to act, is a sufficient ground for voting in a particular way at the next Parliamentary elections. Where the responsibility is political only, there are no legal sanctions, but merely the sanctions which can be applied, through voting, by the electors or their parliamentary representatives.

(b) Accountability and Information

Of more importance to the public lawyer is the term "responsible" used in the sense of "accountable" or "answerable".

"Accountability" means that a person who is accountable may be compelled to explain the actions for which he is accountable. Normally, Ministers will either wish or feel obliged to explain those matters from which they are able to gain some political advantage, even though there may be some sections of the community who will criticize those actions. In such cases, there is no problem, for the Ministers will freely give the required explanation. They do so in speeches, Ministerial Statements, and by the tabling of reports and papers. However, executive governments in the British tradition (which includes, by reason of the heritage of the colonial period, the executive government of Papua New Guinea), have traditionally been secretive in the belief, arguably misguided, that secrecy makes for "better" government. In many cases of action by the executive government, neither the Minister nor the public servants in the branch of the executive government for which the Minister is responsible will voluntarily give the information required, either information that relates to the policy of the government or of the Minister or the action that has been taken in particular cases. Such information may be obtained only through other means. The fact that the Minister or the public servants have not voluntarily disclosed the information does not make them any the less responsible for it. However, they can only be compelled to discharge the responsibility if other persons have information which makes them concerned about the activities of the Minister or the public servant and are prepared to ask the Minister to explain. Traditionally, asking for information and explanation has been the role of members of Parliament, when making representations

or asking questions on behalf of the people in their constituencies.

The Parliamentary question is the traditional means by which a Member of Parliament can obtain information about the activities of the Government - providing he or she knows the right question to ask or what specific information is required. However, the framing of questions requires some skill, especially where the questions are on notice or are to be answered in writing, for in such cases the answers are drafted by the Department, and are not given on the spot by the Minister. The answers, while literally answering the question can, if prepared with care, defeat the purpose of the questioner. Very often an ordinary member of Parliament, or even the combined resources of a political party cannot provide the right question or the right way of asking it. In addition, in most Westminster type Parliaments, Ministers are not obliged to answer questions relating to matters of policy. [18] It is not clear what constitutes a 'matter of policy', and whether or not a question requires an answer will depend on the discretion of the Speaker. In Papua New Guinea, the Speaker is less likely to be politically committed to the Government than is the case in the United Kingdom or in the Australian Parliaments, and in practice Speakers in Papua New Guinea tend to have required answers to most questions.

In some Westminster-type Parliaments, and in the United States Congress, committees of the legislature also provide an important means of obtaining information. The Papua New Guinea Constitution provides for a Public Accounts Committee [19] and for other Parliamentary Committees, [20] but the use of these committees is, as yet, not highly developed. In Australia, the Senate Estimates Committee have been particularly useful in this regard. When the Government presents its budget papers, included in the budget are the estimates for each Department or Instrumentality. The Minister responsible for the Department or Instrumentality and his senior officials attend before the committee and are examined as to the past activities and future plans, sometimes in great detail. Questions by the Senators are often based on information contained in the budget papers themselves, but are also occasionally based on information gained from external sources.

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18 See generally D. N. Chester and N. Bowring, Questions in Parliament (Oxford 1962).

19 Sections 214-215

20 Subdivision IV 2.E

The resources available to individual members to enable them to inform themselves of matters which might give rise to questions are limited. In Papua New Guinea, as in Australia, ordinary members of Parliament have only limited secretarial and research staff. Staff of the Parliamentary Service, especially the Parliamentary Library, provide what help they can, but their resources are also limited. Such assistance is extremely meagre compared with the publicly-funded staff available to members of the United States Congress. Lack of adequate assistance in Parliamentary research means that individual members of Parliament are usually unable to cope with the vast amount of information which is continually being made available in the form of reports, statements etc. from official sources, as well as documents produced unofficially in Papua New Guinea and outside the country. Where the Member's first language is not English, the difficulties of gleaning adequate information from all the sources available are far greater. Members of Parliament will therefore depend largely on what information they can obtain from their party organisations and from the media.

In Papua New Guinea, the Constitution itself provides the basis of a right to obtain information. This is the right of freedom of information guaranteed by Section 51 of the Constitution. Under Section 51(3) laws are to be made which provide for the enforcement of this right. No such laws have as yet been enacted, but the right is one which could be enforced under Section 22 of the Constitution. No claim for information appears yet to have been the subject of enforcement proceedings in any court. Even so, information relating to certain acts of the executive government are not to be made available, because of the specific exceptions set out in Section 51. [21] The existence of Section 51 would seem itself to be an encouragement to departments and instrumentalities of the executive government to make available information about their activities.

Once a member, or a group of members, have been able to obtain information which discloses matters which they consider should be explained to Parliament, they may raise the matter outside the Parliament, for

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21 The exceptions in Section 51 are not nearly as wide as those proposed under the Freedom of Information bill introduced into the Australian Parliament in 1978. Australia, the Senate, Standing Committee on Constitutional and Legal Affairs, Freedom of Information, (Canberra 1979).

example in a media release, or in Parliament, by a question to the relevant Minister, by a speech in a grievance or adjournment debate, or, if they can gain sufficient support, as a matter of urgency. In the last resort the matter may be the foundation for a motion of no confidence. Which of these means is chosen will depend largely on political considerations. A member who supports the Ministry in Parliament no matter how disturbed he may be by a matter of maladministration may be unwilling to appear to criticise the Ministry, and he may wish first to try to raise the matter informally, directly through discussions with the Minister, or through party channels. Members who are not associated with a government party are more likely to raise the matter, but unless the matter is especially serious, or unless it provides a focus for general opposition to the government, while the government has the numbers to maintain itself in office, it may use those numbers to stifle parliamentary discussion of matters which are politically embarrassing, or at least to defeat any motion which might require it to put right any of the matters complained of.

(c) Can Responsibility to Parliament Be Enforced?

In practice, where a speech, question, or even an informal request by a member of Parliament reveals an administrative error, most ministers will ensure that it is corrected by administrative action; the Minister will require the department or instrumentality to put matters right. Parliamentary action, as opposed to the discussion of a matter in the Parliament, remains the ultimate sanction. Whether or not a single case of administrative error or maladministration will be the foundation for ministerial action is ultimately political.

In the British system, Parliamentary questions, debates and resolutions were the traditional means of correcting administrative error. This was an essential part of the system of responsible government on the Westminster system. In practice, it was found not always to work, and in recent times, alternative methods have been sought. The Parliamentary question and airing of grievances were related both to the collective responsibility of the Government and to the individual responsibility of the Ministers, but more to the latter. Ministers were required to provide an explanation. However, before they took any action, Ministers tended to rely on the advice of their departments, and the departments had a vested interest in protecting themselves from any allegation that they were not perfect.

New Zealand was the first country in the Westminster tradition to

establish an independent institution to investigate maladministration, when it established its Ombudsman. A version of the Ombudsman system was established in the U.K. and later in some parts of Australia, before the Papua New Guinea Constitution established the Ombudsman Commission.

(d) Non-Parliamentary Methods of Making Government Accountable

Before discussing the relatively new institution of the Ombudsman Commission, older non-parliamentary methods of making government accountable should be considered. The first is the mass media. Because of the influence which newspapers, and more recently electronic media, have on public opinion, the mass media have always been able to focus public attention on acts of the government which may be in any way questionable, or which suggest maladministration, inefficiency, or impropriety. Once an issue has been raised in the media, politicians, especially those critical of the government, are quick to raise the matter in Parliament, even if the media publicity itself is not enough to prod the Minister into explaining, or accounting for, the occurrence. As Section 46 of the Constitution protects Freedom of Expression, it can reasonably be expected that the mass media will continue, to some extent at least, to put Ministers into a position where they are called upon to account for the activities of the government, either in the Parliament, or through a public statement. If the matter is sufficiently serious, full accountability of the Ministry under Section 141 will be required by the members of Parliament, especially those in opposition.

Another traditional source of making government accountable in British institutions, is the judicial system. The English rules of administrative law, provided that they are not inconsistent with custom or inappropriate or inapplicable in Papua New Guinea, form part of the underlying law. [22] Sections 18, 19, 22 and 23 of the Constitution require the Supreme Court to interpret and apply the Constitution; Section 155 (4) and (5) empower the Supreme Court and the National Court to grant relief in the nature of "prerogative writs". [23] The

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22 Constitution, Schedule 2.2(1).

23 The prerogative writs were orders issued by the English Courts to ensure that public officers and bodies performed the functions which the law required them to perform, that they did not

effect of these provisions in the Constitution of Papua New Guinea is to ensure that the Courts have a very important role to play in making the executive government accountable. In this sense the accountability is not through the Parliament to the people as a whole, but through the Courts to particular individuals who claim to have been aggrieved by actions of the executive government.

In some other countries the role of the ordinary courts in enforcing government according to law, (which may also be called the "principle of legality" or the "rule of law") is augmented. In the countries of the Roman-based civil law system, there is a separate system of courts applying a special body of administrative law, or as in some common law countries, there is a system of non-judicial institutions with the function of reviewing decisions made at various levels of the executive government. Within the common law world, the system of administrative review in Australia is probably the most highly developed, though the developments have taken place only since Papua New Guinea became independent. However, the achievements of the Constitution of Papua New Guinea in this regard are important and highly significant. The Constitutional Planning Committee did consider the establishment of a system of administrative tribunals, and took into account the various proposals which had been made in Australia and elsewhere.[24] It rejected this solution in favour of conferring wide powers upon the Ombudsman Commission.[25] Sections 218 (a), (b),

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exceed the powers given by law, and that they acted in accordance with basic standards of fairness and proper procedures. The rules surrounding the making of such orders by the courts developed into a rather complicated, detailed and technical body of law, and often the courts took advantage of technicalities to avoid involvement in administrative matters. However, the basic rules remained, and provided that the courts in Papua New Guinea, taking account of Constitutional provisions, including Section 2.4 (judicial development of the underlying law) and Section 158(2), apply the rules in a manner appropriate to the circumstances of the country, the prerogative writs will provide a useful remedy for administrative failure or error.

24 Papua New Guinea, Constitutional Planning Committee Final Report (Port Moresby 1974) paragraph 11.6.

25 The functions of the Ombudsman Commission are amplified in the Organic Law on the Ombudsman Commission, and are summarized in J. Goldring, The Constitution of Papua New Guinea, (Sydney 1979) Chapter 8.

and (c) and 219 of the Constitution state the purposes and functions of the Ombudsman Commission with regard to supervision of the State Services:

> 218. The purposes of the establishment of the Ombudsman Commission are: -
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> (a) to ensure that all governmental bodies are responsive to the needs and aspirations of the People; and
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> (b) to help in the improvement of the work of governmental bodies and the elimination of unfairness and discrimination by them; and
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> (c) to help in the elimination of unfair or otherwise defective legislation and practices affecting or administered by governmental bodies; and ...
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> 219. Functions of the Commission: -
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> (1) Subject to this section and to any Organic Law made for the purposes of Subsection (7), the functions of the Ombudsman are: -
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> (a) to investigate, on its own initiative or complaint by a person effected, any conduct on the part of -
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> (i) any State Service or a member of any such service; or
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> (ii) any other governmental body, or an officer or employee of a governmental body; or ...
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> specified by or under an Organic Law in exercise of a power or function vested in it or him by law in cases where the conduct is or may be wrong, taking into account, amongst other things, the National Goals and Directive Principles, the Basic Rights and the Basic Social Obli-

gations; and

(b) to investigate any defects in any law or administrative practice appearing from any such investigation; and ...

While the Commission may not enquire into the justifiability of a policy of a Minister or of the National Government [26], there seems no reason why it may not enquire into virtually any other action of the executive government, and if it finds that there is an administrative error, it may act accordingly. Unlike the Courts, the Ombudsman Commission has no power to make an order setting the matter right; its powers are limited to recommendation and report. [27]

The role of Courts and of the Ombudsman Commission in making government accountable is important. Yet that role might, at first glance, not seem consistent with the supreme role of Parliament and a democracy with representative, responsible government - even more so where existence and independence of the National Judicial System and of the Ombudsman Commission is guaranteed by the Constitution. Where the Constitution gives to non-elected bodies, whose members have constitutionally guaranteed tenure of office, the task of reviewing actions either of the legislature or of the executive, those officers have a good deal of political power. This is, no doubt, one of the reasons why judges and Ombudsman are subject to the *Leadership Code*. However, it means also that individuals who are neither elected by the people nor responsible to them or their representative may have the final say as to whether or not certain governmental actions are proper and legal. How democratic is this? Studies in other countries [28] have shown that judges may, because of their background, not be well-suited to decide questions of great political importance. In Papua New Guinea similar considerations may apply to the judges, and to a lesser extent, to the Ombudsman. However, this danger was considered in detail by the Constitutional Planning Committee. [29] Whether the judiciary still

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26 Constitution 219(3)

27 Constitution 219(6); Organic Law on the Ombudsman Commission 22-23

28 Some of these are discussed in Goldring, op.cit. n. 26 at 116, in the Papua New Guinea context.

29 Constitutional Planning Committee, op.cit., n.25 paras 8.132-8.149.

retains popular confidence in Papua New Guinea is a political question which is controversial. Any review of the role of non-elected review bodies in the present circumstances of the country must take into account not only the political developments in this country, but also what has happened in other countries, such as the U.S.A. where judicial review of Constitutional and administrative acts is well-established. Judicial review does ensure that the words of the Constitution will prevail, even over the views of the majority of the people from time to time. This may be necessary if the Constitution embodies a popular desire that certain rules, as for example, the protection of basic rights and freedoms and the maintenance of government, follows certain and predictable principles of law.

(e) Answerability

Even though the Courts and the Ombudsman Commission are separate from and independent of the Parliament, they must be seen to play an important part in the system of responsible government in Papua New Guinea, and though they do not affect the relationship of the executive to the legislature, they must influence the behaviour of Ministers and public servants in significant ways.

"Accountability" and "answerability" may be different. The fact that a Minister or official is obliged to explain his acts or omissions does not necessarily mean that he or she will be forced to suffer the consequences of that act or omission. "Answerability" is a term which carries with it the idea that the person who is answerable may be blamed if his acts fall short in some way of what is required, and it may be that to be answerable for something is very similar to being liable for that thing, in the sense that if the facts are established, some consequences follow.

Where a Minister is accountable to Parliament, it is clear that he has a duty to explain, but it does not necessarily follow that he will suffer any definite penalty if he fails to do so, nor if the explanation given is unsatisfactory to the Parliament. He may suffer removal from office as a result of a vote of no confidence, but this is by no means the only possible consequence. It is not certain that a Minister, or any parliamentary supporter of a Ministry, will necessarily lose the next election in his or her constituency, even where there is a failure to fulfil the duty of being accountable. Whether or not any adverse consequences follow is purely a political question. Only where a majority of the Parliament is prepared to punish the Minister as an individual or the Ministry collectively will there be

such consequences. The position is similar where the Ombudsman Commission, having made an investigation of a complaint, finds that there is a case where an administrative act is wrong and reports accordingly. Only where a majority in Parliament is prepared to take the political decision that some penalty should be inflicted does any sanction necessarily attach to the Minister who is responsible for the wrong act.

If the law provides that the executive government or one of its officers has some obligation, and a Court decides that the case is one in which a prerogative writ should be granted the position is entirely different. The prerogative writ is an order of the Court which requires that the official to whom it is directed either do, or refrain from doing, something. Failure to obey such an order is a contempt of the Court and is punishable as a crime. Thus a public servant who is found to have broken some duty, and so, in that sense is not acting in a responsible way is subject to a sanction which is of a type quite different from the consequences of a failure to fulfill a political responsibility.

In this way, the "answerability" which is an important part of the concept of responsible government is not a legal liability. A person who offends against a law is responsible and answerable in a real sense; but a person whose responsibility and answerability is political will be faced with adverse consequences only when his political opponents have sufficient power to force the consequences upon him and they choose to exercise that power, by, for example, supporting a motion of no-confidence which is carried.

PART III: THE FUTURE

So far, this paper has been a fairly theoretical treatment of the positions, relative to each other, of the executive and the legislature under the Papua New Guinea Constitution It has looked at the formal relationships between those two organs of government, and has shown that in the last resort, the Parliament will be in a position where it can control the executive. In practice, it is clear that in all parliamentary democracies many very important decisions are not made by Parliament, nor by the Ministry, but rather by public servants or ministerial advisers. For these decisions, under the system of responsible government, and especially under the terms of the Constitution, a Minister must accept responsibility, in some real sense. Over and above this individual responsibility, the Ministry

as a whole is collectively responsible to the Parliament for the conduct of the operations of government.

At a time when the people of Papua New Guinea, through their representatives, are reviewing the Constitution, it does seem proper to ask a number of questions. As it stands, the Constitution of Papua New Guinea represents, in many respects, the ultimate refinement of the Westminster system of representative and responsible government, expressed in a way which the Constitutional Planning Committee and the Constituent Assembly thought was consistent with the spirit of the people, as expressed in the National Goals and Directive Principles. The General Constitutional Commission is faced with the decision as to whether any improvements can or should be made in the Constitutional provisions. This means that it must examine whether the relationship between Parliament and the executive should be changed. If not, there may still be ways in which the Constitution may be changed so that the relationships can be more clearly seen, and, possibly, so that there are better means of enforcing those relationships.

Among the questions which may be considered are: -

(a) Should the executive be more, or less, subject to the control of the Parliament?

(b) Should the Constitution spell out more clearly the relationships between Ministers and Public Servants? If so, what should this relation be?

(c) Do the same considerations in respect of responsiveness, accountability and answerability apply to Ministers and to Public Servants? If not, what are the differences? Should these considerations be reflected in the Constitution, in Organic Laws, or in Acts of the Parliament?

(d) At present, the Constitution stresses the responsibility (which almost certainly means the accountability and answerability) of the Ministers, individually and especially collectively to the Parliament. Do the Constitutional and other laws provide adequate means of ensuring that these responsibilities are carried out and enforced? In any modern country, are parliamentary means invariably the best ones? What should be the relations between parliamentary and non-parliamentary means of ensuring that the executive is responsible? If the reliance

> on non-parliamentary means (especially the Court and the Ombudsman Commission) is too great, is there a chance that those organs may frustrate the democratic spirit of the Constitution? On the other hand, does the high position given to judicial review and the role of the Courts and the Ombudsman Commission by the Constitution mean that the Constitution must be seen as being superior to the wishes of those who, from day to day, exercise political power, both executive and legislative?

These questions do not have easy answers. No lawyer could give them, for just as the Constitution is an expression of political will, any question about the content and the meaning of the Constitution, or of amendments to it, are political questions which must be answered by politicians, giving full weight to political considerations. In this area, legal considerations must be tempered, so far as possible, to accommodate political realities.