CHAPTER 9

THE LEGAL FRAMEWORK

Chapters 1 to 7 were concerned with issues involved in designing decentralised systems of government. This chapter is concerned with the issues involved in deciding whether aspects of a particular system should be enshrined in law, and if so, which aspects and in what sorts of law. The Working Paper which forms the bulk of the chapter consists of two main parts: section A, which outlines the relative advantages/disadvantages of embodying aspects of a decentralised system in different kinds of law – the constitution, ordinary legislation, a regulation – or in announcements of Government policy; and sections B to H, which contain recommendations prepared as the deliberations of the Special Committee on Provincial Government were drawing to a close, when members' likely attitudes were becoming clear and they asked for a detailed set of proposals consistent with those attitudes to be put before them for consideration.

It may seem surprising, at first sight, to deal with the legal framework after implementation. But the sequence in this volume is as deliberate as that in the Special Committee's work: it is intended to ensure that the legal arrangements made for the decentralised system should, as far as possible, be instruments of policy rather than the reverse. Such arrangements should not be made to fit into preconceived notions of what a 'federal', 'unitary' or other system of government is or should be, but should be tailored to the kind of decentralised system that policy-makers find appropriate to local circumstances.

The sequence also has other advantages: it recognises that it is only when the main features of the decentralised system have become clear that it is possible to determine how much legal protection or autonomy should be given to subnational units of government and how much flexibility should be allowed. It also makes it easier for the advisory body to consider imposing legal requirements on other aspects of the implementation process discussed in Chapter 8.

The main considerations which should be borne in mind when working through section A of Working Paper 9.1 are the need for flexibility in the decentralised system and the likely strength of opposition to the establishment and effective operation of the system. If the system is to be flexible, with room for experimentation and modification as circumstances change, then no more than the basic elements should be embodied in law, and the relevant law should take the form of ordinary legislation rather than constitutional legislation, which is generally more difficult to amend. However, if there is likely to be strong opposition to the decentralisation programme, it may be necessary to embody more of the system in law, to ensure both that the system is implemented and that subnational units of government are given certain guarantees, at least for as long as the law is obeyed.

In Solomon Islands, the Special Committee on Provincial Government recommended a system that might be described as a 'unitary devolved system' with certain general principles embodied in the national constitution, and other important matters in a special Provincial Government Act. The proposed Act was intended to facilitate public access to the relevant legislation by bringing it together in a single place, but to do so without sacrificing the need for some parts of the system to be more deeply entrenched than others. Thus, some sections of the Act would be subject to amendment like ordinary legislation, while others would require adherence to the procedures followed in amending the national constitution and the support of an absolute majority of members of the National Parliament (Solomon Islands 1979b: 98-99). However, the Solomon Islands Government has opposed entrenchment of the decentralised system in either the national constitution or legislation which is more difficult to amend than ordinary laws (Solomon Islands 1979c: 4-5). It has tried to preserve flexibility

for itself by preparing a bill which gives greater powers to the national government, and especially the Minister of Home Affairs, than the Special Committee recommended (Solomon Islands 1980). It seems to have encountered remarkably little opposition to its proposals from proponents of decentralisation.

In Papua New Guinea, by way of comparison, leaders from the North Solomons Province, where secession had been proclaimed shortly before independence, insisted in subsequent negotiations that full details of the provincial government system should be enshrined in constitutional legislation, including the constitution itself, and an organic law (Papua New Guinea 1977) which is as difficult to bring into force and to amend (Papua New Guinea 1975: section 17). They were determined to do what they could to prevent the national government from going back on their agreement at a later date.

It remains to be seen whether the legal arrangements proposed by the Special Committee on Provincial Government or those embodied in the *Provincial Government Bill* (Solomon Islands 1980) will meet the demands which gave rise to the original decision to embark on a decentralisation programme in Solomon Islands. But, whatever the eventual fate of either set of proposals, the issues addressed in Working Paper 9.1 are likely to have to be addressed by policy-makers contemplating, or involved in, decentralisation programmes in other countries, especially those involving political decentralisation.

WORKING PAPER 9.1

LEGAL ARRANGEMENTS FOR PROVINCIAL GOVERNMENT

1. This paper considers how the provincial government system may be embodied in legislation. Section **A** covers the general principles, while the subsequent sections (B-H) make some tentative suggestions about how specific aspects of the system might be treated.

A. GENERAL PRINCIPLES

2. There are various ways in which the recommendations on provincial government might be put into effect. For example:

- as a result of decisions or public announcements made by particular office-holders (for example, the Public Service Commission, Ministers or the Cabinet);
- by regulation;
- by Act of Parliament;
- by changing the national constitution.

3. It might also be decided that certain matters should be left to provincial constitutions or laws. Provincial autonomy in relation to such matters would therefore depend, at least in legal terms, on:

- whether the national government/Parliament had the power to disallow/override provincial constitutions/laws; and
- how the power to make/change provincial constitutions/laws was given to provincial governments (for example, by decision, announcement, regulation, Act of Parliament or national constitution), and therefore how the power might be reduced or withdrawn.

4. In looking at the legal arrangements which might be made for the establishment and operation of provincial governments, it is necessary to consider:

- the advantages and disadvantages of embodying recommendations in law;
- which kind of law, if any, they should be embodied in – a regulation, an Act of Parliament or the constitution.

5. In making these decisions, it should be remembered that:

- policies need not take the form of laws (although they must be lawfully made);
- some recommendations (for example, that Provincial Secretaries should use their powers more often/more effectively) could be put into law, but are more like policy guidelines or advice – putting them into a law would achieve very little;
- laws which are not, or cannot, be enforced may weaken public respect for the entire legal and provincial government systems;

– a decision that a particular recommendation should be embodied in the constitution would require the support of two-thirds of the members of the National Parliament to be included (Solomon Islands 1978a: section 61(3)).

6. Embodying a particular recommendation in law would have the following advantages and disadvantages:

Advantages

– consideration by specified body
– formality – so taken seriously
– publicity
– harder to change – so greater certainty
– may be more precisely/clearly drafted

Disadvantages

– might be delay for formal consideration
– might be unnecessary formalism
– legalism
– might bring lawyers/courts into policy disputes
– harder to change – so less flexibility
– might be hard to enforce.

7. These decisions may be made in two ways:

Option (i): The Committee could go through its recommendations one by one and discuss how, if at all, they should be embodied in law

Advantages

– clarity
– firmness

Disadvantages

– lack of time
– problem of seeing recommendations fit
– inflexibility in drafting

Option (ii): Members could make recommendations in principle about the kinds of things to be embodied in regulations/Acts/the constitution, and leave the details to the draftsmen

Advantages

– intention clear
– principles firm
– easier to keep principles if parts of Committee's report not accepted/changed

Disadvantages

– details might not be clear

- recommendations might be less firm
- allows flexibility to draftsmen
- report should be seen as a whole, and all details provided for.

8. One way of making the legal arrangements for the establishment and operation of provincial governments would be to amend the national constitution to provide the basic legal framework for provincial government and to set out the main principles of the system, and to include much of the detail in a special Provincial Government Act.

There would be several advantages in having such an Act, in particular:

- the constitution would not be cluttered with matters of detail; and

- most of the information about the legal arrangements for provincial government would be together in a single place.

Moreover, the national constitution could be amended to safeguard provincial autonomy by providing that part/all of the Act would come into effect/be amended only if an absolute majority of members of the National Parliament agreed to a bill moved and dealt with in the same way as bills to alter the constitution. Such an Act would be easier to change than the constitution, but harder than ordinary Acts.

9. Under the scheme proposed in para. 8, the national constitution would provide for:

(a) the establishment of a system of provincial government in accordance with the objectives set;

(b) Parliament to make laws for such a system, and to have the power to prescribe that all or part of these laws should take effect or be altered only if –

- the Speaker has been given at least four weeks notice before the first reading;

- a bill is clearly expressed to be a bill for an Act made under this provision; and

- it is supported at the final voting on two separate readings in the National Parliament by the votes of an absolute majority of the members (cf. Solomon Islands 1978a: section 61).

Acts (or parts of Acts) which meet the last three conditions will, for convenience, be referred to below as 'entrenched' Acts (or parts of Acts).

B. BOUNDARIES

10. The existing references to boundaries in the constitution might remain much as they are, although:

(a) a provision might be added requiring the Constituency Boundaries Commission to consult Provincial Assemblies;

(b) a requirement could be added that there be a review every five years; and

(c) a proviso would have to be added to allow Parliament to make other provisions in an Act containing 'entrenched' (that is, hard-to-change) provisions – and the rest of the Committee's recommendations could be embodied in such provisions.

C. POLITICAL LEADERSHIP AND STRUCTURE

11. The national constitution should provide for elected Provincial Assemblies, shared executive power and the establishment of Area Councils. These details should not be left to provincial laws or constitutions or to 'entrenched' national legislation. The national constitution should probably also set out the broad principles on which provincial constitutions are to be made, notably who can make them and what they should provide for. But the models from which Provincial Assemblies must choose before making their own constitutions should be in schedules to the 'entrenched' Act.

D. POWERS AND FUNCTIONS

12. The national constitution should probably say that provincial governments should be responsible for performing designated government functions – but List C (executive functions) would not, under the proposed scheme, be 'entrenched'. The constitution should set out the principles of Lists A and B, as follows:

(a) there must be certain final –not exclusive – powers for provincial governments; and

(b) there must be other subjects on which they can make laws and policies, subject to disallowance and/or supervening national laws.

Lists A and B themselves should, when refined, become 'entrenched' schedules to the 'entrenched' Act.

13. The constitution might also say that:

(a) Provincial Assemblies should have the final say over whether/when to accept new or transferred functions;

(b) there should be a comprehensive law reform to 'make space' for provincial legislation; and

(c) the 'entrenched' law should set out the procedures for delegating powers and functions, with the proviso that the recipient must agree before a transfer can take place.

14. There could also be a general injunction that provincial governments should be consulted about policies and activities that affect them directly, with the details spelt out in the ordinary laws dealing with such subjects as immigration, planning, foreign relations, etc.

E. STAFF

15. The constitution should probably say that:

(a) a designated senior civil servant chosen by each provincial government according to procedures specified in an 'entrenched' law should have control over all staff perform-

ing provincial government functions and the power to coordinate all government staff in the province – the details to be spelt out in an 'entrenched' law; and

(b) provincial governments should have the power to employ their own staff directly up to a level specified in an 'entrenched' law.

16. The disciplinary powers of Provincial Secretaries could be dealt with by regulation/delegation, and the recommendations on moving staff out of the national capital should be regarded as policy guidelines or advice.

F. FINANCE

17. The national constitution might well say that provincial governments:

(a) should receive untied grants according to a formula (which would be revised every four years) and that they must get at least enough to pay for transferred functions;

(b) should have revenue-raising powers of their own;

(c) should be able to raise loans from institutions within the country;

(d) should be able to undertake business ventures as specified;

(e) must give Area Councils the power to raise basic rate; and

(f) should be consulted (according to defined procedures) on all aspects of planning and development in their areas.

But most of the rest of the Committee's recommendations on finance should go in the 'entrenched' law.

G. RELATIONS BETWEEN GOVERNMENTS

18. The constitution could establish the Premiers' Conference, provide that it meet at least once each year to allow the national and provincial governments to consult on matters of common interest/concern, and give it the power to regulate its own affairs.

19. The constitution could provide that governments should try to resolve their differences by:

– negotiation; then

– mediation; then

– arbitration; and then

– by legal action, but only over points of law.

The details could be set out in an 'entrenched' law, as could the definition of 'consultation'.

20. The circumstances in which provincial governments can be suspended should probably be spelt out in the constitution; but the details could be left to an 'entrenched' law.

H. IMPLEMENTATION AND REVIEW

21. The constitution could provide for a specific transition period – or it could allow Parliament to provide for such a period in an 'entrenched' law. The latter would be a more flexible approach. The constitution should probably require 'the responsible Minister' to present an annual report to the National Parliament on implementation of the provincial government system.

22. The constitution should probably specifically require the general review of the provincial government system after five years. There might be value in adding a qualification that membership of the review body should be set out in an 'entrenched' law – or that members of the body should be chosen in consultation with provincial governments/the Premiers' Conference.