

**BRUNTON AND COLQUHOUN-KERR'S  
THE ANNOTATED CONSTITUTION OF PAPUA NEW GUINEA**

A review article dealing with "The Annotated  
Constitution of Papua New Guinea", by Brian Brunton  
and Duncan Colquhoun-Kerr,  
University of Papua New Guinea Press, Port Moresby  
1984 (VI+596 pages: K27).

By

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**INTRODUCTION**

In the Preface to his 1978 book on the Papua New Guinea Constitution, Goldring expressed the hope that his work might stimulate the preparation of a book badly needed by the courts and the legal profession in Papua New Guinea: 'a detailed, annotated text, in the style - perhaps inimitable - of Quick and Garran's classic work on the Australian Constitution' (Goldring, 1978: vii).

The authors of the Annotated Constitution of Papua New Guinea quote Goldring in their Foreword, and state that their work is "responding to this need" (Annotated Constitution: v).

By making this claim, the authors raise high expectations, for the commentaries on the Constitution in the famous 1901 text, the Annotated Constitution of the Australian Commonwealth, set a standard which is difficult to meet (Quick and Garran, 1901). In that still much used work, each section of the Australian Constitution is analysed separately. The analysis comprises detailed discussion which synthesises a wide range of material helpful in understanding both the origin and meaning of each section, and the key words and phrases used in them. This material is fully referenced, and includes: records of the debates of successive

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I am grateful to Dr. E.P. Wolfers for several suggestions which assisted the preparation of this article. However he is responsible for neither the arguments nor the conclusions reached.

Constitutional Conventions (1890-1898) which gave rise to the section in question; parallel sections in the Constitution of the United States of America and the British North America Act (in respect of Canada); a wide range of judicial decisions from the United Kingdom, the United States, Canada and the Australian colonies; and academic texts and articles.

The suggestion that something similar has now been achieved in respect of the much longer and more complex Constitution of Papua New Guinea is a most exciting one. The origins of many of its sections are complex. Sub-s24(1) of the Constitution allows the courts to use a wide range of source materials as aids to interpretation when interpreting or applying the Constitution, amendments to the Constitution and the Organic Laws. These materials include: the Final Report of the Constitutional Planning Committee, (hereinafter the "CPC Report"); documentary responses to the CPC Report tabled during debate on that Report in the pre-Independence House of Assembly; the records of those debates and of the Constituent Assembly debates concerning the draft Constitution (prepared following the House of Assembly debates); and any other document tabled for or in connexion with either set of debates. So the need for a major work tracing the origins of each section of the Constitution is clear.

As a Papua New Guinean equivalent to Quick and Garran (1901), the Annotated Constitution is deficient because: it lacks analysis and synthesis of available material; it lacks references to many of the materials available under sub-s 24(1); it lacks references to other material such as scholarly articles; it lacks either background materials or comment concerning many sections of the Constitution; relevant portions of the CPC Report have been omitted; and the analytical material included is inadequate. After describing the contents of the Annotated Constitution, and its strength as a source of references, this article examines each of the deficiencies.

#### The Material

The Annotated Constitution sets out the full text of each section of the Constitution (including the Preamble and National Goals and Directive Principles). All amendments made to the end of 1983 are included. Most sections (and in many cases, sub-sections) are followed by a range of materials, all set out in much smaller type than the text of the Constitution itself. The additional materials comprise:

1. In relation to ss32-56 (the basic rights provisions), references to sections of analogous international human rights laws, (including the Constitutions of the United States of America and India;

2. The full text of portions of the CPC Report regarded by the authors as relevant to the section in question. In some cases, these are extremely long, running to as much as seven pages: eg in relation to s28 (the Leadership Code) (Annotated Constitution: 79-86);
3. Summaries, and in many cases, direct quotations of judgments of the National and Supreme Courts (to the end of 1983) relevant to the section in question. Where a wide range of issues has been touched on in the judgments, the authors have grouped the summaries and quotations under subject headings. For example, following sub-s37(3) ('A person charged with an offence ... shall be afforded a fair hearing ...') there are seven main headings dealing with such matters as the application of the sub-section to disciplinary offences, the requirement of separation of investigatory and judicial functions, the effect of postponement of trial, and so on (ibid pp107-110);
4. Lists of references to "every instance not otherwise recorded in which a judge has referred to the relevant sub-part of the Constitution" (ibid pvi). Any observations of significance contained in those judgments are summarised immediately following the reference;
5. "Comments", which are described as "the authors' contributions" (ibid), are scattered amongst the other materials. There are surprisingly few of them - about sixty. They range from one line notes to a few lengthy and detailed analyses of issues arising from particular sections; and
6. In relation to the many sections of the Constitution which provide explicitly for a law to be passed to carry out or give effect to the section, the authors usually give a reference to the law or note that no such law has yet been passed.

A number of sections are not followed by any materials or comments. Many of them are sections in respect of which there are no materials available in the CPC Report. For example, in respect of ss87-98 (on the Governor-General), there are only single line case references, and two single line references to relevant Organic Laws (ibid pp253-259). Presumably this is because the only material on the Head of State in the CPC Report recommended against an Independent Papua New Guinea having such an institution (CPC Report:

ch7 p2 paragraph 14). The question whether provisions such as these should have virtually been ignored is discussed later in this article.

#### A Source of References

In addition to its obvious application as a set of teaching materials for Papua New Guinean law students, the main value of the Annotated Constitution will be as a source of references.

In particular:

1. the availability of references to relevant judicial decisions (1975-1983) on particular sections of the Constitution will be a valuable resource to any person with either a practical or academic interest in the Constitution. The authors have gone to great effort in amassing references to the judgments. Their presentation by reference to particular issues arising from the various subparts of the Constitution is generally very helpful. The references appear to be comprehensive. Being less than familiar with the full range of judicial decisions on the Constitution, I am unable to comment on the authors' indication that they have included reference to every instance where judges have referred to particular sub-parts of the Constitution (Annotated Constitution: vi). However, there is no question that this book will be an essential source for anyone interested in judicial interpretation of the Constitution;
2. the references to analogous international human rights laws relevant to the basic rights provisions of the Constitution will also assist researchers and legal practitioners;
3. there is some value in having specific CPC references linked to each section (although criticisms of the selections of CPC material are dealt with below); and
4. the detailed index to provisions of the Constitution (ibid pp557-596) will be a valuable resource to anyone trying to find particular words, phrases or sections in this complex legal document (although some deficiencies in the index are discussed later in the article).

Lack of analysis and synthesis

The bulk of the book comprises a limited selection of materials on the origin and interpretation of sections of the Constitution. The materials are reprinted, word for word. They are left to speak for themselves, with very little comment made by the authors. Approximately 240 of the 544 pages of text is made up of such material (about 130 pages from the CPC Report and 110 pages from judgments). Many additional pages are filled by the text of the Constitution itself. The reprinting of materials is taken to unusual lengths when the same 20 line piece of a particular judgment is repeated on three separate occasions: a section of the judgment of Kearney, J, in *The State v The Independent Tribunal: Ex parte Sasakila* [1976] PNGLR 491, at pp506-507 is repeated at p5, pp66-7 and p500. A cross-reference should have been sufficient for any but the first occasion on which the judgment was referred to.

The book is over-burdened with large sections of material from the CPC Report and from judgments which would have been much better dealt with in analytical pieces by the authors. Complex lines of arguments from judgments are presented through lengthy quotations, rather than analytical pieces. For example, at pp534 to 537, quotations from judgments on the adoption of foreign statutes are set out, followed by a section of analysis by the authors in which they argue that the "complex and unresolved debate" set out in those judgments is "fundamentally misconceived" (*ibid* p 537). It would have been better to have omitted the quotations and instead summarised and analysed the lines of argument together in a much shorter piece of text.

In other cases, lengthy quotations from judgments make points that the authors could have summarised in a line or two: for example, at p364, a 20 line portion of a judgment is set out which merely establishes the proposition that members of the National Executive Council are as liable to punishment for contempt of the Supreme Court as are ordinary citizens (*Re Rooney* (no2) [1979] PNGLR 448, at pp502-503).

The book would have been of more value if it had followed the example of Quick and Garran (1901), and analysed and synthesised the whole range of available material on the origin and meaning of each section of the Constitution. The result would have been far more succinct, and contained much more readily accessible information than the present text.

Materials Referred to in s24

In their Foreword, the authors justify the inclusion of what they claim to be 'any relevant parts of the CPC Report' related to particular sub-parts of the Constitution on the basis that these extracts 'assist in clarifying the intentions underlying particular provisions' (Annotated Constitution: v). Further, they point out that under s24 of the Constitution, the CPC Report can be used as an aid to interpretation and application of the Constitutional laws (ibid). But in their enthusiasm for the CPC Report, the authors have ignored other vital material made available by sub-s24(1).

Sub-s24(1) also allows the court to refer to the "official records of debates and of votes and proceedings":

- (a) of 'the pre-Independence House of Assembly' on the CPC Report; and
- (b) of 'the Constituent Assembly' on the draft of the Constitution.

Furthermore, "any other documents or papers tabled for the purposes of or in connexion with those debates" may be used.

It would have been expected that a book in the style of Quick and Garran would have attempted to define the materials available under sub-s24(1), and that as far as possible, the widest range of those materials would be referred to where they might help elucidate the origin and meaning of particular sections.

However, other than the CPC Report, the Annotated Constitution contains no references to any of the material referred to in sub-s24(1). In fact there is no comment in the annotations in the text following sub-s24(1) explaining the range of materials available under that sub-section. The authors simply note that the CPC Report has been used by the courts as an aid to interpretation and comment on the different approaches of the judges in their use of such aids generally (ibid p66).

One reason why sub-s24(1) permits reference to materials other than the CPC Report is that major parts of the recommendations of the CPC Report were not accepted by the pre-Independence Government of Papua New Guinea, nor by the pre-Independence House of Assembly. As is discussed later in this part of the article, the House of Assembly made the CPC Report's recommendations the drafting instructions for the Constitution, but subject to modification by: the Government Paper entitled 'Proposals on the Constitution and Explanatory Notes' (Government Paper 1974); the Opposition's paper en-

titled 'United Party Proposals on the Constitution' (United Party Paper, 1974); and specific amendments made during the House of Assembly debates. The draft Constitution was tabled in the Constituent Assembly, and many amendments were made to it during debate in that Assembly (Fourth Draft, 1975). As a result, when finally passed in September 1975, the Constitution was in many important respects a very different document from that envisaged by the CPC Report.

The Government Paper (1974), the United Party Paper (1974) and the Fourth Draft (1975) are all available to the Courts under sub-s24(1), as are the official records of the abovementioned debates. Each of the three documents and the records of debates should have been discussed in any comments made by the authors in relation to sub-s24(1). The authors' failure to do this is particularly difficult to understand because each of these sources of the Constitution is explicitly dealt with in the Constitutional Documents (Manner of Proof) Act ch5. It is a little known Act which, as its preamble indicates, was passed to implement Sub-s24(2) of the Constitution. That sub-section empowers a law to "make provision for the manner of proof of the records and documents referred to in sub-section (1)" (ie sub-s24(1) of the Constitution).

That Act also deals with the manner of proof of the CPC Report and the Minutes of Proceedings of both the House of Assembly and the Constituent Assembly (ie minutes of sessions dealing with the CPC Report and the First Draft (1975) respectively). This Act may not be conclusive of the question of what materials may be admissible under sub-s24(1). For example, it seems that a document not mentioned in the Act may be admissible, namely the Report on Central-Provincial Government Relations (Watts and Tordoff, 1974). This is because that Report was tabled during the House of Assembly debates on the CPC Report on August 23 1974 (HAD III (33) 4303). However, there would appear at least to be no doubt about the admissibility of the documents described in the Constitutional Documents (Manner of Proof) Act ch5. In a note following Sub-s24(2) the authors make reference to that Act, but make no mention of its provisions. There is no reason why the full range of materials was not referred to, in discussion of sub-s24(1). The materials should also have been referred to in discussion of other sections whenever relevant.

In their Foreword, the authors explain the omission of references to the records of debate of both the pre-Independence House of Assembly and the Constituent Assembly: 'No official published record of these debates exists, the un-

edited photo-copied transcripts that do exist are not generally accessible and the courts almost never refer to them' (Annotated Constitution: vi).

In respect of the pre-Independence House of Assembly, the authors' assertion is incorrect. The normal edited Parliamentary records of debate in respect of the debate on the CPC Report are generally available in most libraries in Papua New Guinea (including incomplete sets in the library at the University of Papua New Guinea).<sup>2</sup> Most importantly, numerous passages of those records provide considerable illumination of provisions in the Constitution.

The main part of the House of Assembly debates on the CPC Report took place over the period from August 16 1974, when the then Chief Minister, Mr Somare, tabled the CPC Report (HAD III (33) 4138) until March 11 1975. During that period, the CPC Report was debated in considerable detail. Having initially debated the Report as a whole, from September 27 1974 the House debated each chapter separately. Formally, much of the debate centred on motions (moved in respect of each chapter) that the recommendations in the chapter in question "be set as drafting instructions to the First Legislative Counsel for the preparation of a Draft Constitution and related bills" (ibid).

The two important responses to the CPC Report tabled during the debates have already been mentioned. The first (Government Paper, 1974) was tabled by Mr Somare on September 23 1974 (HAD III (35) 4415),<sup>3</sup> and the second (United Party Paper, 1974) was presented by Mr Tei Abal, then Leader of the Opposition, on September 24 1974 (HAD III (35) 4434).

As debate on each chapter was concluded, the House of Assembly passed a motion in respect of the chapter which adopted the CPC recommendations as drafting instructions, but subject to: in respect of all chapters, modifications as proposed in the Government Paper (1974); in respect of chapter 1, amendments contained in the United Party Paper (1974); and in respect of all chapters, amendments proposed during the debates in the House of Assembly.<sup>4</sup>

A wide range of proposals made by the CPC was modified, amended or rejected in these debates. It is only by closely comparing the CPC Report, the Government Paper (1974) the United Party Paper (1974) and the records of the debate that one can be confident of understanding the origin of many provisions later included in the draft Constitution considered by the Constituent Assembly (Fourth Draft, 1975).

Reference to these materials give some understanding of the reasons why important CPC recommendations were not included in the Constitution. Significant examples include the following recommendations: that there should be no head of state (CPC, 1974, ch7, p2, para14); that there should be no regional electorates (ibid ch6, p2, paras7-9); that general elections for the Parliament should be held every four years (ibid p31, recommendation 83); and various provisions relating to naturalisation of foreign citizens (ibid ch4, pp5-8, paras36-60, and ppl6-19, recommendations 7 to 11). In each case, these recommendations were rejected by the Government and the House of Assembly, and as a result contrary provisions were inserted into the draft Constitution (Fourth Draft, 1975) and eventually became part of the Constitution as adopted. The sections in question are s82 (Head of State), s101(1) (regional electorates), s105(1)(a) (five year terms for Parliament) and ss68 and 69 (citizenship).

These disparities between the Constitution and recommendations of the CPC Report have not been dealt with in the Annotated Constitution, even in cases where the disparity is clear in the portions of the CPC Report reprinted in the book. In respect of ss82, 101(1) and 105(1)(a), the book contains the text of each section, followed by the relevant portion of the CPC Report (Annotated Constitution pp246-247, 264-265 and 272-273). The fact that parts of the text from the CPC Report in each case argue in favour of some quite different provisions from those appearing in the sections draws no comment from the authors. In respect of s68 (on citizenship) the contrary recommendations of the CPC are neither included nor referred to in the book, and as a consequence, one could be left with the impression that no materials are available on the origin of, or as aids to interpretation of, that crucial section. As discussed below, that is not the case.

References to the readily available records of the debates of the House of Assembly would have provided elucidation of the origin of important provisions of the Constitution. Further, they would have focused attention on other important source documents of the Constitution, namely the Government Paper (1974) the United Party Paper (1974) and the Fourth Draft (1975). None of these documents is mentioned anywhere in the book.

In relation to the records of debate of the Constituent Assembly,<sup>5</sup> the authors' assertion about the lack of general availability of official published records was, until recently, correct (Annotated Constitution: vi). However, as they acknowledge, unedited transcripts of the debates have long been available (ibid pvi and p480). Although scarce, there is a copy in the Justice Department Library at Waigani,

and various persons who were advisers to the CPC, or to political parties at the time the CPC Report was being debated, have copies (personal communications, Wolfers, E and Bayne, P).

Very recently, the edited records of debate in the Constituent Assembly have become available. They comprise 500 pages, covering 27 days of debate from May 23 1975 to August 26 1975. During that period, the Constituent Assembly considered the Fourth Draft (1975) tabled by Mr Somare on May 29 1975 (NCAI p24).<sup>6</sup> During the subsequent debate, the Fourth Draft (1975) was changed in many ways: sections were amended; others were omitted and replaced; some were omitted without replacement; and in some cases entirely new sections were added. Some of the changes were significant: for example, the lengthy and complex provisions of Section 68 (Special Provisions Relating to Naturalization) were introduced for the first time during the Constituent Assembly debates on July 23 1975 (NCAI p239). This section and another new Section which subsequently became s69 (Application for naturalisation) together replaced ss66 to 70 of the Fourth Draft (1975) which had dealt with the topic of 'Provisional Citizenship', and which were then omitted entirely (NCAI p239). Ss68 and 69 were debated over much of two days (July 23 and 24 1975), and further amendments were made to the new clause 68 during the debate. The debates are an essential guide to the origin and meaning of the sections (ibid pp239-266).

In addition to ss68 and 69, another 17 sections were introduced in their present form for the first time during the Constituent Assembly debates.<sup>7</sup> Some of the new provisions involved important new material. Some improved slightly on provisions in the sections they replaced. Others were entirely new sections dealing with matters of detail that had been overlooked until then. Of the sections omitted from the Fourth Draft without replacement, some were omitted as superfluous, and without controversy. Others were the subject of bitter dispute, the most controversial omission being that of Part VII (ss189 to 198) dealing with Provincial and Local Government. (Aspects of the omission of these provisions are discussed further below.)

Of the 283 clauses of the Fourth Draft, 155 were amended, omitted or replaced. Some were amended on as many as three and four separate occasions: for example, s42 (liberty of the person) was amended once during debate on June 26 1975, twice on July 11 1975 and once more on August 13 1975 (ibid ppl84, 356, 364, and 409). Although the majority of amendments were minor ones, minor changes in wording can often have significant effects on meaning.

In their Foreword, the authors justify the omission of references to the debates by saying that "until the debates were published or otherwise made more accessible there was little point in over-burdening an already lengthy text with reference to materials not available to most of our readers" (Annotated Constitution: vi).

It is suggested that, on the contrary, the lack of general availability of these materials is the very reason why they should have been referred to, particularly in cases where the Constituent Assembly debates resulted in major changes being made to the Fourth Draft (1975). The book would have then been an essential guide to the way the Constitution developed. Had the book been largely consisted of analysis of the available materials, it should not have 'over-burdened' the text to have included references to the un-edited records of debate in the Constituent Assembly in all cases where sections were derived in part from those debates. If that had been done, now that edited records of the debates have become available, the Annotated Constitution would have been a very valuable text to use in conjunction with those edited records when examining the origin and meaning of many sections of the Constitution.

It is therefore clear that none of the materials available under sub-s24(1) can be treated in isolation. As discussion of the Head of State and the citizenship provisions has shown, reliance on the CPC Report alone is an incorrect approach to understanding the origin and meaning of the Constitution. Two other examples assist in making the point, namely Part VIA (Provincial Government and Local Level Government) and the general provisions in respect of the Organic Laws.

In respect of Part VIA, the Annotated Constitution refers only to the CPC Report. Yet in many important respects, the provisions of Part VIA are at marked variance with the CPC proposals on Provincial Government (Goldring, 1978 pp 73-81). This fact draws no comment from the authors. Some of the changes to the CPC Report's proposals were made on the basis of the Government Paper (1974) and some the House of Assembly debates. Eventually, provision very similar to the present Part VIA was made in Part VII of the Fourth Draft (1975). However, unexpectedly, after some general debate, those provisions were omitted by the Constituent Assembly on July 30 1975 (NCA 1 p347). The constitutional amendment containing the present Part VIA was not introduced into Parliament until early in 1976, following the attempted secession of part of the then district of Bougainville (Conyers, 1976 pp50 -74).

There is an interesting question concerning the availability of materials under sub-s24(1) when interpreting or applying an amendment to the Constitution. Sub-s24(1) empowers the use of the materials as an aid to interpretation, where relevant, in relation to 'any provision of a Constitutional Law'. Schedule 1(2) defines 'constitutional law' to include 'laws altering this Constitution' as well as the Constitution itself and the Organic Laws. So the materials are clearly available, and the main test for the court under sub-s24(1) is to determine whether any of the materials are relevant to a question of interpretation or application before it. However, because amendments may often have little connection with matters considered by the CPC Report or by subsequent reports and debates, it will probably not be often that the materials will be relevant to interpretation of an amendment. This will vary from case to case: for example, Constitutional Amendment no8, the most recent constitutional amendment (to ss190, 191 and 192) arguably makes the provisions of the Constitution in respect of the Public Service more consistent with the CPC Report than was formerly the case. That is not the case with, for example, Constitutional Amendment no7, which dealt with suspension of provincial governments.

In this regard, Part VIA is a special case, because it is similar to Part VII of the Fourth Draft (1975). Because the latter part was drafted following the House of Assembly debates on the CPC Report and is different in many respects to the CPC proposals (ibid), it may be relevant, when attempting to elucidate the meaning of particular words or sections in Part VIA to examine viz the Fourth Draft (1975) the Government Paper (1974); the records of debate of the House of Assembly; and the CPC Report. All these materials may be relevant to interpretation or application not only of Part VIA, but also provisions of the Organic Law envisaged by that Part (the Organic Law on Provincial Government). As noted above, the Watts and Tordoff (1974) may also be admissible under sub-s24(1).

In relation to the general provisions of the Constitution on the Organic Laws (ss8 to 12), the CPC Report is no guide to origin and meaning, for the concept of Organic Laws was not developed until after that Report was completed. Thus, the Annotated Constitution contains no material on the origin and development of the concept. The book would have been improved by an attempt to trace the origin of the concept.

Examination of Part VIA and ss8 to 12 demonstrates the dangers of relying upon the CPC Report, and ignoring other materials available under s24(1). By ignoring all original materials other than the CPC Reports the authors have tended

to present an incomplete and misleading picture of the origins of the Constitution. This can only help to perpetuate the slowly developing myth that the CPC Report is the complete basis of the Constitution. That is unfortunate, for the Constitution, whilst owing much to the CPC Report, was also derived from the other material just discussed. It is essential that the myth should not gain too much credence because it is both historically inaccurate and because sub-s24(1) gives equal recognition to the other materials, so far as they are relevant, when questions of interpretation and application of Constitutional Laws arise. Thus, in a book such as the Annotated Constitution, it is essential that proper weight be given to the full range of source materials.

#### Selection of other materials

Although the selection of cases quoted or referred to in the Annotated Constitution is useful and impressive, had the annotations comprised analytical sections which synthesised available material, a much wider range of material could have been referred to. In particular, the book could have dealt with the fairly extensive and steadily growing range of scholarly articles and chapters of books which deal with the Constitution and the courts' interpretation of it.

In this respect, the Annotated Constitution only includes material from and makes references to Goldring (1978), to an article by J. Kaburise, (12 Melanesian Law Journal, 1) and makes one general reference to two text books on the European Convention on Human Rights (Annotated Constitution pp141, 361, 111 and 92). However, there have been at least seven other major articles on the Constitution published in the Melanesian Law Journal since 1975, as well as numerous relevant articles in other journals, and chapters in several books (in particular numerous chapters in Pacific Constitutions (Sack: 1982) and in Law and Social and Change in Papua New Guinea (Weisbrot, Paliwala and Sawyerr: 1982). Much of this material provides valuable insights into the origins and meaning of sections of the Constitution. For example, Wolfers' "Defining a Nation" traces aspects of the development of the citizenship provisions of the Constitution from the CPC Report's recommendations through the House of Assembly debates and unedited records of the Constituent Assembly debates (1977 p301).

Another insight into the origins of a particular provision is provided by Ghai and Hegarty (1982) in a chapter on the Bouraga Case (SCR nol of 1982; Re Bouraga [1982] PNGLR 178), a case that dealt with, inter alia, the nature of Ministerial functions set out in s148 of the Constitution.

The treatment of s148 in the Annotated Constitution provides yet another example of a marked difference between a section of the Constitution and the CPC proposals set out beside it (Annotated Constitution p327). Curiously, in this case it seems that the CPC Report's proposals were not changed during either the House of Assembly debates or the Constituent Assembly debates. Chapter 7 of the CPC Report proposed that provision be made 'for each Department to be under the direction and control of a Minister and, subject to that direction and control, under supervision of a Head of Department' (CPC Report 1974 ch7, p6, para46, and pp10 and 12, recommendations 18 and 29). However, s148 makes provision to the contrary: all departments must be the "political responsibility of a Minister", but that "does not confer on a Minister any power of direction or control". The court (in Bouraga's case) was not concerned with the obvious conflict between the CPC Report and s148, but one would have expected the authors of the Annotated Constitution to comment on the striking disparity in the materials which they chose to juxtapose. This is especially so when there is published material available elsewhere suggesting an explanation. Ghai and Hegarty (1982) make the following comment:

"The CPC had recommended strongly in favour of the political answerability of the public servants to Ministers. This was endorsed by the Government as well as the Constituent Assembly and the penultimate draft (fourth) of the Constitution did not contain sub-s3 of s148. The public service, largely expatriate at that time, profoundly unhappy at the loss of its power implicit in s148, and disturbed by the possibilities of ministerial 'excesses', prompted the addition of Sub-s3 at the last minute, and there is reason to believe that none of the political leaders were aware of its implications." (1982: 252)

#### Sections not commented upon

There are about seventy sections of the Constitution which receive almost no comment in the Annotated Constitution, and in respect of which virtually no materials are included in the book. The main reason would appear to be the absence of material in the CPC Report which can be linked with these sections, and the lack of judicial decisions (so far) relating to them. Much light could have been thrown on the origin and meaning of many of these sections had the other materials been examined.

For example, the origin of the provisions on the Governor-General would be much better understood if the Government Paper (1974) and the House of Assembly debates had been re-

ferred to. Further, as several of the above mentioned sections are amongst those added for the first time during the Constituent Assembly debates, reference to those debates would have been helpful (ss30, 69, 83, 106, 249, 260 and 268).

Had the authors actually carried out the task they set themselves in the Foreword, and followed the example of Quick and Garran (1901), there would have been explanation and comment about every section. Clearly, that would have been a mammoth task, involving perhaps many years of research. Nevertheless, the result would have been well worth the effort. But accepting that this book is in essence a set of materials, it should still have included references to those parts of the materials available under sub-s24(1) that are pertinent to each section. Even if, in most cases, nothing more than brief references had been included, the book would have been a much more complete set of materials.

#### Selection of materials from the CPC Report

The authors claim to have "included the complete text of any relevant parts of the CPC Report" following "each sub-part of the Constitution" (Annotated Constitution pv). If the book fulfilled this claim to be a complete guide to all relevant parts of the CPC Report, its usefulness would be greater, especially given the fact that new copies of the CPC Report are at present unavailable. However, the authors' selection of the material from the CPC Report is deficient in two ways: first, some CPC recommendations which are contrary to provisions of the Constitution have been ignored; second, in many cases in the second half of the book, the authors have included only portions of the running text of the chapters of the Report, and have ignored relevant recommendations appearing at the end of the chapters in question.

Concerning the first point, the failure of the authors to mention the contrary recommendations of the CPC Report in respect of, for example, the Head of State, and the controversial citizenship provisions, creates an erroneous impression. It is only by tracing the origins of these provisions through the various stages of debate that their intent and meaning can be fully understood.

Secondly, wherever relevant, the authors should have quoted the recommendation, because: (a) they are more precisely worded than the explanatory text contained in the chapters; and (b) they formed the basis for the drafting instructions. It may well be that both explanatory text and recommendations are relevant, in which case both should have been included.

A few examples will demonstrate the point

- . At p273, s105 (General Elections) is followed by text from ch6 of the CPC Report (CPC, 1974 ch6, p 13) but not recommendations 83 and 84 of that chapter (ibid p31);
- . At p283, s114 (Voting in the Parliament) is also followed by text of ch6 (ibid p8) but not by recommendations 51 to 53 (ibid p26);
- . At p327, s148 (Functions, etc. of Ministers) is followed by text of ch7 (ibid ch7, p4) but not by recommendations 18 and 29 (ibid p10 and 12); and
- . At p436, s210 (Executive Initiative) is followed by text from ch9 (Ibid ch9, p2) but not by recommendation 4 (ibid p5).

The same is true of all portions of chapter 10 of the CPC Report set out in respect of Part VIA (Provincial Government and Local Level Government), and of many other sections in the latter part of the book.

The unfortunate consequence is that the Annotated Constitution cannot be regarded as a reliable guide to portions of the CPC Report relevant to the origin and meaning of each section.

#### Analytical Material

The impression that the Annotated Constitution is essentially a set of teaching materials is underscored by both the relatively small amount of analytical material by the authors, and by the failure of the authors to comment upon or analyse a number of important matters arising from various sections of the Constitution.

The analytical material appears under the heading 'Comment' and is described in the Forword as 'the authors contributions' (Annotated Constitution pvi). There are approximately sixty entries under that heading, and they contain an uneven mixture of material. About half are very short notes, including: cross references to other parts of the book; notes of the dates on which certain sections cease to have effect; introductory notes to sections of judgments; and useful explanatory notes.

A number of the other 'Comments' make more substantial points which are generally interesting and useful concerning particular issues arising from specific sections or cases (ibid pp107, 108, 110, 113, 120, 125, 163, 185, 219, 220, 278, 286, 326, 328, 468, 476, 478, 479, 480, 499, 510).

However, disappointingly few of the entries under this heading provide detailed analysis. Some that do so are very good. Together with the shorter comments referred to in the previous paragraph, they give an indication of how valuable the Annotated Constitution could have been if the book had been prepared as an analysis of available material on the origin and interpretation of sections. Amongst the better analytical portions of the book are the following:

- . comments at pp141 and 361 analysing and refuting views expressed by Goldring (1978);
- . a comment at p142 on whether pre-Independence laws can limit basic rights provisions by being deemed to comply with s38;
- . an analysis at p173 of apparently inconsistent judicial views on the extent of the freedom of expression provided by s48;
- . an analysis at pp213 to 215 concerning problems involved with the Constitution's provisions on natural justice;
- . a note at p337 on inconsistent judicial decisions on the nature of the Supreme Court's power of review under s155(2)(b);
- . an analysis at pp345 to 346 of judicial decisions concerning the Supreme Court's powers under sub-s155(4) (prerogative writs and other orders);
- . a note at pp409 to 410 concerning the non-judiciality of inter-governmental disputes;
- . a note at p500 on the meaning of the expression 'fair and liberal meaning', as used in sch1.5(2);
- . an analysis at p517 of three judgments by Deputy Chief Justice Kapi concerning post-Independence common law decisions of English courts; and
- . a note at pp528-529 on problems with judicial development of the underlying law.

On the other hand, at least two sections of the material under the heading 'Comment' are not adequate. This is particularly true of comments at p263.

The material in question is a four line note which deals with the effect of s100 (3), which provides that Parliament cannot "transfer permanently, or divest itself of, legislative power". The authors suggest that s26 of the Organic Law on Provincial Government "would appear to offend" s100(3) of the Constitution, in that it purports to prevent Parliament from making laws on subjects defined by that Organic Law as being "primarily provincial".<sup>10</sup>

This argument, if correct, would have broad ramifications, not only in respect of the 'primarily provincial' subjects listed in s24 of the Organic Law on Provincial Government, but also s56 of the same law, which purports to prevent Parliament making laws in respect of the "exclusively provincial taxes" listed in s57 of the same Law. The provisions of ss56 and 57 are not mentioned by the authors in this context.

Given the obvious and serious ramifications of their argument in respect of s100(3) of the Constitution, it is surprising that the authors do not examine the issues involved in more detail, especially as there are fairly obvious counter-arguments that can be advanced.

The most obvious of these is the point that the Organic Law on Provincial Government does not necessarily involve a permanent transfer of legislative power. Subject to procedural requirements, Parliament is free to amend or even repeal the Organic Law at any time. Until such time as it chooses to do so, Parliament cannot 'derogate from the superior legislative power of the Provinces' (Ghai and Isana, 1978 pl4).

In addition, s100(2) of the Constitution makes provision for Parliament to make laws "conferring on an authority other than the Parliament legislative powers or functions". It may be argued that ss26 and 56 of the Organic Law are provisions envisaged by Section 100(2) of the Constitution, rather than provisions prohibited by s100(3).

A further though clearly less substantial argument that may need to be examined in relation to s26 of the Organic Law involves the power of the Parliament under s37 of the Organic Law on Provincial Government to disallow provincial laws. This power is subject to important procedural constraints but applies to all provincial laws other than provincial constitutions. This includes laws under s24 of the Organic Law on Provincial Government. In the absence of a provincial law on

any subject under s24, Parliament is free to pass laws on that subject. By disallowing provincial laws under s24 it may be that Parliament can keep the field open for its own laws.

Another less serious example of inadequate material is the comment at p395 concerning s5 of Constitutional Amendment no1 - Provincial Government, passed by the Parliament in 1976. This section of the amending law raises an interesting question.

The section is a transitional provision, dealing with former provincial government bodies, particularly those created by the Provincial Government (Preparatory) Arrangements Act 1974. S5 of the 1976 amendment provided the authority for important provisions of the Organic Law on Provincial Government which allow pre-existing provincial government bodies to become provincial governments under the Organic Law (ss106 to 111).

The Annotated Constitution (p395) repeats the transitional provision under the heading 'Comment'. But the only comment made is as follows:

"Section 5 was not expressed to form part of the Constitution, but is, presumably, to be regarded as a Constitutional Law".

However, there is no doubt that it is a Constitutional Law, for schedule 1.3(3) of the Constitution is explicit on the point. This schedule, which the authors do not refer to in their discussion, states that:

"Each provision of a Constitutional Law takes effect as a Constitutional Law".

The authors do not consider the more interesting question as to whether the transitional provision should in fact be considered as part of the Constitution, even though it is not explicitly expressed to be a part of it. In this regard, it might be argued that the reason for the failure of the amending law to make it clear the transitional provision is part of the Constitution was poor drafting of the amendment. Had the draftsman done his job properly, the section should have been made part of Part XIII of the Constitution (Immediate and Transitional Provisions).

The authors have also failed to comment upon or to analyse a wide range of other questions of both interpretation and application of the Constitution. A number of these mat-

ters have already been dealt with elsewhere in this Article. Amongst additional matters that warranted attention are the following:

1. In relation to the amendments to the Constitution passed between 1976 and 1984, it would have been helpful had the authors commented briefly on the reasons why each of them was made;
2. The reason why the Law Reform Commission is established, and its functions provided for, in a schedule to the Constitution rather than the body of the Constitution is nowhere discussed;
3. There is an interesting question of whether provisions of the Constitution should have been amended following the signing of the Bougainville Agreement (1976) and the passing of the Organic Law on Provincial Government (in March 1977). That Agreement, which provided the main drafting instructions for the Organic Law on Provincial Government, was signed several months after the introduction into Parliament of the Constitutional amendments relating to Provincial Government. Some of the provisions of the agreement dealt with matters not adequately covered in the Constitutional amendments on the Provincial Government system. In a 1978 consultants' report to the National Government, Ghai and Isana recommended several amendments which they argued were necessary to remove "some alleged inconsistencies between the Organic Law and the provisions of the Constitution" (1978 p9). In particular, they argued for amendment of s38, to allow provincial governments power to qualify the basic rights, particularly in relation to legislation on 'primarily provincial' subjects; amendment to s117, to enable Parliament to enact legislation on 'primarily provincial' subjects where domestic legislation is required to give effect to an international agreement; and amendment to s100, to remove any doubt as to whether that section is offended by the Organic Law provisions purporting to give provincial governments areas of exclusive legislative power (ibid pp10-15);
4. The question whether provincial government legislatures have power to pass laws that regulate the rights provided by s50 of the Constitution should have been raised. This question arises because all other rights and freedoms under the Constitution can only be regulated by a law that complies with s38. As s38 requires, inter alia, that such laws

must be made and certified by 'the Speaker' to have been made by an absolute majority, it seems that only Parliament can pass them. S50, on the other hand, makes no reference to s38. Instead, rights under s50 can be "regulated by a law that is reasonably justifiable for the purpose in a democratic society that has a proper regard for the rights and dignity of mankind". As s50 contains no reference to s38, there seems no reason in principle why a provincial law should not be able to regulate the rights in question. S187D of the Constitution should not prevent such a law being passed by a provincial government legislature, for the relevant provisions of that section only proscribe provincial laws that are inconsistent with the Constitution "and in particular with Division 3 (Basic Rights)". Thus the distinctive wording of s50 may be the basis for provincial laws dealing with rights of citizens to vote in provincial elections, and others that prohibit members of provincial legislatures from standing in elections for the National Parliament;

5. Some discussion should have been included on s109(2) of the Constitution, which empowers Parliament to pass "Acts of the Parliament, not inconsistent with the Constitutional Laws", which provide for "matters that are necessary or convenient to be prescribed for carrying out and giving effect to this Constitution". Goldring points out that s32(d) of the Organic Law on Provincial Government restricts the power of provincial legislatures to pass laws in the 'unoccupied' legislative fields from extending to "laws of a kind referred to in s109(2) of the National Constitution" (ibid pp87-88). He argues that laws relating to 'such matters as the operation of the system of provincial government, and the making of provincial constitutions' are matters necessary for the putting into effect of Part VIA of the Constitution. On that basis, he argues that s32(d) of the Organic Law places laws on such matters beyond the power of provincial legislatures. In consequence, despite contrary provisions in the Organic Law, the Parliament should be able to alter provincial constitutions by ordinary Act, "provided that such alterations are not inconsistent with the Constitution or an Organic Law" (ibid pp87 to 88). Although there are obvious counter arguments (based on s11(b) of the Organic Law which provides, inter alia, that a provincial constitution can only be

changed by Parliament by an Organic Law), Goldring's argument is an interesting one, with wide ramifications if it is correct; and

6. The expression 'provincial services' is used at four places in the Constitution (ss159(3)(b), 191(1)(c), 191(2) and 219(1)(a)(i)). The expression is not defined in the Constitution. The Annotated Constitution not only does not discuss the expression, it also fails to cross-reference its use, and only one of the four references is included in the index.<sup>11</sup>

No doubt a meticulous examination of both the Constitution and the steadily expanding literature dealing with it would reveal many other matters requiring explanation and analysis.

#### Other Matters

There are a number of other less fundamental matters that require brief comment:

- (a) the Table of Contents (at piv) is inadequate. Ideally, the Table of Contents should have included a page reference for each section of the Constitution. This is made all the more necessary because the useful index (pp557-596) is very lengthy, largely because it includes references to words and phrases. This makes it difficult to locate particular sections unless one is already familiar with the Constitution. As a minimum, the Table of Contents should have given page numbers for each of the 14 parts of the Constitution, for that would have made it easier to locate particular sections within the parts. In addition, as the existing Table of Contents consists of only one page, it would have been preferable for it to have been placed on a right hand page of the book, as this would have made it easier to find than is the case with the present left hand location;
- (b) there is no list of references included. The authors refer to several books, articles and reports (pp92, 111, 113, 141, 361 and 481). Other articles and books are referred to in some of the sections of text of judgments repeated verbatim in the book (pp205 and 249). A list of all references would have been helpful;
- (c) in general, cross-references between sections of the Constitution are hard to identify. As noted above, some appear under the heading 'Comment'. In

at least one case (at p280) a cross-reference appears under the heading 'Generally'. It would have been preferable to have a special sub-heading for cross-references;

- (d) there is inadequate cross-referencing. Amongst the provisions that should have been cross-referenced are s255 with schl.6, ss32 and 50 with s187D, s25 with s63, s50 with schl.20, s65 with s68(6), s109(4) with schl.5(2), and schs2.13 and 2.14 with s21(2);
- (e) S4(4), (in respect of an Act to make provision for the government of the National Capital District) should have been followed by a reference to the National Capital District Government (Preparatory Arrangements) Act ch392, which was passed in April 1982;
- (f) S187I, which refers to the Gazelle Peninsula Affairs (Temporary Provisions) Act 1973 should have been followed by a note to the effect that that Act was repealed by the Gazelle Peninsula Affairs (Temporary Provisions) (Repeal) Act 1977, nol4 of 1977;
- (g) the index is not complete. Amongst the words and expressions used in the Constitution but not included in the index are 'acting prime minister' (s134), 'fair and liberal' (schl.5(2)), 'fair, large and liberal' s109(4)), 'arms, departments, agencies and instrumentalities' (s214(2)), and 'justiciable' (s187D(2)). Further, the index refers to only one of the four places in the Constitution where the expression 'provincial services' is mentioned;
- (h) there are some typographical errors, including a mis-spelling of Garran (as in Quick and Garran) at pv, and the references to s104(c) at pages 272 and 326 which should be references to s104(2) (c). A more serious error appears on p66, where mistaken type setting has resulted in an apparent change of meaning to sub-s24(1). The last five lines of that sub-section have been made continuous with sub-para(b). In fact, those lines refer to both subparagraphs (a) and (b). So the mistake changes the whole meaning of the section. As sub-s4(1) is of fundamental importance to interpretation and application of the whole Constitution, this mistake is particularly unfortunate.

### CONCLUSIONS

The Annotated Constitution will find much use as a set of teaching materials. It will also be widely welcomed and much used by lawyers and judges as a source of references: to cases on particular sections of the constitution; to provisions of analogous international human rights laws; and to some sections of the CPC Report relating to particular provisions of the Constitution.

The authors' comparison of their work with Quick and Garran (1901) is unwarranted. Indeed, the Annotated Constitution has so many deficiencies that it is quite misleading to rely upon it as a guide to the origins of the Constitution. Much material available as aids to interpretation and application of particular provisions has been ignored. Thus, its value as a set of teaching materials must be seriously questioned, for it will tend to give students the entirely erroneous view that the Constitution was derived solely from the CPC Report.

Because of the publication of these materials in book form there may now be a danger that it will be difficult to convince publishers of the need for a more comprehensive analytical work. It is to be hoped that this will not discourage potential authors from carrying out the necessary detailed research on the origins and meaning of each section of the Constitution, for there is no doubt that Goldring's 1978 call for the Papua New Guinean equivalent of Quick and Garran has yet to be answered (Goldring, 1978 pvii).

## ENDNOTES

1. The most likely explanation for the lack of provision in respect of the Report by Watts and Tordoff (1974) in the Constitutional Documents (Manner of Proof) Act ch5 is that when that Act was passed in early 1976, the first amendment to the Constitution had not been passed. There was therefore no provision for a provincial government system in the Constitution. So presumably, the draftsman regarded the Report as irrelevant, even though it seems clear that it was tabled in the House of Assembly 'for the purposes or in connexion with' the debates on the CPC Report.
2. The records of debate appear in the normal edited volumes of Hansard, in respect of the Papua New Guinea House of Assembly, Third House, (vIII, nos32 to 44.)
3. Originally, a Government Paper entitled 'Proposals on Constitutional Principles' was tabled by Mr. M. Somare in the House of Assembly on August 16 1974 at the same time that he presented the CPC Report. After the former document was tabled, explanatory notes were circulated to Members. The document presented to the House on September 23 1974 was a consolidation of the Government Paper and the explanatory notes, and included some minor amendments. Because both documents were tabled for the purposes of or in connexion with the debates on the CPC Report, presumably sub-s24(1) makes them both available as aids to interpretation. Nevertheless, as there would be no relevance in comparing them, the issue is theoretical. The Constitutional Documents (Manner of Proof) Act ch5 deals only with the paper tabled on September 23 1974 (see s6).
4. Motions were passed by the House of Assembly in respect of each Chapter of the CPC Report as follows:
  - Chapter 1, September 30 1974 (HAD III (36) 4562);
  - Chapter 2, October 1 1974 (HAD III (36) 4603);
  - Chapter 3, October 1 1974 (HAD III (36) 4613);
  - Chapter 4, October 4 1974 (HAD III (36) 4658);
  - Chapter 5, October 15 1974 (HAD III (37) 4741);
  - Chapter 6, October 30 1974 (HAD III (39) 5135);
  - Chapter 7, November 27 1974 (HAD III (40) 5205);
  - Chapter 8, December 3 1974 (HAD III (41) 5309);
  - Chapter 9, November 25 1974 (HAD III (40) 5149);
  - Chapter 10, March 11 1975 (HAD III (44) 5740);
  - Chapter 11, November 25 1974 (HAD III (40) 5152);
  - Chapter 12, December 4 1974 (HAD III (41) (5333);
  - Chapter 13, December 3 1974 (HAD III (41) 5292);

Chapter 14, November 26 1974 (HAD III (40) (40)  
5163;  
Chapter 15, November 26 1974 (HAD III (40) 5163);  
Chapter 16, and Schedule, March 11 1975 (HAD (44)  
5742);

5. The motions referred to in note (4) above provided drafting instructions for the Constitution, which went through several drafts before an official draft (the Fourth Draft (1975), as discussed in note 6, below) was considered by the Constituent Assembly. That body was formed to debate and pass the draft Constitution and some of the Organic Laws. It met for the first time when the House of Assembly adjourned on May 23 1975. In announcing the adjournment, the Speaker said: "The work of the Constituent Assembly will be to enact the Constitution and whatever legislation that may come under it, to take this country to independence. Another job of the Constituent Assembly will be to break any ties which may exist between Papua New Guinea and Australia or any other country, so that we may draft our own legislation" (HAD III (45) 5811).
6. There were at least two versions of the Fourth Draft of May 10 1975. One was simply called "Fourth Draft of May 10 1975" and the other "Fourth Draft of May 10 1975 (renumbered and revised)". The sections in the former version are not numbered consecutively: instead the sections within each division and subdivision are numbered consecutively. From the page and section numbers of the Fourth Draft of the Constitution referred to by members of the National Constituent Assembly during the debate, it appears certain that the "renumbered and revised" version was the one that was tabled by Mr. M. Somare on May 25 1975. Section 1 of the Constitutional Documents (Manner of Proof) Act ch5 defines the draft Constitution as the "Fourth Draft (revised and renumbered) ... presented to the Constituent Assembly on May 29 1975".
7. Sections introduced in their present form during the Constituent Assembly debates were: s5 (Provinces) (NCAI p403); s7 (Oath of Allegiance) (ibid); s20 (Underlying Law and Pre-Independence Statutes) (ibid p355); s21 (Purpose of Schedule 2) (ibid p356); s30 (Other Authority) (ibid p169) s51 (Right to Freedom of Information) (ibid p319); s82 (Queen and Head of State) (ibid p357); s83 (Queen's Successors) (ibid); s106 (By-election) (ibid p423); s150 (Secretary to the National Executive Council) (ibid p270); s177 (Functions of the Public Solicitor and the Public Prosecutor) (ibid p324 and 325); s249 (Declaration by Certain Office-holders)

(ibid p361); s259 (Independent Tribunals) (ibid p159); subs260(2) (Membership of the General Constitutional Commission) (ibid p160); s268 (First Governor-General) (ibid p293); s274 (Composition of Certain Constitutional Institutions) (ibid p303 and 442); and s275 (Chairmanship of Tribunal to Review Internments) (ibid p442). The same is true of sch1.11 (Determination of Appropriate Authority) (ibid p312); sch3 (Declaration of Office) (ibid p317); sch4 (Judicial Declaration) (ibid p318); and sch5 (Adopted Laws of Other Countries) (ibid).

8. Ghai and Hegarty are incorrect in one detail: the Fourth Draft did in fact contain sub-s3 of s148, but it was not part of the earlier third draft.
9. Cross-references are at pp134, 138, 222, 498, 502, 530 and 541. Dates of cessation of effect of sections are noted at pp44, 46 and 238 (in relation to ss15, 17(9) and 68 respectively). Introductions to judgments are at pp4 to 5, 36, 66, 154, 190 and 337. Explanatory notes appear at pp45, 49, 69, 88, 163, 208, 278, 446, 480 and 499.
10. The same argument has been advanced by Goldring (1978 p 90).
11. In August 1984 (too late for inclusion in the Annotated Constitution) the expression 'provincial services' was the subject of judicial consideration in the Supreme Court's decision in SCR Nol of 1984; Re: Morobe Provincial Government v The Independent State of Papua New Guinea and Michael T. Somare [1984] PNGLR 212 at page 215.

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