SOURCES OF POLITICAL LEGITIMACY IN CONFLICT AND NATURALIZED FOREIGNERS: SOME COMMENTS ON THE GENERAL CONSTITUTIONAL COMMISSION'S FINAL REPORT, 1983

by

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I. INTRODUCTION

The Final Report of the General Constitutional Commission is a bold work. The Commission's terms of reference directed it 'to enquire into the working of the Constitution and Organic Laws and any other matter of a Constitutional nature'. The Commission took full advantage of that mandate. Its Final Report touched upon every subject dealt with by the Constitution in greater or lesser detail. It contains literally hundreds of both substantive and procedural recommendations. Whilst many of its recommendations can be described as 'technical'; (i.e. proposals designed to fill lacunae, and resolve ambiguities in existing laws) many others would, if implemented, significantly alter the texture of the constitutional law of Papua New Guinea.

These recommendations include some proposals which are certain to generate political controversy.

The attention of a critic will naturally fall upon such dramatic elements. This is perfectly justifiable. A modest report can be judged a success if it simply contains sound and practical technical recommendations. But a report which advocates fundamental changes is to be judged against a larger scale.

Yet there is a very real problem in this aproach. It tends to ignore the collective significance of the many technical recommendations. The Government, and ultimately the Parliament, will determine the Report's fate. This political process may result in the rejection of one or all of the more controversial recommendations of the Commission. The less controversial 'technical' elements of the report are conversely that much less likely to be rejected.

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That, however, is mere speculation. My approach has been to concentrate on two dramatic elements of the report: the Commission's recommendation that the National Goals and Directive Principles be made justiciable and its recommendations concerning citizenship.

Secondly, in doing so, I have tried to point out what I have perceived to be some important weaknesses underlying the Commission's approach to its task, rather than stressing my concurrence with those aspects of the report which I believe to be soundly based. The result is an idiosyncratic selective commentary which I hope will be interesting but which in no way purports to be comprehensive.

II. SOURCES OF POLITICAL LEGITIMACY IN CONFLICT

I propose first to examine the relationship between two of the Commission's principal recommendations, viz, that the National Goals and Directive Principles be made justiciable and that members of Parliament ought to lose their seats if (in certain circumstances) they change their party political allegiance.

The National Goals and Directive Principles express, generally consistently, a quite detailed 'political' programme. That programme was included in the Constitution with the intention that it would establish 'definite, widely known long term objectives' for Papua New Guinea's leaders to aim towards (Final Report of the Constitutional Planning Committee 1974, Part I Ch.2 p.1 para.3, hereinafter referred to as the C.P.C. Report).

The General Constitutional Commission proposes that these objectives be further developed (to incorporate principles aimed at ensuring local control over the economy, economic equality of citizens and a complete rejection of the use of nuclear weapons and participation in the nuclear fuel cycle) and made justiciable. The Commission explains this latter recommendation in the following terms:

> (Failures in implementing the National Goals and Directive Principles) have been obvious in every level of government... We consider this to be contrary to the spirit of the Constitution... Our proposal therefore stresses the need for positive steps to be taken to ensure that government actions and decisions are made or taken with full appreciation and application of our nation's ideals (General Constitutional Commission Final Report 1983 Ch.3, A2, pp.19-20, hereinafter referred as G.C.C. Report).

The Commission does not set out in any detail the legal implications of its proposal to make the National Goals and Directive Principles justiciable.

Presumably it intends that the National Goals and Directive Principles be redrafted in the form of self-executing laws and that ss.25(1),(2) and (4) of the Constitution be repealed.

If such was to be the case the National Goals and Directive Principles would then operate both so as to impose mandatory duties upon the various arms of government and so as to invalidate, to the extent of the inconsistency, all acts (whether legislative, executive or judicial) that were inconsistent with them.

Additionally, the Commission has proposed that non-compliance with the National Goals and Directive Principles should be a ground for the dismissal of the government or the holder of any leadership office. The mechanism proposed for such dismissals is expressed to be 'through existing legal means'. This may be a reference (in so far as the national government is concerned) to the further recommendation of the Commission that the Head of State be given authority to dissolve the Parliament in certain limited circumstances (G.C.C. Report Ch.6, A1, 2.3 p.86) but that would be at best an uncertain expedient. Generally it would seem that effective enforcement of this recommendation could not be assured through existing legal means but would require express consequential amendment.

I turn now to the derivation and content of the Commission's recommendations concerning party membership.

The Commission noted many electors were bitter about their member frequently changing his party. It concluded that the practice weakened the 'proper development of strong cohesive political parties' (G.C.C. Report Ch.7, A2, 2.10 p.117). In order to prevent erosion of 'our system of Parliamentary democracy based on strong political parties' (Ch.7, A2, 2.13, p.118) it recommended that a member of Parliament should lose his seat if he switched parties within the first twelve months following a general election or three times in three years thereafter.

Underlying this proposal is the assumption that Papua New Guinea ought develop along lines similar to those of the English system of responsible government.

That system (substantial elements of which have already been borrowed and incorporated into the structure of Papua New Guinea's constitution), notionally places unlimited legal powers in the hands of Parliament and of an Executive which is responsible to it. It is designed to allow the government to pass whatever laws it believes are in the best interests of the community. Popular control over this legally omnipotent government is exercised

through general elections. General elections offer the people a chance both to reject a government with whose policies they disagree and to elect a government which they support. A vital element in this process is the political party. It is through the party system that electors can participate in the choosing of a government in the course of choosing a local member. By that process general elections produce a government with a mandate, that is a vote of support for the policies on which it campaigned and on which it was elected. Once in power it will be expected to implement its policies. The idea of mandate is deeply embedded in the English system.(1)

The idea is less well embedded in the Papua New Guinean political system. As the Commission itself observed, 'a notable characteristic of our Parliamentary system of Government is the frequent changing of Party Alliances (G.C.C. Report Ch.7, A2, 2.9 p.116). Greater restraints upon the fluidity of party membership will of course facilitate the development of the notion of a mandate.

However, the existence of entrenched constitutional laws substantially predetermining the nation's political future would prevent the doctrine of mandate from working properly because it would (theoretically) stop government from implementing policies which it was elected to carry out. Essentially the ideas of mandate and of substantive limits on Parliament's powers to make policy are mutually exclusive. One can of course easily overstate the practical as opposed to the theoretical importance of this inconsistency.

In practice much would depend upon how firmly the National Goals and Directive Principles were to be entrenched. Unfortunately, upon this question the Commission is silent. However, in the absence of any express prescription to the contrary, it requires a two-thirds absolute majority vote of the Parliament to amend the Constitution (s.17(1) Constitution). That majority would be sufficiently difficult to obtain as to fairly raise the issue discussed by O'Brien in a different context.

> Questions (concerning the power to entrench) raise more than an interesting academic issue; they concern a fundamental principle relating to the continued vitality of democratic government. In a simple form the question can be put as to whether the "dead hand of the past" (should) be allowed to rule the present?... Whether the democratic choice of the electorate as between political parties and policies can be negated by the constitutional entrenchment of a contrary policy...(2)

But that is essentially a question outside the scope of this paper. What I desire to illuminate is the difficult position in which the courts may be placed if they have the duty of enforcing essentially ideological objectives.

Again it is easy to overstate the problem. So long as all political parties large enough to influence the formation and policy of government are actively committed to the implementation of the National Goals and Directive Principles, no clash between the rival sources of constitutional political legitimacy would be likely to eventuate. But how realistic is that scenario? Certainly it was not one which the CPC thought possible.

> Naturally, it will not always be possible to proceed in a straight line towards the achievement of the goals. There will be times of stress and difficulty when short-term measures to deal with particular situations will be necessary (CPC Report Ch.2 p.15 para.124).

Even that view may be thought over-optimistic.

Essentially the National Goals and Directive Principles embody principles of 'social democratic' thinking within a strongly nationalistic framework. It is, however, quite possible that political parties advocating a quite different role of the State (i.e. a free market philosophy) may be formed and command popular support.(3) Indeed the development of a strong party system will tend almost of necessity to encourage the development of parties with differing policy objectives. It is therefore by no means improbable that a party may be elected to government with a mandate at least significantly inconsistent with one or more of the National Goals and Directive Principles.

If such a party then seeks to implement its mandate it will come into conflict with the Courts.

To this it may be objected that such conflict is always a possibility whenever any constitutional freedom or liberty is entrenched and that such provisions already exist in the Constitution of Papua New Guinea.

My response to that objection is that there is much less likelihood of conflict between the judiciary and the legislature/executive over such basic rights provisions as are contained in ss.32 to 58 of the Constitution.

Disputes involving such provisions will often concern not the legitimacy of a government's policy, but rather (and only) the means of its pursuit.

Second, the Constitution is fairly clear about the powers of the respective organs of government in such instances. These rules themselves recognise the need for flexibility and the right of government to reulate all but the most basic of the citizen's rights. Such, however, would not be the case were the National Goals and Directive Principles to be made justiciable.

An attempt by the Court to exercise its authority in that area would necessarily involve a direct challenge to the legitimacy of the elected government's policy. Second, such review would involve the application of principles which in their nature are incapable of exact or even fairly clear definition.

To be fair, the Commission did pay some regard to the potential for conflict between the arms of government. Its consideration of this matter was however quite brief and is set out in full hereunder.

Enforcement

1.3 It has been argued that if the National Goals and Directive Principles are made justiciable, this will make the courts arbiters over ideals towards which our nation is expected to strive and the policies which are expected to be pursued by the Government, its agents and institutions to realize these goals. This will mean that the questions of enforceability or declarations on an act, (sic) be it of the National Executive Council, the Legislature, Government agents or institutions, is valid or not, would have to be decided by the Courts. If this situation is allowed to exist, constant hostility and confrontations between the National Executive Council and/or the Legislature on the one hand and the Judiciary on the other would be likely to prevail. It has also been argued that lawyers who preside over courts of law may not necessarily be competent judges in this area because the objectives of these provisions related to the policy area which the Constitution allocates to the government and not the courts. The proper function of the courts is one of dealing with substantive legal rights.

1.4 We appreciate these anxieties but are convinced that they can be overcome with proper arrangements for a more efficient administration of these ideals and greater consultations and understanding amongst all governmental bodies and institutions, of their roles in the light of the National Goals and Directive Principles. (G.C.C. Report, Ch.3, A2, 1.3 and 1.4 p.20).

This analysis raises more issues than it disposes of. What for example are the 'proper arrangements of a more efficient administration of these ideals' which will allow the 'anxieties' to be overcome? Even if the Supreme Court is supposed to 'consult' and try to reach an 'understanding' with the other arms of government what happens if the parties fail to agree? The Court would then be faced with the odious choice of either evading its constitutional duty to strike down an offending law or contesting the legitimacy of the popular mandate.(4)

The first option would be destructive of the stature and independence of the Court, the second option could lead to savage conflicts between the executive/legislature and the judiciary which might threaten the stability of the political system.

Government faced with such instability and/or a challenge to its legitimacy could well be tempted to respond (either formally or by force majeure) by amending the Constitution to exclude the Court from examining the constitutionality of any Act of the Parliament.

It would be a tragic irony if attempts to hold Government to a narrow and preordained course led either to the undermining of the simpler but crucial human rights clauses of the Constitution or to a decline in the independence and stature of the judiciary.

III. NATURALIZED FOREIGNERS

Citizenship is an internationally important matter. International law, however, recognises the prerogative of each State 'to determine for itself, and according to its own constitution and laws what classes of person shall be entitled to citizenship'(United States v. Wong Kim Ark (1898) 169 US 649 at 668 per Grey J.).

Independence created (broadly) two classes of citizens: 'automatic citizens' and 'citizens by descent' as contrasted to naturalized citizens. As a rough generalization automatic and citizens by descent were persons who could trace their descent through persons born in the country over a number of generations i.e. mainly the indigenous inhabitants.

Persons who were not automatic or descent citizens (i.e. the majority of expatriates) could acquire citizenship only by naturalization. The conditions for acquisition of Papua New Guinea citizenship were made stringent and were designed to exclude all but those who were genuinely concerned to advance the welfare and progress of the people and who were capable of contributing to the nation's development.

Applicants were required to demonstrate fluency in Pisin or Hiri Motu, to demonstrate respect for the custom and cultures of the country and to renounce any other citizenship. However, apart from s.65(5) which enabled the Parliament for a period of ten years after Independence Day to pass laws which positively discriminated in favour of automatic citizens, all classes of citizens were to have equal rights and obligations under the Constitution.

The General Constitutional Commission has proposed sweeping changes to that structure. It proposes further strict controls over the acquisition of naturalized citizen status. Applicants must ensure that their spouse and children also apply at the same time. Applicants must also be able to prove that they have been accepted and adopted by a Papua New Guinean community and that they identify themselves with that community. They must also have no business interests at all outside Papua New Guinea.

The Commission has proposed that persons who have already been naturalized should be deprived of their citizenship unless their spouse and children also apply for citizenship within the twelve months following the adoption of its recommendation.

It proposes that naturalized citizens should 'automatically' lose thier citizenship if they abuse that status, if they divorce themselves from the customary obligations of their adopted community or if they breach known customs of that community. It proposes that once lost, a naturalized citizen should be unable to regain his citizenship.

It also proposes that naturalized citizens be required to reside in the country for twenty years before being eligible to hold any elective or leadership office.

Finally, it proposes that there be a fifteen year moratorium on further applications for citizenship (after a transitional period of twelve months) during which period a full review of the citizenship laws would be undertaken including a 'thorough scrutiny of the activities of the already naturalized'. (G.C.C. Report Ch.4, A1, 9.15 p.65).

Underlying these recommendations are two main thoughts. The first is that naturalized citizens are not really and never really can become Papua New Guineans. This is made explicit in the following passage:

> ...we too believe that certain economic, political and social rights must be vested only in those who really belong to this country. The rights of naturalized citizens on the one hand and automatic citizens and citizens by descent on the other must be clearly discernable in these matters. The right to be elected to public office, the right to be appointed Chief Justice

> or to hold any other important public office, should not be a right for the naturalized citizen. (G.C.C. Report, Ch.3, A2, 4.33 p.45).

It is also implicit in a passage which equates 'naturalized citizen' with 'foreigner'

> In our proposal, we consider that a twenty (20) year residential qualification (before a naturalized citizen may seek election to office) is reasonable and would ensure that only true and genuine naturalized citizens take part in leading our nation and our people. We believe that a foreigner who has lived and worked with the people for at least twenty (20) years would have proven that his heart is with Papua New Guinea... (G.C.C. Report, Ch.7, A2, 2.5 p.114).

The second thought is that naturalized citizens pose a most important threat to Papua New Guinea's independent economic and social future.

> The tendency by outsiders to acquire citizenship primarily to protect local and foreign business interests was also pointed out to us. It was generally felt that because of this, many of our enterprising businessmen and women are forced into unfair disadvantages in their business ventures. Perhaps the most disturbing allegations are that of ousiders acquiring citizenship to secure positions of power, authority or influence in government and governmental bodies or to gain access to restricted rights and privileges.
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> Although we are unable to determine (sic) these complaints and allegations, they are nevertheless so serious as to require an upheaval of the citizenship laws... (G.C.C. Report, Ch.4, A2, 2.2 and 2.3, pp.66-67).

Similar concerns about the possibility of external domination are expressed by the Commission in other parts of its Report (See Ch.7, A2, 2.4 pp.113-114).

Naturalized citizens are therefore seen by the Commission as 'foreigners' and 'outsiders' who threaten to dominate Papua New Guinea for their own selfish ends.

There are two objections to that analysis. The first needs no detailed explanation. It is that the continued equation of 'naturalized citizens' to 'foreigners' and 'outsiders' is a repudiation of their adopted status. It is quite inconsistent with a commitment to a society in which all citizens are to have the same

rights, duties and obligations regardless of race, tribe, place of orgin, political opinion, colour, creed, religion and sex (Constitution s.55). Moreover it ignores that reciprocity of obligations which underlay the original C.P.C. recommendations concerning citizenship.

> Foreign citizens should have to demonstrate a strong commitment...before they can apply for naturalization. And, in admitting them to citizenship, we must recognise that our country is making a commitment to them (my emphasis) (C.P.C. Report, Ch.4, p.9 para.65).

The second objection is that it creates a false and distracting scapegoat. Doubtless there have been naturalized citizens who have placed their own self interest before that of the nation. It would be surprising, however, if that sin was restricted to such citizens. Yet individual self-seeking, individual wrong-doing by foreigners can be controlled. Structural economic forces are by contrast both less easy to control and more significant. The forces that lock Papua New Guinea into the 'developing' sector of the capitalist world are not generated by a handful of naturalized citizens. Capitalism has no particular affection for naturalized citizens. In the developing world it tends to create a comprador class from whatever elements of the domestic society that are available to it. Once created it will rely upon those people to suppress any national objectives which are contrary to its interests. It is that phenomena, the emerging comprador element (as agent for large corporate and multinational foreign interests) which may come to threaten the national objectives of Papua New Guinea. Focusing attention on the few naturalized citizens seems both unlikely to achieve anything of substance and very likely to distract attention from an examination of structural economic change, for good or ill, occurring within its economy.

IV. AN ASSESSMENT

It will be the fate of the G.C.C. Report to be compared with the Final Report of the Constitutional Planning Committee 1974. There is little doubt that by that standard it will not be judged a success.

Whilst my two part commentary does not attempt to be comprehensive, it has revealed a number of instances of lack of rigour in the aspects of the Commission Report examined. Unfortunately those instances are not isolated examples.

Indeed there are some surprising lapses of internal consistency within the G.C.C. Report which suggest there may have been some haste in its final drafting. For example at Ch.12, A2, 1.3 p.277, the Commission sets out its recommendation that the system of Organic Laws in the Constitution be 'done away with' but at Ch.12, B1, 1.1 p.280 (just three pages later), the Commission puts

forward the contrary view. In that latter passage it recommends that the special procedures and majorities prescribed for amending the Organic Laws be retained in the Constitution. It is surprising that such a direct inconsistency could have survived the editorial process and suggests that there may have been some haste or other problems in the Final Report's preparation.

It is also possible to cite a number of other instances of the Commission's lack of rigour, for example.

(a) Attorney-General

There is a reference to the Attorney-General at Ch.11, A1, 5.8, p.139. The office of Attorney-General neither exists presently nor is its creation recommended by the Commission;

(b) Sections 22 and 23

At Ch.12, 1.7, p.289 the Commission suggests that ss.22 and 23 'can usefully be omitted altogether from the Constitution'. It argues that the sections 'only add to the scope of public law remedies, what is already covered in such Section (sic) as 57, 58 and 155 of the Constitution'.

Whilst, arguably, that is so in the case of s.22(5) it is not correct in the case of s.23. Section 23 confers a criminal jurisdiction on the National Court. It enables that Court to punish a breach of a constitutional prohibition by the imposition of a term of imprisonment (not to exceed 10 years) or a fine (not to exceed K10,000) and/or the ordering of payment of compensation. Section 23(2) extends that jurisdiction so as to enable the Court to punish a breach of orders made to enforce constitutional rights by the same penalties as set out above. To omit s.23 would effectively decriminalise breaches of constitutional prohibitions. By way of illustration no criminal sanction would attach to the raising of unauthorized military or para-military forces contrary to s.200 of the Constitution.

It is no answer to this objection to argue, as the Commission may be supposed to have reasoned, that the raising of unauthorized forces is 'adequately overed by the Criminal Code of Papua New Guinea' (G.C.C. Report Ch.12, C2, 1.7 p.289). First, not all such prohibitions are replicated in the Criminal Code (i.e. the prohibition against the Minister for Defence assuming any military rank or title). Second, if it is thought fit to entrench provisions such as s.200 in the Constitution, then it is less than consistent to leave their enforcement to ordinary Acts of Parliament, capable of being amended or repealed by a simple majority.

(c) Section 41

Section 41 of the Constitution makes unlawful any act done under a valid law if that act is 'harsh or oppressive' or disproportionate to the 'particular circumstances of the particular case' or is not 'reasonably justifiable in a democratic society having proper regard for the rights and dignity of mankind'.

The Commission at Ch.3, II. C2, 1.5 p.56 reports as follows:

1.5. Section 41

> We can see a possible argument that this provision can only be invoked in relation to certain areas of the human rights provisions as was certainly the intention of the Constitutional Planning Committee.
>
> The provision also gives way to a possible conflict between the Parliament and the Judiciary. We propose that:-
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> (a) The provision be omitted altogether from the Constitution, or
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> (b) The provision be re-drafted with a view to clarifying its meaning and effect.
>
> We also recommend that, should this provision be retained in the Constitution, it must be amended in terms of Paragraph (b) above and relocated after Section 37.

Two criticisms may be made of these recommendations.

The first is that s.41 is neither ambiguous nor is its effect unclear. Although the meaning of the expression 'reasonably justifiable in a democratic society having a proper regard for the rights and dignity of mankind' is on first reading somewhat vague, it is comprehensively defined by s.39 of the Constitution and its meaning is not at all unclear.

In the one case, Tom Amaiu v. The Commissioner of Corrective Institutions(6) in which s.41 has been relied upon, Bredmeyer J. found no difficulty in its application.

The second criticism that can be made is that the Commission offers inadequate reasons to justify its suggestion that s.41 be abolished.

Although it may be true that s.41 could become a source of tension between the legislature or executive and the judiciary, the Commission fails entirely to evaluate the likelihood of such conflict and its potential significance or to weigh that factor against the importance of retaining s.41 as an integral element of the Court's armoury to enforce human rights.

The recent decision of Bredmeyer J. in Tom Amaiu's case(7) illustrates two points. First it confirms that the courts will, in appropriate cases, exercise their power under s.41 to review harsh and oppressive (but otherwise lawful) conduct and second, the mild response to the decision demonstrates that the other principal arms of government will not necessarily regard such judicial review as an affront to their own authority. Indeed, for the reasons I have advanced previously,(8) I suggest that the enforcement of the human rights provisions of the Constitution are much less likely to generate conflict than would the adoption of the Commission's own proposal to make the National Goals and Directive Principles justiciable.

(d) Customs and the Constitution

At Ch.12, A2 paras. 2.6 to 2.11 pp.278-279, the Commission criticises the courts for not taking into sufficient account the customs of the people. The Commission also criticises the legal profession for not doing enough to place evidence of custom before the courts.

Yet at Ch.13, A2, 3.18 p.297, the Commission recommends that references to custom in Schedule 2.1 (adoption of custom as part of the underlying law) should be restricted to that custom which is recognised throughout Papua New Guinea as a matter of fact and should not include local custom or custom that applies only to some or certain parts of the country.

No more effective way of entirely eliminating custom as a component of the law could be devised than the adoption of such a rule. The difficulty of proving the existence of a custom throughout the country which is followed 'as a matter of fact' by all the seven hundred language groups in the nation should have been self evident.

Summary

The above points are offered as examples of internal inconsistency and lack of rigour. They suggest to the author that there was insufficient attention given to the editing of the Report and that there was untoward haste in its final preparation. This textual hypothesis is given some support from a reading of Appendix B which contains the following passage:

> This (operation at full strength) was to be drastically interrupted by the "election fever" of 1982. The Commission's Secretary resigned and virtually all our Commissioners were busy with the elections. It was this year that the Commission came very close to halting its operations.
>
> To the time of writing and submitting of this report, the Commission has not recovered from the election interruptions. In fact at the end of 1982, the staff strength was reduced to one, the Legal Officer who was also acting Secretary (G.C.C. Report, Part II Appendix B p.3).

Other evidence of internal difficulties with funding and with additional terms of reference are described in Appendix B, Appendix C and Appendix G. (G.C.C. Report, Part III). Indeed if Appendix C is to be believed, the Commission did not meet between the 10th-14th February, 1982, and the Report's publication in March 1983.

Under such circumstances it is hardly surprising that some sections of the report are less 'worked through' than others.

One feels it is a great shame that the time, finance and a more settled political environment were not available to the Committee. I have, for the reasons I explained in my introduction, taken my task to be pointing out weaknesses rather than strengths of the Commission's Report.

Yet there are some real strengths, particularly the detailed technical work in Chapters 9, 11, and 19 and the bold assertive nationalism of Ch.6 which persuasively details the case for a citizen Head of State. It will be a matter of regret if the exposure of particular weaknesses in the Report leads to its entire rejection because there is much within the Report that warrants respect and close examination by the Parliament. One feels, however, that it could have been a much better report (and a greater vindication of the large resources that were put at its disposal between 1979-1981) had the Commission been given more time and resources in 1982-3 to finalize its work.

NOTES

1. In setting down this brief description of the derivation of 'mandate' I have borrowed heavily from comments made by M. Stokes in a public lecture delivered in September 1978 at the University of Tasmania entitled 'How to Reform Australian Federalism' now published under the same title in [1980] University of Tasmania Law Review p.277.

2. B.M. O'Brien. 'The Indivisibility of State Legislative Power' Vol.7 June 81 Monash University Law Review, p.244.

3. If all political parties were fully agreed upon the National Goals and Directive Principles then political choice would become rather insignificant. Would a one policy state be more democratic than a one party state?

4. If despite the obvious difficulties it is still desired to make the National Goals and Directive Principles justiciable then it would seem prudent to set about altering the political system. The idea of mandate is not congruent with that objective. Perhaps instead, thought could be given to adopting some variation of the American model. American government is designed in a way which encourges political parties not to present a specific programme to the electorate. Party alliances are weak and lack ideological consistency. Even Presidential candidates are unable to present a detailed programme, because their capacity to control the legislative process is quite limited. Such a system may be better able to accommodate (as a 'check or balance') enforceable goals as State objectives. At least there would be no conflict with that other source of political legitimacy, the mandate.

5. It is unfortunate that the Commission did not discuss or consider the technical implications of the repeal of these provisions upon the case law derived from their authority. See for example State v. Kwambol Embogol (1977 Unreported) N.91.

6. (1983 Unreported) N.417.

7. Ibid.

8. See at p.7 supra.