

Supreme Court Reference No. 3 of 1986; Reference by Simbu Provincial Executive

Supreme Court

Kapi Dep. C.J., Amet and Barnett JJ.

10 April 1987

Constitutional law - federalism - suspension of provincial government - requirement to hold fresh elections in province.

10 *Constitutional law - federalism - amendment of provincial constitution by National Parliament - repeal of same amendment by provincial assembly - vires of National Parliament to amend provincial constitution.*

Constitutional law - provincial government - section 97 of Organic Law on Provincial Government.

The Simbu Provincial Government was provisionally suspended by the National Executive Council, on 14 December 1984, under section 187E(1) of the Constitution. That suspension was confirmed by Parliament, on 22 August 1985. Prior to the confirmation, on 17 June 1985, the National Parliament extended the nine-month
20 suspension by another six months, so that the suspension would end on 14 March 1986. The suspended provincial government was restored to power on 12 May 1986.

During the period of suspension, the National Executive Council purported to amend the Simbu Provincial Constitution by making provision for new provincial elections during a suspension. A new paragraph (d) was added to section 28(1), so that section 28(1) read (in part):

(1) A general provincial election to the Simbu Assembly shall be held -

30 (d) if the Assembly is under suspension in accordance with the provisions of the National Constitution and the Organic Law on Provincial Government, if the Head of State, acting with and in accordance with, the advice of the National Executive Council so decides.

Upon its restoration, the Provincial Government purported to repeal paragraph (d) of section 28(1). The Simbu Provincial Government then sought and obtained an injunction restraining the Electoral Commissioner from conducting a provincial general election in Simbu province until a constitutional reference had been determined in the Supreme Court.

The following questions were referred to the Supreme Court:

40 Q.1 Does section 187F of the Constitution require that in all cases where a provincial government is suspended, fresh elections must be held before a provincial government can be re-established?

Q.2 In section 187F(1) of the Constitution, do the words "if necessary" refer to "fresh elections" and "fresh appointments" in the preceding sentence, or do they refer only to "fresh appointments" or do they refer only to "fresh

elections"?

- Q.3 If the Parliament under section 187F(3) of the Constitution fails to extend the suspension of a provincial government or where the Parliament fails to confirm a provisional suspension within seven sitting days of the Parliament following the tabling of a report from the Permanent Parliamentary Committee on Provincial Government Suspension under section 91B(2) of the Organic Law on Provincial Government, do the members of suspended provincial governments return to office?
- Q.4 If yes to Question 3, does the provincial government remain in office for a period up to the time of the next elections provided for by the Constitution of the province or do fresh elections have to be held in accordance with section 187F of the Constitution before that time?
- Q.5 Is the Head of State, acting on advice empowered to repeal or otherwise alter (except in accordance with its own provisions or by an Organic Law of the Constitution), a Provincial Constitution, and in particular does section 97 of the Organic Law on Provincial Government empower the National Executive Council to amend the Simbu Provincial Constitution?

HELD: The following answers were given by the Court to the five questions:

- (1) (Kapi Dep. C.J. dissenting). No, the provincial government is entitled to resume office with full authority and to run its full term of office: *l.* 730 per Amet J. and *l.* 1290 per Barnett J.
- (2) (Kapi Dep. C.J. dissenting). The words "if necessary" refer to both "fresh elections" and "fresh appointments": per Amet J. *l.* 780 and *l.* 1320 per Barnett J. [Ed. note: it follows from the majority answer to Question 1 that "fresh elections" may not be necessary.]
- (3) (Kapi Dep. C.J. dissenting). Yes, the members of suspended provincial governments do return to office where a suspension is not extended, or where the original suspension is not confirmed: *l.* 930 per Amet J. and *l.* 1370 per Barnett J.
- (4) (Kapi Dep. C.J. dissenting). The answer to question 3 being "yes", the provincial government, which has returned to office, is restored for the balance of its term, as determined by provincial law: *l.* 940 per Amet J. and *l.* 1400 per Barnett J.
- (5) Yes, the Head of State is entitled to amend a provincial constitution but (Kapi Dep. C.J. dissenting) the amendment process is subject to ratification by the National Parliament by a two-thirds absolute majority.

OBSERVATION: At least two other provinces sought to intervene in the reference: East New Britain and New Ireland were granted leave with respect to question 5.

Cases referred to in judgment:

Constitutional Reference No. 1 of 1977 [1977] P.N.G.L.R. 362

Kuberi Epi, In the matter of Tony Farapo (unreported, Supreme Court S.C. 247 1983)

Simbu Provincial Executive v. Electoral Commissioner of Papua New Guinea (unreported, Kidu C.J., 12 August 1987)

State v. Independent Tribunal, ex parte Sasakila [1976] P.N.G.L.R. 491

Legislation referred to in judgment:

The Constitution of Papua New Guinea, sections 22-25, 187, 228, 239.

The Organic Law on Provincial Government, sections 6, 11, 91 and 97.

Simbu Provincial Constitution

Simbu Constitutional Amendment Act No. 1 1986

Simbu Provincial Government Constitutional Amendment (Electoral Provisions) Law (1986)

100 **Other sources referred to in judgment:**

National Goals and Directive Principles (as referred to in section 25(3) of the Constitution of Papua New Guinea)

B. Narakobi for the Simbu Provincial Executive

P. Young for the Independent State of Papua New Guinea

K. Whimp for the Provinces of East New Britain and New Ireland (intervening re question 5 only).

KAPI DEP. C.J.**Judgment:**

110 This is a reference by the Simbu Provincial Executive, an authority which has standing to make a reference under section 19 of the National Constitution on any question relating to the interpretation or application of any provision of a constitutional law. It is useful to set out the circumstances which give rise to the reference. This will clarify the issues of law in the reference.

On 14 December 1984, the Simbu Provincial Government was provisionally suspended by the National Executive Council under section 187E of the National Constitution. This was confirmed by the National Parliament, presumably in accordance with the procedures set out under the provisions of the Organic Law on Provincial Government.

120 It would appear that the National Parliament came to the view that such a suspension would only last for a period of nine months from the date of provisional suspension by the National Executive Council. In my opinion, this is not a correct view and I will address this question later on in my judgment. Acting on this view, the National Parliament further extended the suspension of the Simbu Provincial Government for a period of six months. On this extension, the suspension would have expired on 14 March 1986. In fact, the National Parliament sought to further extend the suspension but that attempt failed.

Before the supposed expiry date of the suspension, the National Executive Council, purporting to act under section 97 of the Organic Law, amended the Simbu
130 Provincial Constitution, section 28, by adding a new paragraph:

(d). If the Assembly is under suspension in accordance with the provisions of the National Constitution and the Organic Law on Provincial Government, if the Head of State, acting with, and in accordance with, the advice of the National Executive Council so decides.

This amendment came into force on 4 March 1986 and on the same day, the Head of State on the advice of the National Executive Council decided pursuant to this amendment, that a general election be held in Simbu. In July 1986, the provincial government which was restored after the supposed lapse of the

140 suspension on 14 March 1986, further amended the Simbu Provincial Constitution by deleting paragraph (d) of section 28. On 13 August 1986, writs for the election were issued by the Electoral Commissioner.

By this time, suspension of the provincial government had supposedly lapsed and section 28(d) of the Simbu Provincial Constitution had been repealed. At this point in time, the Simbu Provincial Government then referred the questions to clarify certain constitutional questions. The Simbu Provincial Government applied for and was granted an injunction restraining the Electoral Commissioner from conducting a provincial general election in Simbu until this Court determines this reference. See *Simbu Provincial Executive v. Electoral Commissioner of Papua New Guinea* (unreported, Kidu C.J., 12 August 1986).

150 The questions referred are as follows:

- Q.1 Does section 187F of the Constitution require that in all cases where a provincial government is suspended, fresh elections must be held before a provincial government can be re-established?
- Q.2 In section 187F(1) of the Constitution, do the words "if necessary" refer to "fresh elections" and "fresh appointments" in the preceding sentence, or do they refer only to "fresh appointments" or do they refer only to "fresh elections"?
- 160 Q.3 If the Parliament under section 187F(3) of the Constitution fails to extend the suspension of a provincial government or where the Parliament fails to confirm a provisional suspension within seven sitting days of the Parliament following the tabling of a report from the Permanent Parliamentary Committee on Provincial Government Suspension under section 91B(2) of the Organic Law on Provincial Government, do the members of suspended provincial governments return to office?
- Q.4 If yes to Question 3, does the provincial government remain in office for a period of up to the time of the next elections provided for by the Constitution of the province or do fresh elections have to be held in accordance with section 187F of the Constitution before that time?
- 170 Q.5 Is the Head of State, acting on advice empowered to repeal or otherwise alter (except in accordance with its own provisions or by an Organic Law or the Constitution), a Provincial Constitution, and in particular does section 97 of the Organic Law on Provincial Government empower the National Executive Council to amend the Simbu Provincial Constitution?

At the hearing of the reference, Miss K. Whimp was granted leave to intervene as counsel for the East New Britain and New Ireland Provincial Governments. Leave was granted only in relation to Question 5.

180 Questions 1 and 2

Questions 1 and 2 need to be dealt with together. In order to give a proper interpretation to section 187F, the whole scheme insofar as it relates to the suspension and re-establishment of a suspended provincial government needs to be surveyed.

Section 187E of the National Constitution provides for suspension of a Provincial Government. This provision provides for two options.

First, a suspension under section 187E(1) of the National Constitution. The

190 procedure for the suspension under this option is provided for by sections 90, 91, 91A-91E of the Organic Law on Provincial Government. The practical effect of all these provisions is this:

- (a) The National Executive Council may initiate proceedings through the Minister for Provincial Affairs and consider the elements set out under section 187E(1) of the Constitution and determine whether it should suspend the provincial government. If grounds exist, it may suspend the particular government. Such a suspension is referred to by section 187E of the National Constitution as a provisional suspension. See also section 91A of the Organic Law on Provincial Government.
- 200 (b) The Minister shall make a report to the Speaker of the National Parliament.
- (c) The Minister then may move a motion to confirm the suspension of the particular provincial government in the Parliament. This must be done within the first seven sitting days of the Parliament following a provisional suspension.
- (d) The matter is then referred to the Permanent Parliamentary Committee on Provincial Government Suspensions for investigation and then report to the Parliament through the Speaker.
- (e) The Parliament then takes a vote on the motion within seven sitting days following the tabling of the report by the Parliamentary Committee.

210 The second option to suspend is set out under section 187E(4) of the National Constitution. Under this provision, the National Executive Council may suspend the particular provincial government directly if it is unable to carry out its functions effectively because of war or national emergency.

Period of suspension

There is no indication at all under section 187E of the National Constitution of the period of suspension under either of the options. The only provisions which appear to deal with the period of suspension are section 187F of the National Constitution and section 91E of the Organic Law on Provincial Government. Section 187F(4) of the National Constitution deals with a definitive suspension by the National Executive Council. In accordance with section 187F(4) of the National Constitution, such definitive suspension ends at the end of nine months after the end of the war or national emergency concerned.

Under section 91E of the Organic Law, where a motion to confirm provisional suspension is not passed within seven days of Parliament following the tabling of the report of the Parliamentary Committee, the provisional suspension lapses.

No similar provision is found in relation to a confirmed suspension under section 187E(1) of the National Constitution. Section 187F(1) deals with the holding of fresh elections and nominations to the Provincial Legislature within nine months. Section 187F(3) of the Constitution deals with the extension of time in which to hold elections. Its own terms do not deal with the extension of the period of suspension. Likewise, section 187F(2) of the National Constitution deals with the question of the nine months' period within which fresh elections are to be held. It does not deal with the period of suspension. The period of suspension with respect to a suspension under section 187E(4) of the National Constitution is separately dealt with under section 187F(4) of the National Constitution. In the absence of any provision limiting

240 the period of a confirmed suspension under section 187E(1) of the National Constitution, the legislature must have intended not to impose any limitation to the period of such suspension. It would appear from the scheme of this provision that the only way a confirmed suspension by the Parliament may come to an end is by fresh elections under section 187F(1) of the National Constitution or by the lifting of the suspension by the National Parliament under section 87(1) of the Organic Law. However, it is to be noted that the lifting of suspension under the provisions of the Organic Law does not affect the operation of fresh elections under section 187F of the National Constitution: see section 86 of the Organic Law.

I can now deal with Questions 1 and 2 more specifically in the light of the scheme of suspensions set out in the provisions.

250 Where a suspension is confirmed under section 187F(1) of the National Constitution, as in the present reference, that suspension remains unless it is lifted by the Parliament under section 87 of the Organic Law. However, when the confirmed suspension takes effect pursuant to section 92 of the Organic Law, elections must be held to re-establish the provincial government.

260 It is obligatory on the National Executive Council to take steps to re-establish the provincial government by fresh elections within the nine months of the provisional suspension. The period set out under section 187F(3) of the National Constitution is directed towards the re-establishment of the provincial government. If fresh elections are not held within nine months of the provisional suspension, the National Executive Council must seek, through the Parliament, an extension of the period of nine months for a further six months in which to conduct the elections to re-establish the provincial government. It seems to me to be clear from the provisions of the National Constitution, that once a suspension has been executed, fresh elections must follow. I hold this view because it appears that even where the Parliament has lifted the suspension of a provincial government, such a lifting of a suspension does not affect fresh elections to be held under section 187F(1) of the National Constitution: see section 86 of the Organic Law. In my view, authority to call fresh elections following a suspension of a provincial government comes from section 187F(1) of the National Constitution. There was no need for the National Executive Council to amend the Simbu Provincial Constitution to give itself the power to hold elections. In fact, under the new amendment to section 28 of the Simbu Provincial Constitution, the discretion to hold elections following suspension was given to the Head of State acting with the advice of the National Executive Council. This in fact is quite contrary to section 187F(1) of the National Constitution. As I have pointed out earlier, there is no question that following a suspension of the provincial government, this provision states that fresh elections shall be held. It is not left to the discretion of the Head of State acting in accordance with the advice of the National Executive Council.

270 In the light of what I have stated so far, I would interpret the words "if a provincial government is suspended" to mean "in the event that a provincial government is suspended". These words relate to a confirmed suspension by the Parliament under section 187E(1) and suspension by the National Executive Council under section 187E(4) of the National Constitution. The meaning of these words is different from the words "while a provincial government is suspended" as used in section 187E(5) of the National Constitution. It is mandatory for the National Executive Council, upon suspension, to organize fresh elections in accordance with

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the law and within the period stipulated or within such further extension which it may obtain through the Parliament.

290 The words "if necessary" can only relate to nomination of members to the legislature. The words implicate a discretion in some authority. Within the context of the interpretation I have given, that is, that fresh elections must be held and that the discretion to hold fresh elections is not given to any authority, these words can only relate to the nominations of members to the legislature as that is the only authority within the context of these fresh elections which has discretion to nominate members. In my view, these words cannot relate to the discretion to hold elections.

It is the clear intention of the Constitution that immediate steps must be taken to re-establish a suspended provincial government as quickly as possible through fresh elections. The time stipulated to do this is nine months. However, when this period begins to run, is different in each case (i.e. confirmed suspension by Parliament and direct suspension by N.E.C.). There is close scrutiny by the Parliament to ensure that this is done. In the case of suspension under section 187E(4) of the National Constitution, the Minister has to report on the measures taken to re-establish the provincial government: see section 187E(6) of the National Constitution.

300 The time in which elections must take place in the case of suspension under section 187E(1) is significance. Considering the fact that elections are required to be held within nine months from provisional suspension by the National Executive Council, the N.E.C. is to move swiftly after provisional suspension to have the matter before the Parliament for confirmation or otherwise. All this must be done so that there is time to hold elections in the given period. If time runs out, the Parliament can give a six months extension.

Similarly, the N.E.C. must move quickly to hold elections within nine months of suspension under section 187E(4) of the Constitution. Where there is extension of the war or national emergency, the commencement of the period of nine months in which to hold elections is governed by section 187F(2) of the Constitution.

310 In summary, the Constitution places upon the National Executive Council a duty to hold fresh elections to establish a provincial government under section 187F(1) of the National Constitution. That is a duty which may be enforced.

In the present case, the Simbu Province Government was suspended under section 187E(1) of the National Constitution. The N.E.C. should have acted quickly to re-establish the government under section 187F(1) of the National Constitution. As I understand the facts, the N.E.C. did not purport to arrange fresh elections under section 187F(1) but under an amendment to section 28 of the Provincial Constitution. As I have pointed out earlier in my judgment, I would have held this amendment contrary to section 187F(1) of the National Constitution. If the N.E.C. proceeded in the spirit of section 187F(1) of the National Constitution the Simbu Provincial Government would have been re-established within nine months from the date of the provisional suspension by the N.E.C. As it turned out, this was not done. But that is not the end of the matter. An extension of six months can be given by the Parliament under section 187F(3) of the National Constitution to hold elections. Now the Parliament actually got an extension of six months. With respect the Parliament acted under a wrong interpretation of section 187F(3) of the National Constitution. This provision does not deal with the extension of a suspension. It deals with the period within which arrangements may be made to re-establish the provincial government. If the Parliament extended this period with this

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interpretation, arrangements should have been made to hold fresh elections within that period. On the interpretation I have given on the period of suspension with respect to a confirmed suspension (s. 187E(1)), the thrust of section 187F(1) and (3) is to re-establish the government within the stipulated period and not to extend its suspension.

Question 3

This question assumes two situations:

- 340 (1) That a suspension expires after a period and the Parliament has power to extend but fails.
- (2) Where Parliament fails to confirm a provisional suspension under section 91B(2) of the Organic Law on Provincial Government.

The question is, would the members of the suspended provincial government return to office upon any one of the events taking place?

350 The first assumption is not correct when considered in the light of a confirmed suspension under section 187E(1) of the National Constitution. As I have held earlier on, there is no limitation to such suspension and no power has been given to Parliament to extend such a suspension. Section 187F(3) as I have already held relates to extensions of nine months for the purposes of fresh elections and appointments.

As it relates to direct suspension by the N.E.C., the assumption is to be considered in the light of section 187F(4) of the National Constitution:

187E(4) - The National Executive Council may suspend a provincial government that cannot carry out its functions effectively because of a war or of a national emergency declared under Part X affecting the province or the whole of the country.

360 This provision, unlike a confirmed suspension under section 187E(1) of the National Constitution, specifically fixes the period of suspension. Such suspension

- (a) ends by early termination; or
- (b) ends at the end of nine months after the end of the war or national emergency.

There is nothing in this provision which gives power to extend a suspension. There is also no provision in the Organic Law to extend such a suspension.

What then is the meaning of the words "subject to subsection (3) . . ."

370 These words will not have any significant if the N.E.C. organizes a fresh election within nine months as stipulated in section 187F(1) of the National Constitution. They have significance only if an election is not held within the nine months and if the Parliament has extended the period for the purposes of elections under section 187F(3). This means that even though a suspension has ended under section 187F(4), if there is a further six months given, the elections will be held in accordance with section 187F(1) of the National Constitution. In other words where suspension expires and there is an extension of six months to hold elections, the elections will be allowed under section 187F(1) to proceed. However, it would mean that members would return to office until the election is completed. The members

380 need to return. The N.E.C. can perform functions of the government while there is a

suspension. When suspension expires under section 187F(4), it can no longer perform any functions. See section 187E(5) of the National Constitution.

However, if there is no extension under section 187F(3) and elections are not held, and the suspension is allowed to expire under section 187F(4), the members return and retain their seats until the expiration of the term.

390 There would be no need for further extension of the suspension. The war or national emergency would be over by then. If there is a further need for an emergency declaration, that would be done under section 187F(2) – extend the declaration and the period will run from the end of the meeting. If there was a further outbreak of war, the process would repeat itself under section 187(4) of the National Constitution. Sections 187(4) and (3) are concerned with bringing the suspension to an end, not extending it.

400 In answer to the first part of the question, while suspension is under section 187F(1) of the National Constitution, there is no need for an extension of suspension because it is permanent. The powers of provincial governments are exercised by the N.E.C., section 187E(5). The N.E.C. must establish government by fresh elections under section 187F(1). If it cannot do so within nine months, it should apply for further periods of six months in which to conduct elections. Where the member comes before the Parliament for extension of the period for the purposes of fresh elections, the Parliament is faced with the option of

- (a) either giving six months extension, in which case a new government would be re-established; or
- (b) if they failed to give the extension, the N.E.C. will continue to exercise the powers of the provincial government under section 187E(5).

Whatever happens, the suspended members can not return to office. This is consistent with the view that it would be wrong to return members to office if they are found to be guilty of one of the considerations under section 187E(1).

410 However, this is not the same for suspension under section 187E(4). The reasons for suspension are beyond the control of the government. Where these reasons are no longer in existence, the members may return to office if there is no election held. It is for this reason, that there is a definite period given for the suspension. The Constitution makes a clear distinction.

The second part of Question 3 relates specifically to the failure of the Parliament to confirm a provisional suspension. This part of the question has no relevance to a suspension under section 187E(4) of the National Constitution.

420 Where there is a failure to confirm a provisional suspension under section 91B(2) of the Organic Law, the provisional suspension lapses and the members of the provincial government must return to office. There is no suspension within the meaning of section 187F(1) of the National Constitution and the question of fresh elections does not arise.

Question 4

It is clear from Question 3 that this question can only have relevance to a direct suspension under section 187E(4) of the National Constitution. Where elections are conducted within the nine months as stipulated under section 187F(1), a new elected government is returned.

However, if there is no election held within the nine months and there is a further

430 six months given to conduct the election and the suspension expires under section 187F(4) of the National Constitution, the members return to office. Section 187F(4) is subject to the extension under section 187F(3), they will serve until the elections are completed.

If however, there is no election at all, then members return to office and remain until their term expires under the law.

Where there is a confirmed suspension under section 187E(1), the question does not arise because as I have held, they cannot return to office. However, if the provisional suspension is not confirmed in Parliament, the government returns and they serve the balance of the term.

Question 5

440 Section 187C(1) of the National Constitution delegates the power to "make provision in respect of the constitution, powers and functions of a provincial government" to an Organic Law.

As far as alteration of a provincial constitution is concerned, section 11 of the Organic Law provides as follows:

11. ALTERATIONS OF PROVINCIAL CONSTITUTIONS.

Subject to this Organic Law and to section 100(3) (*Exercise of the legislative power*) of the National Constitution, the constitution of a province may be repealed or otherwise altered only –

- 450 (a) in accordance with its provisions; or
(b) by an Organic Law.

Section 6 of the Simbu Provincial Constitution provides for ways in which the provincial constitution may be altered. It may be altered:

- (a) by the National constitution;
(b) by an Act of the Simbu Assembly.

460 The issue raised in this case relates to alteration of the provincial constitution by an Act of the Assembly. Section 6(2) to (8) of the Simbu Provincial Constitution sets out the procedure to be carried out by the Assembly. That is the proper procedure to be carried out while the Assembly is in existence.

However, we are concerned with the power to amend the Provincial Constitution while the government is suspended. The procedure set out under section 6(2) to (8) of the Provincial Constitution is not applicable. The Provincial Constitution makes no provision for exercise of these powers while the government is suspended. This matter is specifically covered by section 97 of the Organic Law. The relevant words which call for interpretation are,

470 97...

- (1) While a Provincial Government is suspended, the national Executive Council has and may exercise and perform, subject to subsection (2), all the legislative powers, functions, duties and responsibilities, of the provincial legislature.

The question is whether, an Act to alter the Provincial Constitution is a legislative power, function, duty and responsibility of the provincial legislature. The answer to the question is clear; alteration of the Provincial Constitution is done by an ordinary

Act of the Simbu Assembly – see section 6(1) of the Simbu Provincial Constitution.

480 All legislative powers without exception are given to the National Executive Council. That is the clear expressed intention of the legislature. If the legislature intended to exclude power to alter the Provincial Constitution, it would have said so. The words are all inclusive and clear. There can be no other presumed intent of the legislature in this matter.

This interpretation is not in any way contrary to section 11 of the Organic Law. Section 11 is made "Subject to this Organic Law". That is to say, the Organic Law may provide for other ways of altering the Provincial Constitution. Section 97 of the Organic Law is an expressed provision for the alteration of the Provincial Constitution during the period of suspension of the provincial government. Exclusive
490 methods of alterations of the Provincial Constitution by section 11 are made subject to section 97. They are to be read together. In summary, while a provincial government is suspended, its constitution may be altered by,

- (a) an Organic Law – section 11(b) of the Organic Law on Provincial Government.
- (b) the National Constitution – section 6(1) of the Provincial Constitution; or
- (c) the National Executive Council in accordance with section 97 of the Organic Law on Provincial Government.

500 My answer to the questions would be as follows:

Q1. Yes the National Executive Council has a duty to re-establish a provincial government by fresh elections under section 187(F) of the National Constitution.

Q2. They refer only to fresh appointments.

Q3. Suspended members with respect to a suspension under section 187E(1) of the National Constitution can not return to office under any circumstances. Fresh elections must be held. With respect to a suspension under section 187E(4) of the National Constitution, if a suspension expires under
510 section 187F(4) of the National Constitution but there is an extension to hold elections under section 187F(3) of the National Constitution, members return to office and will hold office until the elections are held under section 187F(1) of the National Constitution. If there is no election, for the reason that the N.E.C. was unable to hold elections within nine months and there is a failure to get an extension of a six months period under section 187F(3) of the National Constitution, the members return to office until the end of their term.

Q4. See answer to Question 3.

Q5. The National Executive Council may alter the provincial constitution under
520 section 97 of the Organic Law on Provincial Government.

AMET J.

This is a special constitutional reference pursuant to the Constitution by the Simbu Provincial Executive, seeking an opinion on several questions relating to the interpretation of several constitutional provisions which relate to suspension of provincial governments.

A chronology of the factual sequence of events and decisions would be useful to understand how these questions have arisen. These were as follows:

- 530 (a) On 14 December 1984, the Simbu Provincial Government was provisionally suspended by the National Executive Council under section 187E(1) of the Constitution;
- (b) On 17 June 1985, the National Parliament extended the suspension for a period of six (6) months;
- (c) On 22 August 1985, the National Parliament confirmed the suspension;
- (d) On 20 February 1986, the National Executive Council decided to advise the Governor-General as Head of State to make a law to amend the Simbu Constitution under section 97 of the Organic Law on Provincial Government, by adding a new subsection 28(1)(d);
- 540 (e) Also on 20 February 1986, the National Executive Council decided to advise the Governor-General under the new section 28(1) to be of the Simbu Constitution to –
- (i) declare that Simbu Provincial Government elections be held; and
- (ii) to instruct the Electoral Commission to conduct the elections.
- (f) (i) On 4 March 1986, the National Executive Council advice to the Governor-General to amend the Simbu Provincial Constitution was signed by the Chairman of the National Executive Council, Mr Wingti, the Prime Minister.
- (ii) On 4 March 1986, the Governor-General signed the amendment to the Simbu Provincial Constitution by the addition of a new subsection
- 550 28(1)(d).
- (iii) On 4 March 1986, Mr Wingti, as Chairman signed the National Executive Council Advice to the Governor-General that on 20 February 1986, the National Executive Council decided to advise the Governor-General that under section 28(1)(d) of the Constitution of Simbu (as amended), the Governor-General should decide that a general provincial election of Members to the Simbu Provincial Government shall be held; and to instruct the Electoral Commission to conduct the general provincial election to the Simbu Provincial Assembly.
- 560 (iv) Also on 4 March 1986, the Governor-General signed two other documents giving effect to these two advices from the National Executive Council; a decision that general provincial elections shall be held and instructions to the Electoral Commission to conduct the general provincial election.
- (g) On 14 March 1986, a motion in the National Parliament for a further extension of the suspension failed to receive the required absolute majority vote.
- (h) The provincial government was automatically restored to office on 12 May 1986.
- 570 On 8 July 1986, the Simbu Provincial Assembly passed the Constitution Amendment Act No. 1 1986 repealing the new subsection section 28(1)(d) which the Head of State had signed into law.

The conflicts have thus arisen between the effects of the constitutional provisions, section 187E, section 187F and the Organic Law on Provincial Government, sections 11, 13 and 97, as to whether the general elections for the provincial governments can

still proceed, notwithstanding the reinstatement of the provincial government. A number of anomalies become apparent in these circumstances. First it took eight months from the provisional suspension on 14 December 1984 to 22 August 1985 for the National Parliament to confirm the suspension. One can only assume that that is how long it took the Permanent Parliamentary Committee on Provincial Government Suspensions to have made its investigations and report under section 91 of the Organic Law. That is a long time. However, there does not appear to be any time limit upon the enquiries and investigations of the Committee and conceivably the Committee can take more than nine months to conduct its investigations and report. Secondly, on 17 June 1985, prior to the confirmation on 22 August 1985, the National Parliament extended the suspension for six months, seemingly to comply with the Constitution, section 187F(1) and (3). The third and the most glaring anomaly which in my view is a blatantly unconstitutional and unlawful course, either made consciously or subconsciously, are the several decisions made by the National Executive Council on 20 February 1986, advices which were signed by Mr Wingti the Prime Minister as Chairman of the National Executive Council and given to the Governor-General on 4 March 1986. This is that on 20 February 1986 the National Executive Council decided to advise the Governor-General to make the Simbu Provincial Government Constitutional Amendment (Electoral Provisions) Law to amend section 28(1) of said Constitution to add a paragraph. (d) This amending law was signed into effect by the Governor-General on 4 March 1986. Also on 20 February 1986 the National Executive Council purportedly decided to advise the Governor-General under the intended amended provision section 28(1)(d) of the Simbu Provincial Constitution, to decide that a general election to the Simbu Provincial Assembly be held and to instruct the Electoral Commission to conduct the general provincial election. Section 28(1)(d), as it was later signed into law, read as follows:

- (1) A general provincial election to the Simbu Assembly shall be held -
 - (d) if the Assembly is under suspension in accordance with the provisions of the National Constitution and the Organic Law on Provincial Government, if the Head of State, acting with and in accordance with, the advice of the National Executive Council so decides.

The fact of the situation on 20 February 1986, when the National Executive Council purportedly made that decision under section 28(1)(d) was that there was no section 28(1)(d) of the Simbu Provincial Constitution in existence at the time. The National Executive Council decision of 20 February 1986 was therefore ultra vires, and consequently the instruments signed by the Governor-General on 4 March 1986 were both unconstitutional. Additionally, there is no record nor any evidence that the amending law when signed by the Head of State on 4 March 1986, was tabled in the National Parliament, as soon as practicable after it was made, and confirmed by a resolution of the Parliament, as required under section 97(2)(b) and (c) of the Organic Law on Provincial Government.

There were two defects then in that purported decision under section 28(1)(d) by the National Executive Council. First, as at 20 February 1986, the Governor-General had not yet been advised to make the amending law nor had he signed the law into effect. Later, on 4 March 1986, the Governor-General did sign such a law. Furthermore, there was no evidence nor any documentation that the law signed by

the Head of State was subsequently confirmed by the National Parliament as required under section 97(2) of the Organic Law. There was not in evidence the Speaker's certification to that effect. This requirement is in mandatory terms to ensure stringent control by Parliament over lawmaking during any suspension and in the general spirit of strict constitutional Parliamentary accountability and responsibility over any suspension. If such a law made by the Head of State acting with, and in accordance with, the advice of the National Executive Council is not tabled in the National Parliament as soon as possible after being made, and confirmed within seven sitting days of Parliament, then the law expires.

Question 1

Does section 187F of the Constitution require that in all cases where a provincial government is suspended, fresh elections must be held before a provincial government can be re-established?

There are two types of suspension of provincial governments under section 187E of the Constitution. The first under subsection (1); where:

- (a) there is wide-spread corruption in the administration of the province; or
- (b) there has been gross mis-management of the financial affairs of the province; or
- (c) there has been a break-down in the administration of the province; or
- (d) there has been deliberate and persistent frustration of, or failure to comply with, lawful directions of the National Government; or
- (e) the provincial government has deliberately and persistently disobeyed applicable laws, including the National Constitution on Organic Law, the Provincial Constitution or any national legislation applicable to the province,

the National Executive Council may provisionally suspend the Provincial Government concerned, subject to confirmation by a simple majority vote of the Parliament.

The second is under subsection (4); where:

The National Executive Council may suspend a provincial government that cannot carry out its functions effectively because of a war or of a national emergency declared under Part X affecting the province or the whole of the country.

It is to be noted that a section 187E(1) suspension is provisional only and subject to confirmation by a simple majority vote of the Parliament, whilst a section 187E(4) suspension is a definitive one. Subsection (2) provides that:

An Organic Law may make provision for and in respect of the procedures to be followed in the exercise of the powers under subsection (1).

The Organic Law on Provincial Government is the Organic Law, which in Part XII provides the machinery and procedures for the suspension of provincial governments.

Just as section 187E provides for two types of suspensions, section 187F also

provides for the re-establishment of provincial governments suspended under either situation. The provisions of the subsections render consistency to this. The section reads:

- (1) Subject to Subsections (2) and (3), if a provincial government is suspended arrangements shall be made to re-establish it and to hold fresh elections and make fresh appointments (if necessary) to the provincial legislature within nine months from the effective date of the provincial suspension under Section 187E(1) (*suspension of a provincial government*) or of the definitive suspension under Section 187E(4).
- (2) Subject to Subsections (3) and (4), where -
 - (a) a provincial government is suspended under Section 187E(4) (*suspension of provincial governments*) as a result of a declaration of a national emergency under Section 228 (*declaration of national emergency*); and
 - (b) the declaration is extended under Section 239(3) (*parliamentary control*),
 the period of nine months referred to in Subsection (1) runs from the end of the meeting (or if there are more such extensions than one the last meeting) of the Parliament at which the declaration is so extended.
- (3) A period of nine months referred to in the preceding provisions of this section may be extended by periods, each not exceeding six months, by the Parliament by an absolute majority vote.
- (4) Subject to Subsection (3), where a provincial government is suspended under Section 187E(4) (*suspension of provincial government*) the period of suspension, unless earlier terminated, ends at the end of nine months after the end of the war or national emergency concerned.

It is thus clear that the phrase "if a provincial government is suspended" under section 187F(1) refers to both suspensions under section 187E(1) and (4).

It is also my view that the section 187E(1) suspension referred to is a "confirmed suspension" provided for by the Constitution, section 187E(1), and section 91B(2) and (3) of the Organic Law. A section 187E(4) suspension, of course, is a definitive one at the outset. Section 187F does not refer to a "provisional suspension" under section 187E(1) because quite obviously if a provisional suspension is not confirmed by Parliament, then the suspension lapses, and the provincial government is restored to office, pursuant to section 91E of the Organic Law. It is thus not necessary to re-establish a provisionally suspended provincial government by fresh elections and fresh appointments as the case may be.

It is worth noting that the Organic Law has provided for ample machinery of checks and balances to ensure that the interests of the provincial governments are protected. Under section 90 of the Organic Law the Minister responsible reports to the National Executive Council on any matters which appear to constitute a ground or grounds for suspension of the provincial government. Section 91 requires the National Executive Council to consider such reports and it may cause the Minister to make further enquiries. Then under section 91A the National Executive Council may provisionally suspend a provincial government, after considering the Minister's report/s, and is of the opinion that a ground/s for suspension exist/s and the matter can only be put right by suspension. After the provisional suspension the Minister is

required by section 91B to forward to the Speaker of the National Parliament for presentation to the Parliament, all reports, explanations and the National Executive Council decisions, which are then referred to the Permanent Parliamentary Committee on Provincial Government Suspensions under section 91C, following a motion to confirm the provisional suspension under section 91B(1)(b). The committee is empowered to carry out an independent investigation into the matters raised giving rise to the provisional suspension and to report back to the Parliament through the Speaker: section 91C.

The effect and purpose of these elaborate investigative and reporting requirements, prior to the provisional suspension and the confirmation by Parliament, is to give effect to the spirit of the Constitution as expressed by the Constitutional Planning Committee, "that provincial governments should be suspended only in the most serious of circumstances, and even then as a last resort."

In my view therefore, if a provisional suspension is not confirmed following investigation and report by the committee, then the provincial government should be restored to office with full authority and power to run its full course and duration. The assumption for a mere simple majority vote being required for confirmation of the provisional suspension is that after the report by the Minister to the National Executive Council which leads to the provisional suspension one would expect there to have been strong grounds, so that an independent committee enquiry might also be expected to support it, thus it would only be necessary for a simple majority to confirm the provisional suspension. However, if the Government cannot muster a simple majority support to confirm the suspension, then the provincial government is entitled to resume office with full authority and to run its full term of office.

On the other hand when a provisional suspension is confirmed, it is my view that elections must be held "within nine months from the effective date of the provisional suspension". If it is not possible to so hold elections within that period, then an extension or extensions must be obtained under section 187F(3), by the required absolute majority vote. If the Government fails to obtain the absolute majority support of the Parliament, then I consider the same consequences follow as in the failure to get a simple majority vote to confirm a provisional suspensions, and that is, that the provincial government is restored to office with full authority and to run its full term.

I would thus answer the question: NO.

Question 2

In section 18F(1) of the Constitution do the words "(if necessary)" refer to "fresh elections" and "fresh appointments" in the preceding sentence, or do they refer only to "fresh appointments" or do they refer only to "fresh elections"?

As I discussed in answer to Question 1, my view is that the suspension referred to in section 187F(1) refers to both a section 187E(1) and a section 187E(4) suspension. Section 187E(4) provides that:

The National Executive Council may suspend a provincial government that cannot carry out its functions effectively because of a war or of a national emergency declared under Part X affecting the province or the whole of the country.

780 Section 187F(4) provides that a section 187E(4) suspension, unless earlier terminated, ends at the end of nine months after the end of the war or national emergency concerned. Reading these two subsections together it is quite apparent that a section 187E(4) suspension is because of a war or a national emergency and not because of any fault on the part of the provincial government. Thus a section 187F(4) suspension permits orderly re-establishment of the provincial government, by restoring the provincial government if its term of office is still current. If its term has expired then it would be necessary to hold fresh elections or if some members were not able to resume their seats through death, then by-elections would be necessary, or if appointments to various positions and offices were necessary then that would be the course to follow.

On the other hand under a confirmed section 187E(1) suspension, if fresh elections were to be held then that would follow. If, on the other hand a section 187E(1) confirmed suspension is lifted pursuant to section 87 of the Organic Law, which provides that a section 187E(1) suspension may be lifted by the Parliament by an absolute majority vote, then it may be considered only necessary to make fresh appointments.

My answer to this Question is that the words "(if necessary)" refer to both "fresh elections" and "fresh appointment".

790 **Question 3**

If the Parliament under section 187F(3) of the Constitution fails to extend the suspension of a provincial government or where the Parliament fails to confirm a provisional suspension within seven sitting days of the Parliament following the tabling of a report from the Permanent Parliamentary Committee on Provincial Government Suspensions under section 91B(2) of the Organic Law on Provincial Government, do the members of the suspended provincial government return to office?

Section 187E(1) suspension

800 Confirmation by the Parliament of the provisional suspension by the National Executive Council is by a simple majority vote. This is given effect to by section 91B of the Organic Law. If the motion to confirm suspension is unsuccessful then the logical consequence is that the provisional suspension lapses and the provincial government is restored into full and effective existence under section 91E of the Organic Law, which states that:

Where a motion under Section 91B(b) has not been passed within the first seven sitting days of the Parliament following the tabling of a report from the Permanent Parliamentary Committee on Provincial Government Suspension as provided in Section 91C, the suspension lapses.

810 Again, the effect of this is that the provincial government is restored into office.

These are the effects of non-confirmation of a provisional suspension. As noted, confirmation is only by a simple majority, which in my view suggests that it was intended to make it relatively easy to confirm a provisional suspension. One would expect that by this stage all the checks and balances would have been gone through and the reports if supportive of suspension would be persuasive such that confirmation should be relatively easy. On the other hand if a mere simple majority

cannot be obtained then that may be indicative conversely of lack of support and persuasion for suspension. In this spirit then it would be just that a provincial government should be restored to full capacity if provisional suspension is not confirmed.

In relation to confirmed suspension section 187E(5) and (6) provide that:

- (5) while a provincial government is suspended, its powers and functions are vested in and shall be exercised by or on behalf of the National Executive Council, in accordance with an Organic Law.
- (6) where a provincial government is suspended –
 - (a) in the case of a suspension under Subsection (4), the Minister responsible for provincial affairs shall, as soon as practicable and in any event not later than the first meeting of the Parliament after the suspension, table in the Parliament a report on the suspension, the reasons for it and the circumstances of it; and
 - (b) at each meeting of the Parliament during the suspension the Minister responsible for provincial affairs shall report to the Parliament on the measures taken to re-establish the provincial government.

We find in the Constitutional Planning Committee Report the following expressions of intentions behind the provisions:

The National government should take over all of the responsibilities of a suspended provincial government with the aim of restoring it as soon as possible ... Fresh elections should be called within six months of the suspension of a provincial government, and should be held within the following three months.

The National Parliament should have the power to extend the period for which a provincial government is suspended by six months at a time, provided that an absolute majority of members support a motion to that effect. If the period of suspension is extended, the Minister responsible for provincial government affairs should make a full report to each successive meeting of the National Parliament on the state of affairs in the province until such time as he is able to report that the provincial government concerned has been re-established.

Every effort should be made to restore a province in which the government has been suspended to normal as soon as possible.

The spirit of these provisions is that once it was found necessary to suspend a provincial government, a power which is to be exercised as a very last resort measure, then the national government must take all steps necessary to restore or re-establish it into effective operation once again within prescribed time limits.

Section 187F provides the directions and the time limits within which to re-establish suspended provincial governments. As I have discussed in answer to Question 1, it refers to a confirmed section 187E(1) suspension and a definitive section 187E(4) suspension because of war or national emergency. A war is declared under section 227 and a national emergency under section 228. Section 229 on "Termination of periods of declared national emergency" provides that:

A declaration of war or of a national emergency may be revoked at any time –

- (a) by the Head of State, acting with, and in accordance with the advice of the

- National Executive Council; or
(b) by decision of the Parliament.

Section 239(3) provides that:

870 Unless earlier revoked, a declaration of a national emergency expires at the end of the period of 21 days after its making, but may be extended from time to time by decision of the Parliament by an absolute majority vote, for a period or periods each not exceeding two months.

A declaration of National Emergency under section 228 would expire at the end of twenty one days, but may be extended from time to time by decisions of the Parliament by an absolute majority vote, for periods not exceeding two months at a time; pursuant to section 239(3), so that for the purposes of section 187F(1) the period of nine months runs from the end of the last meeting of Parliament at which the declaration is extended. Whilst the national emergency keeps being extended by
880 two months at a time, the period of nine months keeps running.

Under section 187F(4) a suspension for war, would, unless earlier terminated, end at the end of nine months after the war ended. So that the national government had nine months from the end of the way to make arrangements to re-establish the provincial government by holding fresh elections and/or making fresh appointments as necessary. This is subject to section 187F(3) which enables the national government to obtain an extension of periods not exceeding six months.

I consider therefore, that pursuant to section 187F(4), where a section 187E(4) suspension has not been earlier terminated, if the national government fails to obtain an absolute majority vote by Parliament for extension of suspension, the
890 provincial government is restored to office. The government is re-established, and if it is necessary to hold any elections to replace deceased members or make any appointments, as the case may be, then that can happen without the need to hold a full fresh election.

I consider that this must be the effect of section 187F(4) in respect of a section 187E(4) suspension, if a section 187F(3) extension is not obtained.

Confirmed section 187E(1) suspension

I consider that the same rationale must follow a section 187E(1) suspension if a section 187F(3) extension is not obtained. If the national government is not able to obtain an absolute majority vote by Parliament to extend the suspension to enable it
900 to continue making arrangements to re-establish the provincial government, then the provincial government must be restored to full existence.

The time limit stipulated under section 187F(1) applies equally to a section 187E(1) and a section 187E(4) suspension. A section 187F(3) extension applies to both. I cannot read the section 187E(1) time limit of nine months within which to make arrangements to re-establish a suspended provincial government as applying only to a section 187E(4) suspension. It clearly does not. It would also render section 187F(1) and (3) quite meaningless and pointless if, the national government were not able to muster an absolute majority vote to extend the suspension, yet no consequences flow from that and the suspension continues ad
910 infinitum. This construction is quite contrary to the spirit of the Constitution. The rationale for these provisions is to protect the interests of the province the provincial government is to serve, so that if it was necessary to have suspended a provincial

government, then every effort must be made to restore it, and Parliament has stipulated stringent guidelines within which this is to be done. A fetter is imposed upon the national government's discretion to move the suspension of a provincial government, that the Parliament controls the continued suspension and when it should be restored. The Constitution has stipulated the will of the people to be that there should be a time limit to the suspension. Further evidence of this fetter to discretion to suspend is that any motion to extend a suspension must be supported by an absolute majority of members of Parliament. Whereas the motion for confirmation of suspension is by a simple majority vote of Parliament only, it is not without significance and consequence that the motion for extension should be passed by an absolute majority vote. It is a strong indication to the national government that it cannot deal with suspensions lightly and expect easy extensions, without any consequences. The logical consequence of the failure to muster an absolute majority vote to extend the suspension, by inference, must be that the provincial government is restored into full existence.

My answer to Question 3 therefore is this - Yes, the failure to extend the suspension under section 187F(3) of the failure to confirm a provisional suspension under section 187E(1) and section 91B(2) of the Organic Law automatically restores the suspended provincial government and the members return to office.

Question 4

If 'Yes' to Question 3, does the provincial government remain in office for a period up to the time of the next elections provided for by the Constitution of the province or do fresh elections have to be held in accordance with section 187F of the Constitution before that time?

My answer to this question, consistently with my discussions of Questions 1 and 3, must be that the provincial government and the members are restored to office for the balance of their regular term, if any be left yet to run.

Question 5

Is the Head of State, acting on advice, empowered to repeal or otherwise alter (except in accordance with its own provisions or by an Organic Law or the Constitution), a Provincial Constitution; and in particular does section 97 of the Organic Law of Provincial Government empower the National Executive Council to amend Simbu Provincial Constitution?

Section 187E(5) provides that while a provincial government is suspended, its power and functions are vested in and shall be exercised by or on behalf of the National Executive Council, in accordance with an Organic Law. This is given effect to in section 96 of the Organic Law on Provincial Government. Section 97 of the Organic Law provides that:

- (1) While a provincial government is suspended; the National Executive Council has and may exercise and perform, subject to Subsection (2), all the legislative powers, functions, duties and responsibilities of the provincial legislature.
- (2) A law made in the exercise of the power conferred by subsection (1) -
 - (a) shall be made by the Head of State, acting with, and in accordance

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- with, the advice of the National Executive Council; and
- (b) shall be tabled in the National Parliament as soon as practicable after being made; and
 - (c) unless earlier repealed, expires at the end of the period of seven sitting days of the Parliament after it is made, unless within that period the Parliament, by resolution, confirms it.

Section 11 of the Organic Law provides in respect of alteration of provincial constitutions thus:

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Subject to this Organic Law and to Section 100(3) (exercise of the legislative power) of the National Constitution, the constitution of a province may be repealed or otherwise altered only -

- (a) in accordance with its provisions; or
- (b) by an Organic Law.

Section 13 of the Organic Law on the Legal Status of Provincial Constitution provides that:

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The Constitution of a province that has come into effect in accordance with Section 7 takes effect for the purposes of any law of Papua New Guinea as if it were an Organic Law, but may be altered only in a manner prescribed by Section 11.

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Under normal circumstances a provincial constitution may only be altered in the manner prescribed by section 11. Pursuant to the Constitution, section 12(2), an Organic Law may be altered only by another Organic Law, or by an alteration to the National Constitution. Implicit in these stringent requirements is that, consistent with the constitutional spirit of decentralization and provincial autonomy, and in particular in relation to its constitutional government, the national government is precluded from arbitrarily amending a provincial government's constitution. It will be noted in section 97(2)(b) and (c), in relation to any law made in the exercise of section 97(1) power, that such a law shall be tabled and confirmed by the National Parliament within seven sitting days of the sitting of parliament. If it is not, then it lapses.

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The issue is whether section 97(1) empowers the National Executive Council to exercise the constitutional amending powers that the provincial government has pursuant to section 11(a), or whether section 97 is subject to section 11. Section 11(a) would appear inapplicable in that it refers specifically to the procedures and formalities that a provincial government has to comply with pursuant to the provincial government constitution provisions. Section 11(b) however is open to interpretation as to whether section 97 is subject to it or whether section 11(b) is subject to section 97.

I consider that the legislative power referred to in section 97 includes the legislature power to amend the provincial constitution, but is to be read consistently with section 11(b) and section 97(2). I believe they can be read together and consistently to give effect to the spirit of the Constitution, that amendment to an Organic Law may be altered only by another Organic Law: per section 12(2) of the Constitution. It would be consistent with the section 97(2) requirement to be confirmed by a National Parliament resolution. And I would suggest such a resolution should be by a two-thirds absolute majority vote. Section 97(2)(c) does

1010 not specify by what majority vote such a law needs to be confirmed. I do not believe that such an important "home grown" constitution should be amended by passage of the amending Act in a simple majority vote as if it were just an ordinary act of the provincial assembly. If under normal circumstances, the stringent requirements of section 11 had to be adhered to, then my view is, consistent with the spirit of the Constitution, any laws in relation to and following suspension need to be scrutinized and sanctioned by the National Parliament rigourously.

My answer therefore to Question 5 is YES, the Head of State, acting on and with the advice of the National Executive Council, is empowered in an appropriate case to make a law to amend a provincial constitution, subject to ratification by the National Parliament pursuant to section 97(2) by a two-thirds absolute majority vote making it consistent with the Organic Law, section 11(b).

1020 My short answer to the questions referred are as follows:

Question 1: No.

Question 2: The words "(if necessary)" refer to "fresh elections" and "fresh appointments".

Question 3: Yes.

Question 4: The provincial government and the members are restored to office for the balance of their regular term, if any be left yet to run.

1030 Question 5: Yes, in an appropriate case, but subject to ratification by the National Parliament by a two-thirds absolute majority.

BARNETT J.

This reference raises some important questions regarding the powers of the National Parliament and the National Executive in relation to a province whose government has been suspended by the National Executive Council under the provisions of section 187E of the Constitution.

The factual situation, is set out in full in the judgments of their Honours the Deputy Chief Justice and Amet J. It can be briefly summarized as follows:

1040 The Simbu Provincial Government was suspended by the Head of State acting on the advice of the National Executive Council on 14 December 1984 in accordance with section 187E(1) of the Constitution. As required, this suspension was ratified by a simple majority of the National Parliament on 22 August 1985. The National Executive Council decided to arrange for fresh elections pursuant to section 187F(1) and to do so under the authority of the Simbu Provincial Constitution. As that Constitution made no provision for holding elections during a period of suspension, the N.E.C. decided to recommend the Head of State to amend the Simbu Constitution. As section 97 of the Organic Law on Provincial Government (hereinafter referred to as the Organic Law) confers the legislative power of a suspended provincial government on the Head of State acting on the advice of the National Executive Council, it proceeded to amend the provincial constitution by adding provisions for provincial elections during suspension into section 28 of the Simbu provincial constitution. This amendment was by way of adding a new subsection (d) which read as follows:

28(1)(d) GENERAL PROVINCIAL ELECTIONS:

1050 (1) A general provincial election to the Simbu Assembly shall be held -

- (d) if the Assembly is under suspension in accordance with the provisions of the National Constitution and the Organic Law on Provincial Government, if the Head of State, acting with and in accordance with, the advice of the National Executive Council so decide.

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It seems that the amendment to section 28 was signed into law by the Governor-General on 4 March 1986 though I agree with my brother Amet J. that the process whereby this was done raises doubts as to the validity of the amending legislation.

In any event, before the elections were held it became necessary under section 187F to extend the period of suspension. The motion to extend the suspension failed on 14 March to gain the required absolute majority of the National Parliament. Consequently, on 12 May 1986 the suspension lapsed. The previous provincial legislature was restored to power in the province and promptly exercised that power by repealing the amendments which the National Executive Council had enacted to its constitution thus cancelling the proposed fresh elections. The repealing provincial legislation, entitled Constitution Amendment Act No. 1 1986, was enacted on 8 July 1986.

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The specific questions which have been referred to this Court are:

- (1) Does a section 187F of the Constitution require that in all cases where a provincial government is suspended, fresh elections must be held before a provincial government can be re-established?
- (2) In section 187F(1) of the Constitution do the words '(if necessary)' refer to 'fresh elections' and 'fresh appointments' in the preceding sentence, or do they refer only to 'fresh appointments'; or do they refer only to 'fresh elections'?
- (3) If the Parliament under section 187F(3) of the Constitution fails to extend the suspension of a provincial government or where the Parliament fails to confirm a provincial government suspension within seven sitting days of the Parliament following the tabling of a report from the Permanent Parliamentary Committee on Provincial Government Suspension under section 91B(2) of the Organic Law on Provincial Government, do the members of the suspended provincial government return to office?
- (4) If 'yes' to Question 3, does the provincial government remain in office for a period up to the time of the next elections provided for by the constitution of the province or do fresh elections have to be held in accordance with section 187F of the Constitution before that time.
- (5) Is the Head of State, acting on advice, empowered to repeal or otherwise alter (except in accordance with its own provisions or by an Organic Law or the Constitution), a provincial constitution; and in particular does section 97 of the Organic Law on Provincial Government empower the National Executive Council to amend the Simbu provincial constitution?

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Those questions must be considered in the context of the whole scheme of the provincial government system which was introduced into the original constitution by amendments to section 187 and extended by the enactment of the Organic Law on Provincial Government, (Ch. No. 1) (hereinafter referred to as the Organic Law). To understand that scheme it is of course necessary to look at the Constitution as a

1110 whole, including the National Goals and Directive Principles set out in its Preamble, and the various provisions which are intended to guide courts when interpreting constitutional laws. Courts are told in Schedule 1.3 to read the Preamble as being subject to the other provisions of the Constitution, to be used only as a guide to interpretation in cases of doubt. On the other hand the National Goals and Directive Principles (which appear in the Preamble) have been apparently elevated to a more important position by section 25 of the Constitution. It provides general directions regarding the implementation of the National Goals and Directive Principles. Section 25 obviously applies to all governmental bodies exercising executive power but it also applies to courts when interpreting and applying constitutional laws and ordinary legislation. Section 25(3) has particular importance for this Court when interpreting constitutional laws:

1120 Where any law, or any power conferred by any law (whether the power be of a legislative, judicial, executive, administrative or other kind), can reasonably be understood, applied, exercised or enforced, without failing to give effect to the intention of Parliament or to this Constitution, in such a way as to give effect to the National Goals and Directive Principles or at least not to derogate them, it is to be understood, applied or exercised and shall be enforced in that way.

In this Reference therefore, before commencing the detailed task of interpreting the various provisions relating to provincial governments this Court must thoroughly familiarize itself with the National Goals and Directive Principles.

Schedule 1.5(2) must also be considered. It directs that:

1130 all words, expressions and propositions in, a Constitutional Law shall be given their fair and liberal meaning. In determining what is the fair and liberal meaning courts must be imbued with the spirit of the Constitution as intended by its framers.

1140 During a prolonged process of community consultation the Constitutional Planning Committee endeavoured to tap the will and spirit of the people. It then set out detailed recommendations for constitutional drafting in its report. With the intention of giving effect to this will or spirit of the people, it recommended the inclusion of the National Goals and Directive Principles in the Preamble to the Constitution. After much discussion in party briefing sessions and open debate in the Constituent Assembly these provisions were finally enacted in the Constitution. Section 25 and Schedule 1.5(2) are both intended to ensure that this spirit, acting through the judicial mind, finds its expression in the way the detailed provisions of constitutional and other laws are interpreted and applied. This approach to the interpretation of the Constitution was well expressed by Kearney J. (as he then was) in *State v. Independent Tribunal, ex parte Sasakila* [1976] P.N.G.L.R. 491, 506, 507 and by Prentice Dep. C.J. (as he then was) in *Constitutional Reference No. 1 of 1977* [1977] P.N.G.L.R. 362, 373, 374.

1150 When interpreting the details of a provision in a constitutional law therefore it is an essential pre-requisite for the judicial mind to be enlightened by the spirit of the Constitution itself. This enlightenment comes from developing a thorough understanding of the National Goals and Directive Principles, by taking an overview which will place the particular provision in the context of the total legislative scheme of which it forms a part and by seeking to understand the intention of the founding

fathers as they expressed it on behalf of the people, when enacting the Constitution and subsequent amendments.

As was pointed out by Kidu C.J. and Pratt J., this of course does not mean the complete abandonment of the normal common law principles of statutory interpretation. Those principles still provide valuable assistance in resolving doubts and ambiguities when a court is engaged in its difficult task of determining the intention of the legislature: (*Kuberi Epi, In the matter of Tony Farapo* (unreported, Supreme Court judgment No. S.C. 247, 1983) at p. 4). But it seems to me that the Constituent Assembly gave a clear direction to courts interpreting constitutional laws. That direction is to reverse the previous conservative approach to statutory interpretation which tends to commence the task by a detailed and literal study of the words used, turning to some "deemed" intention of the legislature only in cases of verbal ambiguity or internal conflict. That direction is to enlighten the judicial mind first and then examine the actual words used from the viewpoint of that enlightened mind. It must be a mind striving to give effect to the National Goals and Directive Principles. If the words are quite clear in their literal meaning when seen from this enlightened viewpoint, and no other interpretation is fairly open, then they must be given that literal meaning. If however, they can fairly be given an interpretation which is clearly more consistent with the spirit of the founding fathers, then they should be given that enlightened interpretation. In seeking to understand this intention courts are specifically empowered and encouraged to examine the Constitutional Planning Committee Report, the fourth draft of the Constitution and the record of the constitutional debates. (Constitution, section 24.)

It is necessary now to make a general examination of the constitutional arrangements for the provincial government system which appears to have been introduced as a means of implementing National Goals and Directive Principles, 2(2):

National Goals and Directive Principles, 2(2)

2(2) ... the creation of political structures that enable effective, meaningful participation by our people in that life, and in view of the rich cultural and ethnic diversity of our people for those structures to provide for substantial decentralization of all forms of government activity; and ...

To facilitate a decentralized political and governmental process a system of provincial government was entrenched in the Constitution by Constitutional Amendment (No. 1) of 1976 which made a series of amendments to section 187. These amendments outlined the basic nature of the provincial governments and provided for the details to be set out in an Organic Law. It was expressly stated that there must be elective (or mainly elective) provincial legislatures and that substantial powers of decision-making and substantial administrative powers in respect of matters of direct concern to the province should be devolved and delegated.

Under the Organic Law there was a requirement for the national minister responsible for provincial government to consult with a provincial constituent assembly on the framing of a provincial constitution. It was then for the provincial constituent assembly to draft its own provincial constitution. The only restriction placed on the provincial constituent assembly's constitution making powers was that the constitution adopted must not be inconsistent with the National Constitution or the Organic Law. Unless the National Parliament revoked its section 4

authorization, the National Executive Council was then obliged to advise the Head of State to grant provincial government to the province and the Head of State was obliged to do so.

Thus the clear intention of the national legislature was to encourage the development of "home grown" provincial constitutions as long as they were consistent with the national constitutional framework created by the Constitution, and the Organic Law. Availing themselves of this power the Simbu Constituent Assembly then proceeded to enact a constitution.

Similarly with regard to amendment of provincial constitutions, each provincial legislature is empowered to amend its own constitution in accordance with the rules of its own provincial constitution, subject of course to the requirement of consistency with the National Constitution and the Organic Law. But also the National Parliament has the right to amend a provincial government constitution by enacting an organic law (Organic Law, section 11).

The provincial constitution is, like the National Constitution, autochthonous in that it comes into force by virtue of its adoption by the provincial constituent assembly – not by an Act or Organic Law of the National Parliament.

The National Parliament has, then, gone to great trouble to make way for autochthonous provincial constitutions within the national constitutional framework. It has reserved to itself a "last resort" power to amend a provincial constitution but it can only exercise that power by enacting an organic law which will require it to be presented at different sittings of Parliament, not less than two months apart, and to be passed by a two-thirds absolute majority. By clear implication the Constitution does not intend the national legislature to interfere with a province's own "home grown" constitution except for some major reason of national importance – such as the need for compatibility of the various institutions and laws within the overall national constitutional framework.

This view of the National Government retaining final power but standing back to let provincial governments run their own affairs with the minimum of interference is reconfirmed in the provisions regarding suspension and reinstatement of provincial governments.

The National Government's "reserve" powers to suspend are set out in section 187E and they can only be exercised in carefully defined circumstances, including various types of what could be called "bad government" set out in section 187E(1) and in times of war or emergency set out in section 187E(4). This reference concerns suspension under section 187E(1). As such a suspension may be required urgently and decisively, the National Executive Council is empowered to order suspension in the first instance but then the suspension must be ratified by a simple majority vote of Parliament. I interpret section 187E(1) as limiting the maximum period of suspension to nine months, with provisions for six months extensions if so decided by an absolute majority of Parliament. Suspension is clearly treated as an abnormal state of affairs at odds with the clearly expressed constitutional requirement for decentralization through provincial governments. Consequently section 187F requires that arrangements be made to re-establish the provincial government and to hold fresh elections within nine months (or any valid six months extension of the period). Should a section 187E(1) suspension lapse for want of confirmation by Parliament or (presumably), for any other reason or be lifted by Parliament provincial government will be automatically revived.

This overview can be summarized as follows:

One major intention of the framers of the Constitution was to encourage meaningful participation by the people in the political and administrative aspects of government. The provincial government system was intended to be a major factor in achieving this goal. Methods of establishing provincial governments were introduced which gave very substantial emphasis to the concept of "home grown" provincial constitutions and to the exercise of substantial powers by provincial government over matters relating to provincial affairs. The National Government has retained powers to amend a provincial constitution but, in normal circumstances, only by means of the solemn and difficult process of the National Parliament enacting an Organic Law. The National Executive has also been given the right to suspend a provincial government in a strictly limited number of defined circumstances. That power is firmly controlled by the National Parliament and it allows only for short term limited suspensions. A major thrust of the suspension provisions is to ensure the restoration of provincial government to the particular province as soon as possible.

Section 97 of the Organic Law provides that

while a provincial government is suspended, the National Executive Council has and may exercise ... all the legislative powers ... of the provincial legislature.

It should be remembered, however, that such powers given to the National Executive Council to exercise during periods of suspension are intended, by section 25 of the Constitution, to be exercised when possible, so as not to derogate from the National Goals and Directive Principles. When interpreting the actual provisions of constitutional laws which confer those powers the courts also are directed by section 25 and Schedule 1.5(2) and by other guide posts in the Constitution to find fair and liberal meanings which are consistent with the spirit of the Constitution. This spirit is to be sought in the National Goals and Directive Principles, in the debates of the Constituent Assembly and in the Constitution Planning Report itself.

With my judicial mind enlightened by the concepts referred to in this overview I turn to the specific questions required to be answered by this reference and to a detailed analysis of the relevant constitutional and statutory provisions.

Question (1)

Does section 187F of the Constitution require that in all cases where a provincial government is suspended, fresh elections must be held before a provincial government can be re-established?

My answer to this question, as framed is, "No". The words of section 187F(1) do not require that elections be held. The subsection merely obliges the National Government, through its executive arm, the National Executive Council, to ensure that provincial government is re-established within nine months (or any lawful extension of that period). This will be done by holding fresh elections only if that is necessary as will be seen from my answer to Question 2. There are other ways to re-

1300 establish a provincial government which do require fresh elections. It should be noted that section 187F is talking about re-establishment of provincial governments after both section 187E(1) and section 187E(4) suspensions. Provisions for terminating the latter type of suspension, without resorting to fresh elections, are specifically provided for in section 187F(4). No such express provision has been included in the Construction for terminating a section 187E(1) suspension which opens the possibility that such a suspension might continue indefinitely if the National Government fails to take appropriate steps to re-establish the provincial government within nine months and/or if it fails to obtain an absolute majority vote to extend the suspension.

1310 Having had opportunity to peruse the judgment of the learned Deputy Chief Justice on this point it appears that he leans towards this interpretation. With respect I am unable to accept that view. To interpret section 187F(1) in a way which could allow for an indefinite suspension seems to be contrary to the constitutional principles upon which the relationship between national and provincial government has been based. I therefore interpret section 187F(1) fairly and liberally as requiring that arrangements for the re-establishment of a suspended provincial government must be made *and executed* within nine months of the effective date of the provisional suspension under section 187E(1) or of the definitive suspension under section 187E(4).

Question (2)

1320 In section 187F(1) of the Constitution do the words '(if necessary)' refer to 'fresh elections' and 'fresh appointments' in the preceding sentence, or do they refer only to 'fresh appointments'; or do they refer only to 'fresh elections'?

My answer to this question is that the words "(if necessary)" qualify the words "and to hold fresh elections and make fresh appointments".

1330 Under section 187E, provision is made for suspension for any of several specified reasons. Some of those reasons would have resulted from malpractice or inefficiency or deliberate disobedience of applicable laws and might necessitate holding new elections in order to cure the situation. Other circumstances justifying a temporary suspension may arise through no fault of the provincial legislature. For instance under section 187E(4) (suspension because of war or national emergency) one can envisage an emergency (possibly some cataclysmic natural disaster or public order problem) which would necessitate the National Government assuming all powers of government for a short period, followed by an orderly handing back of power to the previous provincial legislature. This could occur, for instance, if all members of the provincial assembly were kidnapped and held for an extended period. Under those circumstances the National Government may have to suspend the provincial government and assume control until the provincial members were rescued.

1340 This could occur for instance if there was a prolonged strike by all public servants in a province. It may then be necessary for the National Government to suspend provincial government in the province and to institute direct rule from Port Moresby until industrial order is restored.

In either of these two types of situations (under subsections (1) or (4) the essential requirement is for the National Government to re-establish the provincial government within the nine-month period referred to in section 187F(1); not that it,

necessarily must arrange fresh elections. Re-establishment may be achieved merely by lifting the suspension. It may be neither necessary nor desirable to hold fresh elections as the members of the suspended provincial legislature had not caused the emergency situation which justified the suspension. As order is being restored in such circumstances the least desirable thing could be to unleash the unrest associated with provincial elections.

To hold that fresh elections *must* be held and that the words "(if necessary)" govern only the words "fresh appointments" would be to insist that the National Government must arrange for fresh provincial elections in *every* case of suspension of a provincial government. This would force the National Government, in some instances, to interfere with the affairs of a province more than is necessary. That interpretation of the words "if necessary" in section 187F(1) would therefore be contrary to the spirit of the Constitution in relation to decentralization and to provincial government/National Government relations. The other interpretation (that the words "if necessary" govern the words "and to hold fresh elections and make fresh appointments") gives more effect to the intention expressed in the National Goals and Directive Principles, 2(2), and to the constitutional principles underlying the scheme of provincial government. This interpretation is at least equally available as a matter of grammar and literal English language construction and should therefore be adopted by this Court as the correct "fair and liberal meaning".

Question 3

If the Parliament under section 187F(3) of the Constitution fails to extend the suspension of a provincial government or where the Parliament fails to confirm a provincial government suspension within seven sitting days of the Parliament following the tabling of a report from the Permanent Parliamentary Committee on Provincial Government Suspension under section 91B(2) of the Organic Law on Provincial Government, do the members of the suspended provincial government return to office?

My answer to this question has already been outlined in the answer to Question 1. Although the Constitution appears to be silent on this subject, it is agreed by counsel for both the parties to this reference that the answer has to be "Yes". To hold otherwise would result in the National Executive Council losing the authority conferred by section 97 and section 98 to exercise the provincial government's powers and to carry out its functions at a time when there are still no members of the provincial legislature or executive to perform these functions. It would surely be wrong to interpret the Constitution as making possible that rightly abhorred state – a political vacuum.

Question 4

If 'yes' to Question 3, does the provincial government remain in office for a period up to the time of the next elections provided for by the Constitution of the province or do fresh elections have to be held in accordance with section 187F of the *Constitution* before that time?

Once the members of the revived provincial legislature resume their seats in the

assembly they will hold those seats until the next elections are held according to the law in force at the time those elections are held. But which elections will be the "next elections"?

From my answers to Questions 1 and 2 it is clearly not necessary that arrangements must be made for fresh elections in all cases of suspension. Therefore whether the "next elections" will be those originally provided for by the provincial constitution or will be fresh elections will depend on whether arrangements for fresh elections had been made during the period of suspension and, if so, whether or not those arrangements were subsequently cancelled by the revived provincial government according to law.

If the suspended provincial government is re-established by the lifting or the lapse of the suspension, without arrangements having been made for fresh elections pursuant to section 187F(1), then the members will retain their seats for the balance of the period remaining under the provincial constitution; just as though there had been no suspension.

If arrangements for fresh elections were made, but the elections were not held during the period of suspension, then the revived members will retain their seats until the holding of those fresh elections. If those arrangements for the fresh elections are subsequently cancelled in accordance with law (as happened in the circumstances leading up to this reference) then the revived members will retain their seats until the expiration of the balance of the period remaining under the provincial constitution.

Question 5

Is the Head of State, acting on advice, empowered to repeal or otherwise alter (except in accordance with its own provisions or by an Organic Law or the Constitution), a Provincial Constitution; and in particular does section 97 of the Organic Law on Provincial Government empower the National Executive Council to amend the Simbu Provincial Constitution?

This question concerns the power of the National Executive Council to amend the constitution of a provincial government during the period of its suspension. The question in this reference is asked with regard to an amendment which was merely designed to provide for fresh elections. Its answer, however, may have important implications for later amendments of a more substantive nature and it may be for this reason that the Provincial Governments of East New Britain, West New Britain and the North Solomons sought and obtained leave to intervene.

Section 97 of the Organic Law on Provincial Government (Ch. No. 1) provides as follows:

- (1) While a provincial government is suspended, the National Executive Council has and may exercise and perform, subject to Subsection (2), all the legislative powers, functions, duties and responsibilities of the provincial legislature.
- (2) A law made in the exercise of the power conferred by Subsection (1) –
 - (a) shall be made by the Head of State, acting with, and in accordance with, the advice of the National Executive Council; and
 - (b) shall be tabled in the National Parliament as soon as practicable after being made; and

- 1440 (c) unless earlier repealed, expires at the end of the period of seven sitting days of the Parliament after it is made, unless within that period the Parliament, by resolution, confirms it.

On the face of it this power is sufficient to authorize the National Executive Council to exercise the provincial government's legislative power to amend the Simbu Provincial Constitution.

Section 11 states that the only way for a provincial constitution to be altered is:

- 1450 (a) in accordance with its provisions; or
(b) by an organic law.

This section is expressly declared to be "subject to this organic law" and that phrase raises the possibility that it is subject to section 97 which confers on the National Executive Council all the "legislative powers, functions, duties and responsibilities of the provincial legislature" during a period of suspension.

1480 In seeking to reconcile this apparent conflict between the two sections the Court should again seek enlightenment from the spirit of the Constitution as set out in the Preamble: particularly in the National Goals and Directive Principles. Again applying the Constitution, section 25 and Schedule 1.5(2), I find myself seeking a fair and liberal interpretation which requires the National Government during a period of suspension to exercise the provincial legislative powers with restraint so as not to interfere in the province's legislative framework more than is fairly necessary to achieve the purposes which necessitated the suspension. This approach would lead the Court to scrutinize with particular care any attempt to amend a province's "home grown" constitution during a period of suspension.

Turning now to examine the two sections of the Organic Law on Provincial Government which have been the subject of lengthy argument in relation to Question 5. Can those sections be fairly interpreted so as to give effect to these guiding principles?

1470 My answer to Question 5 is that section 97 does authorize the National Executive Council to amend a provincial constitution during the suspension of a provincial government in appropriate circumstances. The way that power is used, however, may be unconstitutional if the circumstances do not warrant it. Amendment of the provincial constitution should be used only as a last resort; if that course of action is necessary to enable the National Executive Council to carry out duties and functions imposed upon it by the Constitution.

1480 If the power is used to make unnecessary or arbitrary amendments to a provincial constitution, if its use is disproportionate to the needs of the circumstances, then it would be ultra vires and open to challenge in the Supreme Court. That this view might bring the Court into the political arena is merely the inevitable consequence of making it the final body charged with the duty of upholding the spirit as well as the words of the Constitution.

Applying those principles to the circumstances which gave rise to this reference poses an additional question:

Did the Head of State, acting on advice, act constitutionally when he amended the Simbu Provincial Constitution by adding to it a provision for calling fresh elections during the period of suspension?

Having decided to make arrangements for fresh elections the National

Government had at least three avenues open to it to achieve that result:

- 1480
- (a) It could have taken advantage of section 11 of the Organic Law and proceeded to amend the Simbu Constitution by way of organic law to be introduced into and enacted by the National Parliament in accordance with the provisions relating to organic laws. The amendment would have to be presented to two successive sessions of Parliament and be enacted by two-thirds absolute majority vote. Such an amendment could not have been set aside by the revived provincial legislature.
- 1500
- (b) In accordance with section 97 of the Organic Law it could by Act of the National Executive Council exercise the legislative powers of the Simbu Provincial Government to amend the Provisional Constitution and so create provision for fresh elections during suspension. This amendment would subsequently need to be ratified by resolution of Parliament. I agree with the judgment of my brother Amet J. that a ratifying resolution should be passed by a two-thirds absolute majority vote. I believe the Court has the power to require such a majority to ensure a degree of consistency between section 11 and section 97 of the Organic Law. This view is strengthened by the provisions of section 13 of the Organic Law which specifies that a provincial constitution, though not an Organic Law, takes effect for the purposes of any law as if it were an Organic Law.
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- (c) The National Executive Council could advise the Head of State to direct the Electoral Commissioner to arrange for fresh elections exercising the power conferred, and the obligation imposed upon the National Executive by virtue of section 187F(1) of the Constitution. In doing this the National Executive Council would be acting in its primary role as the National Executive body constituted by section 149 of the Constitution with responsibility to carry out the executive government of Papua New Guinea. If existing constitutional law or statute does not provide a legislative framework to enable the National Executive Council to fulfil the constitutional obligation imposed by section 187F(1) the lack would be provided by the National Court pursuant to section 22 of the Constitution. In filling this lack the National Court would no doubt consider the National Goals and Directive Principles and would work by way of analogy with existing legislation regarding the calling of elections.
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Had it acted thus, in its primary role, the National Executive Council would have had greater power than it had by merely choosing to act in its role as caretaker for the suspended provincial government as authorized by the Constitution, section 187E(5), and section 97 of the Organic Law. In that caretaker role it was obliged to act in accordance with the Organic Law and had no greater power than that previously held by the suspended provincial government.

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To arrange fresh elections as caretaker it was bound by the provincial constitution which therefore required amendment. By acting under section 187F(1), though, the National Executive Council would have been acting as the National Executive with over-riding authority derived directly from the Constitution itself. This authority would over-ride the provincial constitution and any provincial law.

This point was not really argued at the hearing of this reference. Subject to hearing full argument, however, it seems to me the Head of State, acting on advice,

acted unconstitutionally in amending the Simbu Provincial Constitution as fresh elections could have easily been arranged without taking the drastic step of interfering with a province's own home grown Constitution.

My short answers to the questions referred are:

Question 1: No.

Question 2: The words "(if necessary)" qualify the words "and to hold fresh elections and make fresh appointments".

Question 3: Yes.

Question 4: The revived members will stay in office until the next elections. Whether these next elections will be those previously required under the provincial constitution or fresh elections arranged for during the period of suspension will depend on factors discussed in the full answer to this question.

Question 5: Yes in appropriate circumstances the Head of State does have that power. It should be used only as a last resort in order to achieve the purposes of the suspension. It requires to be subsequently ratified by a two-thirds absolute majority vote of the Parliament.

Reported by: L.K.