

THE POST-INDEPENDENCE DEVELOPMENT OF
PAPUA NEW GUINEA'S LEGAL INSTITUTIONS

by

David Weisbrot*

INTRODUCTION

Despite the great disparity between European and traditional Papua New Guinean societies in terms of culture, linguistics, social norms, mores, social organisation, geography, and fundamental notions of justice and punishment, the colonial authorities nevertheless transplanted European laws and courts and practitioners with little or no adaptation to local circumstances.

The imposed legal system was meant to be leavened by taking into account local standards, beliefs, customs and perceptions in arriving at a proper, and generally lesser, punishment. This scheme, which looked to custom for mitigation but not exculpation, offended against basic common law notions that a person should not be held criminally responsible unless he has a guilty mind (mens rea) - that is, it ignored the question of moral responsibility.

One commentator has recently argued, with force, that in pre-Independence Papua New Guinea, law was, and was perceived to be, the cutting edge of the colonial administration.¹

* Senior Lecturer in Law, University of New South Wales, Australia.

1. P. Fitzpatrick, Law and State in Papua New Guinea (London: Academic Press, 1980) p.57.

With few resources, little infra-structure, few goals and little infra-structure, few goals and little vision, the Australian administration took as its principal tasks the general maintenance of order and the provision of labour for plantations and mines. As with British colonialism in Africa and Asia, the Australian administration justified stern, and generally culturally inappropriate, measures on the basis that it was necessary to impose "the rule of law".²

In pre-Independence P.N.G. the indigenous population was subject to the full force of the law - particularly the criminal law - but with few of the balancing rights, privileges and safeguards meant to be part of the liberal tradition of the legal systems in the Western democracies.

So, for example, Papua New Guineans had no role, either directly or through popularly chosen representatives, in the formulation of the law - the foundation of the social contract model upon which western systems of law and governance are said to rest. There was (and still remains) no right to trial by a jury of one's peers. There was no real separation of powers in a territory where the administration and its officers filled the roles of executive, legislature and judiciary. Civil liberties such as the right to silence, freedom from unreasonable search, seizure and arrest, right to counsel, freedom of speech and assembly, equal protection before the law, the presumption of innocence and other natural justice requirements were often absent.

The rigour of the legal system was also apparent in the expansion of the realm of the criminal law to include not only those matters ordinarily thought to be "criminal", but also to add coercive and punitive elements to issues of industrial relations, revenue raising, family relations, and even matters of personal taste, dress and hygiene through the use of the Native Regulations.³

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2. A. Paliwala, J. Zorn and P. Bayne, 'Economic Development and the Changing Legal System of Papua New Guinea' (1978) 16 African Law Studies 21-27.
 3. E.P. Wolfers, Race Relations and Colonial Rule (Sydney: Australia and New Zealand Book Co., 1975) pp.17-23; also D. Weisbrot, 'Integration of Laws in Papua New Guinea: Custom and the Criminal Law in Conflict', in D. Weisbrot, A. Pal'wala and A.Sawyer (eds.), Law and Social Change in Papua New Guinea (Sydney: Butterworths, 1982) pp.66-67.

It is not surprising then that in the early 1970's, as Papua New Guinean nationalist sentiment grew and the pressure for self-government and independence intensified, there were frequent and powerful expressions of discontent from leading political figures about the imposed legal system.⁴ And given the central role of "the rule of law" in both the ideological underpinning of, and the actions of, the colonial administration, it is not surprising that those same leaders were keenly aware of the relationship between control of legal institutions and the maintenance of power, and that debate about the future of the legal system figured most prominently in the lead-up to independence.

For example, the first Papua New Guinean Minister for Justice Mr John Kaputin, made the following statement in his inaugural policy speech at a legal gathering in 1973:⁵

The truth is that law has been used throughout the ages as an instrument of domination and oppression by the ruling classes.... In this country, the law was an instrument of colonialism and a means whereby the economic dominance of the white man was established over us. In other words, the law was not universal and abstract principle; it was specific and it made numerous distinctions between the white and the black. And not only did it deprive us of our land, but forced us to work for expatriate plantation owners to whom the law gave our lands.

Kaputin subsequently reiterated these sentiments in a stinging article which declared the inherited legal system to be a "colonial fraud".⁶

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4. P.J. Bayne, 'Legal Policy-Making', in J.A. Ballard, (ed.), Policy-Making in a New State: Papua New Guinea 1972-1977. (St Lucia: University of Queensland Press, 1981) p.139.
 5. J. Kaputin, 'Ministerial Policy Statement'. Mimeo, 1973, pp.1-2.
 6. J. Kaputin, 'The Law - A Colonial Fraud?' (1975) 10 New Guinea 4.

Similarly, in 1973 the then Chief Minister (later to be Prime Minister) Mr Michael Somare expressed the following unequivocal view of the urgent need for law reform and development:

We are facing, at this very moment, the need to devise a system of laws appropriate to a self-governing, independent nation. The legal system that we are in the process of creating must ensure the orderly and progressive development of our nation. But, in addition, it must respond to our own needs and values. We do not want to create an imitation of the Australian, English or American legal systems. We want to build a framework of laws and procedures that the people of Papua New Guinea can recognize as their own - not something imposed on them by outsiders

Finally, the indigenous Constitutional Planning Committee (C.P.C.), charged with devising an autochthonous Constitution for P.N.G.'s independence, set itself the goal of re-establishing the primacy of Melanesian ways. In a florid passage in its Final Report⁸ which has often been quoted, the C.P.C. likened colonialism to a huge tidal wave "submerging the natural life of our people". In the aftermath, the task of the people (upon Independence) is to sift through the debris and the detritus and to rebuild society "not on the scattered good soil the tide wave of colonisation has deposited but on the solid foundations of our ancestral land", relying on traditional ways, social obligations and customary laws rather than Western techniques.

The Constitution that finally emerged upon Independence Day, 16 September 1975, contained only some the C.P.C.'s design for a Melanesian renaissance.

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7. M. Somare, 'Law and the Needs of Papua New Guinea's People', in J. Zorn and P. Bayne (eds.), Lo Biling Ol Manmeri 14-30 (Port Moresby: University of Papua New Guinea, 1974) p.14.
 8. Constitutional Planning Committee (C.P.C.), Final Report Part 1 (Port Moresby: Government Printing Office, 1974) pp.2/13-2/15.

The C.P.C. clearly intended the Constitution to be a fundamental decolonizing agent. In Tabo Sipo v. Mukara Meli (1980) N. No.240, Mr Justice Narokobi, formerly legal adviser to the C.P.C. and first chairman of the Law Reform Commission, stated well this viewpoint:

The Constitution did intend a new start in life. In goals and directive principles make it quite clear that a new vision for the nation was intended. If Independence meant nothing more than maintaining unequal laws, it would not have been worth attaining. If the Constitution did not set out the highest ideals and standards for the Legislature, the Executive and the Judiciary, the whole process of creating a home-grown Constitution would have been worthless.

Nevertheless, despite the clear dissatisfaction with the inherited legal system expressed above, and the popular belief that customary law should play a central role in the development of new laws and legal institutions, the anticipated legal transformation has never eventuated.

The failure to bring about the needed legal changes may be attributed to four broad factors. First, there is the well-known phenomenon that once independence is finally achieved, the vigour of the anti-colonial debate makes way for new political realities.⁹

Secondly, the post-colonial period in P.N.G. has generally been characterized by a de-emphasis on law reform, especially in contrast to economic development concerns.¹⁰ This is quite apparent from the failure by Parliament even to consider major Law Reform Commission reports, from general parliamentary debates, and from the limited legislative programmes of successive governments. Although "law and order" is an important issue, law reform has not been.

9. See above note 3, Weisbrot, 96.

10. D. Weisbrot, 'Papua New Guinea: Judges and Politicians Part II - the Wilson Affair', (1980) 5(5) Legal Service Bulletin 217.

Thirdly, there is an element of technical failure in the provisions of the Constitution relating to legal development and the "underlying law" which makes it difficult for significant change to come about.

Finally, and perhaps most critically, there has been a failure on the part of the institutions charged by the Constitution with the development of a uniquely Papua New Guinean legal system to earnestly apply themselves to the task.

The Parliament has not reviewed the bulk of inherited colonial legislation; has not considered Law Reform Commission proposals as requiring any debate or action; nor has it formulated its own law reform initiatives aimed at "customising" the legal system.

The courts have resisted the clear Constitutional invitation to be innovative and activist, and have instead acted merely as successors to the colonial courts in perpetuating the dominance of the English common law.

The legal profession, for its part, has played virtually no role at all in the search for a Melanesian jurisprudence. As a collective agency, the profession has not lobbied for legislative change to the substance or processes of the legal system, nor has it led public debate on the shape or future of the Papua New Guinea legal system. Individual lawyers appear to be generally unwilling or unable to adduce customary law in appropriate court cases, or of otherwise urging the courts to make use of their powers to progressively develop the underlying law.

THE INDEPENDENCE CONSTITUTION

The element of technical failure referred to above has four aspects, each central to the development of the national legal system, which are largely responsible for the failure of customary law to become a significant, much less pre-eminent, source of law in P.N.G. These aspects are: (1) the relegation of the National Goals and Directive Principles to the Preamble of the Constitution, and their non-justiciable nature; (2) the failure to require a review of the colonial legislation, which was adopted *in toto*; (3) the sources of law provisions, especially s.9 and Sch.2, which allow the written law to pre-empt the fostering of a Melanesian jurisprudence; and (4) relying on the courts as the main mechanism for developing a national "underlying law".

The National Goals and Directive Principles

The National Goals and Directive Principles (NGDPs) formulated by the C.P.C. expanded upon the pre-Independence "Eight Point Plan for National Improvement", more commonly known as the "Eight Aims". The NGDPs were intended by the Committee to provide "a clear definition of Papua New Guinea's most fundamental national goals.¹¹ a yardstick against which government performance can be judge".

The goals themselves refer mainly to broad social, political and economic concerns, but many could also bear on questions of legal development. For example, the NGDPs call for "...development to take place primarily through the use of Papua New Guinean forms of social and political organization" (No.1(6)); for P.N.G. "to be politically and economically independent" (No.3); for the "wise assessment of foreign ideas and values so that these will be subordinate to the goal of national sovereignty and self-reliance" (No.3(5)); and for a "fundamental re-orientation of our attitudes and the institutions of government, commerce, education and religion towards Papua New Guinean forms of participation, consultation, and consensus, and a continuous renewal of the responsiveness of these institutions to the needs and attitudes of the People" (No.5(1)).

The C.P.C. recommended that "All courts and other adjudicatory tribunals shall be guided in the exercise of their functions" by the NGDPs. However, it also recommended that the NGDPs "not be directly justiciable", although they "should not be regarded by any court, other adjudicatory tribunal or institution of government as being of less weight than other directly justiciable provisions". The recommendation also provided that the Government should make specific reference to the NGDPs in formulating and explaining national policies and programmes.¹²

11. See above note 8, p.2/1.

12. See above note 8, p.2/25.

The Government of the day supported these C.P.C. proposals in a response paper, but pointed out that "Courts are not however to apply the goals as law but must administer the law as it stands... The Government supports the rule of law, which requires the courts must apply the law as it exists".¹³

In the end, s.25 of the Constitution specified that the NGDPs are non-justiciable - that is, they may not be the subject of direct litigation in a court or tribunal - but imposed a duty on all governmental bodies "to apply and give effect to them as far as lies within their respective powers". Subsection (3) provides that:

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 the 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.

Further, (1) the NGDPs are said to be particularly relevant in the considerations of the Ombudsman Commission, especially in Leadership Code matters; (2) Sch.2.3 directs the courts to have regard to the NGDPs where no existing rule of law applies and they are called upon to formulate a new rule of underlying law; and (3) s.22 calls for regard to be had for the NGDPs in judicial determination of the nature of rights, powers and duties recognized by the Constitution.

13. Papua New Guinea (P.N.G.), Proposals on Constitutional Principles and Explanatory Notes (Port Moresby: Government Paper, 1974) p.4.

Handling the NGDPs in the manner in which the Constitution provides entails a substantially different judicial technique than the traditional common law method of interpretation and decision-making, and requires that counsel bring to the proceedings a different range of materials and submissions for the court to work with. Constitutional Law authorities have expressed doubts whether the Supreme Court judges, trained in the narrow Anglo-Australian tradition which does not regard the preamble to a piece of legislation as an aid to interpretation, would be willing to be guided by the NGDPs.¹⁴

In the event these fears have been justified by the practice of the post-Independence court. In the ten years, the NGDPs have been referred to by the judges only very rarely, even though there were many occasions on which policy was being determined. In Public Curator of Papua New Guinea v. Public Trustee of New Zealand [1976] P.N.G.L.R. 427, Prentice Dep. C.J. had regard to the NGDPs in giving a liberal interpretation to the words of s.43 of the Wills, Probate and Administration Act 1966 so as to accept the validity of a will with several formal defects.

In Supreme Court Reference No.4 of 1980 (the "Vanuatu Case") [1981] P.N.G.L.R. 265, the Court was consciously engaged in policy-making by the formulation of a rule of underlying law (Sch.2.3) with respect to locus standi (legal standing) to Constitutionally challenge an Act of Parliament. Nevertheless, the only significant reference to the NGDPs is by Kapi J. (at p.293) in the following terms: "I find that there is nothing in the National Goals and Directive Principles which is relevant to the formulation of the law in this case."

The National Government, as well, has rarely thought it necessary to justify or explain policy decisions in terms of the NGDPs, and indeed some politicians and bureaucrats have been openly scornful of them. The Morgan Report in 1983 recommended that in future.¹⁵

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14. J. Goldring, The Constitution of Papua New Guinea: A Study in Legal Nationalism (Sydney: Law Book Co., 1978) pp.37-38.
 15. Department of Provincial Affairs, Report of the Committee to Review Policy and Administration on Crime, Law and Order (the "Morgau Report") (Port Moresby: Department of Provincial Affairs, 1983) p.335.

N.E.C. submissions should be certified by the Principal Adviser to the N.E.C. as to compliance with the Constitution and in particular, with the National Goals and Directive Principles.

This recommendation has not yet been taken up.

Thus, the C.P.C.'s vision of the NGDPs as a "guiding lamp" in national and legal development has certainly not eventuated.¹⁶

Failure to Review Colonial Legislation

The C.P.C. recommended in very strong terms that the Constitution be an autochthonous (homegrown) one that would serve as a focus or symbol of the "breaking [of the] legal link with the law of Australia... [a] definite break with the past."¹⁷ In keeping with this break from the past and the need to construct a new and appropriate legal system, the C.P.C. also recommended a thorough review of the existing law.¹⁸

Ideally, only those existing laws which are in conformity with the new Constitution should be adopted by it. However, we recognize the necessity to make provision for a reasonable time to elapse before the Constitution becomes fully effective in respect of the body of presently existing law, to enable all of our present laws to be carefully reviewed, and inconsistent laws repealed or amended as is appropriate. We suggest that a period of two years should provide sufficient time for this work to be done.

16. See above note 8, p.2/15-16.

17. Id. p.15/1.

18. Id. p.15/2.

And again (at p.8/9):

We believe that many of the laws that will be in force at independence are more appropriate to the circumstances of colonial rule than to a society seeking to achieve the National Goals and Directive Principles... The need for a thorough-going review of our legal system is apparent to all of us.

The C.P.C. suggested that such a review be undertaken by the Law Reform Commission or by the "special alternative body" - a Permanent Committee of Parliament - recommended (at p.5/1/20) to be established with a brief to review existing laws "for the purpose of making recommendations for the repeal or amendment of those laws which are not in conformity with either the National Goals and Directive Principles or the Fundamental Human Rights and Obligations" portions of the Constitution. (At p.15/2.)

In its final form the Constitution makes no reference to such a legislative review. Section 9 provides that the laws of P.N.G consist of, inter alia, laws "adopted by or under this Constitution", and Schedule 2.6 effectively adopts all pre-Independence colonial laws, as well as a number of English and Australian (Commonwealth) laws (Schedule 5). The Law Reform Commission is charged by Sch.2.14 with the "special responsibility" of overseeing the development of the "underlying law", or P.N.G. common law, but no directions are provided about reviewing existing legislation. Even where ad hoc reviews were undertaken, as in the case of the Criminal Code, they were not always very successful.¹⁹

In enumerating the sources of law and the components of the underlying law, the Constitution (s.9 and Sch.2) makes customary law subordinate to all written law. Further, many key areas of the law, such as criminal law, are covered by comprehensive statutory schemes.

19. Above note 3, Weisbrot, 62.

Thus, the failure to include in the Constitution a mandatory review of adopted colonial legislation, or the power to modify or override the legislation where it is inappropriate to the circumstances of an independent Papua New Guinea, has entrenched the colonial laws and made difficult the adaptation and localisation of the law. The role of the underlying law, whether based on local custom or otherwise, is limited to an interstitial one, filling in gaps in legislative schemes or operating in those increasingly few areas not largely covered by statute law.

This position contrasts poorly with that in Vanuatu, for example. Section 93 of the Constitution of the Republic of Vanuatu provides that the Joint Regulations and subsidiary legislation of the pre-Independence condominium shall continue in operation, but "shall be construed with such adaptations as may be necessary to bring them into conformity with the Constitution". Further, British and French laws applicable in the condominium also remain in force (unless expressly revoked or) unless they are "incompatible with the independent status of Vanuatu and whenever possible taking due account of custom".

One of the most enduring ironies of the Papua New Guinea Constitution is that while local custom is enforceable only in very limited situations and subject to a number of strict qualifications (see below), colonial era statutes are conclusively presumed to be applicable, appropriate, and dominant, subject only to non-substantive adaptations of nomenclature (Sch.2.7).

The Constitutional Sources of Law

Section 9 of the Constitution provides that:

The laws of Papua New Guinea consist of -

- (a) this Constitution; and
- (b) the Organic laws; and
- (c) the Acts of the Parliament; and
- (d) Emergency Regulations; and
- (e) laws made under or adopted by or under this Constitution; or
any of those laws, including subordinate legislative enactments made under this Constitution or any of those laws; and
- (f) the underlying law, and none other.

Section 37(2) provides that no one "may be convicted of an offence that is not defined by, and the penalty for which is not prescribed by, a written law". Therefore purely customary offences may not give rise to criminal liability in the courts, even the village courts-- although the village courts may punish a breach of a lawful order made with regard to a customary law, insofar as this involves an element of contempt of court.

Section 20 provides that an Act of Parliament shall declare, and provide for the development of, the underlying law of P.N.G. As no such Act has yet been promulgated - or even debated - by the Parliament, the "transitional" provisions of Schedule 2 of the Constitution still apply ten years later. The purpose of Sch.2, according to s.21, "is to assist in the development of our indigenous jurisprudence, adapted to the changing circumstances of Papua New Guinea".

Schedule 2.1 provides that "custom is adopted, and shall be applied and enforced, as part of the underlying law" except "in respect of any custom that is, and to the extent that it is, inconsistent with a Constitutional Law or a statute, or repugnant to the general principles of humanity". The provision is similar in terms to the old Native Customs (Recognition) Act 1963, s.6 (now s.3 in the Revised Laws version), which imposed two additional qualifications: that the custom not be against the public interest, and that it not adversely affect the welfare of a child.

Schedule 2.1(3) also provides that an Act of Parliament may (a) provide for the proof and pleading of any custom; and (b) regulate the manner in which, or the purpose of which, custom may be recognized, applied or enforced; and (c) provide for the resolution of conflicts of custom. As the Parliament has not yet acted, those matters are all still governed by the provisions of the colonial era Native Customs (Recognition) Act.

Schedule 2.2 adopts the principles and rules of the common law and equity of England (including the Royal Prerogative, subject to special qualifications contained in subsection 2) in existence at the time of Independence, notwithstanding statutory revision, as the other main source of the underlying law, except if, and to the extent that:

- (a) they are inconsistent with a Constitutional Law or a Statute; or

- (b) they are inapplicable or inappropriate to the circumstances of the country from time to time; or
- (c) in their application to any particular matter they are inconsistent with custom as adopted by [Sch.2.1].

Notice that while the common law is made subject to a judicial determination of circumstantial applicability and appropriateness, it is assumed that, unlike customary law, there will be no clash with "the general principles of humanity".

An affirmative duty is placed on the National Judicial System, particularly on the Supreme and National Courts, to formulate an appropriate rule as part of the underlying law where neither custom nor the common law are applicable. In formulating such a rule of underlying law, under Sch.2.3, the court must have regard to:

- (a) in particular, to the National Goals and Directive Principles and the Basic Social Obligations; and
- (b) to Division III.3 (Basic Rights); and
- (c) to analogies to be drawn from relevant statutes and custom; and
- (d) to the legislation of, and to relevant decisions of the courts of, any country that in the opinion of the court has a legal system similar to that in P.N.G.; and
- (e) to relevant decisions of courts exercising jurisdiction in or in respect of all or any part of the country at any time

and to the circumstances of the country from time to time.

The Law Reform Commission is also given a "special responsibility" under the Constitution to report to the Parliament and the National Executive Council from time to time on the development of the underlying law (s.21 and Sch.2.13 2.14).

At first glance, with custom listed as the initial source of the underlying law, adoption of the common law made subject to consistency with adopted custom, the wide range of subsidiary sources available in formulating a new rule of underlying law, and the affirmative duty placed on the judiciary to develop the underlying law, the Constitutional scheme regarding sources of law would appear to have made good the C.P.C.'s wish that customary law form the basis of the new legal system and that a uniquely Melanesian jurisprudence be developed. In practice, however, this is far from the case.²⁰

In essence, the Constitutional scheme has failed to propel customary law to the fore because it did not fully take into account the pre-Independence experience of the relative lack of impact on the legal system of the Native Customs (Recognition) Act 1963. The Act, which provides for the recognition of custom subject to certain qualifications, and the application and enforcement of custom in designated matters of civil and criminal law, has been referred to by the superior courts only very occasionally in the past two decades.

Consideration of that experience would have pointed up several problem areas in the Constitutional scheme. First, that the written law, particularly in certain areas such as criminal law, is so extensive that there is often little room to manoeuvre in incorporating custom.

Second, there are enormous difficulties inherent in ascertaining customary law on a case-by-case basis, and in separating customary "rules of law" from customary process, and in overcoming conflicts between different customary regimes, even where the courts and counsel act in the best of faith.²¹ The lack of time, specialised training, and resources operate to make it difficult for counsel to adduce evidence of local custom which properly may be used by the court. Courts are generally unfamiliar with ascertainment procedures and tend to prefer the relative certainty and ease of discovery of common law rules.

20. B.M. Narokobi, 'Adaptation of Western Law in Papua New Guinea', (1977) 5 Melanesian Law Journal 52. N.K.F. O'Neill, 'The judges and the Constitution - The First Year', (1976) 4 Melanesian Law Journal 252-58.

21. See above note 3, Weisbrot 89-95.

Because, of the problems of ad hoc ascertainment described above, thought must be given to providing institutional assistance to the courts and to throwing out ascertainment questions to the wider community, by the recognition of chiefly authority in appropriate cases, or through the use of assessors or special juries or referees, or where appropriate by national or provincial or local governmental recognition (through legislation or other means) of general principles of customary law or by other means.

Finally, given all the obstacles described above, it is almost inevitable that where custom "may" be a source of law, it will not be. If it is national policy to formulate a distinctively Papua New Guinean legal system, there must be an affirmative and inescapable duty placed on the courts and counsel to do the necessary hard work.

THE LEGAL PROFESSION AND LEGAL DEVELOPMENT

Sadly, the legal profession as a whole in Papua New Guinea has made very little contribution to either the debate surrounding, or the development of, a Melanesian jurisprudence. This is partly accountable by the fact that the profession has not been able to effectively organise itself into a workable collective entity, much less organise around any particular issue.

Law Society elections are held intermittently, but the local profession has no codified ethical standards, no prothonotary, no effective complaints or disciplinary mechanisms, no investigative apparatus, no fidelity funds or mandatory insurance schemes to protect clients, and little outside supervision over competence, behaviour or trust accounts. In short, it is one of the least regulated legal professions in the world.

This is not to suggest that the legal profession is not be set by a range of institutional problems which make organisation and action difficult. It is a relatively very young profession, with its base in the public service - and constrained, therefore, by its relative inexperience and the ethos of bureaucratic non-activism in matters thought to be broadly political. Most of the senior national lawyers are already on the bench, in politics, or at the top level of the public service.

The still substantially expatriate private profession mainly services the legal needs of the expatriate community²² and the multi-national companies doing business in Papua New Guinea. This segment of the profession has taken little interest in general matters of law reform and development, but has been quick to act where it perceives that its own interests or that of its commercial clients may be threatened,²³ as in the case of the Law Reform Commission's proposals in 1976 regarding a "fairness of transactions" bill.²⁴

The educational background of lawyers in P.N.G. and the admission rules also contribute to the lack of professional involvement in law reform and development.

Apart from the first few national lawyers admitted in the 1960's after studying in Australia, virtually all national lawyers - who since late 1980 have formed the majority of admitted lawyers in P.N.G. have been educated at the Law Faculty of the University of Papua New Guinea, with a subsequent stint at the Legal Training Institute.²⁵

The Law Faculty did for many years require students to complete a one semester course on Customary law and land Tenure as part of the 4 year LL.B. programme or the 2 year Diplomas in Land Administration and Magisterial Service. Unfortunately, this requirement was dropped in 1981, apparently more for staffing reasons than sound pedagogical ones. A number of other courses, in particular Family Law and Land Law, do deal with issues of customary law in a significant way, but in competition with Western law.

22. 75% in 1982, see B. Mitchell, 'The Legal Profession and the Delivery of Legal Services in Papua New Guinea', in D. Weisbrot, A. Paliwala, and A. Sawyerr (eds.), Law and Social Change in Papua New Guinea (Sydney: Butterworths, 1982) p.243.

23. See above note 4, pp.151-52.

24. Law Reform Commission, Fairness of Transactions, Working Paper No.5. Port Moresby: Law Reform Commission of Papua New Guinea, 1976.

25. Mitchell, op.cit. 241.

The Customary Law course, while it existed, served to focus interest and attention on the role of custom in legal development and symbolically asserted the importance and legitimacy of custom as a source of law in P.N.G. In addition, the Customary Law course dealt extensively with methods of adducing evidence of, and ascertainment of, customary law in the courts - crucial topic which is not now dealt with elsewhere in the curriculum.

The Legal Training Institute's programme has tended to concentrate on training law graduates for the private profession, and devotes at most a few classes to customary law recognition or broader issues of legal development.

The Law Faculty at the University of Papua New Guinea once did attempt to pursue a policy which would have placed a greater focus on customary law and legal development. The Report of the Committee of Enquiry into University Development (1974, the so-called "Gris Report", after its convenor) recommended that all University students should, as part of their degree programmes, spend time engaged in work experience, preferably in their home areas. In response, the Law Faculty devised a new programme which would have divided legal studies into two self-contained "modules", split by a year in the field. During that year, students would have been required to do research into the customary law of their home areas, give basic legal advice and information to the community, and possibly assist in development activities.²⁶

The modular approach was approved by the Law Faculty and the University's Academic Board. However, the University Council, which has final approval, deferred the proposal for some time and effectively killed it. At least in substantial part, this was due to opposition by elements of the legal profession and the judiciary. One judge condemned the proposal as a "socialistic experiment",²⁷ although a number of leading national lawyers supported the scheme.²⁸

26. D. Weisbrot, and A. Paliwala, 'Lawyers for the People: Re-evaluating Legal Services in an Independent Papua New Guinea', (1976) (1976) 4(2) Melanesian Law Journal 197.

27. Id. 198.

28. See above note 4, p.149.

At the time of this debate in 1976, the Faculty's proposal had been given a boost from the National Parliament when it passed, by an almost unanimous vote, an amendment (No.82 of 1976) to the Post-Graduate Legal Training Act 1974. The amendment, which was in the form of a private member's bill sponsored by Mr Buaki Singeri and generally referred to as the "Singeri Amendment", provided that all law students had to be certified by the Dean of the Law Faculty as having spent at least one year doing research into customary law and/or doing community legal work before they could be admitted to the Legal Training Institute for professional training.²⁹ The government never brought this legislation into force, however, and it has been omitted from the Revised Laws of Papua New Guinea (Ch.168).

No continuing legal education programme exists in P.N.G. to remedy the serious deficiency in the training of national and expatriate lawyers with lawyers with respect to customary law; or to acquaint foreign lawyers with the particular circumstances of the legal system in P.N.G. or of Melanesian society; or to acquaint lawyers generally with new developments in the law; or to assist practitioners to refine their skills and techniques.³⁰

The situation with regard to foreign-trained lawyers is even worse. As noted above, the private profession is still dominated by expatriate lawyers, and many of the most senior and influential government legal officers' positions are still filled by expatriate lawyers.

The Lawyers' Admission Rules made pursuant to the Lawyers Act (formerly the Legal Practitioners Act 1954, now Ch.91 of the Revised Laws) - a colonial holdover - provide (r.2) that practitioners admitted in Australia, England or New Zealand are automatically admissible in Papua New Guinea. Lawyers from other foreign jurisdictions, such as the United States, Canada, or an African state, are presented with some obstacles to admission generally, a two year waiting period and attendance at the Legal Training Institution (r.5).

29. Weisbrot and Paliwala, op.cit. 198.

30. See above note 15, p.405.

In neither case does the admitting authority (the National Court) scrutinise whether the applicant for admission to practice law in Papua New Guinea: (1) speaks one of the lingua franca (Tok Pisin or Hiri Motu); (2) is familiar with the Papua New Guinea Constitution, the supreme law of the land; (3) appreciates the role of custom in the P.N.G. legal system and is able to adduce evidence of custom where appropriate; (4) is familiar in general terms with local circumstances and conditions; or (5) intends to remain resident in Papua New Guinea for any period of time.

If Papua New Guinea was a pure common law jurisdiction, the automatic admission of lawyers from three other common law countries might have some justification (particularly if there was reciprocity). However, the Constitution position is that, under s.9 and Sch.2, the English common law is meant only to be one of the sources of the underlying law, and subordinate to local custom at that (Sch.2.2.).

Moreover, Australian, New Zealand, and English lawyers would have little training or experience in dealing with many of the most significant aspects of the P.N.G. Constitution: the human rights and civil liberties provisions; the National Goals and Directive Principles; the underlying law scheme; and the many other programmatic provisions which allow the courts great freedom to pursue social justice.

Very many more legal cases in Papua New Guinea would, or could, have a Constitution dimension than in most other "common law" jurisdictions. Indeed England and New Zealand have no written Constitutions in the technical sense, relying mainly on convention, and Australia's Constitution is primarily concerned with the mechanics of federalism. None of these jurisdictions has a written or enforceable Constitutional declaration of human rights, either.

In May 1982, the Law Reform Commission and Legal Training Institute jointly sponsored a seminar on the need for a new act regulating the profession in Papua New Guinea (Law Reform Commission 1982). Unfortunately, none of the issues raised above (except a residency requirement for unqualified admission) were dealt with, nor do they appear to be addressed by the draft bill (based on the Kenyan Advocates Act 1967) which was circulated.

All of the foregoing, and a number of other factors, have contributed to the generally poor performance of lawyers in raising matters of customary law in the courts, and fulfilling the Constitutional mandate regarding the development of an underlying law appropriate to the particular circumstances of Papua New Guinea.

Most lawyers actively involved in litigation operate in the public sector, through the Public Solicitor's and Public Prosecutor's Offices. This is so because the private profession handles mainly commercial matters and the court calendars are comprised

mainly of criminal matters (and to a lesser extent civil cases where the local litigants cannot afford the very high fees of private counsel).

According to a recent major study of the legal system in Papua New Guinea,³¹ many of these public lawyers "are simply inexperienced, unsupervised and grossly overworked." In the circumstances, traditional advocacy of basic competence is difficult enough to achieve without expecting counsel to also undertake complicated research into customary law, marshal all of the (often conflicting) documentary and testimonial evidence, and present it to the court in a cogent and compelling fashion.

As well as having an insufficient educational background in customary law ascertainment, limited experience, scarce resources, extreme logistical problems, and an overwhelming caseload to contend with, counsel have received little encouragement from the courts to pursue such a course, and there are few clear guidelines - either judicial or legislative - to assist willing lawyers in understanding what sort of evidence is needed; how it is to be obtained; how it must be formally presented in court; and what circumstances it is appropriate to raise custom as an issue at trial.

THE JUDICIARY AND THE UNDERLYING LAW

Schedule 2 of the Constitution places with the judiciary the responsibility for the development of the underlying law. Schedule 2.4 provides that:

31. W. Clifford, L. Morauta, and B. Stuart, Law and Order in Papua New Guinea (Port Moresby: Institute of National Affairs Discussion Paper No.16, 1984) pp.152-53.

In all cases, it is the duty of the National Judicial System, and especially of the Supreme Court and the National Court, to ensure that, with due regard to the need for consistency, the underlying law develops as a coherent system in a manner that is appropriate to the circumstances of the country from time to time, except insofar as it would not be proper to do so by judicial act.

Section 21 requires the courts to "assist in the development of our indigenous jurisprudence".

The judges are given very broad powers under ss.57-60, 109(4) and 155(4) and (5) to assist them in enforcing the human rights provisions and developing an indigenous jurisprudence. Section 155(4), for example, provides that the superior courts have an inherent power to make any order "necessary to do justice in the circumstances of a particular case".

The C.P.C. envisioned the Bench regularly looking to the NGDPs and to the particular customs and conditions of P.N.G. in making the inevitable policy choices.³²

In carrying out their judicial role, judges and magistrates must take full account of the goals of the society in which they live; they must be attuned to the wishes of that society and to that extent must be politically conscious (although not party politically conscious).

The C.P.C. did recognise that there were disadvantages in giving the main responsibility for legal development to the judiciary. In particular, the C.P.C. recognized that "courts tend to be formalistic and legalistic"; that the judiciary was (at that time) predominately expatriate; that the courts, as final arbiters of the Constitution, could overshadow "the powers of other institutions which express more directly and clearly the wishes of the people"; that the courts have a limited capacity to conciliate and effect compromises (C.P.C. 1974: p.8/15); and that a built-in tension exists between the courts' role as protector of individual rights and liberties and their role as determiners of public policy and facilitators of the programmatic National Goals (C.P.C. 1974: p.8/1).

32. See above note 8, pp.8/15-16.

In the ten years' since Independence, surprisingly few cases involving judicial development of a custom-based underlying law have emerged. As in the case of the legal profession, the judiciary has had to face considerable institutional and resource obstacles to satisfactorily fulfilling its Constitutional mandate. However, there have also been some very notable missed opportunities, and self-created problems of attitude and performance.

The Court has also experienced significant and regular changes in personnel since Independence, although its composition has largely stabilised in the past few years. Clearly, it requires a settled and capable bench plus time in order to develop an indigenous jurisprudence. In the first half of the decade since Independence the Bench was entirely expatriate. In the wake of the so-called "Rooney Affair" in 1979, the judiciary has been steadily localised, led by the appointments of Sir Buri Kidu and Mari Kapi as the Chief Justice and Deputy Chief Justice respectively.³³

In the early years just after Independence, a number of the expatriate judges informally expressed the view that, notwithstanding the Constitutional mandate, it would be inappropriate for them as "outsiders" to effect significant changes in legal rules, procedures or institutions. At least the new, mainly national judiciary have not feel constrained in that regard. Other constraints have emerged, however.

All of the judges are based in Port Moresby, and are faced with regular, costly, and taxing circuits to other regions throughout the year. The absences from the capital are significant enough to hinder a collegial approach to legal development, while the presence in each of the regional centres is too brief for a judge to gain any real knowledge or understanding of local customs and usages. Certainly some thought should be given to basing judges in the main provincial or regional centres to resolve logistical problems, assist judges to understand local conditions, and to provide a symbol of the accessibility of the legal system to people outside of Port Moresby.³⁴

33. P.J. Bayne, 'Judicial Method and the interpretation of Papua New Guinea's Constitution', (1980) 11(1) Federal Law Review 150.

34. Law Reform Commission, The Judiciary, Working Paper No.7. Port Moresby: Law Reform Commission of Papua New Guinea, 1978, pp.19-21.

Both on circuit and at home, the judges are faced with massive case loads to process. Unlike many English language jurisdictions (although similar to most Pacific Island states), the judges of the Supreme Court are also judges of the National Court with very heavy trial commitments. This naturally cuts into the time available for pondering and formulating policy decisions on major issues which arise at trial, or on appeal or by reference to the Supreme Court.

Amendments to the Criminal Code and the District Courts Act in 1980 substantially increased the jurisdiction of senior (Grade V) District Court magistrates to hear a range of hitherto indictable offences summarily. This was done expressly to relieve the overcrowded National Court calendar and to reduce the period of custody for those accused refused bail.³⁵ In the event, however, these changes have not significantly reduced the workload of the National Court,³⁶ and the minimum penalties scheme brought in by Parliament in 1983 will likely exacerbate the problem further.³⁷

The Court is also extremely under-resourced for the important work it has to carry out. The judges operate without court reporters and must themselves take down detailed notes of the proceedings including verbatim transcripts of witness testimony where appropriate.³⁸

35. Law Reform Commission, Indictable Offences Triable Summarily, Report No.8 Port Moresby: Law Reform Commission of Papua New Guinea, 1978, p.7.

36. See above note 31, p.145.

37. D. Weisbrot, 'The Papua New Guinea Minimum Penalties Legislation: The Judges and Parliament Confront Law and Order and Each Other'. Paper delivered at the 39th A.U.L.S.A. Conference, Surfers Paradise, 26 August 1984, p.28.

38. See above note 15, pp.281-82.

Interpreter services are insufficient and sometimes unreliable,³⁹ and there is no trial co-ordinator to efficiently manage the calendar.⁴⁰ Library resources are often inadequate, particularly with respect to journals, comparative materials, texts, and other materials that venture beyond Anglo-Australian cases and statutes. All of these problems are magnified on circuit, of course.

The judiciary would benefit from an upgrading of the Judge's Associate position. An extremely prestigious prize for law graduates in North America, the position in Papua New Guinea has mainly been filled by non-graduates, who are assigned routine clerical tasks but rarely entrusted to do serious research. This may be partly explainable by the comparable situation in Australian state jurisdictions, where judges are also short staffed (albeit tip-staffed). In Papua New Guinea, where the Constitution requires the courts to do more than mechanically work with cases and statutes, it would be useful if the judges had qualified associates to assist with research and the drafting of judgments.

Increasing the number of judges would certainly help relieve the excessive workload. Alternatively, or additionally, appointments to Assistant Judgeships could be made from among the profession, the senior magistracy, or elsewhere.⁴¹ The Constitution (s.167) provides for such a position, but no enabling legislation has been enacted and appointments of this kind have never been made.

The judges have complained that cases before them are often poorly prepared or poorly argued, with submissions inadequate to assist the Court in ascertaining custom or formulating a rule of underlying law. In Constitutional Reference No.1 of 1977 [1978] P.N.G.L.R. 295 at p.299, Raine Dep. C.J. wrote that:

39. Supreme Court, Annual Report of the Judges. Port Moresby: Court of Papua New Guinea, 1982, p.4.

40. See above note 31, pp.155-56.

41. Law Reform Commission, The System of Selecting Judges of the National and Supreme Courts: A Proposal, Occasional Paper No.7. Port Moresby: Law Reform Commission of Papua New Guinea, 1978, pp.7-9.

In some quarters it is fashionable to suggest that the Supreme Court is shirking this duty [under Sch.2.3 of the Constitution, to develop the underlying law]. It is not so. We are not given the tools with which to work.

Similarly, in St. v. Paul Pokolou (1983) N. No.404, the Court commented that:

There are basically two reasons why custom is not recognised by the courts and the underlying law has not been developed. First, in almost every case before the courts lawyers have not made any attempts either to produce evidence or material necessary for the judges to use to recognise custom or to develop the underlying law. Judges have not the time and the resources to undertake their own research in most cases... Secondly, the Parliament of Papua New Guinea has failed to perform its duties as given to it by the Constitution [to enact legislation providing for development of the underlying law, under s.20]. Until that time... Sch.2 does not permit the court to ignore the statutory law and the decisions of the Supreme Court and pronounce a new law based on custom.

In his decision in the "Vanuatu Case" P.N.G.L.R. 265 at pp.292-293, Kapi Dep. C.J. remarked in similar terms.

Whether or not custom has any influence in the formulation of principle depends on the evidence that is produced before the court. The court may, in appropriate cases, decline to formulate a law if it considers that not much assistance has been given on these considerations. Formulation of new law depends to a large extent on the evidence of these considerations. It is foreseeable that in appropriate cases the formulation of a new law may change from time to time on the subject depending on the evidence that is brought before the court. It is not satisfactory. For these reasons counsel appearing in these cases ought to give these matters the fullest research. This does not mean that the judges should not give the fullest research outside counsels' research. But it must be borne in mind that the judges of the Supreme Court are trial judges in the National Court and have very little time for full research. We do not have the benefit of law clerks as in the Supreme Court of the U.S.A. This undoubtedly puts a heavy burden on counsel who appear in these cases.

These complaints have a certain cogency, and the shortcomings of the legal profession have already been noted. However, the judiciary has contributed to this situation by its own actions and omissions.

Schedule 2.5 of the Constitution provides that in their annual report to Parliament under s.187, the Judges shall,

if in their opinion it is desirable to do so... comment on the state, suitability and development of the underlying law, with any recommendations as to improvement that they think is proper to make.

In the first few years of Independence the Judge's Annual Report did briefly discuss the development of the underlying law, but this central issue has received little attention in recent years. Despite the remarks of Andrew J. in Pokolou quoted above, the judges have not seen fit to prod Parliament to enact the necessary legislation facilitating the declaration and development of the underlying law called for in the Constitution, s.20.

The judiciary has also failed to provide clear guidelines as to how it wishes evidence of custom to be formally adduced by counsel in court. Recently the Rules of Court promulgated by the judiciary were revised. Despite the urgent need for a provision on the pleading of custom, and at least one submission strongly calling for the same, no such provision was included notwithstanding the Constitutional scheme (Sch.2.1.) which lists custom as a principal source of the underlying law, and overseas experience which indicates that special rules of procedure dealing with custom are essential for satisfactory use in the courts. In view of this omission, counsel could certainly be forgiven for believing that the courts are not especially interested in receiving submissions on custom.⁴²

42. See above note 3, Weisbrot 90.

Ex tempore and written opinions from the judges do not assist to clarify the situation. For example, in Siwi Kurondo v. Lindsay Dabiri (Unreported National Court judgment N258, 26 September 1980), and again in Supreme Court Reference No.4 of 1980 (the "Vanuatu Case") [1981] P.N.G.L.R. 265 at 304, Justice Miles expressed the view that assistance from the bar table on matters of custom (while not strictly "evidence") was welcome, especially when counsel are Melanesians. Statements from the bar table would have little probative value, of course, where counsel are in disagreement.

In Michael Mandaku v. Patrick Wau [1973] P.N.G.L.R. 124 at 134, Minogue C.J. stated that (what is now) s.2 of the Customs Recognition Act, on proof of custom, enables the court to inform itself in a quite informal matter, although as a matter of practice the court should also carefully record the source of all advice upon which it places reliance. Section 2 provides, in relevant part, that with regard to proof of custom, a court:

- (a) is not bound to observe strict legal procedure or apply technical rules of evidence; and
- (b) shall -
 - (i) admit and consider such relevant evidence as is available (including hearsay evidence and expressions of opinion); and
 - (ii) otherwise inform itself as it thinks proper

However, in a later murder trial involving elements of alleged with craft and customary retribution (given wide publicity by the Australian "60 Minutes" peripatetic television crew), Ramage A.J. was extremely critical of counsel for even attempting to give evidence from the bar table and refused to consider the statements of counsel even though the prosecutor and defence counsel were in agreement.

Similarly, in Acting Public Prosecutor v. Nitak Mangilonde Taganis of Tampitanis [1982] P.N.G.L.R. 299, both Chief Justice Kidu and Deputy Chief Justice Kapi wrote (at p.302) that statements from the bar table by counsel could not be considered as proper or sufficient submissions on custom.

The fears of the Chief Justice and Deputy Chief Justice about the impropriety and unreliability of statements from the bar table are probably very well grounded. More guidance, however, is required for counsel to understand exactly how they are to inform the court on matters of customary law.

Apart from the procedural problems, another line of cases would appear to place such stringent - indeed nearly impossible - requirements on a litigant seeking to rely on custom that it may will operate as a major disincentive to counsel considering raising customary law or underlying law matters.

In Constitutional Reference No.1 of 1977: Poisi Tatut v. Chris Cassimus [1978] P.N.G.L.R. 295, the Supreme Court considered the question of whether an action for enticement was vacated by legislation in 1970 and could not then be adopted under Sch.2.2. Prentice CJ then interpreted Sch.2.4., which places a duty on the courts to "ensure that, with due regard to the need for consistency, the underlying law develops as a coherent system in a manner appropriate to the circumstances of the country from time to time", as requiring that (at p.298) any custom adopted as part of the underlying law under Sch.2.1. must obtain throughout the country:

[B]efore undertaking the duty of formulating an appropriate rule as part of the underlying law, in regard to a matter close-knit into the fabric of traditional village life, the Court would I think, need to have evidenced before it an appropriate almost country-wide custom.

Saldanha J. also came to the same conclusion in this case, which results in a classic Catch 22 situation: since there is no evidence of a national custom, custom may not be adopted (under Sch.2.1.) as the underlying law, but "as long as there is a doubt that there may be a remedy at customary law... it would not be proper... to formulate a rule of [underlying] law on this subject [under Sch.2.3]". Saldanha J. then recommended that the matter be left for Parliament to deal with.

Later, in Supreme Court Reference No.4 of 1980 [1981] P.N.G.L.R. 265, the Court considered whether the then Leader of the Opposition, the Rt. Hon. Michael Somare, and standing to challenge the Constitutional validity of the Defence Force (Presence Abroad) Act 1980. It was under authority of that Act that P.N.G. Defence Force troops were dispatched to Vanuatu at the invitation of that government to help put down an anti-Independence rebellion.

Among the submissions made to the Supreme Court on behalf of the petitioner was that (at p.271):

[I]n Papua New Guinea "big men" can speak in any forum. Mr. Somare should be allowed to speak in this forum because he is such a man.

Evidence tendered in support of this submission included anthropological works and witness testimony from an East Sepik traditional and political leader on local custom.

The submission failed, however, because the Court determined that the evidence of custom related only to the Arapesh peoples of the East Sepik Province and did not sufficiently demonstrate nationwide application. Kudu C.J. wrote (at p.272) (emphasis supplied):

[I]n a case such as this, for a custom to be held to be applicable in Papua New Guinea, evidence that at least the majority of the nineteen Provinces have this custom would be required...

An even more daunting standard is imposed by Kapi Dep. C.J. (at p.288) (emphasis supplied):

[I]n a case which involves an issue which has a general application to the whole country... it must be established that there is a custom which is common to all societies throughout the country.

Given the more than 700 different social groups in Papua New Guinea, each with its own language, customs and usages, these cases make it extraordinarily difficult for even the most enthusiastic and conscientious counsel to assert that a rule of underlying law should be based on custom.

Narrower customary law issues, such as determining the practices of a particular society with respect to marriage or divorce or child custody, may be possible to deal with in the courts. Raising more fundamental issues of legal development through a custom-based underlying law, however, may be all but foreclosed by these requirements. Kapi Dep. C.J. would also limit the indirect influence of custom in formulating a new rule of underlying law under Sch.2.3 of the Constitution where both custom and the common law have been found to be inapplicable. He states (at p.292) (emphasis in original):

Under Sch.2.3.(1)(c) the court shall have regard to analogies to custom. This is different from custom as adopted and applied under Sch.2.1. Under Sch.2.1. custom must be proven with some precision whereas the degree of precision may not be the same under Sch.2.3(1)(c). However in practice custom must be decisively established under Sch.2.3(1)(c) if it is to play any part in the formulating of a new rule of law.

In fairness, although the Supreme Court in this case was unsympathetic to the submission on custom, it did by a majority of 3-2 (Kearney and Greville Smith J.J. dissenting) decide not to simply adopt the common law rules of standing. Instead, the major-

rity formulated a new rule of underlying law based on the progressive (relative to the common law) principle that under the Constitution "the People, the depository of all power, have standing". Subject to judicial discretion in each case, the standing rules thus appear to be considerably more liberal than in any of the common law countries.

This makes a refreshing change from a long run of cases in which the courts have demonstrated a marked predisposition towards finding the English common law "applicable and appropriate" and adopting it as the underlying law under Sch.2.2. without any significant, or often even any cursory, prior examination of the suitability of custom under Sch.2.1. See, for example, St. v. Kewa Kai [1976] P.N.G.L.R. 481, regarding corroboration in rape cases; Johns v. Thomason P.N.G.L.R. 15, regarding the doctrine of ratification in the principal-agent area; W.A. Flick & Co. v. Thompson [1976] P.N.G.L.R. 112, regarding restraint of trade; Government of Papua New Guinea v. McCleary [1976] P.N.G.L.R. 321, regarding damages in tort for non-economic loss; Buka v. Lenny [1978] P.N.G.L.R. 150, regarding construction of the statutory reference to "nearest relative"; and St. v. Alan Woila [1978] P.N.G.L.R. 99, regarding the voluntariness or otherwise of confessions.

Some brief examples of cases where the courts have grappled with the development of the underlying law serve to further illustrate the difficult problems involved, and the somewhat less than innovative approach and see generally which has become characteristic.⁴³

In Sangumu Wauta v. St. [1978] P.N.G.L.R. 326 the Supreme Court considered whether an accused could be convicted of incest under what is now s.223 of the Criminal Code for having carnal knowledge of a girl alleged to be his adopted daughter under custom (in accordance with the Adoption of Children (Customary Adoption) Act 1969, s.5(1)). After finding that the section did not apply as between adoptive parent and child, Prentice C.J. also pointed to (1) the Constitutional injunction (s.37(2)) against convicting a person for an offence not defined by a written law; (2) the fact that under both the Native Customs Recognition Act. Prentice C.J. wrote.

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43. P.J. Bayne, 'The Constitution in the Courts 1975-1980,' in D. Weisbrot, A. Paliwala and A. Sawyerr (eds.), Law and Social Change in Papua New Guinea (Sydney: Butterworths, 1982) pp.229-38; P.J. Bayne, 'Judicial Technique and the Interpretation of Pacific Island Constitution' in P. Sack (ed.), Pacific Constitutions (Canberra: Australian National University, 1982) pp.293-301; A.R. Blackshield, 'Judicial Innovation As A Democratic Process', in Future Questions in Australian Politics (Melbourne: La Trobe University, 1979) p.41; B.B. Sakora, 'Judicial Law-Making Under the Papua New Guinea Constitution', in P. Sack (ed.), Pacific Constitutions (Canberra: Australian National University, (1982) pp.265-67; D. Weisbrot, 'The Impact of the Papua New Guinea Constitution on the Recognition and Application of Customary Law', in P. Sack (ed.) Pacific Constitutions (Canberra: Australian National University, 1982) pp.278-85.

Is the Criminal Code's provisions as to incest to take effect in the different societies and villages differentially according to what may be proved as the particular adoption process and its particular local effect in each particular case? Such a possibility would render the operation of the Statutory Criminal Law and its administration quite uncertain. Findings of guilt in each case, would depend not upon the terms of the Statute, but upon the evidence as to the particular "law" in each case. Availability of wit witnesses as to such "law", and the variable enthusiasm of prosecuting counsel and of police, in procuring their attendance, would surely prove an unsatisfactory basis for finding the law. Such a process would possible militate strongly against the development of "coherent system" of underlying law (Sch.2.4 of the Constitution).

In St. v. Uname Aumane & Ors. [1980] P.N.G.L.R. 510, five accused, including a son of the deceased, were charged with the wilful murder of an old woman who was allegedly known in the community as a sorceress, responsible for a large number of deaths. Four accused pleaded guilty (the other was acquitted at a subsequent trial) and each was sentenced by the trial judge to three months imprisonment with hard labour and ordered to pay compensation of five mature pigs to the deceased's other son. In arriving at this seemingly lenient sentence, the trial judge, Narokobi A.J., expressly relied on local custom, the National Goals and Directive Principles, and the underlying law provisions of the Constitution. He concluded that it was appropriate in P.N.G. to make compensation a form of liability for crime, possibly in preference to a severe custodial sentence depending upon the circumstances of the particular case. The Public Prosecutor appealed to the Supreme Court against the nature and inadequacy of this sentence.

The case was widely reported in the Western press as a

[L]andmark in justice in Papua New Guinea, one which encompasses the important questions of the suitability of Western-style justice in a non-Western country and the related question of "justice" versus "legality".⁴⁴

44. P. Byrne, 'Five Pigs for Murder? No, Say PNG's Top Judges', Sydney Morning Herald, 8 May 1981, p.6.

The five judges of the Supreme Court unanimously upheld the appeal, quashing the order for compensation and imposing a six year sentence on the four accused (less seven months time already served in custody). About half of the lengthy decision is devoted to discussion of a procedural point regarding temporal limitations on the institution of an appeal by the Public Prosecutor, but the Supreme Court does as well consider questions of judicial development of the underlying law.

On the question of sentence all judges expressly agreed with the Chief Justice that the penalty imposed by the trial court was "grossly inadequate for the crime of wilful murder". Kidu C.J. wrote (at p.513) that while it was quite proper to consider cultural factors in sentencing, they

[S]hould not override the clear dictates of the Parliament that those who commit the crime of wilful murder attract to themselves the possible penalty of imprisonment with hard labour for life. If Parliament represents the people of P.N.G. and the laws it makes reflect the attitude of the people, then Courts must take heed.

The opinion which most closely considers the relevance of customary law is that of Mr. Justice Kapi. While recognizing the wide discretion and powers of the sentencing judge to impose an appropriate penalty in a particular case, Kapi J. found that of necessity this discretion may be exercised only within the bounds laid down by the relevant legislation. In this case, the Court's power to punish was controlled by s.19 of the Criminal Code which specifies the types of punishments which may be applied and by what is now s.299, which specifies the punishment for wilful murder. Kapi J. referred to s.37(2) of the Constitution which ties criminal punishment to written law, and found that the underlying law as determined under Sch.2 did not amount to a "a written law" for the purposes of s.37(2).

Kapi J. also disagreed with the trial court's use of what is now s.4(e) of the Customs Recognition Act, finding that this provision entitles a court to look at custom and take it into account in sentencing (that is, in mitigation), but does not enlarge the power of the court to formulate qualitatively different punishments outside the controlling statutes. In conclusion, Kapi J. found that (at p.543):

There is no room for developing the underlying law in this case. The development of the underlying law under Sch.2.3 arises only when there appears to be no rule of law that is applicable. In this case the Criminal Code Act is applicable.

These cases illustrate several of the major problems discussed above:

- (1) The pre-emptive nature of the existing written law;
- (2) the failure to have some agency review the adopted colonial legislation for suitability;
- (3) the difficulties involved in developing underlying law on a case-by-case basis;
- (4) the difficulties involved in marshalling evidence as to custom;
- (5) the failure of the parliament to enact comprehensive legislation under s.20 of the Constitution to provide for the declaration and development of the underlying law; and
- (6) the cautiously traditional common law approach of the judiciary in preference to the judicial boldness and innovativeness which could easily be justified under the Constitution.

CONCLUSION: PLURALISM MARKS TIME

The generally critical tone of this paper should not draw readers to the conclusion that the Papua New Guinea legal system is wholly without pluralistic elements which permit local customs, usages and attitudes to be taken account of by the mainly western-style institutions. Rather, the central criticism is that little has happened in the ten years since Independence to further these pluralistic elements and to begin to create a uniquely Papua New Guinean jurisprudence as envisaged by the Constitutional Planning Committee.

The blame for this situation may be apportioned, if need be, across the legal system. The Parliament has apparently lost interest in issues of law reform that do not deal directly - in its perception - with law and order. A large number of reports from the Law Reform Commission and ad hoc committees have appeared in recent years which have not received any attention from the legislature.⁴⁵ In the ten years since Independence, Parliament has still not considered legislation to declare and develop the underlying law per Schedule 2 of the Constitution, and in a number of other key areas enabling legislation foreshadowed in the Constitution has not eventuated.

The courts have not moved strongly or surely enough to develop the underlying law in the absence of legislative action, even though the Constitution does give them a mandate for overseeing and fostering an indigenous jurisprudence. In this task the legal profession has been of little assistance as a collective entity, and few individual lawyers seem to appreciate their Constitutional responsibilities.

Among the pluralistic elements which do exist in the legal system are: the Customs Recognition Act (1963), discussed above, which sets out the areas of civil and criminal law in which custom may be pleaded, recognised and enforced; the Marriage Act (1963) which recognises customary marriages; the Local Courts Act (1963), which permits that court to make orders regarding customary law, including the validity or dissolution of a customary marriage; the Adoption of Children (Customary Adoptions) Act (1969) which recognises customary adoptions; the Wills, Probate and Administration Act (1966) which recognises customary succession to property and stipulates that "traditional property" (such as shell money, or bilas) must pass according to custom and succession to it may not be altered by will; and the Workers Compensation Act (1979), which extends benefits to persons who are regarded as customary dependents. Earlier legislation had been interpreted as restricting benefits to a western-style nuclear family.

All of the above operate, at least in part, in the area of personal law, where customary law has generally been recognised - even in colonial times - as having its major application both in Papua New Guinea and in other countries which allow for pluralism.

45. See above note 3, Weisbrot 96, and note 15, pp.226-30, 394.

Other pluralistic elements which are even more innovative include: the Sorcery Act (1971), which creates certain offences and recognises certain defences in criminal matters involving acts of sorcery or attacks upon alleged sorcerers; the Local Government Act (1963), which empowers local government councils to pass ordinances setting out or regulating custom, such as by determining the amount and nature of bride-price payments; the Inter-Group Fighting Act (1977), which introduced the traditional concept of group responsibility to the criminal law, as well as encouraging settlement by mediation and compensation; the Business Groups Incorporation Act (1974), and Land Groups Incorporation Act (1974), which allow for customary groups to form the basis of modern business associations, and therefore to conduct business ventures, to borrow money, and to acquire, hold, dispose of, and manage land; and the Land Disputes Settlement Act (1975), which establishes Land Courts which mediate land disputes in a relatively informal fashion and rely on customary law.

The Business Groups Incorporation Act, in particular, has been a popular success,⁴⁶ but unquestionably the most important institutional break with the colonial legal past was the establishment of the Village Court system in 1974,⁴⁷ which is bound only by natural justice (Constitution, s.37(22)) and the Village Courts Act and Regulations, with the aim of ensuring (s.16):

[P]eace and harmony in the area for which it is established, by mediating in and endeavouring to obtain a just and amicable settlement of disputes.

46. See above note 4, 146-48.

47. D.R.C. Chalmers, 'A History of the Role of Traditional Dispute Settlement Procedures in the Courts of Papua New Guinea', in Guinea', in D. Weisbrot, A Paliwala and S. Sawyerr Law and Social Change in Papua New Guinea (Sydney: Butterworths, 1982) p.169.

With their emphasis on mediation of disputes (arbitration is available as a last resort), procedural and evidentiary informality, the banning of lawyers, election of magistrates by the local community reliance on local customs and usages, blurring of the civil-criminal distinction, and recognition of group responsibility, the village courts represent a major step away from the reliance on the substance and procedures of the common law.

By most accounts the Village Courts are working well, in the sense that they have been established in large numbers (although national coverage is not yet quite complete), are very widely used (more than the Local, District and Children's Courts combined), and serve to spur the sense of community and community involvement.⁴⁸

The main problems that have been identified are inadequate supervision, lack of transport, and ineffective police support and co-ordination; the Village Courts Secretariat is currently working on solutions to these.⁴⁹ A more structural problem is the extent to which some commentators suggest that the Village Courts have become too formal, rely on non-traditional mechanisms, and use adjudication over much.⁵⁰

48. See above note 31, p.184.

49. See above note 15, p.284.

50. A. Paliwala, 'Law and Order in the Village: The Village Courts', in D. Weisbrot, A. Paliwala, and A. Sawyerr (eds.), Law and Social Change in Papua New Guinea (Sydney: Butterworths, 1982) p.191; G. Westermark, 'Village Courts in Question: The Nature of Court Procedure', (1978) 6 Melanesian Law Journal 79.

Other commentators are more sanguine and see the Village Courts, despite these problems, as being the best hope for the development of a truly Papua New Guinean system of law and justice.⁵¹ It is most significant that all of the recent reviews of the P.N.G. legal system regard the Village Courts as, on balance, successful and recommend an increased role for the courts in future.⁵²

Virtually all of these elements of pluralism were introduced into legislation, or have their foundations in inquiries conducted by the colonial administration or the local House of Assembly in the build-up towards Independence. Few significant innovations have occurred since Independence.

It is crucial that Parliament make up for this lost decade by beginning now to consider the important question of the basis on which legal development will proceed in Papua New Guinea. Much momentum has already been lost from the dynamic period of 1972-1975, and if current practices go unchecked then the unadapted common law will become permanently entrenched as the foundation of law in P.N.G.

Immediate thought must be given to enacting legislation which replaces the "transitional" provisions of Schedule 2 of the Constitution, providing for the declaration and development of the underlying law. Adoption of the Law Reform Commission's well-constructed proposals on the underlying law and criminal responsibility would go some way in improving the situation regarding judicial development of the law.⁵³

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51. N.D. Oram, 'Grass Roots Justice: Village Courts in Papua New Guinea', in W. Clifford (ed.), Innovations in Criminal Justice in Asia and the Pacific, (Canberra: Australian Institute of Criminology, 1979) p.76.
 52. National Planning Office, Report of the Committee of Review on Law and Order for the National Planning Committee. Port Moresby: National Planning Office, Mimeo, 1982, p.iv.
 53. Law Reform Commission, The Role of Customary Law in the Legal System, Report No.7. Port Moresby: Law Reform Commission of Papua New Guinea, 1977, pp.17-27.

Over twenty years of experience with the Customs Recognition Act and Schedule 2 of the Constitution, however, caution against relying exclusively on the courts to develop the law. As discussed above, ascertainment of customary law and formulation of underlying law by the courts on a case-by-case basis will inevitably be slow and difficult. Further, the integrationist policy of recognising and enforcing custom in the western-style formal courts involves the hazardous, if not impermissible, practice of divorcing customary law from its processes, and raises a large number of other practical and theoretical difficulties.⁵⁴

For these reasons it is also important to pursue a strategy of extending official recognition to traditional institutions, or the creation of "neo-traditional" institutions such as the Village Courts, and thereby to return legal decision-making and development to the grassroots level, as envisaged by the Constitutional Planning Committee.

Thought should also be given to legislating on matters of substantive customary law. The development of an indigenous jurisprudence would be fostered by the central government legislatively introducing broad (if not universal) Melanesian concepts of law and justice which have widespread acceptance. These might include: the extended family (wantok system); group responsibility; strict (civil) liability; compensation as a major aspect of dispute settlement, and so on. This might also spur provincial governments and local government councils into using the powers they already have, but rarely utilise, to pass ordinances dealing with matters of local custom in greater detail. What is called for is not the mere (and futile) codification of custom, but rather the progressive development of the law in a way that consciously seeks to suit modern Melanesian circumstances and sensibilities.

54. See above note 3, Weisbrot 89.