INTEGRATING THE JUDICIAL SYSTEM AND REVIEWING THE ADMINISTRATION OF JUSTICE IN PAPUA NEW GUINEA

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INTRODUCTION

"We the people of Papua New Guinea hereby establish, adopt and give to ourselves this Constitution...."[1] The people of Papua New Guinea on the 16th of September 1975, solemnly adopted a written Constitution This Constitution, the authority of the People for a form of representative government contains the founts of the country's principles of democracy and bears the model of its social aspirations. The gaining of independence as enshrined by the autochthonous Constitution necessarily goes beyond limits of immediate political independence. The desire for a "home grown" constitution was prompted more by political considerations than legal requirements.[2] However, as Alan Harding has expressed... 'law is the expression of social needs, a system of law is a description of the society for which it is made![3] Thirteen years has passed since independence, yet no serious attempt to evaluate the working of the THIRD ARM of the democratic process namely, the National Judicial System[4] has been considered. A few changes to the system of the administration of the laws of the country were made.[5] What is desirable is a significant review of all areas of the administration of justice.

Most systems, whether mechanical, natural or social, have a tendency for periodical change. Mechanical systems need regular servicing and replacements and natural systems continuously change and adjust. A legal system (a legal system may not be a "perfect system" under *systems theory),* may require review and change to accommodate the needs of the community, consequential to continuous social changes and to enable the legal system to blend with the environment in which it functions.[6] In Papua New Guinea Law Reform is further prompted by obvious and urgent needs. The gaining of independence and the accompanying Constitution was intended to precipitate reform to the established legal order. This need was expressed by Mr Justice Narokobi in *Tabo Sipo* v. *Mukara Meli.*[7]

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1. Preamble, the Constitution of The Independent State of Papua New Guinea

2. J, Goldring. *The Constitution of Papua New Guinea* (The Law Book Co. Ltd., Melbourne, 1978) 29.

3. A, Harding,. *A Social History of English Law* (1966) 7; also quoted by Goldring, op.cit. 1.

4. See Section 99 of the Constitution (Ch.1).

5. For example the establishment of Principal Magistrates in 1980.

6. This has been highlighted and the need for such review has been advocated for quite some time, see generally P. Bayne, 'Legal Development in Papua New Guinea: The Place of Common Law (1975) 3(6) *Melanesian Law Journal,* 9-39; T.E. Barnett, 'Crime Kin and Compensation: The Law as an Accessory to Payback' (1972) 1(3) *Melanesian Law Journal,* 29-36, and B. Narokobi, 'Adoption of Western Law in Papua New Guinea', (1977) 5(1) *Melanesian Law Journal,* 52-90.

7. (1980) N/No 240, 6.

> 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.

The present legal system is an imposed and imported system.[8] Even otherwise, where changes are likely to benefit the recipients of the services, create greater efficiency and greater stability, there is a valid reason for periodical law reform.

As mentioned, the existing legal system is not one of choice. Adopted for colonial needs, it was thrust upon the people, without[9] as it often happens, understanding the needs of the recipient society. The existing legal system is neither homogeneous, nor was it intended or designed, to suit the requirements of the indigenous population. It is a regime which was prevalent in a foreign environment, suited perhaps very well, to a population whose culture and values were and are quite different to those of the people of Papua New Guinea. For example, the criminal law process, does not provide adequate compensation for harm suffered by the victim. The attitude of the existing criminal law is to duly appraise the culpability of the suspect and convict, where the guilt is proved. Once the guilt is established, the institutions of the state enforces punishment on the convict in order to express society's indignation towards the act of the offender. Such punishment carries veins of deterrence, retribution and even reform. Under this system the victim is necessary merely to inform the forum of the transgression and perhaps categorize the act of the offender. In this legal system of communal punishment, the state is the central figure. Then the State and all others forget the unfortunate victim. On the other hand the traditional methods always view the victim as the central figure, both in the control of behaviour and the consideration of compensation. The pain and suffering of the victim and in case of death, the loss of the victim to those close to him or her, including the tribe, is the main consideration in determining the gravity of the offence. The expression of social indignation towards the act and the punitive sanctions are subordinate.[10]

Today, thirteen years after independence, the legal system has not changed to provide for the people a compromise suited for their needs. Obviously, in view of established tradition and the customs of the land, people have endorsed little consensus and perhaps less respect.

> Before the advent of the European, there was no system of public administration of justice in the nature of communal punishment of crime. The redress of wrong was a private affair often dependent for its implementation on the status, power and opportunity of the individuals concerned... The present system of justice did not grow from below to satisfy a popular demand, but was imposed from without, and was

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8. See M. Somare, 'Law and the Needs of Papua New Guinea's People'.. J.Zorn and P. Bayne (eds), *Law Bilong Ol Manmeri*, 14-30 (University of Papua New Guinea, Port Moresby. 1974), 14.

9. See generally, P. Lawrence, 'The State Versus Stateless *Societies in Papua New Guinea*', B.J. Brown (ed.), Fashion of Law in New Guinea, (Butterworths, Sydney, 1969) 15. See also Department of Provincial Affairs, Report of the Committee to Review Policy and Administration on Crime and Order (the Morgan Report) Port Moresby, Department of Provincial Affairs 1983, 10.

10. See Lawrence, *op.cit.* 14-34.

> contrary to popular practice. The population has to live with and learn to understand this system - a process which is yet far from completion.[11]

The question is, whether, in order to gain acceptance by the people of this country the 'imposed laws', is it necessary to change their attitudes, values, custom and tradition or can the laws be modified to accommodate popular needs. The answer to this may be gathered from attitudes of people, displayed in their behaviour.

> In recent history the judges had become very concerned with savage killings in the Highlands. Axes can be used with devastating effect and the judiciary repeatedly pointed out that the use of such a lethal weapon to express a point of view has to cease - that otherwise sentences would increase. Soon there was a spate of strangulations, with accused on arraignment saying "I did not use an axe; I used a rope".[12]

This almost innocent acknowledgement of culpability, illustrates a point. Attitudes are difficult to change. Today, twenty years after the time of the aforementioned events, the system of criminal law in this country has failed to justify its continuity because it lacks popular respect. The prevalence of 'pay-back' killings, killings without a motive in the legal sense, killing of persons innocent to the true problem, are current examples. Criminal though, such acts may be still laudable in the tribal tradition. This contributes to the inevitable conclusion that methods of dealing with offenders (punishment generally) are not oriented to the feelings of this society.[13]

> But in the case of punishment, the situation is quite different. Today we impose punishments, ranging from fines to imprisonment. In the Western World, those punishments affects the offender in many ways ....
>
> How does this work in our society? I must in all due modesty explain that I can only speak with familiarity with the society of Papua New Guinea. In my country, which is really a very large landmass, society is still rather unchanged from old values. In such areas, the collective spirit of the people, usually referred to as 'wantokism" - a phrase derived from the pidgin word "wantok", referring to a group speaking the same language, meaning one tribe - is still live and kicking. In such a society, the tribe or village would readily chip in to provide the money to pay a fine, just as readily as they would collect money for a marriage, or a death or a feast.
>
> What about prison.... Prison is certainly not something one would elect to go to, but it does not have the sudden, sharp drop in the quality of life that one takes for granted in the West.
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> This leaves the stigma. Once again, I feel that this no great deterrent.[14]

It may not be possible to change existing laws and de- criminalize criminal acts or make "wantokism" a criminal offence. Developing an underlying law, as envisaged under

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11. Johnson, *op.cit.* 83, 101.

12. *Id.* 98.

13. See Ross. *op.cit.* 7-8.

14. P. Tohian, 'Police Policy in the Pacific - the Need for Change' (Unpublished Paper presented by P.T. Tohian, Commissioner of Police, PNG, at the South Pacific Chiefs of Police 17th Conference, Rarotonga, Cook Islands, August, 1988).

Constitution, may be one solution to this problem.15 yet, no positive effort towards this end has been demonstrated since independence. In any event, developing an underlying law is a process that is likely to take centuries more than decades. The compromise therefore is to review and revise the existing adopted system of administration of justice in order to enable the people to recognize the merger of concepts without hesitation.

This paper generally considers the processes of the administration of justice which may need review. What is mentioned here is intended to stimulate interest and discussion on two main areas namely, the integration of the judiciary and the need for reform in the administration of justice in Papua New Guinea. For convenience the latter is divided into five headings - the Judiciary, the Courts, the Judicial Service, the Legal Departments of the State and Statutes. It is observed that in practice these topics are interrelated and often overlap each other.

THE JUDICIARY.

In a constitutional democracy, elected representatives are vested with governmental powers on behalf of the perennial source - the People. The legislative, the executive and the judiciary form the major institutions which perform specific functions with mutual respect, understanding and responsibility towards each other and are ultimately answerable to the People. Unlike the other two bodies the judiciary is not an elected body, yet the judicial power of the People is vested in it via the National Judicial System.

The traditional function of the judiciary in a society, is to carry out justice and keep the peace. Section 158 of the Constitution imposes this duty in no uncertain manner.

> 158. Exercise of Judicial Power.
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> (1) Subject to this Constitution, the judicial power of the People is vested in the National Judicial System.
>
> (2) In interpreting the law the courts shall give paramount consideration to the dispensation of justice.

In the process of administering justice and establishing the peace, on behalf of the people, the judiciary enforces and interprets canons of behaviour - populars ledges. Unlike the legislature and the executive, the judiciary, under the system of Parliamentary Democracy has no direct access to its perennial source of power - populars - the people. Although representative of the populars the judiciary is different from the other two bodies in many respects. It neither has any fiscal power nor the capacity to direct national policy. In the highest echelon, its power of review of legislative, executive and administrative actions is constitutional. Even in this area, in actual practice it lacks any inherent power of enforcement.

The judiciary has no voice, because the judiciary cannot and must not directly appeal to the people in national affairs or even in matters relating to itself. For the latter the judiciary has to solely depend on the members of the legislative and the executive. This is how the system functions and it has to remain so for proper constitutional government. Any departure from this normative approach infringes the democratic process or may

15. See S.20 of the Constitution. See also the interesting analysis of this problem in D. Weisbrot, 'The PostIndependence Development of Papua New Guinea's Legal Institutions'. (1987) 15 *Melanesian Law Journal*, 18-43.

create a crisis situation.16 It is not intended to discuss this area because it would be a departure from the subject of this paper.

In addition, the concept of separation of powers, which concept when rationally observed would not permit members of the legislative and the executive to actively participate in any of the institutions controlling judicial behaviour and decisions. Participation in the affairs of the judiciary by the other two bodies - legislative and the executive - will be dangerous and damaging to the democratic process.

Because of this unique isolation both from the people and the policy makers and with no fiscal powers it is difficult, if not impossible, for the judiciary to originate and carry out reforms to its departments or related areas. Therefore, reviews are initiated by bodies like the Law Reform Commission or *ad hoc* Commissions. Review and revision are the responsibilities generally of the policy makers, and more specifically of the executive with the compliance of the legislative. In addition to this situation, the people - the citizen - generally remain unaware of the pressing needs or the incongruous systems. Obviously, the average citizen is often unaware of the needs in the areas of law reform. In Papua New Guinea there is a Law Reform Commission. To enable this body to carry out its duties in a responsive and responsible manner it must be provided with sufficient facilities for research and record. This means the staff and the funds, without which continuing law reform becomes difficult.

The administration of justice embodies the judicial process. The judiciary is central to both these functions. Thus, the importance of the judiciary as the third arm of the government needs no further emphasis. Being the institution vested with the duty of carrying out justice and keeping the peace in this society, the judiciary cannot be left stagnant through a period of economic development and social progress. Peace and good order is an inherent right of the people. No degree of progress can be attained or sustained without social harmony. In any society, the pursuit of economic well-being and materialistic gains will ultimately be a mirage without the reinforcing effect of the law which conveys peace and happiness to the people. The perennial fount to peace in any society is the National Judicial System.

THE JUDICIARY OF PAPUA NEW GUINEA

The judiciary consist of two identifiable and defined divisions.17 These two divisions are identified as the Higher and the Lower Judiciary.18 The former consists of the judges of the Supreme Court and the National Court. The judges of the Supreme Court and the National Court consist of the same individuals, except Acting Judges of the National Court who do not function in the Supreme Court.19

The Lower Judiciary consists of all magistrates in the Magisterial Service of the country. Magistrates of the Village Courts20 are not in the Magisterial Service. All magistrates in

16. A problem of this nature was recently reported to exist between the judiciary and the executive in Malaysia. For a more detailed discussion of this question see O. Wijetillake, 'Public Policy Functions of Supreme Courts and the Independence of the Judiciary', (Jan. 1982) *Malaysian Current Law Journal*, 14-19.

17. This is a universal concept and see S155 of the Constitution.

18. See generally SS154 and 155 of the Constitution.

19. See generally SS 161(1), 165, 166, 168, 169, of the Constitution

20. S 174(1) of the Constitution.

The Magisterial Services are divided into five grades beginning from Grade One to Grade Five.[21] In addition to the aforementioned five grades, namely Grade 1, Grade 2, Grade 3, Grade 4 and Grade 5 or Principal Magistrate,[22] the law provides for the appointment of Additional Magistrates, Assistant Magistrates,[23] and Reserve Magistrates.[24] There are in all eight identifiable levels of magistrates functioning in the lower courts. These different grades of magistrates form the lower judiciary of the country. The jurisdiction, functions and powers of these different grades of magistrates depend on the individual grade of the magistrate and not on the jurisdiction of the court to which he or she is appointed to function.[25] Section 7 of the *Magisterial Service Act* (Ch.43) states the qualifications for magistrates generally, and Sections 1A, 1B and 1C of the *District Courts Act* (Ch.40) deals with 'Appointment of Principal Magistrates', 'Qualifications of Citizens for appointment as Principal Magistrates' and 'Qualifications of non-citizens for appointment as Principal Magistrates' respectively. At this point, it seems opportune to make an observation on the qualifications and training of magistrates.

In other jurisdictions, where the legal system is based on the Common Law system, magistrates are appointed from the bar. They are (fully admitted) lawyers with a minimum period (5-10 years) of experience in the courts. Papua New Guinea, like most other Pacific Region countries, may not achieve this practice at least for another 10-15 years. Except for the Grade Five magistrates, most of whom are lawyers admitted to the bar, (number of them do have few years of experience at the bar) other magistrates have only a limited legal training.

Papua New Guinea has a futuristic system of training magistrates. Commencing from a basic two year study course at the University of Papua New Guinea and obtaining the *Diploma in Magisterial Studies,* the new entrants are appointed to the courts as Grade 1 magistrates. Thereafter these magistrates are expected to gradually work their way to the higher grades while working on the bench and returning to the University for completing the Bachelor of Laws (LL.B.) degree. After obtaining the LL.B. degree these magistrates are given a final training at the Legal Training Institute, before admission as lawyers. The current program in Papua New Guinea is well comparable to similar institutions in other countries and is a reasonable compromise in view of the available national lawyers.

> The NSW Judicial Commission has released details of its plans for servicing the continuing legal education requirements of the judiciary and for providing criminological assistance on sentencing to the State's criminal courts.

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21. S 5, *Magisterial Service Act*, (Ch.43).

22. S 2 of the *District Courts Act* (Ch.40).

23. See SS 5 and 6 of Chapter 41.

24. S 3 Chapter 40.

25. S 4 *Local Courts Act* (Ch.41) and SS2 and 3 *District Courts Act* (Ch.40).

JUDICIAL EDUCATION.

> In its role of providing assistance in continuing judicial education (CJE), the Commission will be following similar organizations established in England, Canada and the United States.[26]

It should be further stated that training judges and magistrates for their special type of work is the current trend in most parts of the world.[27]

> It is not claimed that the judge should become an expert, or a specialist, but a broad training seems essential, especially for certain delicate assignments, which demand some knowledge of psychology, of sociology, of conservation of the environment, of treatment of delinquents and of the mentally ill and of assistance for minors.[28]

Giving a training for judicial work is preferred to the system of absorbing or "inviting" practicing lawyers to the bench. A reason for this attitude stems from the difference in the judicial work, which is varied and more demanding to that of the practicing lawyer.

> After his graduation from law-school, he should function as a trial lawyer in a large number of trials. He should then, for a considerable period, serve as an apprentice to a trial judge. Before he is nominated for election to or appointed to, the office of trial judge, he should be required to pass a stiff examination and be officially certified as fit for that office.[29]

The judicial role is a highly specialized one. It is based on tradition and circumscribed by the laws of the country. Normative conduct deeply rooted in law, and seen in the professional role of those in the judiciary, more than define correct behaviour. Appropriate and inappropriate behaviour goes to determine and define values and sentiments. These may even influence their sentencing practice.[30] In Papua New Guinea the task has become even more complicated due to a multitude of variants which may influence the sentence of the court.

> The judges bear the onerous responsibility of allocating punishment within limits declared by the legislature. A consideration of such matters in the Territory is complicated by the presence of a number of factors not met with, in say, a typical Australian community.[31]

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26. 'Continuing judicial education for NSW judges and magistrates', *Australian Law News* (Mar.1988) 23(2) 8.

27. *Ibid.*

28. United Nations Social Defence Research Institute, *The Role of the Judge in Contemporary Society*, (Fratelli Palombi, Rome, 1984) 22.

29. J. Frank, *Courts on Trial*, (Princeton, New Jersey, Princeton University Press, 1949) 251.

30. J. Hogath, *Sentencing as a Human Process* (Centre of Criminology University of Toronto, 1971) 6-12.

31. Lawrance, *op.cit.* 101. This observation is equally applicable to magistrates.

ANALYSIS OF THE EXISTING LOWER JUDICIARY.

What is deficit to magistrates of the lower judiciary in Papua New Guinea is not appropriate training but a defined range for their future prospects. They need a proper recognition of their judicial office, and prospects for a carrier in the judicial service. As a right, every magistrate in service should have an equal opportunity, dependant on merit, education and experience, to be, if not the future Chief Justice of the country, at least a Judge of the National Court. Because of the present system there is polarization of the two divisions of the judiciary without the possibility of convergence.[32] This situation affects magistrates in many ways. For magistrates, there is no defined venue for promotions to the National Court and not even an unobstructed path to move on to the higher grades in their own Magisterial Service. There are magistrates who are in service today, who have been working as magistrates for over 10-12 years and are still working at most as Grade 2 magistrates.[33] There are others who have completed the *Diploma in Magisterial Studies* without having the opportunity to complete the law degree and be eligible for promotion.[34] There are also those who ultimately complete the law degree and get admitted to the bar as lawyers but soon thereafter leave the Magisterial Service because they have little hope for a future beyond Grade 5 level.

Another problem closely associated with the above is the divided administration of the judicial service. Magistrates as well as judges are all appointed by the Judicial and Legal Service Commission.[35] However they function in two separate compartments with very little dialogue. The only official contact is the appellate jurisdiction of the higher judiciary. Although the Magisterial Service was intended to liaise on matters of the magistrates working all over the country[36] it has best isolated magistrates from the higher judiciary.

This is ascertainable from the attitudes and the behaviour of most magistrates in the Magisterial Service. Even in the areas of the laws this buffer is prevalent. The diversity has seeped into the criminal law regime. There is no need for a criminal offence to be differently applied in two statutes. Such was the case in the offence of simple assault, under *Summary Offences Act*[37] (Ch.264), which does not provide for a defence of provocation. Yet the defence of provocation is available for the offence of simple assault under Criminal Code Act[38] (Ch.262). This situation created differences of opinion even in the higher courts. Fortunately it was restored to normality by the Supreme Court ruling on the matter.[39] This diversity and confusion is not an isolated one. It is present in the *Criminal Code* in many instances. The presumption is, a system incongruent to the needs

32. See generally, A. Strathern. 'The Supreme Court: A Matter of Prestige and Power', (1972) 1(3) *Melanesian Law Journal*, 29-36 and Barnett, *op. cit.* 35-35.

33. Two of such magistrates are currently in the Diploma in Magisterial Studies (DMS) program.

34. For example with the exception of two who at the time of their enrolling for the DMS course were serving magistrates, none of the magistrates who completed their DMS course have come back to the University to do their LL.B. during the last ten years.

35. See generally SS170, 172, 173 and 183 of the Constitution.

36. See SS175, 183 of the Constitution and the Preamble and S2 of the Magisterial Service Act.

37. S6.

38. SS243 and 244.

39. Supreme Court Reference, (No.6 of 1984), [1985 PNGLR], 31; see also Lawrance, op. cit. 97.

of the society. It is detrimental to the interests of the people and the country. Laws and regulations should be unified, consolidated, freely accessible and stated in a manner easily understood by all who have to obey them. The National Judicial System has to be a single integrated judicial system *without being* 'a house divided against itself'. This very fact has been mentioned in no uncertain terms, as far back as 1972.

> Finally, I suggest that an awareness of to bridge over the gap between indigenous expectations and introduced legal codes could help to provide some integration at the top level of the Territory's court system, where it could be effectively publicised and recognized. Then the courts would have not only legal power but also prestige and influence with a wider set of institutions for social control.[40]

The National Judicial System is not intended to serve merely those learned in the law like the judges, magistrates, officers of the Magisterial Service, support staff in the courts or this country or even academics,. It's purpose is to serve and it should be designed to wholly serve the needs of the people. Judicial Service like Health or Medical Services should be available to the people during their needs, be close to villages and towns and freely serve them in times of their problems. Recent news items in the Post Courier and later in the Times[41] reported the intended decentralization of the National Court by His Honour the Chief Justice. This step should be greatly appreciated and is undisputedly in the desired direction. In the event of such changes, the integration of the judiciary becomes not only imperative but also urgent for administrative purposes and the unification of the system.

A compartmented judiciary may also adversely affect the independence of the lower judiciary. Although the laws of the country enshrines the independence of the entire judiciary under Constitution[42] and under subordinate laws, an anomaly exists in this respect in the present system of the lower judiciary, namely the magistracy. This is the lack of psychological and practical independence. Such independence is lacking due to the presence of an administrative maze. Magistrates at all levels are appointed by the Judicial and Legal Services Commission (JLSC) and are presumed to be independent in their judicial work. This is guaranteed and no significant interference to their independence in judicial work can be seen to exist. However, the independence in judicial work is often related to daily duties in the courts which evolve as ministerial or administrate matters. In the latter magistrates are hampered and bound to follow administrative directions from many, within and outside the judicial service. Of course the JLSC is the governing body and is lawfully entitled to give administrative directions to all magistrates in the country, directly or via the Chief Magistrate. The Chief Magistrate may also give administrative directions as provided for under the law.[43] Then, the, Chief Magistrate may by instrument delegate to *any* person all or any of his powers and functions.'[44] (The point is, why any person?). Further, the Deputy Chief Magistrate or anyone of the Principal Magistrates also have non judicial-powers functions, duties and responsibilities towards running the courts and consequen

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40. See Strathern, *op. cit.* 28.

41. *Post-Courier*, PNG 13 May 1988, p.5. See also The *Times of Papua New Guinea*, No.480, 18-24 August, 1988, p.1.

42. S157 of the Constitution.

43. See generally S2, *Magisterial Service Act* (Ch.43).

44. S4, *Id.* (my emphasis).

administrative powers over the junior magistrates.[45] Then there is the Senior Magistrate for the Province (SPM), who has similar powers.[46] In the instance of two magistrates in a Local Court one of them is the senior person and may give administrative directions to the other. In addition there are those officers in Magisterial Service who are directly involved in the running of courts and the work of magistrates through financial allocations.

These officers may give directions pertaining to their fields, but subordinating the magistrates. Magistrates need to comply with general government regulations relating to housing the use of government vehicles etc., and these again involve compliance with the directions of those superiors. Magistrates are also public servants who fall within the definition of the *Public Service Act*.[47] They are again bound by the provisions of this Act including in addition to the number of superiors aforementioned.

Independence of the Judiciary means the independence of the individual judges and magistrates in the exercise of their judicial functions. This also means the independence of the judiciary as a body. Understandably, the former notion denotes that judges and magistrates shall be subject to no other authority but the law, in their judicial decisions and in the carrying out their official duties.

> Accordingly it also means that they must have adequately secured terms of office and tenure. The second aspect of the term is important, because if the judiciary as an institution has outside pressures or interference, this will have to effect the sense of independence of the individual judges [and magistrates].[48]

It is not necessary to spell out further the existing constraints due to the hierarchical administrative ranks on a group of persons who according to the Constitution of this country are required to be independent.

> Judicial independence at its heart derives from the judge's own determination to be free to make up his own mind in the end. The purpose of such independence in Papua New Guinea is to entrust to suitably equipped individuals in whom general confidence lies the resolution of conflicts according to standards embodied in the Constitution and the rules of law.[49]

SUBMISSIONS

What is now needed is an integrated judicial service under one umbrella, controlled and administered by one body, creating and preserving the desired degree of independence of

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45. S7A, *Id.*

46. S8, *Id.*

47. This position is not very clear and is a debatable issue but in practice salary determinations, leave etc, are all still done by the officers of the Public Service Commission.

48. Shetreet, *Judges on Trial* (1976) 59, cited also in, Ross, op. cit. 17.

49. *The Public Prosecutor* v. *Nahau Rooney* (2) [1979 P.N.G.L.R.] 448, 494. These observations would be equally applicable to any magistrate.

the individuals [50] and the whole system. This will certainly unify the service and negate existing disparities.[51]

Changes for this purpose may be made without a problem and with little expense by repealing the *Magisterial Service Act* and by providing enabling sections in the *Constitution*. In place of the existing division the whole judicial service can be brought under the administration and direction of one single body, namely a *Judicial Service Commission*.[52] All those holding judicial office other than those of the Village Courts become members of the *Judicial Service*. A *Secretary* to the Commission can liaise with magistrates or the members of the lower judiciary.

The functions of this Secretary should be confined to carrying out the directions of the *Commission* with the power to give temporary administrative directions subject to the subsequent approval of the *Commission*. These changes can be made to eventuate the integration the judiciary for the welfare of all. In addition the Judges of the Supreme Court have inherent powers over all inferior Courts. This in practice relates to the judicial functions. There is no legal barrier to extend this to include administrative functions as well.

THE COURTS

The Court system is an integral part of the National Judicial System and has to be effectively organized to enable its optimum usefulness to the people. There are several aspects of the current socio-legal situation in the country which are not conducive to this prospect. People have a tendency to regard the existing court system as an imposed system because dispute settlements in the courts are different and alien in comparison to the traditional perspective.[53] Writing on this problem in 1968, Peter Lawrence observed that,

> [T]he difficulty of establishing an Australian type of legal system in the Territory of Papua New Guinea is due neither to the innate inability of the indigenous to understand it nor to the incompetence of the legal officers in explaining and implementing it. The essential problem is that the two human groups concerned, the Australians and New Guineans, represent quite different, specialized social systems, each with its own highly idiosyncratic process of social control geared to operate within it and meet its peculiar needs.[54]

The procedure in the courts, the language and remedies are so foreign that the people tend to treat it as unblending and inadequate to meet their needs. From my experience as a Principal Magistrate in the Highlands Region I felt that this may be one cause for Highlanders resorting to tribal fighting. Reflecting the desire to solve disputes the traditional way. Perhaps they have little or no faith in the new system, do still find comfort in old, traditional and tested remedies for dispute settlement. The crime

50. The independence of individual magistrates ultimately aggregates for the whole system.

51. See Barnett, *op.cit.* (footnote 40).

52. This aspect is dealt with later in this paper.

53. See generally, Ross, *op. cit.*

54. The State Versus Stateless Societies in Papua New Guinea; Peter Lawrence, *op.cit.* 101

problem, whether in the increase or otherwise is also related to legal institutions.[55] Cases that come before courts have to be dealt with expeditiously, justly and accordingly to the laws of the country.

Sentences have to be given with care and responsibility. An effective court system is cardinal to the attempt to control crime. Ross's in his article mentions that -

> ....[C]ourts in the common law system have one characteristic which no other institution of Government has: They are at least nominally open to every citizen who conceives he has a cause. No matter what other institutions a Government may fashion for the settlement of disputes, the control of Government illegality, the protection of human freedom, the sanctioning of law breakers or the generation of interstitial rules, courts are a useful general residual institution to resolve cases otherwise lack a forum. Their generalist character, that disqualifies them from taking a major part in many development programmes, in this respect is a positive asset. It is the necessary condition of what is then literally a court of last resort.[56]

In this context a passing observation seems pertinent. In most societies including that of Papua New Guinea with the increase in crime people at all levels, from reputed penologists to unknown 'grassroots' refer directly or otherwise to the relation between crime and punishment.

Suggestions vary from considerations to the introduction of the death penalty[57] to the needs for rehabilitation of offenders.[58] The sentence of the court of law is the decision by means of which the declaration of punishment is allotted to persons convicted in a criminal trial. A criminal trial may well include that of any statutory offence. According to the 1977 - Annual Report by The Judges over 45289 cases were dealt by the Local Courts throughout PNG for a period of 12 months. Of this number 80-85 per cent of cases relate to criminal matters or statutory offences. On a reasonable basis over 40 per cent of these cases may have involved meeting out punishment to the convicted offenders. Figures in relation to the District Courts can be much greater. The magistrates of these courts take the brunt of censure from the superior courts and even from the public for wrong approaches in sentencing. This may be granted. Such sentences are often excessive or based on "a trigger happy" attitude of giving sentences of imprisonment. The invisible factor not seen by the critics and overlooked by everyone else, is that magistrates at all levels are not given proper training and the necessary continuing education in the selection of appropriate sentences. No guidelines are available to these magistrates except the decisions of the Superior Courts. "There is no decision in the criminal law process that is so complicated and difficult to make as that of the sentencing judge [or magistrate]."[59] If the penal sentence of court is desired to be

55. No one in PNG seems to doubt that crime in on the increase, see *The Times of Papua New Guinea*, No.480 18-24 August, 1988, p.5.

56. R. Seidman, *Law and Development*, (1976) 38, cited by Ross. *op.cit.*

57. See for example the opinion expressed by Bishop David Hand 'The Death Penalty - yeas or no?' in the *The Times of Papua New Guinea*, No.480 of Week 18 August - 24 August, 1988, 10.

58. J.P. Delgoda, *Elementary Criminology for Correctional Officers*, (Correctional Headquarters, PNG, 1988).

59. 'The Challenge of Crime in a Free Society', A Report by the President's Commission on Law and the Administration of Justice, Washington, 1967, 141.

meaningful in terms of its effect on the fight against crime and recidivist behaviour, then magistrates have to be given appropriate training and continuing judicial education in sentencing. There is an urgent need to properly educate magistrates of all grades in the sentencing method.

Reverting to the topic, as mentioned, a clear anomaly in the lower courts is the current method by which the grade of the presiding magistrate deciding the jurisdiction and power of the court. Practical problems in this system are many. In criminal matters, the clerk or the prosecutor often aware of the grade of individual magistrate, processes the days cases and sends them before the appropriate magistrate. In the Local Court this process leads to duplication of procedure when a person elects to have the matter determined by the District Court.[60] Different grades leads to further complexity and uncertainty in the District Courts, where three grades of magistrates may be functioning. In civil matters the litigants have to be directed to the correct court with a magistrate of the appropriate grade. This can be frustrating and causes needless delay. There is no real problem in changing the current system which has exhausted its practical value. Changes may be conveniently carried out with a few amendments to the existing statutes.[61]

SUBMISSIONS

It is submitted, that existing Local Courts be named Magistrate Courts. These new Magistrate Courts may be presided by Grade 1 and Grade 2 magistrates currently in service in the Local Courts. The jurisdiction of these Magistrate Courts may be increased both in civil and criminal areas. Election of jurisdiction may be removed.[62] The existing District Courts retain their name while the presiding District Court Magistrates, namely Grade 3 and Grade 4, being named Additional District Court Judges and District Court Judges respectively, having equal power and jurisdiction. The salary scales may vary in the senior positions and promotions can be given on qualifications, merit and experience. This may equally be the case for Magistrates of the Magistrate Courts. Grade Five Magistrates may, depending on their experience and merit be appointed as Assistant National Court Judges[63] or as Provincial Judges.

The Village Courts should be re-defined and these institutions may be re-named "Mediation Councils," The Village Court Magistrates have to be called by some other name and be dressed in civilian garments to depict their true and proper *peace-makers* image and not give the impression of officers of a court martial.[64] In order to bring back the traditional ideas of conciliation and settlement of disputes through the mediation process and the payment of reasonable compensation the *Village Courts Act* may be amended to contain a schedule. The *Village Courts Act* can provide for offences and civil causes given in the schedule to the Act to have a form of exclusive jurisdiction namely; that these shall not be entertained or heard in any other court unless a Certificate of Non-reconciliation signed by the Chairman of the Mediation Council is annexed to the

60. See ss14 and 41 of the *Local Courts Act* (Ch.41).

61. The *District Courts Act*, The *Local Courts Act*, the Magisterial Services Act are the main statutes needing change.

62. S14 *Local Courts Act* (Ch.41)

63. There is existing provision for this in the Constitution see S167 of the Constitution.

64. Traditional, it is only in a Military Court or Court Martial the members of the court wear uniforms.

complaint. This will compel people to mediate before they come to courts. Such a move may give rise to better harmony at the village level.

JUDICIAL SERVICE

There is now a picture of a Judicial Service with the Supreme Court Judges at the top, the Judges of the National Court, Assistant National Court Judges or Provincial Judges. District Judges, Magistrates and Additional Magistrates. What is further necessary, is to define their respective roles. The Supreme Court may be placed in its present role.[65] The National Court Judges may be separately identified from those of the Supreme Court, with the judges of the National Court being appointed as such and the Court itself continuing its current role.[66] National Courts may be established permanently in the provinces of the country with the present Grade Five magistrates being appointed as Assistant National Court Judges where necessary. The offences currently listed in Schedule 2 of the *Criminal Code Act* may be reviewed and revised accordingly.

District Judges appointed from present Grade 4 magistrates may be vested with a higher jurisdiction both in civil and criminal matters and the Additional District judges (present Grade 3 magistrates) having the same jurisdiction. Some of the current offences in Schedule 2, *Criminal Code Act* may be heard by the District Judges. As mentioned, Grade 1 and 2 magistrates become Magistrates and Additional Magistrates having the same powers and jurisdiction but being on two different salary scales. Of course finer touches will have to be made to the whole process, when appropriate. In this instance too a bill may be passed consolidating the laws and creating a new Act to be called the Judiciary Act. One aspect of the integration of the the two divisions of the judiciary is to lend support to the notion of having the higher courts of the country comprised of those who have gained experience in the judiciary in Papua New Guinea and who are nationals of Papua New Guinea.

The concept of the separation of powers is well known to students of law and those interested in democratic constitutional government. As a principle of government this concept is given appropriate recognition in Section 99 of the Constitution. However difficult it is, to achieve this ideal, yet no such attempt is futile, specially so in relation to the separation of the judiciary from the other two arms of the government. Section 183(1) of the Constitution provides for the establishment of the Judicial and Legal Services Commission. In the composition of the members of the Judicial and Legal Services Commission there is an obvious anomaly especially relevant from a view point, thirteen years in the post-colonial era. There may have been very good reasons at the time of the framing of the Constitution to depart from the traditions of separation of powers. The Constitution has been tested. Its weaknesses and strong points have been appreciated. The judiciary is no longer exclusive to foreign judges. The realistic role of the courts as the arbitrator of the Constitution needs to be given its proper place. The judiciary in this country is mature and no longer needs to have Government guidance.[67]

The composition of the JSLC is a violation of the principle of separation of powers. Re-thinking is desirable in this area. Being the head of the Judiciary of the country, the Chief Justice should be the Chairman of the Commission and the Deputy Chief Justice should be the ex-officio Deputy Chairman. Minutes of proceedings of the Commission may be tabled before the Speaker of the National Parliament in order to keep the National

65. See the Constitution S161.

66. See S166 of the Constitution.

67. Se R.D. Ross, *op.cit.*, 17-25.

Parliament informed, without having its representative directly participating in the proceedings of the Commission. The concept of the separation of powers will be truly established in this manner. Similarly, the Secretary for Justice (being a public servant) may best represent the Minister for Justice[68] without the Minister's actual presence and participation in the appointments etc, to the Judiciary. Thereby the Executive will not, unlike the existing practice, directly participate in appointments to the Judiciary.

Finally, it is submitted that all appointments to the lower judiciary ranking from those of District Judges downwards be made on a probationary basis. A period of three years probation seems appropriate, after which the appointee becomes a permanent member. A probationary office holder may be removed from office by the Commission for misbehaviour, inability etc., but a permanent office holder should be removed only under the provisions of Section 178(C) of the Constitution. This procedure would ensure greater independence to these officers of the judiciary.

THE LEGAL DEPARTMENTS OF THE STATE

The current constitutional provisions relating to the offices of the Public Prosecutor and Public Solicitor are vital to safeguard their independence in view of their functions.[69] However, there is a need to reconsider the constitutional positions of the Public Prosecutor, Public Solicitor and the Principal Legal Adviser,[70] in order to unify the Legal Departments of the State. The need for such changes are obvious from recent reports - "Should we call Narokobi Attorney-General?".[71]

A Department of the Attorney-General may be established. An experienced senior lawyer who could well be the Principal Legal Adviser to the National Executive and the Government may be appointed to this position under Section 156 of the Constitution. The Solicitor-General (replacing the current office of the Public Solicitor) could be the Deputy to the Attorney-General and may take over the existing responsibilites vested in Public Solicitor. The office of the State Prosecutor may be remaned - the Director of Public Prosecutions (D.P.P.), without any changes to the existing status quo in relation to the Constitutional position, independence and responsibilities of the office holder. Administratively these two officers may be subordinate to the Attorney-General but retaining their current Constitutional independence and status.

In addition to these, changes may be made in the current system of the State Prosecutors and Public Solicitors representations in Provinces. It is a very expensive exercise to establish officers of these two state legal departments in each province. Yet it is not only a legitimate right but also an essential need for the average citizen to have access to these public officers. Under the existing system, for court circuits, whether of the National Court or of Grade Five magistrates much public money is spent and at times great inconvenience results to the public because of the shortage of lawyers (officers) of these two departments either as prosecutor or defence counsel. It is suggested that in each province private lawyers practicing in the area may be appointed by the relevant departments as Unofficial Public Prosecutor (UPP - or other appropriate designation).

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68. See S183(2) of the Constitution.

69. See S177 of the Constitution.

70. See S156(1)(a) of the Constitution and *Principal Legal Adviser Act* (Ch.54).

71. *Post Courier*, PNG, 15 August 1988, p.1.

These officers need not be full-time lawyers of the Department but they represent the State (like any other client). When the need arises they can appear and carry out such duties on the directions given from the Head Office. Letters of appointment may provide these lawyers to be representatives of the State Law Office. They remain in private practice without creating any conflict in their duties to the State. Their fees can be paid by the State on an ad hoc basis. This system is likely to save the State expenses currently incurred in payments for travelling, board and lodging for lawyers of the State Prosecutors Office and will certainly ease the problems of the shortage of staff in the Department. In times of special need or in important matters the normal officers of the State Prosecutors Office may still appear.

A similar system to the aforementioned may be established in case of legal representation for accused persons in Grade Five Courts and the National Courts. In the alternative on the first day of the circuit of these Courts, during the call-over, the Court may assign to individual private lawyers the defence of accused persons who are not represented by private lawyers or those from the Public Solicitors Department. After the case is complete (or at regular intervals) the fees of these Assigned Counsels can be paid by the Public Solicitor's office (via the BMS) on a standard basis upon a bill being taxed and approved by the Court. This system is likely to have two major effects. One of which is that it will save the State the expense of having to pay the Public Solicitor's Lawyers to go from Port Moresby or any other regional office to distant places. Further it is likely to give impetus to young lawyers to establish a practice in provincial stations and also give them some work experience in defending persons in indictable offences. Most of all this system is likely to make legal representatives (lawyers) available and accessible to the public of Papua New Guinea throughout the country.

THE STATUTES

Ignorantia juris quod quisque scire tenetur non excusat [ignorance of the law which every body is supposed to know does not afford excuse].[72] If this legal maxim is to be meaningful in this country (It is recognized by the laws; see section 23 *Criminal Code Act* (Ch.262.) the laws of the country in the written form (legislative enactments) must be made accessible, to be read and understood with clarity, devoid of uncertainty and duplicity, to courts, lawyers and law enforcement bodies. Further, it is the right of every person within the jurisdiction of the country to know the law. Frustrating though, this not the actual case today. A good example of this is the *Criminal Code Act* (Ch.262). This statute contains -

(1) acts or ommission which are offences under other status; Eg. *Summary offences Act* section 6: *Criminal Code Act* Section 335; and
(2) the statute also contains provisions relating to and incidental to the law of evidence; Eg. Part VIII; Division 5 Section 579-589; and
(3) also contains matters of criminal procedure; Eg. Part VII, Division 1, Sections 521-578; and
(4) it contains duties, 'Duties Relating to the Preservation of Human Life' Eg. from sections 283-288. These duties are not offences; they are not offences in law punishable in view of Section 37(2) of the Constitution;
(5) it also contains directions in relation to sentencing, Eg. Sections 18-20.
(6) This statute intended or supposed to contain most of the criminal law in this country contains a duplication of some statutory offences which should be in specific statues intended to provide for these special matters, E.g. 'Section 451. Travelling with infected animals'. This is an offence punishable as a crime because it is in the Criminal

72. Osborn's *Concise Law Dictionary* (6th ed Sweet & Maxwell, 1976

Code Act From the best definitions of a "crime" - offences of this nature should not be made crimes but these should be legal wrongs

> The idea which Blackstone and Stephen are attempting to embody is one of great importance, if only on account of the wide currency it has obtained, and it deserves a very close scrutiny Crimes, according to this idea, are such breaches of law as injure the community Now there can be no doubt that if we make a merely general contrast between crimes, taken as a mass, and the remaining forms of illegal conduct, taken similarly as a mass, the amount of harm produced by the former group will be much greater and much more widespread that produced by the latter This fact was observed even so early as in the days of the Roman Empire [73]

This fact has to be considered in consolidating the criminal law of this country There is certainly a new set of Revised Laws of Papua New Guinea These volumes contain Acts of Parliament or statutes Each of these Acts must, as far as possible specifically, clearly and exclusively contain its defined area of law Acts which are used very frequently like, as mentioned before,the *Criminal Code Act* consists of both substantive and adjectival law In effect these contain the substantive laws and punitive sanctions *sancit* There are sections stating procedure and sections which contain rules of evidence Procedure in courts is important as much as the punitive sanctions To be meaningful and clear, at least the main statutes, have to be revised and consolidated

SUBMISSIONS

For the purpose of this paper and in view of the pressing urgency, it is submitted that the *Criminal Code Act* (Ch 262) the *Summary Offences Act* (Ch 264), the *District Courts Act* (Ch 40), the *Local Courts Act* (Ch 41), the *Arrest Act* (Ch 339), the *Search Act* (Ch 341) the *Bail Act* (Ch 340) and the *Evidence Act* (Ch 48) need review and consolidation It is further emphasized that, the aforementioned list of statutes is not an exhaustive list It is merely a priority list There is indeed an urgent need to organize all the criminal laws of the country into a single statue Separate the sections from the *Criminal Code Act* (and any other statutes) relating to procedure and evidence, consolidate those in to the relevant areas - Acts

Once this is accomplished the proposed 'Consolidated Criminal Code Act' or the "Criminal Code Act' will thereafter contain, to the exclusion of all other statutes the Criminal Law of the country All sections stating criminal procedure currently contained in the *Criminal Code Act* (Ch 262), the *Summary Offences Act* (Ch 262), the *District Courts Act* (Ch 40), the *Local Courts Act* (Ch 41), the *Arrest Act* (Ch 339), the *Search Act* (Ch 341), and the *Bail Act* (Ch 340) or any other statute should be included in a new Act which may be titled the *Criminal Procedure Act* Once this is accomplished, some of the existing statutes may become superflous and will have to be repealed A schedule to the proposed Criminal Procedure Act may contain columns giving the following items

> (1) Section, (2) Offence, (3) Whether arrest with or without warrant, (4) Summons or warrant shall ordinarily be issued in the first instance, (5) Whether bailable or not, (6) Whether compoundable or not, (7) Maximum punishment under the Criminal Code Act, (8) Triable by what court

This schedule will be of great benefit to magistrates and prosecutors as a 'quick reference guide' It is further suggested that an appendix to the proposed Criminal Procedure Act

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73 Kenny, *Outlines of Criminal Law*, (15th ed 1936, Cambridge University Press, 1936) ; see also 4 Blackstone's Comm 5 and those later edited by Stephen

may provide for the types of sentences available under the laws of the country with references to the providing Acts, along with guidelines on sentencing. There is a dire need in the lower courts for this kind of statutory guidance and for uniformity in sentencing

It is further suggested that the criminal law in this country should provide procedures for compounding certain types of offences in criminal courts. This would certainly lend support to traditional approaches in the area of dispute settlements. Compounding offences would be in keeping with the feelings of the people of this country and no doubt contribute to social harmony and amity. Statutory provisions for this purpose are urgently needed.

The other area that needs urgent attention is the Evidence Law. The existing *Evidence Act* (Ch.48) is not a comprehensive statue dealing with the law of evidence exclusively or exhaustively. It is suggested that the existing law of evidence be codified.[74]

> Subject to the solution of the vexed problem of the right extent of the difference between the rules governing civil and criminal cases, the law of evidence is a fit subject for codification. If this task is ever undertaken in England or Australia, there will be some useful precedents which are mentioned from time to time in this book. There is the Indian Evidence Act 1872, drafted by Sir James Stephen, which still forms the basis of a number of Evidence Ordinances in the Commonwealth;...[75]

It is submitted that there is no great problem in making these changes. What is required is the green light from the relevant Ministries and Departments with a sincere intent to provide for these urgent reforms. The financial support to carry out the work may even be obtained from some outside benevolent institution, which may appreciate the need.

CONCLUSION

This paper is intended to promote discussion on the matters briefly outlined. To comprehensively deal with all these areas is the subject of an ad hoc report. The paper is merely an outline of subjects and submissions relevant for reference to an appropriate Commission.[76] The paper highlights the areas that must be considered as part of a revision of the laws, the integration of the judiciary and the re-structuring of the court system by an ad hoc Commission. The main intention here is to promote discussion on the matters raised and other related areas so as to bring these to the lime light and the attention of the policy makers and most of all the people of this country. It is therefore hoped that this brief paper would serve its intended purpose:

***Fiat justitia, ruat coelum* - Let justice be done, though the heavens fall.**

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74. See Cross on *Evidence*, J.A. Gabbo, Byrne, David., J.D. Heydon (eds), (2nd Aust. ed 1980 Butterworths), 3. Also, Also, The Law Reform Commission (Australia), Issues Paper *Reform of Evidence Law*, Issues Paper No.3, October 1980, Australian Law Reform Commission, Sydney.

75. *Ibid.*

76. There is already a Commission, Chaired by His Honour Justice Amet considering changes to the lower courts. This Commission may be empowered to recommend reviews in to some of the areas mentioned in this paper.