L A W R E F O R M C O M M I S S I O N

O F

P A P U A N E W G U I N E A

THE JUDICIARY

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The Law Reform Commission of Papua New Guinea was established by the Law Reform Commission Act 1975 and began functioning in May 1975.

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Comments suggestions and criticism of the proposals in the Working Paper are invited and should be submitted before ~~Friday 30th June~~ 31 St July, 1978.

PROPOSALS BY ASSOCIATE PROFESSOR STAN ROSS

ON A REVIEW OF THE JUDICIARY IN PAPUA NEW GUINEA

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P R E F A C E

The Constitution calls for the adoption and development of our customary law as part of the underlying law of our country, the other part being the common law and equity of England. The underlying law will be developed to provide answers where the written law does not supply a solution to a matter before the court. In our Report on the role of customary law in the legal system (Report No. 7, 1977) we propose that customary law should be the primary underlying law of Papua New Guinea. This is a fundamental reorientation of the administration and development of our legal system. So far introduced law has enjoyed primacy of application with customary law recognised and applied to matters before the courts if such matters were covered by a customary law.

In the light of this fundamental redirection of the legal system, we believe that a major adaptation of the courts and their personnel is necessary to draw the most benefit from this reform. We acknowledge the worthy efforts of the judiciary to date to operate the introduced system of law and courts to serve the needs of our people. However we also feel that it is necessary to review the courts and the judiciary in order to draw still greater benefits for our people from the changes.

It is for this reason that we invited Mr. Stan Ross, senior lecturer in law at the University of New South Wales to report on the legal profession in Papua New Guinea. He has written two reports, one on the judiciary and another on the legal profession. This latter report will also be produced as a working paper. He was at the time of our invitation

a Visiting Associate Professor of law at the University of Papua New Guinea. We are grateful to Mr. Ross for his report and the law students who assisted him with the collection of materials and interviews. We invite the members of the public to discuss and comment on this report.

THE JUDICIARY

CHAPTER 1. INTRODUCTION

In April 1977 the then Minister for Justice, N. Ebia Olewale, acting under Section 9 of the Law Reform Commission Act, 1975, requested the Law Reform Commission to investigate the Legal Profession and the Judiciary. This is a report to the Law Reform Commission on one part of that reference - the judiciary. A paper on the legal profession will follow in the near future.

The Minister's reference calls for an enquiry and a report into -

1. "The structure of ... the judiciary, and its methods of training, payment, etiquette and conduct, including the manner of its dress; and
2. The ways in which ... the judiciary meets or fails to meet the needs of our country and its people; and
3. The ways in which the judiciary should be changed so that it will meet the needs of our country".

The Minister suggested that in undertaking the review the Law Reform Commission will -

1. "Consult with any body of lawyers established in Papua New Guinea and such other bodies or people as you consider appropriate; and

2. Give particular attention to the localisation of ... the judiciary; and

3. Give particular attention to ways in which legal services can be made cheaper and more readily available...."

This report is based on interviews and discussions with members of judiciary, the public and private lawyers, and the law faculty.

CHAPTER 2. THE STRUCTURE OF THE JUDICIARY

The formal national judicial system is composed of the Local Courts, District Courts, and the National and Supreme Court. Attached to this system are the Village Courts and the Administrative Tribunals. Separated from the system are the Land Mediators, the Local Land Courts and the District Land Courts.[1]

The Land Mediators attempt to settle a land dispute before it gets to the Local Land Court which has jurisdiction over customary land disputes. The District Land Court is the final Court to hear appeals from the Local Land Court. In the main court system the Administrative Tribunals allow appeals to the National Court, while the decisions of the Village Courts are reviewed and appealed to the Local Court magistrate or by the District Court supervising magistrate. The decisions of the Local Courts and District Courts can be appealed to the National Court, from which lies a final appeal to the Supreme Court.

Each of the court systems has been endowed with particular jurisdiction: The Village Courts cater for small local disputes and have jurisdiction to award K300 compensation (except in cases of custody of children, bride-price or death, where there is no limit to the amount of compensation or damages), or a fine up to K50 or a community work order for up to one month (six weeks in criminal cases). These Courts have no power to imprison except

with the endorsement of the local magistrate.[2] The Local Courts have original jurisdiction in civil cases to a limit of K200 and in summary offences may impose a K100 fine or a six months prison sentence.[3] The District Courts have original jurisdiction in civil cases involving K1000 or less (or K2000 if a Stipendiary Magistrate hears the case) and in criminal cases, all summary offences and committal proceedings for indictable offences.[4] The National Court has original jurisdiction in civil cases above K2000 and for indictable offences.[5] The Supreme Court has original jurisdiction in constitution law cases.[6]

The structure of this court system is quite similar to that in other countries that were formerly colonies. It is a system that is organised on three levels: 1) No-Formal-Structure System, 2) The Impressionistic System; and 3) The Paper System.[7] The system that has no formal structure (not in a sciological sense) is usually the unofficial court system that is made up of moots and meetings of family heads, etc. This method of dispute settlement does not take place in any uniform prescribed way, but adjusts its membership and procedure according to importance of the case and/or the litigants. In Papua New Guinea this method of dispute settlement has not been supplemented by the more formal Village Court system that has been brought into existence by the Central Government. The impressionistic system are courts instituted by the government and presided over by government appointees who have been given some legal training but who are not members of the legal profession. These courts apply both statutory law and customary law and have a limited reliance on written legal materials. The magistrates in these courts are supposed to make short summaries of evidence and of their reasoning in the particular case, but do not keep full verbatim records or issue formal opinions. These courts are in touch

with the Paper System and with the No-Formal-Structure System. In Papua New Guinea the Local Courts and the District Courts (to a less degree) represent this system. The Paper System Courts are usually the highest courts in the country. They are presided over by lawyers and are more formalistic and legalistic. They concern themselves mainly with interpretation of statutes and cases and keep written records. The National and Supreme Courts fall within this category.

This type of court system tries to meet two problems: 1) that of helping to develop national unity in countries that are composed of numerous tribal units, and 2) that of helping to maintain among the people the local law on which their community unity is based.

This is very difficult to achieve and quite often the two objectives come into direct conflict.[8] This has been evident at the Village Court level where there have been numerous instances of the new appointees trying to apply in an amateur fashion some of the little law they have learned from the more formal local and district court system.[9] As a result, the objective of the village courts to render settlements that are in line with community values can be stifled. Magistrates should be instructed to help the Village Courts to maintain their informal methods and not to be a detrimental influence.

Another criticism of the present system is that it allocates jurisdiction in the civil area on the basis of the monetary value of the case.

Except in the area of constitutional law there is no consideration made of the importance of the case to the litigants, the technical problems of the case and its precedent value. It is just assumed that if a case has higher monetary value then a more formalistic and legalistic system should deal with the problem.

CHAPTER 3. THE TRAINING AND APPOINTMENT OF THE JUDICIARY

(A). THE MAGISTRACY

Until 1976, to be eligible for appointment to the magistracy a person had to complete the fourth form of secondary school education and pass the training course given at the Administrative College. This has been changed, requiring students to have completed the sixth form or its equivalent. Another method of entering the magistracy is by being appointed from the legal profession. These appointments have so far been at the District Court level. There may possibly be some opposition to such appointments by the Magistrates' Association, because if top positions are filled from outside there will be less room for promotion for present members of the magistracy. The Chief Magistrate has considered the appointment of selected law students as magistrates. In Tanzania certain law students who wish to become magistrates spend their long vacation working as temporary magistrates and receive a court posting on graduation. This system has certain merits in raising the standards of the magistracy.[10]

At present there are only a few qualified lawyers in the magistracy. This situation is being remedied by a special programme that enables a limited number of the present magistrates to do the law degree at the University of Papua New Guinea. It should be noted that these magistrates are not given any credit towards their degree for the course they have completed at the Administrative College. It is estimated that five of these magistrates will graduate by the end of 1980.

All future magistrates will be trained at the Faculty of Law of the University. The Administrative College course has been transferred to the University. The new course envisages that trainees spend their first 18 months at the University and then be appointed to a local court for two to three years (during which time they can enrol in correspondence courses). After this period in the field they may be able to complete their degree by having two years of full-time study at the University. There is no obligation for the magistrate who has completed his or her (although the "her" are very few -- two Magistrates as of 1977) study at the University to return to the magistracy. There is a distinct possibility that if no bonding provisions are introduced, that a number of these graduates will eventually leave the magistracy to enter the private or public legal profession.

It is hoped that by raising the educational requirements to enter the magistracy, there will develop a sense of professionalism and loyalty and higher ethical standards. At present there is high turnover in the magistracy and a certain number have been found guilty of various criminal offences and discharged. A development of pride in their vocation, an elevation of status of their profession and the effective teaching of legal ethics may go a certain distance in alleviating this problem.

By raising the educational requirements and the standard of training to become a magistrate, the problem of formalism and legalism now present in Local Courts and even more evident in District Courts,[11] will be accentuated. This will result in these Courts becoming even further removed from the people.

Another programme that has been suggested but not brought into existence is that there be an exchange of selected legally qualified staff between the public legal service and the magistracy. This will enable both groups to broaden their legal experience and be more competent at their jobs. There should also be a possibility that these exchanges result in a permanent transfer in suitable cases. The Magistrates' Association may possibly be opposed to such a scheme. An additional problem in trying to implement such a programme is that magistrates with legal qualifications usually have higher salaries than the lawyers in the public service. This situation would have to be remedied for all these exchanges to take place.

(B). THE NATIONAL AND SUPREME COURTS

The National Court is composed of the Chief Justice, the Deputy Chief Justice, and at least four, but not more than, six other judges, unless an act of Parliament provides for a greater number.[12] The judges act individually, but may sit together.[13]

The Supreme Court includes the Chief Justice, Deputy Chief Justice and other judges of the National Court (excluding any Acting Judges). The Supreme Court sits at least with three judges.[14] Therefore the Supreme Court in essence has the same judges as the National Court, but a judge of the National Court cannot sit on an appeal from his or her judgement to the Supreme Court.[15] The present National Court has seven judges, but the Government is planning to expand it to eight in the near future.

The appointment of the Chief Justice is a different procedure than the appointment of the other judges. The Chief Justice is appointed by the Head of State, "acting with, and in accordance with, the advice of the National Executive Council given after consultation with the Minister responsible for the National Justice Administration".[16] The National Executive Council consists of all the government Ministers.[17] The other judges of the National Court are appointed by the Judicial and Legal Services Commission.[18] This Commission is composed of the Minister for Justice or his representative, who is the Chairman; the Chief Justice, the Deputy Chief Justice, the Chief Ombudsman, and a member of Parliament. When the Commission is discussing a matter relating to the Magisterial Services, the Chief Magistrate is then also a member of the Commission.[19] This method of appointment of the judges, combining all three branches of government, was adopted as a means of balancing the problem of having "political judges" appointed and having judges appointed that would be unsatisfactory to the government in office. (See below for the independence of the judiciary). As the Constitutional Planning Committee stated: "If politicians do not have (a say in appointing judges)

... we consider it less likely that they will accept judicial decisions which they regard as politically unpopular or as increasing the limitations on their own powers".[20]

There are different qualifications for appointment to Court for citizens and non-citizens. A citizen must have graduated at least six years ago in law from a university in Papua New Guinea or a university of another country which is recognized by the Judicial and Legal Services Commission, and have practised as a lawyer for at least four years,[21] or he or she may be a graduate in law with at least five years experience as a Stipendiary or Resident Magistrate.[22] A non-citizen is required to have practiced as a lawyer for at least five years in Papua New Guinea or in a country with legal system that is substantially similar to the one in Papua New Guinea, or has been a judge in Papua New Guinea before Independence, or a judge of a Court of unlimited jurisdiction in a country with a substantially similar legal system.[23] There are obvious problems of interpretation of these requirements, but two that may cause some difficulty will be what constitutes practice as a lawyer and what is a "substantially similar" legal system.

Certain individuals are disqualified from being appointed. These include members of Parliament, provincial governments or local government councils, officer-holders of a registered political party, and bankrupts.[24] For the first 10 years after Independence, all appointments are for three years

with the possibility of re-appointment. After the 10 year period a citizen can be appointed for a term of 10 years and non-citizen for three years with the possibility of being re-appointed.[25] When a person is appointed to the Court he or she is required to refrain from engaging actively in politics or being involved in the management of a corporation or a business that is seeking to make profits.[26] Judges cannot be appointed or re-appointed after becoming 60 years of age. The former 55 year age limit has recently been extended to 60 years with the retiring age pushed up to 65 (National Gazette, No. G.82 13 October, 1977) This early retirement age was adopted because life expectancy in Papua New Guinea is not as high as that in other countries and this would also lead to having judges that are "closer in age and spirit to the majority of our people".[28]

The training in order to become a judge in England consists of the development of the skills of advocacy. This is accomplished by practising as a barrister as a member of a private legal profession. The private legal profession was almost non-existent in the less developed colonies and many of the colonial judges had spent their whole career in the Colonial Legal Service. A good example of this process was the career of Sir John Ainley. He started his service as a probationary Crown Counsel in Fiji, then became Attorney-General in the Gold Coast, was then promoted to a puisine judgeship in Kenya, and terminated his career as Chief Justice in Fiji.[29]

Although Papua New Guinea was not a British colony the pre-independence Department of Law played a large in the appointments made to the Supreme Court. Although the present National Court is composed mainly of individuals who have had extensive practice as advocates, several judges received most of their experience as members of the Department of Law. The question that must be answered is what kind of training should be given to future appointees to the Court. (See below)

(C). THE LOCALISATION OF THE NATIONAL COURT

(1). Localisation of the Personnel

At present all the judges on the National Court are non-citizens. Three judges have left the Court in recent months and three new judges have been appointed. If the Government is to expand the Court to eight there will need to be one new appointment. This would seem to be a golden apportunity to appoint a Papua New Guinean to the Court. The main problem is that at present there are only three citizens (two public lawyers and one magistrate) that are eligible under the requirements of the *National Court Act, 1975*. Within the next two years there will be nine more citizen lawyers and one magistrate that will meet the requirements. Almost all of the eligible people feel that they are too young or do not have enough experience to take up a position with the Court. In addition, these lawyers have important positions in the public service or the magistracy.

If they leave their present position the Government will have to replace them with less experienced nationals or with expatriates and this will disturb the consolidation that is now only beginning to take place in the government legal service. This lack of continuity that has been present in the higher positions has been detrimental to the Government. A final problem will be that of all the lawyers that are eligible in the next two years, only a couple will have had substantial court experience. This is not an essential requirement to be appointed to an appellate court, but the National Court is a Court of original jurisdiction in addition to being an appellate court. These lawyers will have little experience in trials and procedure, in examination of witnessess or in the handling of facts. This will make it more difficult for them to do a competent job under the present judicial system.[30] This may be remedied by giving the new appointees some training before they take their place on the Court. (See below)

There are several possible approaches to solving the immediate problem. The one that the Government is adopting is to seek non-citizens (preferably those who have formerly served in the country) for three year contract appointments as a stop-gap measure. Three new judges have been appointed on the basis of their previous service in the country: Warwick Andrew, John Greville-Smith and Judge Wilson. Formerly they had been Acting Public Solicitor, Chief Crown Prosecutor and Acting Judge in Papua New Guinea respectively. This has mainly been done through the Government's contacts in Australia. As one prominent civil servant said: "We contact our friends and our friends are in Australia". This search for new judges has been expanded to New Zealand, but in all likelihood the appointments will be made from Australia.

It is a difficult task. Not only are there statutory restrictions which allow for only a three year contract, but the salaries being paid are substantially below those of judges in Australia. Other alternatives that could be followed are requesting the Commonwealth Secretariat to provide temporary judges from other Commonwealth countries,[31] or approaching individual Commonwealth Governments and the United States for temporary help in this area.

The Planners of the Constitution realised that there would be difficulties in placing competent and experienced Papua New Guineans on the Court during the first ten years after Independence. This is one of the reasons that provision was made for short term appointments during this period. Another provision that they included was for Assistant Judges.[32] It was intended that Papua New Guinean lawyers with three years' experience could be appointed as trainee judges under the supervision of the more experienced foreign judges. It was hoped that this would speed up the process of localisation of the Court.[33] These Assistant Judges were to "participate fully in the court process, subject of course to the overriding decision of the judge with whom the assistant judge is sitting in the event of a difference of opinion on a question of law. As to questions of fact, we believe careful consideration should be given by the legislature of maximizing the effectiveness of assistant judges' participation, particuarly in criminal cases. The assistant judges should sit with different judges in different court cases to gain wide experience of all the judges".[34] Parliament has not enacted any legislation to bring this concept into existence. If it intends to do so, it may have to have the Constitution amended because section 166 concerning the jurisdiction of the National Court would seem to block any Assistant Judges from exercising the jurisdiction of the National Court. It calls for the exercise of the jurisdiction of the Court by a judge or judges of that court. Assistant Judges could not be considered judges of the Court.

There is difficulty in adopting the institution of Assitant Judges. National Lawyers do not want the position because it lacks the status that they presently have in a different government position.[35] It could be given a higher status by providing a high salary that would be equivalent to the top positions in the public service. It can also be used to help experienced magistrates with legal qualifications make the transition from the magistracy to the National Court. Finally, if a training course for judges is established this position could become an essential part of such a course.

Since Papua New Guinea will need few new judges in any one year it would be uneconomical to establish a separate school for training judges, like those which exist in certain civil law countries.[36] But a special course taught at the University by lecturers and judges of the Court in conjunction with practical training would help to overcome some of the obvious inexperience of new judges. The University courses should be on judicial practice and the social sciences. The trainee judges should be required to participate as observers in all judicial activities of the Court, and to help the administration and writing of opinions. In addition, they should be exposed to the administration of prisons and the functioning of corporations and government. Too few judges know about the actual condition and supervision of prisons or about the everyday functioning of businesses and government. This course and training could be over six months. There also should exist refresher courses for judges every few years. This should be offered during a period of sabbatical leave in which the judges will have some time to reflect on the intellectual content of their work and receive information on recent developments.

Papua New Guinea is in the unenviable position of being a sovereign state which has to rely on foreign judges to interpret the Constitution and develop its underlying law. Papua New Guinea is not the only former colony that inherited this situation. Many of the former British colonies in Africa had (and some still have) foreign judges for a number of years after independence. For example, the High Court of Uganda in 1971, eight years after independence, had only three African judges among the 13 members.[37] Hopefully, Papua New Guinea after eight years of independence will have a higher percentage of localisation.

(2). Localisation of the Manner of Dress

It is obvious that the attire of judges and lawyers that existed in England in the eighteen century at the time of King George III is inappropriate to Papua New Guinea in the 1970's. The main obstacle to removing the wigs and gowns is the belief that they serve an important function. One Papua New Guinean lawyer was afraid that the people would lose respect for, and not obey, the Court if the wigns and gowns were not worn. It is true that the manner of dress does lend to the Court a certain mystique. It is an emotional aspect to the administration of justice that gives it a spiritual meaning. It is questioned whether this form of dress is the only one that can maintain this mystique and whether or not Papua New Guineans want to maintain it.

The vast majority of Papua New Guineans have had no contact with the National Court. Those who do have contact are usually people who have violated the criminal law. As long as the Court remains for the people mainly an institution for the enforcement of the criminal law, a certain aura must be maintained to let the Court have influence over the behaviour of the people. The problem is that this distance should not be so great that the people have no understanding of what is taking place in the Court. Court procedures are complicated and result in few people comprehending what is happening. The manner of dress accentuates this feeling of alienation.

It can be argued that the present manner of dress is not deeply rooted in the institutions of this society. Very few people have been in contact with it and it is only in recent times that the people have received information as to what the Court is like. Therefore it is feasible to replace the present dress with some other attire. The problem is what sort of local costume will be acceptable. In the Sudan, the Shariat Courts (Moslem religious courts) the judges adopted a simple robe as their form of dress. This robe is similar to those that are worn by respected members of the community. Papua New Guinea has some traditional dress, such as the lap-lap, but will this dress evoke the necessary respect required by the Court? It is suggested that the Commission seek the peoples' views on an appropriate form of dress for the Court.

(3). Geographic Localisation

At present the judges of the National Court are all based in Port Moresby. Most of them prefer being stationed in that city because it provides for themselves and their families the amenities that they are most used to in their own countries. In addition, by having all of them together there develops a "collegiate" rapport. For example, they can discuss the problems of particular cases. For Supreme Court cases, besides circulating their written briefs, areas of controversy can be clarified through discussion. It is argued that by decentralizing the Court, the decisions will become fragmented and the National Court system will lose the present uniform and coherent system of decision-making. It is debatable whether this fragmentation would take place especially if four of the judges (the Chief Justice, Deputy Chief Justice and two additional judges) remain in Port Moresby and the other judges come for meetings and sittings of the Supreme Court several times a year. It would be necessary for administrative reasons, the sitting of the Supreme Court, governmental obligations, and the extra-large civil docket, to have these four judges located in Port Moresby (the National Capital Province).

There are other reasons for establishing District National Courts. In discussing the establishment of three permanent High Court Districts in Tanzania, Professor Russell stated:[38] "Besides reducing the travel time for High Court Judges (as well as for lawyers, and litigants), High

Court Districts would have the advantage of enabling a High Court Judge to become more familiar with a particular area of the country and this might be quite beneficial in handling customary law appeals. Also the stationing of High Court Judges in the major regions of the country would bring the Court into closer touch with the local magistrates and increase the Court's ability to guide and supervise the lower courts." At present magistrates have very little supervision and often have no one with whom to discuss points of law and procedure. The judges could also supervise the local lawyers. Presently there are only a few private lawyers practicing in Mt. Hagen, Lae, Rabaul and Kavieng. Decentralising the Court may help to decentralise the legal profession and thereby provide greater access to lawyers for the majority of the people. The judges' supervision would also extend to the public lawyers. It will mean that the public prosecutor would be able to reopen offices that were closed because of lack of supervision. By having a permanent office of the public prosecutor, the police will also profit from guidance in reference to the gathering of information and the enforcement of the law. Finally, in a pluralistic society like Papua New Guinea, the decentralisation of the Court could serve as a unifying aspect of nation building. The Court is a symbol of the Central Government and its permanent presence would carry this symbol to the people.

There may be some problems in decentralising the Courts. The National Court would need adequate building facilities and law libraries. The law libraries would have to be improved in all the regions, but Lae and Rabaul both have adequate Court facilities. There are new facilities

planned for Mt. Hagen and Kieta. These buildings would have to be completed at a standard suitable for a National court. There may be difficulty in recruiting foreign judges and having the present judges serve in places outside Port Moresby. Under the present contractual arrangements, judges are required to serve where they are sent. It may be more advisable not to force judges to preside over a Court in an area where they do not wish to live. A practical solution would be to bring the decentralising process into existence by gradual stages. Thus by the time the Court is completely localised, the Courts can become fully decentralised. Another difficulty with localisation in conjunction with decentralisation is the pressures on Papua New Guineans from their wantoks. It may be advisable to place judges in districts different to those of their home villages. This will be disadvantageous from the point of view that a person so stationed will not be as familiar with local traditions and customary law as a person coming from that district. These factors will have to be considered when the appointments and stationing are made.

It may be that with efficient functioning of provincial government each province will eventually have its own Supreme Court and the National Government will establish a Court of Appeal for the whole country which would have jurisdiction over all constitutional law issues and serve as the final Court of Appeal from the Supreme Court of each province. Appointments of such a Court could be made from a wider group of legal expertise, because it would not be concerned with trial procedures and the examination of witnesses. For example, leading legal academics could make excellent judges.[39]

CHAPTER 4. THE NATURE OF THE JUDICIARY

(A). INDEPENDENCE OF THE JUDICIARY

The freeing of the judiciary from interference by outside pressure was formally achieved in 1704 in England, by the Act of Settlement. This concept of judicial independence was exported to all the British colonies and was inherited by Papua New Guinea. The term has two different meanings: "the independence of the individual judges in the exercise of their judicial functions, and the independence of the judicary as a body".[40] The former comprises the notions that judges shall be subject to no authority but the law in their judicial decision-making and in carrying out their other 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 affect the sense of independence of the individual judges.[41]

The most popular notion of the independence of the judiciary is that of freedom from interference by the legislative or executive branches of government in the carrying out of its judicial function.[42] This idea was expressed in the highest form of rhetoric by the International Commission of Jurists in 1955 when they stated: "The ultimate protection of the individual in a society governed by the Rule of Law depends upon the existence of an enlightened, independent and courageous judiciary, and upon

adequate provision for the speedy and effective administration of justice."[43] It is believed that by having an independent judiciary the formal requirements of a liberal democracy will be guaranteed - these being equality before the law; access to the courts for all people; a fair trial; and effective control over bureaucratic or governmental arbitrariness.[44] But as Professor Seidman has pointed out: "In practice, courts as they operated (and, to a great extent still operate in England and the United States) guaranteed these results at most only to those who have the resources and sophistication sufficient to invoke their process. They served the middle class in their struggle against aristocratic privilege, without significantly impairing governmental authority to deal summarily with the lower orders." [45]

In reality, both the concept of an independent judiciary and its guaranteeing the formal requirements of a liberal democracy did not exist in the colonies.[46] Unlike the judges in England, the colonial judges were in theory dismissible merely at the pleasure of the Crown.[47] Most of the judges had come up through the Colonial Legal Service and had a loyalty to the Colonial Government and were expected by the Colonial Government to enforce the law in its interest. It rarely happened that the interestes of these two groups clashed. Papua New Guinea had a similar development to that of the English colonies in the respect. A legal academic in Papua New Guinea, Mr. Peter Bayne, has pointed out that the Supreme Court until 1963 was usually sympathetic to the administration in making its decision.[48] After that date the personnel of the Court had changed and it operated more like an Australian Court. It was therefore less

sympathetic to arguments of administrative convenience and more interested in upholding the formal requirements of the rule of law.[49]

At independence, the British enacted non-authochthonous constitutions for most of their various colonies with provisions that would ensure an independent judiciary. There were established judicial service commissions to make judicial appointments under the chairmanship of the Chief Justice and with majority representation from the bench. The Chief Justice was appointed by the Government. Security of tenure was guaranteed by longevity of the appointment and by the elaborate procedures required in order to dismiss a judge.[50] But within a few years of independence, many of the former African colonies had abolished or greatly reduced the powers of the judicial service commissions, and some made dismissal of a judge a simple executive decision.[51] There are two views of why the Courts did not fulfill their function after independence. One is that they were too weak. They did not prevent the denial of basic human rights by governments, nor did they serve as a watchdog against administrative illegality.[52] They therefore did not have popular support when the government interfered with their independence. A second view is that of the former Chief Justice of Tanzania, Justice Telford Georges, who stated that the High Court in Tanzania maintained its independence because it was involved in "nation building".[53] It therefore avoided "the open clashes between the party and government on one hand and the judiciary on the other as were experienced in the post-independence era of countries like Ghana and Zambia".

In these two countries the judiciary was not involved in nation building. Justice Georges believes that his omission meant disaster for the Courts. The Ghanaian judges were removed because the government dubbed their decisions as being in "open subversion and treachery against the workers' class and cause".[54]

Papua New Guinea faces the problem of deciding what kind of judicial independence it wants. Like the former colonies in Africa the concept of judicial indepencence has been incorporated in the Papua New Guinea Constitution. This concept is specifically spelled out in Section 157:

> Except to the extent that this Constitution specifically provides otherwise, neither the Minister responsible for the National Justice Administration nor any other person or authority (other than the Parliament through legislation) outside the National Judicial System has any power to give directions to any court, or to a member of any court, within that System in respect of the exercise of judicial powers or functions.

There are also elaborate provisions concerning the dismissal from office of a judge.[55] But Papua New Guinea's Constitution, as discussed above, has given the Government an equal say with the judiciary in relation to appointments to the Court, and the Government appoints the Chief Justice.[56] In addition, there has been legislation adopted that also takes a compromised position on judicial independence. As discussed above, during the first ten years after independence, judges can be appointed for any three year contracts that can be renewed. After that ten year period they can be appointed for only ten years and the contract can be renewed.[57] On the other hand an appointee to the Court cannot be a politician.[58]

This elaborate Constitutional and statutory framework will be in vain if the Court loses touch with political and social developments. Like the High Courts in Africa, the Supreme Court in Papua New Guinea does not yet possess the "aura of sanctity".[59] It has in the past had little contact with the vast majority of the people.[60] In addition, it is composed of foreigners, which compounds the impression that there is a big gap between the people and those concerned with the administration of justice. This gap can only cause misunderstanding and foster suspicion. In Tanzania, which also had a High Court composed of foreigners, there "was a growing conern over what the term 'independence of the judiciary' meant and what the results of such independence would be in a society where the party was so powerful .... The concept of the Judge as the neutral, belonging to no party in the multi-party democracy, can have no meaning here - where there is one party. If he stands aloof seeming to play the apolitical role which is supposed to be his, his motives will doubtlessly be suspected".[61] Justice Georges says that he sees "no harm and much good in party membership by members of the judiciary, and the use of the opportunities which membership offers to show a positive interest in helping the process of rapid national development and to stress the importance of the courts in the achievement of that goal".[62]

Papua New Guinea is not Tanzania. It does not have a one party state, and already has enacted legislation prohibiting judges from being members of a political party. But less developed countries like Papua New Guinea must rethink the implications of judicial independence. A country that is determined to rapidly build a unified and economically developed nation must have a different approach to the concept. It may have to reject the liberal legal philosophy that is attached to the concept of judicial independence and develop a completely new concept. Professor Hayek

gives the extreme form of this liberal philosophy:[63]

> A judge cannot be concerned with the needs of particular persons or groups, or with reasons of state or the will of government, or with any particular purposes which an order of actions may be expected to serve. Within any organisation in which the individual actions must be judged by their serviceability to the particular ends at which it aims, there is no room for the judge. In an order like that of socialism in which whatever rules may govern individual actions are not independent of particular results, such rules will not be 'justiceable' because they will require a balancing of the particular interest affected in the light of their importance. Socialism is indeed largely a revolt against the impartial justice which considers only the conformity of individual actions to end-independent rules and which is not concerned with the effects of their application in particular instances. Thus a socialist judge would really be a contradiction in terms, for his persuasion must prevent him from applying only those general principles which underlie a spontaneous order of actions, and lead him to take into account considerations which have nothing to do with the justice of individual conduct.

Can an underdeveloped country adopt this philosophy and have judges who do not take into consideration nation-building? Less developed countries like Papua New Guinea quite often find themselves in a dilemma - they want to protect the individual, but they do not want the individual or a particular institution (e.g. the judiciary) sabotaging the process of nation building. They end up not satisfying either objective. Judicial independence is directly related to the problem of deciding what should be and can be the role of a judge and the National and Supreme Court in Papua New Guinea.

(B). THE ROLE OF JUDGES AND COURTS

The Constitution of Papua New Guinea has established certain guidelines for the development of an underlying law. When creating new rules of law, the National Court and Supreme Court must formulate an appropriate law having regard to the National Goals and Directive Principles and the Basic Social Obligations; to the Basic Rights; to analogies to be drawn from relevant statutes and custom; to legislation and court decisions of any country that has a legal system similar to that of Papua New Guinea and to decisions of other courts exercising jurisdiction in the country.[64] The National Goals and Directive Principles, the Basic Social Obligations and the Basic Rights contain general statements of economic, political and social principles and include the guarantee of certain basic human rights and the requirement of certain social obligations for its citizens.[65] These general statements are embodied in more detail in other sections of the Constitution,[66] but these sections still leave the Supreme Court with a wide area for interpretation and development of the law. The Government has also formulated an Eight Point Plan for economic development. Therefore the Court does have some general guidelines to follow. One of the main problem is that the guidelines are too general and the Government has been inconsistent in their application. Unlike the Arusha Declaration and the concept of "African socialism" that have been enunciated and pursued by the Tanzanian Government, there does not seem to exist any consistent general social and political philosophy in Papua New Guinea for the Court to follow. This has allowed the Court to rationalize continuing to perform its functions since independence without any significant change.

The Court as the arbitrator of the Constitution does not need to have Government guidance. As an independent body it can have a significant role in having the Government follow the "spirit" of the Constitution as enunciated in the Preamble. There is also no particular reason why an expatriate Court cannot be a progressive and dynamic force in a less developed country. Outstanding judges with imagination and sensitivity can be a very constructive force. The High Court of Tanzania, after independence was basically an expatriate Court (the first local judge being appointed two years after independence) under the leadership of an expatriate Chief Justice, Justice Georges. But it appears that the present Supreme Court, and the one that will exist for the next few years, will be very cautious in developing the underlying law. This Court is composed of foreigners, with short-term contracts, and they believe that they must be extremely circumspect especially in relation to "political" decisions. They will be unwilling to strike out in any new direction, but will try to maintain the status quo. But what should the role of judge and of the courts be in the future, when the positions have become localised?

Judges quite often do not represent or seem to represent all elements or classes in society. They usually tend to favour one segment of the community over another, sometimes because of their social background or sometimes because of their political philosophy. But "whatever the social background a judge comes from,he should endeavour to ensure that his background and prejudices do not obviously influence his decisions".[68] The foreign judges in Papua New Guinea have quite often achieved this objective, but no matter how hard they try to overcome their background and prejudices they will be unable to represent or seem to represent Papua New Guineans. Future local appointments may have similar problems in that they may become associated in the minds of the people with a

particular class or particular part of the country. These future judges will have the additional problem of inheriting a court system that is basically "foreign" to Papua New Guineas.[69] It will be their job to modify the judicial system esepcially the National Court and Supreme Court, so that it suits the needs and reflects the traditions of Papua New Guinea.

A judge in Papua New Guinea faces the problem that he will be interpreting a legal system that is based upon a society that is composed of a multitude of different values. How to reconcile and balance these conflicting values and interests will require special legal and social skills. If a judge attaches meanings that deviate too far from socially recognized meanings, his other role in Papua New Guinea society will become irrelevant.[70] This will happen also if the judge loses touch with the political realities. "The courts do not...exist in vacuum"[71]. By becoming politically conscious, this does not mean that a judge has to be "party politically conscious".[72] It does mean that judges "must take full account of the goals of the society in which they live; they must be attuned to the wishes of that society..."[73]

In carrying out his role a judge in most societies has certain controls and checks on his behaviour. One obvious check is removal from the bench for certain outrageous behaviour. But what kind of checks are present on the every day behaviour of a judge in court? "Mr. Justice Blackburn wrote that 'the only real practical check on the judges is the habitual respect which they all pay to what is called the opinion of the profession."[74] Of course, the profession should include not only the advocates, but the solicitors and legal academics who also act as a check. But the "most important means of control is through informal social and professional pressures, exercised both by individual barristers and by the collective actions of the Bar".[75] Papua New Guinea does not have what can

be considered a separate Bar. The profession is fused, there are few private advocates (mainly expatriates) and few public advocates. There is some indirect control over an individual judge in that his or her decision can be appealed and he or she may be overruled.

Courts in less developed countries have been used as agents of western modernization. For example, they have introduced into all areas of Papua New Guinea life concepts, ideas and rules alien to the traditional pattern of life. By doing this they have displaced many rules of customary law. Some of these changes have been beneficial and some of them have been detrimental, but most of the indirect effects were not planned. There was exported from the United States during the 1960's the idea of Roscoe Pound that law could be used as an instrument of "social engineering". This idea led to the belief that courts could become agents of economic development. But the traditional common law courts (especially in England and Australia) have not been a significant force in this area. The main functions of these courts as seen by their personnel (their judges) has been to resolve disputes, getting at the truth so as to allocate guilt and liability, protect individual rights, give the law some spiritual meaning (natural justice or due process), educate the public and sometimes help the government exercise political control. But they have not been structured to help a country carry out a development programme. Professor Seidman has aptly stated:[77]

> ....courts 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 freedoms, the sanctioning of lawbreakers, or the generation of interstitial rules, courts are a useful general residual institution to resolve cases that other-wise lack

> a forum. Their generalist character, that disqualifies them from taking a major part in many development programs, in this respect is a positive asset. It is the necessary condition of what is then literally a court of last resort.

It is when courts are used as the last resort in a conflict between Government and business that they can either hinder or help governmental development objectives. This is one area in which Courts in Papua New Guinea will have an important role to play. They will have to protect the rights of the individual, minority groups, and businesses, but at the same time help the government achieve its National Goals and Directive Principles.[78] It may be that future Courts will have to devise new ways to achieve just results. One such innovation may be not to limit itself only to specific disputes and issues that are brought before them, which to the present role of courts in common law countries. It may be worth considering what Podgorecki said: "Is it not worth considering whether the judge be allowed to seek for the truth beyond what the parties offer and relate?.... I believe it is the duty of a wise judge to discover all that can serve justice, or would stand in its way".[79] The courts do have an important place in Papua New Guinea society, but they will have to develop procedures and a philosophy that is drastically different from what they inherited from Australia.

FOOTNOTES

1. Land Disputes Settlement Act, 1975. See also J.G. Zorn, "The Land Titles Commission and Customary Land Law: Settling Disputes between Papua New Guineans", (1974) 2 Melanesian L.J. 151.

2. Village Courts Act, 1973, as amended 1977, Sections 24, 26 and 37.

3. Local Courts Act, 1963, Sections 16(3) and 19(1)(a) and (b).

4. District Courts Act, 1964, Sections 28 and 29.

5. It has complete original jurisdiction, but this is in practice what it takes as jurisdiction. Section 166(1) of the Constitution.

6. Sections 18 & 19 of the Constitution. "The Powers of National and Supreme Courts are discussed in: N O'Neill, "The Judges and the Constitution - The First Year", (1976) 4 Melanesian L.J. 242.

7. R.E.S. Tanner, "The Selective Use of Legal Systems in East Africa", (1966)

8. R.A. Bush, "Modern Roles for Customary Justice: Integration of Civil Procedures in African Courts", (1974) 26 Stanford L. Rev. 1123.

9. A. Paliwala, J.Zorn & P. Bayne, "Economic Development and the Changing Legal System of Papua New Guinea, "Mimeo. unpublished (1976) at page 24 and private discussions.

10. S.D. Ross, "A Comparative Study of the Legal Profession in East Africa", (1973) 17 J. of African L. 279 at 284.

11. See J.K. Gawi, Y.P. Ghai, and A. Paliwala, "National Goals and Law Reform. A Report on the Goroka Seminar", (1976) 4 Melanesian L.J. 259 at 263.

12. Section 164 of the Constitution.

13. Section 166(3) of the Constitution.

14. Section 161 of the Constitution.

15. Supreme Court Act, 1975, section 2.

16. Section 169 of the Constitution.

17. Section 149 (2) of the Constitution.

18. Section 170 (2) of the Constitution.

19. Section 183 of the Constitution.

20. Final Report of the Constitution Planning Committee, Part 1 (1974) 8/6, para. 49.

21. National Court Act, 1974, Section 2 (a).

22. Ibid., section 2 (b).

23. Ibid., section 3.

24. Organic Law on Terms and Conditions of Employment of Judges, 1975 section 4.

25. Ibid., section 2.

26. Ibid., section 5.

27. Ibid., section 7.

28. Final Report of the Constitutional Planning Committee, Part I, (1974) 14/3 paras, 18 and 20.

29. See Y.P. Ghai and J.P.W.B. McAuslan, Public Law and Political Change in Kenya, (1970) at p. 382.

30. R.E. Megarry, Lawyer and Litigant in England (1962) at p. 120.

31. One current member of the National Court was appointed through the Commonwealth Secretariat.

32. Section 167 of the Constitution.

33. Final Report of the Constitution Planning Committee, Part I, (1974) 8/4, para. 36.

34. Ibid., para. 38.

35. Status seemed to be involved in the abolishment of the institution elsewhere. Tanganika had the position of Associate Judges, but it was abolished as soon as the first African judge was appointed to the High Court in 1964. T. Barnett, "The Courts and the People of Papua New Guinea", (1967) 1 J. of the Papua and New Guinea Soc. 95 at p. 101.

36. J.P. Richert, "Recruiting and Training Judges in France", (1973) 57 Judicature. 144. In the United States there has been established a National College for the State Judiciary, while institutes of judicial administration are in existence in other common law countries. These centres are used for research into the Judiciary and for refresher courses for judges. They are very different than the institutions in the civil law countries.

37. P.H. Russell, The Administration of Justice in Uganda: "Some Problems and Proposals" (1971) at p. 16. (This is an unpublished report submitted to the Attorney-General of Uganda.)

38. Ibid., at p. 68.

39. This can be supported by the American experience i.e. Felix Frankfurter. See S. Shetreet, Judges on Trial, (1978) at p. 59.

40. Ibid., p. 17.

41. Ibid.

42. See: The Rule of Law in a Free Society, (1959) at p. 11 (International Congress of Jurists at New Delhi).

43. The Rule of Law and Human Rights: Principles and Definition, (1966), p.6, International Commission of Jurists.

44. R. Seidman, Law and Development, (1976) Ch. 15 "Courts and Development" at pp. 13-15, (an unpublished manscript-to be published 1978 by Croom Helm Ltd., London).

45. Ibid., at p. 15.

46. Ibid., pp. 14-31

47. Terrell v. Secretary of State for the Colonies (1953) 2 Q.B. 482. See also K. Roberts-Wray, "The Independence of the Judiciary in Commonwealth Countries," In J.N.D. Anderson (ed.), Changing Law in Development Countries, (1963) at pp. 63-80;

48. P. Bayne, "Legal Development in Papua New Guinea: The Place of the Common Law", (1975) 3 Melanesian L.J. 9, at pp. 15-22. Constitutional Reference Case No. 1 of 1977 shows that the Court is still sympathetic to arguments of administrative convenience.

49. Ibid., p. 23.

50. L.C.B. Gower, Independent Africa - The Challenge to the Legal Profession, (1967) at p. 25.

51. Ibid., pp. 79-84

52. Seidman, op. cit., ch. 15 at p. 36.

53. R.W. Hames and F.M. Kassam (eds.), Law and its Administration in a One Party State - Selected Speeches of Telford Georges, (1973), p.4.

54. Ibid., p. 5.

55. Sections 178-182 of the Constitution.

56. Sections 169 and 170 of the Constitution.

57. Organic Law on Terms and Conditions of Employment of Judges, section 2.

58. Ibid., section 5.

59. Gower, op.cit., pp. 83-84.

60. Bayne, op.cit.

61. James and Kassam, op.cit., p. 27.

62. Ibid., p. 28.

63. F.A. Hayek Law, Legislation and Liberty, Vol. 1. Rules and Order, (1973) pp., 120-121.

64. Schedule 2.3. of the Constitution.

65. Preamble of the Constitution.

66. Sections 25 - 63

67. H. Itch, "How Judges Think in Japan", (1970) 18 Amer. J. of Comp. L. 775 at 798.

68. Shetreet, op.cit., p. 384.

69. T. Barnett, op.cit. p. 96.

70. H. Itch, op.cit., pp. 793-794.

71. Final Report of the Constitutional Planning Committee, Part 1, (1974), 8/1, para. 5.

72. Ibid., 8/1/, para. 6.

73. Ibid.

74. Shetreet, op.cit., p. 225.

75. Ibid.

76. Ibid pp. 410-412.

77. Seidman, op.cit., Ch. 15, p.38.

78. Final Report of the Constitutional Planning Committee, Part 1.8/1, paras. 7-10.

79. A. Podgorecki, Law and Society, (1974) p. 64.