THE VILLAGE COURTS OF PAPUA NEW GUINEA: THEIR INTRODUCTION, HISTORY AND OPERATION UNTIL 1976*

BY

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During the period from 1968 until 1973 the External Affairs Department of the Commonwealth Government of Australia, committed to a policy of self-government for Papua New Guinea, carried out the complex procedures to transfer executive powers to Port Moresby.[1] During this same period, two parallel developments were proceeding in Port Moresby. First, local political parties were beginning to emerge[2] and policies crystallize. The only material difference between the two major parties (Pangu Pati and United Party) in 1972 was the Pangu Pati's firmer stand on the question of early self-government.[3] Secondly, a Select Committee on Constitutional Development was appointed by resolution of the House of Assembly on 24 June 1969 with reference:

> ... to consider ways and means of preparing and presenting and to draft for the consideration of the House, a set of constitutional proposals to serve as a guide for future constitutional development in the Territory ...[4]

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1. See P. Bayne and H. Colebatch *Constitutional Development in Papua New Guinea* (1968-1973) 51 New Guinea Research Bulletin for a detailed analysis of this process.

2. E.P. Wolfers, 'The Emergence of Political Parties' (1968) 5 Journal of Pacific History and E.P. Wolfers 'The Structure of Parliamentary Politics in Papua New Guinea 1964-1967', paper delivered at Australian Political Studies Conference, Canberra, August, 1970.

3. See B. Jinks, P. Biskup and H. Nelson, *Readings in New Guinea History* (1973), pp.417-429.

4. Quoted from J.R. Mattes, 'Constitutional Development' (1972) 7 New Guinea, No. 2, p.23.

Accordingly, it was not unexpected that the National Coalition Government, formed by the minority Pangu Pati in 1972, focussed attention on the main issue of Independence. In this new mood, a subsidiary but connected matter of the relevance of the official courts to the people of Papua New Guinea was also debated. This was another segment in the general debate on decolonisation in the country.

The debate drew sustenance from the patent fact that at the outset of the 1970's all was not well with the system of official courts. It was common ground amongst many spectators of the system of courts that the judicial system was failing to bring justice to the people. Moreover, research was tending to reveal the haphazard operation of the courts at the village level. Essentially, the system of official courts had changed little from colonisation.[5] This conservative state of affairs changed radically with the introduction of Village Courts.

I. *The Breakdown of Justice in the Lower Courts*

The most serious breach in the credibility of the structure of official courts introduced as a result of the Derham Report in 1960 was at the lower level. This problem of credibility was most acute in rural areas, especially amongst clans or groups where there was homogeneity in language, culture and rules of custom.

In the rural areas the new Local Courts and District Courts were considered alien and imposed. This was in many ways attributable to the lack of effort to build upon local customary institutions for dispute settlement to produce 'evolution and development'[6] in the system of courts from below. The new official courts were unfortunately a typical Australian hierarchy unimaginatively introduced with no genuine appreciation of regional or cultural difficulties.[7]

In the urban areas, however, the new District and Local Courts worked adequately, because litigants and offenders before these courts had generally moved out of the ambit of custom[8] and into a westernised life-style. It was, therefore, appropriate for them to be dealt with by an urbanised system of jurisprudence.

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5. See generally D. Chalmers, 'Full Circle: A History of the Courts in Papua New Guinea', LL.M. Thesis (U.P.N.G.), 1978.

6. T.E. Barnett, 'The Courts and People of Papua and New Guinea' (1967) 1 Journal of the Papua and New Guinea Society, p.96 (hereafter cited as Barnett (1967)).

7. See Chalmers, *op. cit.*, pp.240-243.

8. Except that many urban centres have town villages within the town boundaries inhabited by people from the same clan group such as Hanuabada in Port Moresby. Similarly, many squatter settlements have grown up around towns with a single clan group living in the settlement.

A. The Problem of the Magistracy

A salient problem with the new system of summary courts was the continuation in staffing in these courts by the same officers of the Department of District Administration as had formerly sat as magistrates in the Courts for Native Affairs. Predictably, the same authoritarian traditions of the abolished Courts of Native Affairs and Courts of Native Matters were perpetuated.

In addition, the efficiency and morale of the Department of Administration were at a low ebb towards the end of 1960 when a start was made to localise the magistracy.[9]

B. The Problem of Lower Court Procedures

The Local and District Courts were hampered in taking firm root at the lower levels by more identifiable and specific defects. First, the procedures and the methods of hearing evidence were (and still are) over-formalised and intricate. Barnett observed that:

> 'The minimum of formality suffices to bring a case before a court but once there the magistrate and parties are apparently expected to act as if they were in courts of petty sessions'.[10]

In criminal cases the magistrate, however, often performed a more active role in questioning the accused.[11] This did assist the system. Civil cases were rare, arguably because of the cumbersome procedures which had to be followed instead of using less formal 'oral pleadings'.[12] Secondly, there was little ingenuity used in the Lower Courts in sentencing or making orders. The usual common-law penalties of imprisonment and fine proliferated. Novel punishments, which could have accorded with local perceptions of justice and fairness and brought a greater degree of acceptance of the Courts by the people, were not conceived or introduced.[13] Thirdly, language difficulties served to make the court more alien.[14]

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9. My informant was W. Tomasetti at an interview on 8 July 1975. Contracts for *kiaps* had been introduced after 1963 and this had attracted less dedicated types. In addition, many capable and experienced *kiaps* changed jobs on attaining tertiary qualifications.

10. T.E. Barnett, 'The Local Court Magistrate and the Settlement of Disputes', in B.J. Brown (ed.), *Fashion of Law in New Guinea*, (1969), p.172 (hereafter cited as Barnett (1969)).

11. The author has observed this process in summary courts visited in Kwikila in the Rigo Sub-Province, Goroka in the Eastern Highlands Province and Port Moresby in the National Capital District.

12. Barnett (1969), *op. cit.*, p.172.

13. Barnett, *ibid*, p.173, suggested work orders on Local Government Council projects. This suggestion was incorporated in the Village Courts legislation, described below.

14. *Ibid*, p.160.

Local languages were used only if an interpreter was available. Fourthly, the diversity of customary laws meant that the system of individualised justice by the *kiap* continued. The degree of application of customary law depended upon the knowledge and sensitivity of individual magistrates. An intake of younger *kiaps* resulted in the knowledge of custom diminishing markedly.[15]

C. The Conflict of Western and Melanesian Justice

Most importantly, the underlying assumption of justice in the adopted common-law, that contesting claims can be weighed, assessed and distinguished to produce a winning litigant, was the antithesis of the Melanesian concept of justice. The courts were supporters of this assertion of superiority. Traditional Melanesian conceptions of justice see the law as integrated into community politics. Group cohesion is therefore dependent on general community welfare and well-being. Brown stated that this dichotomy rested in the differing function of common-law courts:

> Western Courts do not recognise an obligation to look beyond the legal issues to the therapeutic work of patching wounds in the community.[16]

In short, Melanesian ideas of law were directed to group interests and the protection of the community in general. The adopted common law has the sanctity of individual interests as its cornerstone.

D. The Continued Growth of Unofficial Courts Through Public Discontent with the Official Courts

Many people, though not articulating it, were being alienated from a system of courts which was incomprehensible and technical. Fenbury[17] effectively summed up indigenous attitudes to the official courts. He said that there were two expressions in Highland pidgin for courts, namely, 'Kot bilong Gavment' and 'Kot bilong mipela' - 'government courts' and 'our courts'. In other words, the people in rural areas at least, if not the urban centres, did not perceive of the official courts as their own.[18]

The consequence of this dissatisfaction was the continued growth and expansion of unofficial courts which showed the true level of the people's resistance to the official courts:

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15. My informant was W. Tomasetti whose information was confirmed in interviews with other former members of the Department of District Administration, viz., R. Mellor, C. Vass and G. Wearne.

16. B.J. Brown, 'Outlook for Law in New Guinea' (1971) 41 Oceania 244.

17. D. Fenbury, 'Kot Bilong Mipela', (1966) 1 New Guinea No. 4, pp.61-66.

18. See also B.J. Brown, *op. cit.*, where it is stated that the law administered in the official courts was referred to in Pidgin as 'Gavman Lo' or 'Wet Lo' - 'Government Law' or 'White Law' not traditional law.

> Probably because the official court system has been so out of contact with the basic local environment, unofficial bodies have continued and still flourish as arbitrators or "unofficial courts".
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> Very few Papuan and New Guinean traditional societies used to have a strong central political authority, capable of making and enforcing unilateral decisions, but influential men in local communities used nevertheless to play some role in the settlement of disputes.
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> As Australian influence has spread, even this delicate traditional balance in the local societies has altered. A new generation of educated and westernised men is less willing to acknowledge the prestige and authority of the elders and new types of disputes are occurring which the customary knowledge of the elders cannot solve. As tribal barriers disintegrate, more and more disputes between members of different tribes occur which no traditional institution has the necessary authority to settle. Under these circumstances, much of the influence of the traditional elders has been transferred to non-traditional leaders such as luluais, pastors, court interpreters, local government councillors and policemen at outposts.
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> The fact that this process of unofficial settlement is occurring is well known, and hardly surprising. Many people are loathe to take a dispute to the *kiaps* courts, and for many reasons (sic). Not unnaturally, many people are frightened of *kiaps* who are also police officers representing the enormous government power. Once confronting him, it often becomes obvious that he inevitably has a rather different idea about the importance of the relevant issues than the litigants. He is sometimes too busy to deal with the case in any event and, if he does, he usually handles it administratively and often makes an order which must seem completely incomprehensible to all parties and onlookers alike...
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> The unofficial settlement is thus, of necessity, vitally important to the people of the country. Unlike the official courts, the people involved and the methods adopted have developed with, and because of, the needs of the community.[19]

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19. T.E. Barnett (1967), *op.cit.*, pp.97-98.

It is interesting to record that the very existence of these unofficial courts had been one of the forceful[20] reasons offered for establishing Native Courts in the early 1960s. The same argument was to be resurrected in the 1970s when the debate arose over Village Courts.

E. Mediation in the Local Courts

Fruitless now as it may be, it is nevertheless interesting to dabble in academic conjecture as to how much further the courts of summary jurisdiction might have progressed to fill the gap which grew up between community affairs and lower courts had sufficient finance been made available for the scheme. Also, District and Local Courts may have been more successful if effective indigenous magistrates had been appointed sooner, and, in the case of Local Courts, if the mediation provisions had allowed a Local Court Magistrate to mediate in civil cases by appointing an Assistant Magistrate.[21] This may be done at any stage before or during proceedings[22] and the assistance of traditional leaders could be sought.[23] The mediation could be done 'out of court and at leisure'.[24] The advantage was that a mediated settlement could then be embodied in a court decision[25] and be enforceable. However, in 1967 the system was availed of little:

> It is apparently true that few magistrates are availing themselves of this opportunity, and that most *kiaps* are still handling civil disputes (if at all) by administrative order which is unenforceable if disobeyed.

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20. See D. Derham, *Report on the System for the Administration of Justice in the Territory of Papua and New Guinea*, (Typescript) (December 1960) (hereafter cited as *Derham Report*), pp.28-30 and Appendix G pp.1-5.

21. *Local Courts Act* 1963, ss.31-33.

22. For discussion of these provisions see Barnett (1967), *op. cit.*, pp.100-101; Barnett (1969), *op. cit.*, pp.170-172; T.E. Barnett 'Law and Justice Melanesian Style' in A. Clunies-Ross and J. Langmore (eds.), *Alternative Strategies for Papua New Guinea*, (1975) p.66 (hereafter cited as Barnett (1975).

23. Barnett (1967), *op. cit.*, p.100.

24. *Local Courts Act* 1963, s.31 (3).

25. Barnett (1967), *op. cit.*, p.100.

However, by 1975, it could be stated that:

> It seems that considerable use is now being made of this provision. The problem is that the magistrates are usually fairly young educated men working outside their tribal area.[26]

A clear implication of greater localisation of the lower court magistracy was greater use of mediation. Unfortunately, this trend was too late to overhaul the defunct machinery. The effort to marry traditional dispute settlement methods with the sanctions offered by the official courts failed in most areas.

However, there were indications that by the end of the 1960s the Local Courts were beginning to receive a measure of acceptance by the people. Quinlivan[27] records that on the Gazelle Peninsula in New Britain, Tolai magistrates had begun to sit with village leaders and *luluais* who assisted in ensuring that decisions when reached were bolstered with more authority than the unofficial courts. Again, the number of civil cases in the Local Courts for settlement indicated a greater acceptance of these courts by the people. Additionally, Local Courts in the Central Province of Papua had begun to sit with success in the villages instead of waiting for the people to attend in central urban centres. These overdue efforts did not decelerate the moves to establish Village Courts.

II *Failings in the Supreme Court*

The problems of the official court structure were most pronounced at the lower level.[28] However the Supreme Court was not enjoying any greater success.[29] The usual rules of procedure and evidence remained substantially unchanged with the result that the Supreme Court of Papua and New Guinea operated in much the same way as its Australian counterparts.[30]

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26. Barnett (1975), *op. cit.*, p.66. In a footnote at the same page he states that in Mount Hagen two local government councillors acted as full-time mediators under Local Court supervision. The author witnessed mediation proceedings during a period of field-work in the Rigo District of Papua. The Local Court Magistrate said that he mediated all disputes of a civil nature before holding his formal court.

27. P. Quinlivan, 'Local Courts in Papua New Guinea: Bringing Justice to the Villages' in P. Bayne and J. Zorn (eds.) *Lo Bilong Ol Man Meri*, (1975), pp.59-65.

28. See Barnett (1975), *op. cit.*, pp.69-80.

29. On evidence see the very legalistic treatment of the subject by Minogue J., 'The Law of Evidence', in Brown (ed.), *Fashion of Law in New Guinea*, *op. cit.*, pp.105-115.

30. This is not to deny the sensitivity shown by many of the Supreme Court judges towards Papua New Guinean accused or litigants.

There were problems of assimilation which were unique to the Papua and New Guinea Supreme Court. Lengthy tracts of interpreted evidence, for example, represented a barrier to the efficient administration of justice.[31] Conceptually, the Supreme Court suffered from one overriding defect. The criminal and civil law were seen as separate divisions of the law. Customary law does not see such a distinction. A practical consequence was the inability of the Supreme Court to award compensation[32] in criminal cases.[33]

It was not just the bewildering rules, procedures and language in the Supreme Court 'touring circus' which caused difficulties. One anthropologist[34] recorded the bitterness of Hageners caused by the refusal of the Administration to order people off their land after an assault on the President of a neighbouring council. This was interpreted as revealing a lack of power and authority in the courts once the mystique of power was shattered. Strathern went on to suggest that once this power myth was broken in the 1950s pressure for change mounted. Studies in the same area[35] have also identified more empirically the major

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31. The Derham Report recommendation for interpreters has not yet materialised.

32. Barnett (1975), *op. cit.*, pp.75-76. See also T.E. Barnett 'Crime, Kin and Compensation. Law as an Accessory to Payback' (1972) 1 Melanesian Law Journal 23.

33. It must be noted that some judges have since Independence taken the payment of traditional compensation as a factor in mitigation of sentence.

34. A.J. Strathern 'The Supreme Court. A Matter of Prestige and Power', (1972) 1 Melanesian Law Journal.

35. See M. Strathern 'Legality and Legitimacy: Hageners' Perception of the Judicial System', (1972) 1 Melanesian Law Journal 5. The article at p.25 also develops the manner in which traditional Hagen dispute solving agencies have assimilated and used official dispute settlement methods: 'Instead of isolating and withdrawing themselves, dismissing "law" as something relevant only to official courts, they have structured the present state of affairs so that they themselves are part of one system, and something of the roles of *kiaps* devolve on their Councillors. Seeing Councillors and *Komiti* in this light means that the latter became mouthpieces for what they interpret to be *kiap* "law" '.

conceptual incongruence between the imported and traditional legal systems: Papua New Guineans see matters in the context of inter-group relations whereas the Supreme Court sees individual guilt and responsibility as the crucial factor. Accordingly, justice was not being seen to be done according to the peoples' perception of justice.

Finally, there has been until recently a lack of Papua New Guinean participation in the Supreme Court. Although the University of Papua New Guinea Law Faculty had graduated some twenty-eight local graduates by the end of 1974,[36] very few had entered into or remained in Supreme Court practice.

III *The History of Village Courts*

It was the limitations of the Local Courts, in the main, which led to a government White Paper[37] being tabled in the House of Assembly in late 1972 which suggested the establishment of a new lower tier of Village Courts[38] to be supervised by the present Local and District Court Magistracy.

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36. Reasons for the failure to attract local counsel amongst University graduates can be gathered from D. Weisbrot and A. Paliwala, 'Lawyers for the People: Reviewing Legal Services in an Independent Papua New Guinea' (1976) 4 Melanesian Law Journal 184.

37. N. Desailly and F. Iramu, *Report of Inquiry into the Need for Village Courts and Village Constables* (1972) preceded the presentation of a paper entitled, "Proposed establishment of a system of Village Courts" before the House of Assembly, see *House of Assembly Debates*, Third House, Fourth Meeting of the First Session, 18-22 September 1972 Vol. III No. 7 at p.716. Debate was adjourned until later when all speakers supported the paper, *House of Assembly Debates*, Third House, Fifth Meeting First Session, 20-24 November 1972, Vol. III No. 10 p.1163 (House of Assembly Debates hereafter cited as *H.A.D.* with Volume Number and page reference). See also *Annual Report for the Territory of Papua New Guinea 1970-1971* at p.49 for discussion of the review of lower courts which was announced by the Minister for External Territories in February 1971.

38. Supervision by Official Local and District Court Magistrates was the material point of distinction between the Papua New Guinea Village Courts and early African Native Courts which were left free from colonial government interference. At a later stage, the policy of 'indirect rule' in African countries brought recognition of indigenous courts and it was usual for district administrative officers to have powers of supervision and inspection over these courts. See H.G. Morris, 'Native Courts: A Corner-stone of Indirect Rule', in H.G. Morris and J.S. Read (eds.), *Indirect Rule and the Search for Justice* (1972).

The idea of lower courts run by Papua New Guineans applying customary law was not new. At the end of the Second World War the question of establishing Native Courts applying customary law was discussed and a draft Ordinance was prepared during Colonel Murray's administration.[39] This was followed by consideration of the establishment of native village courts under the *Papua and New Guinea Act* 1949. Section 63 of that Act had provided that courts and tribunals, including native village courts, and other tribunals, in which natives would act as adjudicating officers could be established by Ordinance. The draft Ordinance which was prepared during Colonel Murray's administration was rejected by the Attorney-General's Department in Canberra as no satisfactory answer had been given to the fundamental question of whether a separate system of African-style Native Courts was needed.[40] In addition, there was internal opposition in Port Moresby to the establishment of these courts from the Chief Justice, Sir Beaumont Phillips, Mr. Justice Gore and the Secretary for Law, Mr. Bignall.[41]

The proposal for Native Courts was again reviewed in 1955 when a *Native Courts Bill* was actually drafted by David Fenbury who was a great advocate of Native Courts.[42] The proposed Native Courts were closely modelled on similar African courts.[43] However, Hasluck in a

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39. See Chalmers, *op. cit.*, pp.172-175 and J.K. Murray, *The Provisional Administration of the Territory of Papua-New Guinea* (1949), p.61.

40. P. Hasluck, *A Time for Building* (1976), p.186.

41. *Derham Report*, *op.cit.*, p.28.

42. *Derham Report*, Appendix G refers to a senior officer of the Department of District Administration who was D. Fenbury. See Appendix 5 for the arguments for village courts at this time.

43. D. Fenbury, *op. cit.*, p.63. The 1955 Native Courts were to have unlimited jurisdiction over matters involving Papua New Guineans (except in criminal cases); they were to be staffed by Papua New Guineans and apply custom; no legal practitioner was to appear and no strict rule of evidence was permissible; powers of supervision were to be vested in District Officers with appeal to a Superior Court only with the consent of the Native Courts Adviser. *Derham Report* paragraph 43 pp.29-30. Notice the similarity between these proposals and the eventual Village Courts legislation. The proposals were based on legislation of Tanzania, Kenya and Nyasaland. See J.R. Mattes, "Native Courts" (1959) *South Pacific*, Vol. 10 No.5, p.112 for a discussion of Kenyan native courts and their relevance to establishing such a system in Papua New Guinea. See also *Derham Report*, Appendix F, for an article by J.H. Jearney giving a concise account of the Criminal Court systems in former British African Territories.

minute of 27 January 1956 refused to establish any structure of Native Courts.[44] Hasluck stuck staunchly to a policy of a single integrated court system. In addition, the Bill had been referred to the Chief Justice, Sir Alan Mann, who had entirely opposed the idea. Mann C.J. was a great traditionalist common lawyer who had little sympathy with customary law.[45] The departure of Fenbury to the United Nations soon after resulted in no further action being taken on the matter of the establishment of Native Courts.

Professor Derham mentioned the background and debate to the establishment of native courts.[46] He pointed to the lack of training of local magistrates, a suggestion which had been made in 1946,[47] and to the expansion of unofficial courts.[48] The main arguments forwarded in favour of the establishment of Native Courts at the time of the Derham Report were:

(i) 'Unofficial' native courts are widespread and while some of them apparently work quite well (e.g. the Hanuabada Council 'Courts'), others are dangerous and may give rise merely to local tyrannies (e.g. the Haluana Kivung and many village constables' 'courts'). The existence and number of these courts is such as to reveal a lack of satisfaction in the Native Affairs Courts on the one hand, and on the other, the need for a regular jurisdiction in closer touch with native community needs than the established courts existing at present.

(ii) The Native Affairs Courts are not competent to understand and apply native customs. Unofficial assessors at present make decisions with respect to custom and the court's decision is a mere formality. It is necessary, therefore, to have courts staffed by natives who are competent to apply native customs.

(iii) There is a definite demand among the native people for courts of a specific native character and this demand ought to be satisfied.

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44. P. Hasluck, *op. cit.*, p.186 (see generally pp.187-191 for Hasluck's views on a single system of courts).

45. My informant was W. Tomasetti.

46. See generally the *Derham Report*, para. 39-43, pp.29-31.

47. *Ibid.*, para. 40-41, p.29.

48. *Ibid.*, para. 42, p.29.

(iv) The technicalities of English law, particularly with respect to procedure and evidence, are not understood by the natives and are not suitable for application in the conditions existing in jurisdictions concerned with native matters. A court free from such technicalities is therefore required.[49]

The arguments which were levelled against the establishment of Native Courts were essentially those made by Hasluck who desired an integrated court system.[50] The arguments against were:

(i) Insufficient attention has been given to the basic question whether or not a separate system of courts for natives is really necessary.

(ii) The proposals may undermine the principles which the Australian Government commonly accepts with respect to the administration of justice.

(iii) The matters with which the local courts will deal are those arising within the local community itself where the court sits and to which only the members of that local community will be parties.

(iv) The proposals subordinate the courts to administrative convenience to such a degree that the proposals amount to little more than an elaborate sham wearing the appearance of providing for a judicial body but covering the substance of the exercise of executive discretion. Thus the courts and the officers supervising them have too wide a liberty in the methods they may use and in the rules they may apply or disregard.

(v) The proposals amount to little more than giving power to the administration of justice at the mercy of civil servants.

(vi) The introduction of a system of native courts with different procedures from the existing territorial courts will make for two systems of justice, which is *prima facie* undesirable.

(vii) The individual is more likely to receive justice through an extension of British courts than through a system of village courts supervised by administrative officers.[51]

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49. *Ibid.*, p.29-30. See footnote 39.

50. Compare P. Hasluck, *op. cit.*, pp.187-191 with these arguments.

51. *Derham Report*, p.31.

IV *The Debate on the Establishment of Village Courts*

The arguments mustered in favour of the establishment of Village Courts at the time of the *Derham Report* were proposed afresh in support of a new system of decentralised courts as self-government and Independence approached. However there was a vital new impetus when the debate on Village Courts was renewed in the seventies. This new argument centred on the issue of law and order. The Government in Port Moresby had become increasingly concerned with breakdowns in public order, especially in tribal fighting in the Highlands of Papua New Guinea. This considerably influenced the establishment of Village Courts.

A. Power to the People

In Parliament, the debate on Village Courts focussed more on nationalistic feelings and distrust of the imported legal system than on issues of law and order. John Guise pointed out that the removal of Village Constables and the repeal of the *Native Local Government Council Ordinance*[52] had left a gap which could be filled by a Village Court. He approved of Lord Hailey's aphorism that in customary societies truth is often obtained by public knowledge rather than scientific testing of evidence. In his address, Guise stated:

> The quality of justice administered by village courts must be judged by the degree of satisfaction which it conveys to the persons more immediately affected than by the standards applicable to more fully developed legal systems ... so that a village court system can be established within the cultural and social environment and heritage of Papua New Guinea's sons and daughters in all the villages of our homeland.[53]

Oscar Tammur was more vigorous in saying:

> My first concern is that a lot of European technicalities will be included to spoil the system of justice by village elders.[54]

Paul Langro was concerned about the independence of these courts:

> There must be no interference from welfare officers and kiaps.[55]

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52. *H.A.D.*, Vol.III No.10, pp.1163-1164.

53. *Ibid.*, p.1164.

54. *Ibid.*, p.1166.

55. *Ibid.*, p.1167.

There was general support for the proposal to establish Village Courts and the House generally complimented the Secretary for Law on advancing the Bill. The popular sentiment of the House was that Village Courts would improve justice at the lower levels.

The following year John Kaputin, then Minister for Justice, read the *Village Courts Bill* a first and second time.[56] In introducing the Bill he affirmed that 'power' was being restored to the people in the shape of Village Courts which were a result of the work of two magistrates who had toured the country seeking the peoples' views.[57]

Officials in government were also concerned with the issue of power being decentralised to the people. With the approach of self-government, officials in Port Moresby were worried that the people would see self-government as a transparent sham unless they had some control of their own affairs. The establishment of Village Courts would be a step towards giving some modicum of effective power back to the people.[58]

B. The Problem of Bribery

The debate on the Bill resumed in November 1973.[59] Tei Abal spoke in favour of the Courts, pointing to examples of polygamy and bride price which were matters which would be best solved by peoples' courts than by magistrates.[60] His only reservation about Village Courts was the potential danger of bribery.[61] Tei Abal, along with Bono Azinifa[62] and Naipuri Maina[63], stated that the Bill was only giving recognition to an already existing state of affairs where disputes were settled in informal courts.

Tei Abel was joined by T. Kambipi[64] in his misgivings about the

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56. *H.A.D.*, Vol. III No.21, p.2881 on 28 September 1973.

57. These magistrates were N. Desailly and F. Iramu.

58. My informant was G. Dabb, Assistant Secretary for Law. He was particularly directing his view to a meeting held in 1973 (attended by J. Guise, B. Holloway, J. Lynch, D. Fenbury and himself) where this point was strongly raised.

59. *H.A.D.*, Vol. III No.23, pp.3081-3089.

60. *Ibid.*, p.3081-3082.

61. *Ibid.*, p.3083.

62. *Ibid.*

63. *Ibid.*, p.3086.

64. *H.A.D.*, Vol. III No.24, pp.3184-3185.

dangers of bribery. This doubt was an issue widely mooted not only in the House but also outside. As early as 1959 Mattes stated that:

> Justice must be impartial. This could lead to very real difficulties in the kinship system which prevails in the Territory. Because of the divergence of native custom, the jurisdiction of native courts would in many cases be limited to the village and would have to be presided over by natives from that village. Could there be any guarantee that justice would be meted out according to the facts of the case, and not according to the relationship of the litigants to the members of the court? Perhaps any actual injustice that may be caused by the use of bribery, or by relationship of the natives, would in most cases be set right on appeal, but this would not overcome the effect on the whole judicial system, if the courts fell into disrepute.[65]

This worry was effectively explained, if not removed, by Dr. Marilyn Strathern[66] when she argued that bribery and corruption in the proposed courts were only problems when assessed from a European common-law perspective. Community status and community politics result in 'corruption and bribery' being implicit within decision making in traditional societies:

> But in such a society, where influence and direction in public affairs is largely a matter of persuasion, where there are few traditional roles setting persons up in authority over others, corruption does not overly concern people. They assume that leaders will look after their own interests; they also assume that this cannot be done without taking into account other peoples' interests as well.[67]

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65. J.R. Mattes, *op. cit.*, p.120. Mr. A. Maino, then a District Court Magistrate, gave evidence of bribery in the Highlands by former Village Councillors in unofficial courts at the Waigani Seminar in 1973. See also P. Bayne, 'The Village Courts Debate', in P. Bayne and J. Zorn (eds.), *Lo Bilong Ol Manmeri* (U.P.N.G. Printery, 1975), p.41.

66. M. Strathern, *op. cit.*, p.25. See also M. Strathern 'Sanctions and the Problem of Corruption in Village Court' in Bayne and Zorn (eds.) *Lo Bilong Ol Manmeri*, *op. cit.*, p.48; M. Strathern, *Official and Unofficial Courts*, New Guinea Research Bulletin No. 47 (1972), Chapter 1; and N. Oram, 'Village Courts and Government Proposals for a Village Court Bill' (Typescript) Seventh Waigani Seminar on Law and Development in Melanesia (1973).

67. M. Strathern, 'Sanctions and the Problems of Corruption in Village Courts', *op. cit.*, p.48.

C. The Law and Order Argument

The other major argument put forward in support of the establishment of Village Courts concerned law and order. This particular argument predated the pressure for Village Courts from national politicians but probably had the greatest impact on the renewal of official interest in their establishment.[68]

L.J. Curtis, the then Secretary for Law, had in 1971 been concerned about the growing problems of law and order in rural areas and the lack of government control in these areas. He ordered an inquiry into the adequacy of the then 'system of lower courts and the operation of the police with particular reference to the rural areas'.[69] At the same time Louis Mona was pressing a motion in Parliament to re-introduce Village Constables.[70] The Secretary for Law saw such a move as primarily intended for the village constable to 'arrest offenders and assist in enforcing decisions in village courts'.[71] The Secretary for Law in conjunction with Greenwell, also of the Department of Law, prepared a report in 1971 which indicated that the official attitude at the outset of the seventies was channelled towards keeping the public order situation under control. The Report favoured Village Courts for three reasons:

> Informal and unofficial methods have continued and there is evidence that local government councils and councillors are, without proper authority, tending to fill the vacuum ...
>
> At the same time respect for the village elders is breaking down in many, if not most, parts and their customary authority is being questioned by the young people.
>
> A further reason for reconsidering the matters is the abbreviated time span in the process of self-government. We think it very likely that some system of village courts would be established as soon as local political control over the legal system is established now it could be fitted into the existing courts system. This would have the virtue not only of eliminating or controlling major abuses which are likely to occur if dispute settlement continues unofficially, but by a process of education adopt certain basic procedures.[72]

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68. The author places the law and order argument after the argument that Village Courts represented an assertion of power in the hands of the people because by the date of the *Village Courts Act*, the principal argument was the nationalist one, namely, that Village Courts were essentially indigenous and would ensure the involvement of the people in the legal system.

69. *H.A.D.*, Fourteenth Meeting of the First Session, Vol. II No.14, p.4331. The enquiry was conducted by N. Desailly and F. Iramu.

70. *H.A.D.*, Thirteenth Meeting of First Session, Vol.II No.13, p.4134.

71. *Ibid.*

72. *Curtis-Greenwell Report*, 1971, at para. 73.

Nigel Oram, an early supporter of African-style Native Courts, also favoured Village Courts as a possible means of restraining the declining law and order situation. He recorded the marked increase[73] in the crime rate for the whole of Papua New Guinea which he attributed[74] to various causes. First, the *Local Government Act* 1963 had taken away local government councils' power over law and order and the introduction of local government councils had led to a gradual phasing out of *luluais* and village constables.[75] The combined effect was to leave a 'vacuum for the preservation of peace and good order'[76] at the village level. Secondly, the administration of justice in the official courts was hampered by western ideas of abstract justice and did not fully appreciate Melanesian ideas of reciprocity.[77] In addition, the growth of an unofficial system of courts outside the official legal system showed by its very existence that justice was not reaching the mass of the people.[78] Finally, Oram pointed to certain 'specific fields of stress'[79] which posed serious threats to law and order, namely, land and urbanisation. The people, he contended, were law abiding with the fault squarely at the door of an unsuitable legal system:

> Our present concern is with the adequacy of the governmental institutions which now exist and the most immediate need is to reform the judicial and law-enforcement machinery of government.
>
> There is a widespread desire on the part of large sections of the population to be law-abiding.[80]

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73. See N. Oram, 'Administration Development and Public Order' in A. Clunies-Ross and J. Langmore (eds.), *Alternative Strategies for Papua New Guinea* (1973) pp.1-58 (hereafter cited as Oram (1973:2); N. Oram, 'Law and Order', (1973) 7 New Guinea, pp.4-22 (hereafter cited as Oram (1973:1). On the issue of law and order A. Maino, a District Court Magistrate, said at a seminar on Village Courts at the University of Papua New Guinea on 9 September 1975 that there was an outcry in the Villages for justice to avoid violence and breaches of order.

74. No.16 of 1964. In force 1 January 1965.

75. N. Oram (1973:1) *op. cit.*, p.34. The phasing out of *luluais* and village constables raised problems of severance pay but they were simply given a thank-you certificate. See *H.A.D.*, Tenth Meeting of the First Session, Vol. 1 No.10, p.1654 and p.1687. See also *H.A.D.* Vol. 1 No. 15, p.2880.

76. Quoted from N. Oram (1973:1), *op. cit.*, p.35.

77. N. Oram (1973:2), *op. cit.*, p.14.

78. *Ibid.*, p.15-16.

79. *Ibid.*, p.17.

80. *Ibid.*, p.19.

V. *Village Courts*

The idea of courts administered by Papua New Guinean citizens and administering traditional rules of customary law was far from novel. Still, the *Village Courts Act* 1973[81] met with popular acclaim. The introduction of Village Courts (and, at a later stage, a new system of Land Courts) represented a very real bifurcation in the style of the system of courts, a system which had remained virtually unchanged since colonisation. The responsibility for justice at the lower level of courts has been handed back to the people out of the hands of central government.

After the Secretary for Law, Mr. W. Kearney,[82] had announced a review of the lower courts of Papua New Guinea, a discussion paper[83] was circulated based on the report of Iramu and Desailly.[84] The *Village Courts Act* 1973 reflects the major concern over law and order. It provides that 'the primary function of a village court is to ensure peace and harmony in the area for which it is established by mediating in and endeavouring to obtain just and amicable settlements of disputes'.[85]

A. Personnel of Village Courts

The Act provides for the appointment of a District Court Magistrate as a supervising magistrate[86] for the personnel of these courts who are styled as Village Court Magistrates. The appointment of a Supervising Magistrate from the District Court paralleled with later developments in methods of control over indigenous courts by central governments in African colonies. There, control over courts outside the official system was accomplished by administrative officers with wide powers of inspection.

The Village Court Magistrates are chosen by the District Court Magistrate in consultation with, as far as possible, the Local Government Council which should name accepted dispute settlers in the area.[87] The

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81. No.12 of 1974. In force 28 November 1974. On Village Courts see generally Bayne and Zorn (eds.), *Lo Bilong Ol Manmeri, op. cit.*, pp.40-68.

82. Now the Honourable Mr. Justice Kearney, judge of the Supreme Court and National Court of Papua New Guinea.

83. *Circular Memorandum about Village Court Proposals.* Department of Law, Konedobu, 4 April 1973, from W.J. Kearney, Secretary for Law.

84. See footnote 37, above.

85. *Village Courts Act* 1973, s.19, hereafter cited as the Act. Note that one Supervising Magistrate in Kainantu felt Village Courts should be set up 'where there are trouble and unrest' *Post-Courier*, 17 August 1976.

86. S.6.

87. S.7.

selection of magistrates is no longer a central government function. Not less than three magistrates and not more than ten are appointed for each village[88] and they hold office for three years.[89] The magistrates require no formal qualifications but the Village Court Secretariat conducts induction courses before the court is established.

B. Village Courts Compared to Official Courts

Village Courts afford greater flexibility than their official counterparts. They may hold meetings 'from time to time and place to place'.[90] The law to be applied in these Courts is to be native custom and a Local Government Council may make rules declaring custom in its area[91] but Councils have not done this.[92] In any case the court should not be bound expressly by any law but should decide a case 'in accordance with substantial justice'.[93] Finally, the Village Court has also been freed from making distinctions between civil and criminal jurisdiction.[94]

C. The Jurisdiction of Village Courts

Village Courts have jurisdiction over any dispute arising in the area of the court or if the parties are resident therein. Jurisdiction over criminal matters is restricted to those specified in ss. 25-28 of the Act.[95] The tricky question of disputes between different villages where customs may be different (or the elders simply inventive) is catered for. If such an inter-village dispute arises the chairman of the panel of Village Court Magistrates for each Village Court area arranges for a joint sitting of magistrates from the respective Village Court areas.[96]

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88. S.8. See *Post-Courier* 30 May 1975.

89. S.10.

90. S.13.

91. S.29. Notice, however, that the *Village Court Regulations* 1974 were made by Mr. Holmes of the Village Courts Secretariat without consultation with the villages and were based on the old Native Regulations. Possibly the authoritarian style of 'kiap' justice may re-assert itself.

92. My informant was Mr. A. Pryke of the Village Courts Secretariat at an interview on 13 April 1976. Magistrates in some courts have tended to invent rules, for example, in Mendi smoking was made an offence for a woman and in Hanuabada walking after 10 p.m. was made an offence.

93. S.30 (1).

94. S.40.

95. See s.15.

96. S.17.

In the view of the Village Court Secretariat,[97] these provisions have turned out to have worked surprisingly and satisfyingly well.

Primarily,[98] Village Courts should reach decisions by compromise and agreement. Failing this, the compulsive jurisdiction of Division 5 of the Act comes into play. In their compulsive civil jurisdiction, Village Courts have a jurisdiction to or for K300 compensation[99] except in cases relating to ownership of land and the driving of motor vehicles.[100] Importantly, however, matters of bride-price and compensation for death have no limit.[101] Very obviously, these matters have generally not been accomodated well within the official courts and are better dealt with according to indigenous jurisprudence. With regard to punishment, the court may also order an offender to carry out useful community work for eight hours each day up to a limit of four weeks.

The criminal jurisdiction of these courts is over all community-type offences prescribed in the Regulations, such as assaults, drinking, damage to property and disturbing the peace.[102] Fines of up to K50 may be imposed[103] but imprisonment is only possible after Village Court orders are ignored and a Local Court Magistrate ratifies the order to imprison.[104] This protection was to prevent any possible vexatious over-zealousness on the part of some Village Court Magistrates. Fines are paid to the Local Government Council or a Local Development Authority if one exists.[105] It was hoped, though rather fancifully, that courts could become self-financing.

Appeals may be made to a Local or District Court Magistrate[106] who would sit with two Village Court Magistrates to hear the appeal.[107]

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97. At an interview on 13 April 1976. For example in the Kainantu area a potential tribal fight was avoided when a Joint-Sitting named the killer and declared that the killing had been by sorcery. Compensation was arranged later.

98. S.20.

99. S.24. The Act originally provided jurisdiction to award only K100. This sum was criticised as too low when a pig, a usual form of exchange in compensation costs much more. The amount was raised to K300 by the *Village Courts (Amendment) Act* 1977 (No.17 of 1977).

100. S.23 (1).

101. S.24 (3).

102. S.25.

103. S.26.

104. S.33-36.

105. S.49.

106. S.49.

107. S.63.

D. Peace Officers

The other aspect of the legislation which encourages the conclusion that the law and order issue was a major consideration in establishing Village Courts is the creation of Village Peace Officers.[110] They act in the area of the court,[108] make arrests,[109] enforce decisions of the courts and generally keep the peace.[111] The removal of the old *luluais* in New Guinea and the Village Constables in Papua had left a gap in rural areas for maintaining law and order. The old *luluais* and Village Constables had been backed by the *kiaps* and, accordingly, had the necessary power to enforce their authority. The Village Peace Officers are intended to fill this gap.

VI. *The Early Development of Village Courts until 1976*

Administrative support, especially in financial form, for the establishment of Village Courts was weak at first.[112] Financing a Village Court was a real problem in some areas. By the end of 1974, however, a Village Court Secretariat had been established to organise pilot training schemes for the first Village Court Magistrates. Further delay was caused in the establishment of the courts when the *Village Court Regulations*[113] were held up because of fresh arguments whether central or local government should finance the courts. Eventually Village Courts opened officially at Rigo in Papua in early 1975 but not before Village Courts had started[114] to operate in Kainantu in the Eastern Highlands. Other areas quickly began to request the establishment of Village Courts in their area. By mid-1976 nearly 300,000 people in 17 Local Government Council areas were under the jurisdiction of Village Courts.[115]

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108. S.63.

109. S.66. The Eastern Highlands Area Authority even asked for hand-cuffs but was refused (*Post-Courier*, 22 July 1976).

110. S.64.

111. S.65.

112. Interview with Village Courts Secretariat, 5 August 1974.

113. No. 41 of 1974.

114. By 22 May 1975 there were twenty-three Village Courts in three Council Areas. In order of official establishment there were seven in Rigo, four in Kainantu and twelve in Mendi. Wabag and Kaipit followed shortly afterwards. By 9 September 1975 158,000 people were covered by 61 Village Courts. For a detailed study of one court in the Kainantu area see N. Warren, 'A New Village Court in Papua New Guinea' in *Pacific Courts and Justice* (1977).

115. See Chalmers, *op. cit.*, Appendix 6 for precise Village Court Statistics at 1 June 1976.

Their popularity[116] confirms the real need which had existed for a more traditional and comprehensible style of justice.[117] For example, the Village Courts at Rigo[118] do not follow official court procedures and the magistrates employ a system of direct questioning before witnesses are called. Also, at the end of any case once a compromise is reached hands must be shaken as a sign of reconciliation.

VII. *Conclusion*

It is clear that the system of courts must be reconstructed and reformed to suit the needs of the people of Papua New Guinea in order that they are not passive spectators in a post-colonial legal system which is not autochthonous or relevant. At the same time, the paramount aspects of the law, liberty, justice and respect for the individual embodied in the concept of the rule of law must not be dissipated by arbitrary decision-making disguised as indigenous traditional justice.

The establishment of Village Courts has been a successful first step towards achieving the active participation of the people of Papua New Guinea in the administration of a more comprehensible and less foreign legal system.

Nevertheless, Village Courts are not intended to replace the present Local, District and National Courts' structure: Village Courts are to supplement these Courts by affording a different type of legal service. The greatest impact of Village Courts will continue to be amongst homogenous groups linked by common customary rules. In the main, these homogenous groups will be in rural areas or in urban squatter settlements settled by people from one clan or regional group. Village Courts will handle community-type disputes whereas the Local and District Courts will continue to serve as an impartial arbiter in disputes in which there is not the same pressure from group opinion to settle the dispute.

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116. For example at a Seminar on Village Courts, cited at footnote 73, it was stated that in the Rigo area only one case in ten now goes to the Local Court whilst the rest stay in the Village Court.

117. However, A. Paliwala in 'Village Courts in Papua New Guinea. Colonial Courts or People's Courts' in D. Weisbrot, *Materials on Customary Law* (U.P.N.G. Printery, 1977) pp.165-177, expresses reservations on the early performance of Village Courts. He points to a formalisation of Village Court proceedings in the direction of official courts. He concludes from the available evidence that the new Village Courts may be influenced by the authoritarian ethos of the old colonial courts. In the early days of Village Courts more people participated in the deliberations ensuring a community decision. Now many areas have fixed court sittings at regular court houses. This has tended to make the Village Courts less democratic.

118. Per P. Taunakeke of Rigo District at a Seminar on Village Courts cited at footnote 73.

The general popularity of Village Courts and their early record of success in maintaining peace in the Villages has vindicated the few voices which were raised in favour of such a system in the past.