

Chapter 10

Creating a State

Decolonisation transformed a dependent Territory into a sovereign State, making people citizens instead of subjects. Sovereignty confers international equality and membership of global institutions. Some landlocked mini-states in Europe could leave it at that. Some insular mini-states in the Pacific and the Caribbean were experimenting with partial sovereignty, while Britain, France or the US continued to provide services.¹ Papua New Guinea was too large to behave like a mini-state and had opted for full independence so the new government had to provide schools and colleges, clinics and hospitals, roads and harbours, diplomats and soldiers, courts and police, agricultural, marketing and all other services to a scattered population. If it proved impossible to fund these on the desired scale, the Government needed a planning capacity to allocate whatever resources were available. It was easy to become a State internationally and in the abstract, but that would not satisfy the people, who needed concrete services. While a constitution was hammered out and economists built financial institutions, public servants were creating and staffing government agencies to fill the new offices in Waigani and deliver services.

Not unreasonably, many observers predicted catastrophe: under-qualified youngsters were rushed into key jobs in bodies that were brand new or were having their powers expanded. The quality of the new public service was uneven; but most of the new people in the new agencies performed as well as their Australian predecessors. Equally important — and more disconcerting — they outperformed their better-educated successors.

There were changes even at the top. When Johnson moved to Canberra, Tom Critchley succeeded him.² Like David Hay, Critchley was an experienced diplomat with recent experience in South-East Asia. This background (he assumes) commended him to Whitlam and Morrison as the man to oversee the moves to independence. His instructions were issued by the Minister for Foreign Affairs but were drafted by Morrison. They delineated three roles. As Australian High Commissioner *in* Papua New Guinea, he chaired the Executive Council and exercised Australia's residual powers. He was also Australia's High Commissioner *to* Papua New Guinea; and head of the Australia Office in Port Moresby (also known as the Papua New Guinea Office. Chapter 7). Conflicts between these roles should not have time to develop, since Australia still expected

independence as soon as December 1974. In retrospect, Critchley would have liked four rather than three years between self-government and independence. But he believed that naming a specified date for independence was necessary to ensure a change of attitude among Australians and a real exercise of power by Papua New Guineans.

A National Bureaucracy

A shortage of skilled and experienced staff was an urgent problem. For decades, the Public Service Commission had enforced Australian standards to public service appointments and promotions, barring Papua New Guineans from most positions and opportunities. In an understandable but unfortunate reaction against that discrimination, Momis and Kaputin saw neo-colonial motives in any proposal to retain Australians, and demanded swift localisation. But a more effective spur to localisation was the 'golden handshake'.

The golden handshake — an inducement to permanent officers to take early retirement — was negotiated in turbulent times, with little concern for long-term consequences. When the Somare Government formed, the Public Service Board submitted its plans to expand the Public Service and localise personnel.³ The plan was informed by the values of the previous House and the cautious ministerial members: they assumed an ever-increasing public service and leisurely localisation. Both elements appalled the new Cabinet with a precarious budget and a nationalist mandate. In September, Somare announced a new policy to merge departments, curb expansion — and cut the number of expatriates from 7,000 to 3,000 in three and a half years. This dramatic reduction should flow from natural attrition, without retrenchments.

Meanwhile, the Public Service Association had been negotiating with Territories over compensation for public servants who expected to be retrenched. Reaching an impasse in 1972, Peacock, as Minister for Territories, appointed as consultant the Adelaide businessman A. M. Simpson. His report — 'largely favourable to the Public Service Association position' — proposed that each retrenched officer receive a multiple of his or her superannuation contributions. This idea was adopted by the Australian Government, but not all Papua New Guinean ministers wanted seasoned officers to leave, nor could they see why the handshake was so generous. Dismay turned to alarm when platoons of public servants resolved to leave at independence: many contented officers could not resist the offer and the Government could not determine when they left. Least of all could ministers see the justice of deducting this sum (\$60 to \$70 million) from the aid budget.⁴

Alarmed by the evident skills shortage, Critchley wanted to create a special category of Australian public servants to help in a transition era.⁵ He was also keen to build a training element into aid projects. Inspired by a successful project in Thailand, he wanted to link Lae to Moresby by road (a Unity Highway), the training component of which would strengthen the nascent Public Works Department. Australia's independence present was a suite of cultural institutions, which were important for national identity but marginal to the skills deficit.

The outcome of rapid localisation has been addressed by others, and is well summarised by Stewart Firth.

The legacy of Australian administration was a large public sector of skilled people delivering services in education, health, transport, communications and policing.

Tens of thousands of Australians did these jobs and left ... with handsome superannuation which counted as Australian aid. No PNG government could replicate the Australian way of doing things. It cost too much and depended on a highly educated bureaucracy.

It is widely agreed that, as well as 'the many impressive Papua New Guinean leaders' of the first generation, 'there were too many with too little knowledge of how to run a modern State'.⁶ With the introduction of democratic institutions from the 1960s, the role of the *kiaps* was increasingly awkward. Papua New Guinean *kiaps* began to be trained and appointed, but that did not resolve the anomaly of an essentially Australian cadre of administrators operating in parallel with elected councillors and parliamentarians. The Department of District Administration continued and was added to the Chief Minister's Department, but most of the *kiaps* drifted away.⁷

Almost equally important in changing the nature of the Public Service, and much less often considered, is the unevenness of localisation: the Army and the police, for two important examples, were localised more swiftly than most of the civilian agencies, and the judges more slowly. Significant consequences flowed from this uneven pace.

The Uniformed Forces

The Department of Territories enjoyed little leverage in developing a national defence force: the Australian Army developed Papua New Guinea's armed forces with little civilian involvement. The Pacific Island Regiment descended from the Papuan Infantry Battalion, raised in 1940 (largely from Papua's constabulary). No similar force was raised in New Guinea, partly because of the terms of the mandate but also because the Administrator hesitated to arm New Guineans. The Japanese invasion trumped that concern, and two New Guinea Battalions were raised by the end of the Pacific War. These three battalions formed the Pacific Island Regiment of the Australian Army. Accusations of indiscipline were made and the PIR was disbanded in 1946 — 'a victory for those ... who saw native troops as a potentially dangerous, destabilising and unruly element'.⁸

By the 1950s, Australians were more anxious about *konfrontasi* with Indonesia than the possible risks of arming Melanesians. They reactivated the PIR in two battalions, created a Territory element in the Australian Navy in Manus, and revived the (mainly expatriate) Volunteer Rifles. Although there was no doubt about the PIR's courage under fire, a liaison officer deplored the absence of 'complete and instant obedience to the orders of a superior officer'.⁹ Undaunted, the Army improved the soldiers' pay and

conditions despite a prior agreement to keep parity with pay and conditions for the police. They also began to train officers. The first were commissioned in 1965 but — as in the civilian agencies — limited education barred many soldiers from officer training: in 1968, there were only six officers and six trainees. To prepare candidates to train in Australia, a Military Cadet School was opened in Lae.

Responses to demonstrators in 1969 (on Bougainville) and 1970 (in Rabaul) focused attention on relations between the Administration, the police and the PIR. The preparations for a call-out of the Army revealed unresolved issues. So seldom had Australians faced this issue that there were no precedents. (A few years later, after the ‘Hilton bombing’ in Sydney, Australians had to consult the history of British India to identify legitimate actions for the army.¹⁰) There were manuals for lending support to the civil power but the PIR had not seen them.¹¹ If the PIR had been involved, its approach would have been brusque: in Hay’s gloss of the way soldiers dealt with such issues, ‘You line them up, issue a proclamation, and if they don’t disperse, you shoot’. Civilian sensibilities were very different. After an earlier riot in the Gazelle, for instance, Chief Justice Mann advised the authorities to assemble so much force that people would not risk defiance. That was also Hay’s preferred approach. Since disorder was expected ‘on a scale beyond the capacity of the police force to deal with’ (Chapter 6), armed forces would surely be needed. Yet even at the end of 1971 officials did not know whether, or how, or how much the PIR would assist.¹² It was at this point that the Army revealed that the PIR simply would *not* train alongside the police.¹³

The PIR was listed in the Australian Order of Battle and paid by the Australian Department of the Army. Military planners had assumed that the Territory would be defended ‘as if it were part of the Australian mainland’ (as Hasluck put it) and that the PIR would remain part of Australia’s forces. Many Australian officers worried about the pressure that Indonesia might bring to bear on Australia through Papua New Guinea. That assumption and that anxiety informed the demand for ‘interoperability’ — making sure that the PIR could use Australian Army weapons although they could not use the batons and shields of the local police. As far as possible, equipment and training were identical with Australia’s. Australians even modified the standard rifle to suit the shorter stature of many PIR soldiers. Any move to reduce this interoperability would be unwelcome to Australian and to Papua New Guinean officers.¹⁴ Such full integration into the Australian Army obviously inhibited it from morphing into a national force.

Perversely, while the Army stuck to its interoperable guns, Australia’s strategic vision was undermining the case for integration. By 1972, *konfrontasi* was over, the setbacks of the Vietnam War had discredited the doctrine of ‘forward defence’, and the Government was rethinking its military obligations. Strategic disengagement was in the air, and the defence of Papua New Guinea shrank from ‘vital’ to a matter of ‘abiding importance’.¹⁵ The value of interoperability was disappearing — but not fast enough to affect events in Port Moresby.

The authorities did not develop a civilian department of defence until the very end of the colonial era, perhaps because there was no Canberra template for a strong department.¹⁶ No civilian was ever involved in formulating policy. During a rare debate on defence in the

House of Assembly, in 1966, Paul Lapun moved a vote of appreciation for Australia's efforts, and this was carried without debate. A year later, the maverick Pasquarelli argued that a construction corps would be more useful than a PIR that he depicted as living in luxury. That heretical proposal died on the floor. Then in 1969, the House asked for a Defence Spokesman to be nominated from the House, and in that way to gain some control over defence. That request was refused because the PIR was intrinsic to the Australian Military Forces.¹⁷ That honest answer begged the question of responsibility.

After the 1972 election, the position of Ministerial Spokesman for Defence was at last created, and supported by a three- or four-man civilian Defence Section. Somare was the first spokesman. While his stature lent importance to the role, he was already wearing so many hats that he could not devote much attention to military affairs. This arrangement therefore preserved the Australian Army's de facto control. The head of the Defence Section, N. L. Webb, seconded from the Australian Public Service, had correct relations with Somare, whereas the military commander enjoyed Somare's warm friendship. Out-gunning Webb's civilians, the soldiers had a colonel as Director of Plans who consulted headquarters staff and enjoyed direct access to the Commanding Officer (Brigadier Aldridge, succeeded by Brigadier Norrie). Somare passed the defence role to Albert Maori Kiki in 1973, another high-profile leader, but one already busy as Deputy Chief Minister and Foreign Minister. So busy was the rest of the Cabinet that Ebia Olewale, for example, had no idea of the debates going on in and around Murray Barracks.¹⁸

When Morrison turned his attention to defence matters, he was dismayed by the size, the cost and the structure of the PIR: they seemed neither relevant nor affordable. Rather than allow the PIR to evolve into Papua New Guinea's Defence Force, he proposed a Police Field Force along the lines of Malaysia's, to patrol and manage the border in a non-provocative fashion. He believed that the Australian Army was over-ready to see the PIR as 'a short backstop to the police in the event of civil unrest'. Australians held combat positions, and that would embarrass Australia if the PIR deployed during internal disorder. For this reason, he wrote to Somare in August 1973, setting out procedures for consultation and warning that he 'should not assume that the PNGDF would be used prior to independence in any particular situation in aid to the civil power'. As Defence Spokesman and Foreign Minister, Kiki replied that his government was 'determined to look after its own security problems' and that soldiers should be used only as a last resort to maintain internal security.¹⁹

Morrison had raised these matters with Lance Barnard, the Minister for Defence, and in a meeting in January 1973 with Somare, Barnard, Johnson and the Chairman of the Chiefs of Staff, Admiral Victor Smith. He persuaded them that the police should be strengthened in order to handle internal disorder. They also accepted his more contentious proposal that a Police Field Force should be created. But the Chairman of the Chiefs of Staff opposed any reduction in the size of the PIR, and he resisted what he deemed to be civilian 'interference' in the PIR's internal security role.²⁰

Australian and Papua New Guinean officers in Port Moresby predictably fought against a proposal that would disconnect the PIR from the Australian Army and (by training with police) blunt their professionalism. They simply ignored the decisions of

the Canberra meeting. Since Barnard was over-stretched in an epic struggle to integrate the forces' supply departments, no attempt was made to enforce these decisions and Morrison's proposal lapsed. (He was not entirely alone. In the House of Assembly, Barry Holloway put forward the idea of a Special Services Unit. That concept was scotched at the same time as Morrison's.)²¹

Pat Galvin reckons that Morrison's proposal was never possible. The PIR was better — and more expensively — trained and equipped than the police. This was a rare institution in which 'Papua New Guineans were treated as equals; high performance was attained; and one outcome was a self-confident elite'. If that was not enough leverage, the Brigadier 'duchessed Somare shamelessly', so it was 'inconceivable that this outfit would consent to be down-sized or down-graded or integrated with any other agency'. Galvin also supposes that the head of the Department of Defence, Sir Arthur Tange, expected closer relations between the Papua New Guinean and Australian armed forces than proved to be the case after independence.²²

Jim Nockels' bleak view is that the subversion of the agreement reflected 'the lack of capacity of anyone' in Canberra or in Port Moresby 'to centrally control this amorphous, humungous defence machine'. When Nockels came to Papua New Guinea as a civilian in defence planning, and saw that the existing arrangements were unaffordable, he revived the idea of a field force. He was promptly summoned before Brigadier Norrie, who threatened that

if I didn't desist from sending notes back to Canberra suggesting that we might think of something different, and maybe a field force, he would personally have me escorted to the aircraft and sent back to Australia.²³

As part of the campaign to defend Australian links, Papua New Guinean officers organised themselves in 1973 to address planning issues. The contest between civilians and soldiers for control over policy was quite lopsided. Before coming to office, Somare had argued that the Army was large enough with two battalions. By the end of 1972, he was denying any intention of reducing the size.²⁴ By weight of numbers, weight of argument and weight of inertia, therefore, a single security force was scuppered by soldiers who insisted on 'the discrete external defence function of a military force'.²⁵

There remained the mechanics of creating a quasi-national defence force. The transition had been planned since the 1960s, and, in 1972, the Army created a Joint Force Headquarters in Port Moresby, based on Army Headquarters: there was no attempt to place the Joint Force 'under the command of ... the head of the civil administration'.²⁶ The Papua New Guinea Defence Force was formed on Australia Day 1973, by renaming the Joint Force. Perversely (as Mench points out), the formation of the PNGDF as a national force required 'a very significant increase in senior and middle level Australian officers' for its headquarters.²⁷ It also entailed 'a dramatic expansion' in the number of officers and some inflation of rank levels.

When proposals came to Cabinet later in 1973, they resolved on a 3,500-man force, and equal status between the commander and the senior public servant in the

Defence Department. The first statement by Maori Kiki as Defence Minister, on Anzac Day 1974, justified a separate and expensive defence force by defining its three roles:

- 1 to defend the nation against external attack;
- 2 to assist the police in the maintenance of public order and security as a last resort if the police cannot reasonably be expected to cope;
- 3 to contribute as required to economic development and the promotion of national administration and unity.

There would be two battalions, an engineer company, a patrol-boat squadron and a landing-craft squadron, and appropriate support.

Morrison intended to transfer de facto control over defence long before independence. December 1974 was the target, but that had to be set back to March 1975, with provisos about the use of Australians in operations. In an era of ambivalent and divided responsibility, control was elusive. In July 1974, a force that had grown to 3,851, despite Morrison's instructions, still deployed 637 Australians. A year later, there were only 486 Australians, and Morrison was still anxious lest they become involved in an incident. But by the end of 1975 (after Morrison had enjoyed a stint as Defence Minister), there were only three Australians in combat positions.²⁸

Powers were formally transferred in March 1975, but many steps were taken only at independence. The creation of a national defence force was a remarkable feat but — as Paul Mench points out — Papua New Guinea's assessment of her defence needs was almost identical to Australia's. That was due partly to decades of reliance on Australian officers, and partly to the arrival of independence too quickly to allow creative thinking. As a result, by 1974

PNG defence solutions differed remarkably little from what Australia had planned and in some cases already developed and Australian defence planning had therefore, in great measure, been accepted by Papua New Guinean leaders ...

[The Papua New Guinea Defence Force] ended up pretty much as if they had been designed completely by Australia and ... the elaborate processes of planning and consultation ... may be seen essentially as a legitimization of the Australian-developed defence forces.²⁹

If Australia still saw the defence of Papua New Guinea as vital to her own interests, this continuity might have been justified, but there had been a seismic shift: no defence treaty was offered and the Papua New Guinea Government was too proud to ask for one. The Joint Statement of the Prime Ministers of Australia and Papua New Guinea, in 1977, was the end of a decade-long shift in Australia's strategic perceptions, so Papua New Guinea accepted full responsibility for her defence — with a defence force based on the assumptions of the 1960s.³⁰

The PNGDF's dependence was profound. For one thing, the force needed continuing training. Again, policy-makers were constrained by the force's logistics requirements.³¹ When Barnard inaugurated the PNGDF, he promised contributions to training, operational and technical assistance and equipment.³² In reality, the PNGDF could develop *only* on the basis of a defence cooperation program with Australia. Papua New Guinea could deploy an effective force to put down secession in Vanuatu in 1980, but only because of the Australian drip.³³ As this support dwindled and Papua New Guinea's budget came under pressure, the effects on the PNGDF were corrosive. Its whole budget was consumed by wages, rations and other recurrent costs, so there was no money for repairs, for training in the field, or for patrolling. An army confined to barracks lost its edge and its discipline, long before it was put to the test of war in Bougainville.³⁴ As Anthony Siaguru put it, there was a huge military build up before independence, but

when we've had to tighten our belt and live within our means, a lot of the soldiers and the defence force has been cut back regularly. Every year cabinet after cabinet cut back and made their soldiers lose more and more of their special entitlements and privileges.

A generation later, when the Eminent Persons Group advised retrenchment and retraining, the force was so ill-disciplined that 'there was a real danger that the military might have gone on the rampage'³⁵.

On the face of it, the Royal Papua New Guinea Constabulary was better prepared for useful roles in an independent country. Police traditions reached back to the very beginning of foreign control, as an armed constabulary. It was the only agency in which ambitious and determined men might expect adventure, relative affluence and independent authority (Chapter 3) before a comfortable retirement. During the 1960s, under officers such as Ray Whitrod, these men had begun to learn new roles as a modern police force — unarmed and professional — more like those of the Australian States and less like a colonial frontier force.

That metamorphosis was incomplete by the 1970s. The pioneering tradition was strong and, for example, when the Administration cracked down on the Mataungans, violent habits revived. Compared with the pull of the past, the attraction of the future was frail. The schooling of most policemen was too limited; too many expatriate officers left at independence; and facilities for training (such as their Gordon Barracks in Port Moresby) were cramped. In quantity as well as quality and training, the police were markedly poorer than the soldiers. Two hundred and forty officers and 3,400 other ranks included 11 'special duty squads' — in effect, riot police, who expected that they could manage one large disturbance at a time, or one medium and one small riot. As Critchley observed eroding efficiency and sinking morale, he urged Australia to top up the salaries

of expatriates in order to retain them. He won that agreement, but too late: the police reached independence with few seasoned officers, and saturated by the values of the colonial past.³⁶

The soldiers and police were better equipped for the 1950s than for the future. Together with the demise of the *kiaps*, these changes undermined the Government's control of town and countryside.

The Judicial System

Most Papua New Guineans experienced the judiciary as an integral facet of government, rather than as something independent or above it. In places where government control was new — especially the Highlands — *kiaps* still acted as judge and jury. Elsewhere, the formal courts often seemed equally subordinate to the *kiaps*. The Public Solicitor's Department could intervene, often successfully, but it could redress the power imbalance only in particular cases. Ian Downs, noting the legalism of proceedings, reckoned that episodes like the Varzin Case (Chapter 9) left the Tolai 'permanently embittered and with little faith in the courts'.³⁷ The same was true of Bougainvilleans when the Australian High Court upheld the Mining Ordinance against them.

Several members of the Constitutional Planning Committee, including Kaputin, Momis, Stanis Toliman and Angmai Bilas, had endured these frustrations personally and wanted the State to reform the courts, to reform the laws and to reshape the judiciary. Lest the structure be transferred and entrenched before they had reviewed it, Momis asked Morrison to delay.³⁸ As matters turned out, the Australians retained control only over the Supreme Court, but that was enough to allow Papua New Guineans to look into the judicial institutions and the values they embodied.³⁹ Kaputin, as Minister for Justice, summarised the most common complaints: the laws were too technical and better laws could improve people's lives; and the law restricted business and worked against Papua New Guineans. He said nothing about the need to prevent crime, but he did expect

decreased tolerance of both poverty and privilege. For the underlying masses, development is apt to be a time of awakening hostilities, of newly felt frustrations, of growing impatience and dissatisfaction.⁴⁰

A major defect of the court system was the absence of local tribunals. This meant (as Fenbury had pointed out in the 1950s) that many people relied on informal dispute-settlement — a 'completely unsupervised, and technically illicit legal system'.⁴¹ He wanted local councils to have a law-enforcement arm, but Hasluck and Derham rejected that idea. They felt that a reasonable standard of justice would not be assured, and they did not believe that the resources could be found for supervision, so no action was taken.⁴² Many later critics insisted that village courts should complement community structures on one hand, and superior courts on the other.⁴³

Soon after self-government, attempts were made to fill this gap. In Kainantu, in the Eastern Highlands, for example, Village Courts started up spontaneously and forced the

hand of the Government.⁴⁴ Geoffrey Dabb drafted a proposal and, in 1973, his draft legislation became the basis of the Village Courts Act, by which local courts would administer 'customary law'.⁴⁵ Under the supervision and control of District Court magistrates, these courts would resolve disputes within financial limits, impose limited penalties and be free to apply 'customary law' — although no one was willing to say what that was.

An immediate problem with the Village Courts was the impossibility of linking them through magistrates to the rest of the judicial system. The writers of the *Clifford Report* in 1984, for example, heard of Village Courts deteriorating in the absence of transport, facilities and visits by police and justice officials. That problem has not been addressed, and lack of supervision still accounts in large part for the defects of local courts. District Court magistrates cannot travel to do the job envisaged under the Act. Many Village Courts, therefore, 'have been colonised by the local power elite'⁴⁶ to the disadvantage of, for example, women. A Village Court system might have flourished if it had been introduced when funding was easier: its late creation exposed it to the tight budgets of independence.

When the CPC asked the people about the administration of justice, they demanded independent courts and an independent Public Solicitor. The CPC agreed that:

the courts should be independent of the legislature and the executive ... judges and magistrates should be sufficiently secure in their positions so that they can make their decisions without fear of personal repercussions.⁴⁷

They were reluctant to give judges the same security of tenure as in Australia, since that might allow young judges to retain office well into their seventies. They proposed instead that a judge could be replaced after 10 years.⁴⁸

For many years, all judges were likely to be expatriates. Only in 1972 did the University of Papua New Guinea graduate the first lawyers to join the Australian-trained Joseph Aoae, Buri Kidu and Bernard Narokobi. Scarcity led to dramatic career moves, such as Narokobi becoming Chair of the Law Reform Commission, and Ilinome Tarua thrust into drafting the Constitution. Buri Kidu quickly became head of the Prime Minister's Department and (though this was not part of the plan) Chief Justice soon after.⁴⁹

The Bench would not be localised quickly if (by convention) a lawyer must work at the Bar for several years before elevation. That tradition generated tension between the desire for an independent judiciary and the likelihood that an expatriate Bench would show little interest in an indigenous jurisprudence. Morrison formed a poor opinion of the judges: he believed that they wanted to be transferred to Australian benches and he was sure that they did not deserve to be. By contrast, Papua New Guineans respected them so much that there was no pressure to localise the judiciary, which began almost by accident. In 1979, the Government resolved to deport Dr Ralph Premdas, a political science lecturer and adviser to ministers. Premdas appealed to the National Court to be

allowed to remain in the country to organise an appeal. The court granted that request, to the dismay of the Minister for Justice. Nahau Rooney, once a member of Somare's kitchen cabinet, was a member of parliament from Manus. Articulate and energetic, she was unusual as a female parliamentarian and unique as a female minister. She reckoned that the Government, not the court, should decide who should be allowed to remain in the country, and she wrote to the Chief Justice saying so. The Supreme Court reacted by launching proceedings against her, describing her statements as contempt of court. Rooney was duly sentenced to eight months. When the Government released her on licence, five judges resigned.⁵⁰

At much the same time, the Supreme Court handed down a custodial sentence of 10 weeks to Kaputin, who had become Minister for National Development. He had failed to comply with a court order to file the 1977 report of a company of which he was an office-holder.⁵¹ What was astonishing in these events was the reverence paid to a court whose decisions astounded the Government as well as much of the public. In this crisis created by the judges' resignations, the Australian jurist Hal Wootton was willing to take over as Chief Justice, but the Government began a program of localisation with Buri Kidu as Chief Justice. The spur to localising judicial offices was the bench of judges, not the Government.

Kaputin and other reformers wanted to give greater scope, in theory and in practice, to 'customary law'. The criminal code of Queensland (adopted many years earlier) still prevailed. In 1963, a Native Customs (Recognition) Ordinance came into force, but custom was considered only in assessing an accused person's retaliation when provoked.

Where an accused was perceived to be 'primitive' or 'unsophisticated', the courts were more prepared to extend the scope of the provocation defence and to give lesser sentences upon conviction.⁵²

Encouraged by the CPC, the Constitution went further, asserting that custom had been adopted and must be applied as part of the underlying law. It stated that an Act of Parliament might provide for the proof and pleading of custom, regulate the manner or purposes for which custom may be recognised, applied or enforced, and provide for the resolution of conflict of custom.⁵³ The courts were charged to formulate appropriate rules, and to ensure that the underlying law developed as a coherent system.

But judges were not keen. When Narokobi was a judge of the National Court, he acted to recognise custom in relation to criminal matters, but he was rebuffed by the Supreme Court, where judges reckoned that customs had to apply throughout the country before they would be recognised. Since custom is necessarily local, such a test could never be met.

The issue was passed to the Law Reform Commission, created in 1975 with Narokobi as chair, assisted by Rooney, Francis Iramu, Meg Taylor and Charles Lepani. The commission moved to modernise and decolonise the more obviously colonial institutions. They proposed the abolition of the discriminatory Native Regulations, and these

were duly repealed. Similarly, they recommended that the Police Offences Ordinances be replaced by a Summary Offences Act. When this was enacted in 1977, it abandoned the vagrancy law ('the offence of having no visible means of support'), although one commissioner did want this offence to remain so that police could arrest such persons and the court could order them back to their village.

Together with the Arrest, Search and Bail Acts of 1977, these laws armed Papua New Guinea with updated and constitutionally valid legislation which was easy to understand and which provided a proper basis for the police to maintain law and order and act in an appropriate and lawful manner in dealing with suspected offenders.⁵⁴

Beyond specific laws, the commission took its broader responsibility seriously. Working Paper 4, *Declaration and Development of the Underlying Law*; Working Paper 6, *Criminal Responsibility: Taking Customs, Perceptions and Belief into Account*; and especially its seventh report, *The Role of Customary Law in the Legal System*, did grapple with custom. Taking the opposite tack, however, was Lynch, the Parliamentary Draftsman, who combined the Criminal Codes of Papua and New Guinea into one document. Both derived from Queensland and Lynch introduced few changes. 'The opportunity to reform the Criminal Code so that it better reflected the world view of Papua New Guineans was lost.'⁵⁵

This discussion implies that customary law could have been embraced if only the courts had taken their duties seriously. But the issue is more complicated than that. Dabb points out that the CPC imagined 'a body of customary law ... waiting only for the tools needed to ascertain and apply it to solve many (some thought all) the questions about a legal system'.⁵⁶ If that were true, then research would uncover concepts and that were fundamental and widely followed. At the 1965 conference of the International Commission of Jurists, however, Justice Smithers observed that he had never seen field staff do their duty to record local customs, no doubt because 'the practices observed were but a wilderness of single instances'.⁵⁷ He approved of village dispute resolution, but insisted that 'decisions be reached ... by reference to settled rules'. Without rules, it was impossible to ensure (or appeal, or even review) the fairness of decisions.

Fascinating 'single instances' were everywhere. Johnson was disconcerted to hear Siwi Kurondo in the second House of Assembly demand the retention of specific customs:

We want no restrictions imposed to stop some of our ideas for looking after pigs. The women sleep with their pigs and I want this to be one of our customs that is continued.⁵⁸

It is possible that 'customary law' — a single, consistent and discoverable body of ideas — simply does not exist. And if so, some of the critics of Papua New Guinea's Government are overstating their case. Early on, the Government 'lost interest in qualitative and substantive reforms', said Narokobi, or perhaps (according to David Weisbrot)

it simply 'lost the will to reform'. In that respect, the Government merely reflects community values.

The indignity of a wholly imposed legal system raises few hackles, and ... large numbers of expatriate judges, magistrates and lawyers playing a leading role in administering a foreign-based system of law and courts does not provoke the same emotional response that overt economic neo-colonialism does.⁵⁹

The best analyst of contemporary 'customary law' issues, Sinclair Dinnen, observes important developments, for example in Bougainville, in resolving conflict. In the absence of the State during nine years of war, many local disputes were resolved by a creative 'mixture of "tradition" and newer structures'. In many parts of the country, informal dispute-resolution resources are used every day. These resources are concentrated in urban areas, along the highways and in areas of resource development rather than in less-developed regions.

Dinnen denies that the judicial system has broken down since independence:

Often it is argued that the colonial system of order was very successful. Often there is an image of a system of *kiap* justice [but before self-government] that system itself was beginning to look shaky as it came under increasing resistance.⁶⁰

Critics of the courts are not the only analysts who cherish a romantic view of colonial law and order. In reality, the Territory Administration was not always effective, even in its own terms, and colonial institutions (such as the *kiap* system) simply could not continue in a democratic society. By no means can all the defects of contemporary governance be attributed to decolonisation — or to the speed with which it was accomplished.

Footnotes

1. Robert Aldrich and John Connell discuss this phenomenon in *The Last Colonies*, Melbourne, Cambridge University Press, 1998.
2. Interview, Critchley. See also his National Library of Australia Oral History interview.
3. David Hegarty, 'September–December 1972', in Moore with Kooyman, *A Papua New Guinea Political Chronicle 1967–1991*.
4. Ross Garnaut, in 'Hindsight'. Garnaut suggested that this arrangement flowed from the Public Service Union's relations with the Labor Party. Morrison retorted that it was the result of Peacock seeking advice from Simpson, who, 'like all private sector people, are far more generous when it comes to using government money than they are with their own money'. The Simpson Report predated the Whitlam Government.
5. Critchley interview and Critchley's Oral History interview in the National Library of Australia.
6. Stewart Firth, 'Papua New Guinea: Why We Must Offer ex-Colony more than Words and Money', *Sydney Morning Herald*, March 27, 1997.
7. Philip Fitzpatrick, *Bamabuta*.
8. Paul Mench, *The role of the Papua New Guinea defence force*, Development Studies Centre Monograph 2, ANU, 1975, quotation from p. 20.
9. *Ibid.*, p. 31: M. B. B. Orken, December 24, 1961.
10. Jim Nockels in 'Hindsight'.
11. Peta Colebatch in 'Hindsight'.
12. David Hay in 'Hindsight'. Draft IDC report, December 1, 1971.
13. A452, T29, 1971/3088, First Assistant Secretary's Minute, December 7, 1971.
14. Nockels, in 'Hindsight'.
15. *Ibid.*, p. 55. See also Bruce Hunt's PhD thesis, 'Papua New Guinea in Australia's Strategic Thinking', University of New England, 2004.
16. Nockels, in 'Hindsight'.
17. Mench, *The Role of the Papua New Guinea Defence Force*.
18. *Ibid.*; and Interview, Ebia Olewale.
19. Morrison, 'The Transfer of Defence Powers', in 'Hindsight'.
20. *Ibid.*
21. Mench, *The Role of the Papua New Guinea Defence Force*, p. 76.
22. Interview, Pat Galvin.
23. Nockels, in 'Hindsight'.
24. *Ibid.*
25. Mench, *The Role of the Papua New Guinea Defence Force*, p. 76. (Morrison observes that 'the record of how the Australian military ignored the agreements reached at the meeting is contained in Walsh and Munster's *Secrets of State*')
26. *Ibid.*, pp. 69–70.
27. *Ibid.*, p. 73.
28. Morrison, 'The Transfer of Defence Powers', in 'Hindsight'.
29. Mench, *The Role of the Papua New Guinea Defence Force*, pp. 56, 92–3.
30. Hunt, *PNG in Australia's Strategic Thinking*.
31. Peta Colebatch, 'Transfer of the Defence Powers', in 'Hindsight'.
32. Mench, *The Role of the Papua New Guinea Defence Force*, p. 73.
33. Nockels, in 'Hindsight'.
34. Hank Nelson, in 'Hindsight'.
35. Anthony Siaguru, *The Great Game: Politics of Democracy in Papua New Guinea*, The Centre for Democratic Institutions Annual Address, June 18, 2001.

36. Interview, Critchley; and Sinclair Dinnen, *Law and Order in a Weak State*.
37. Ian Downs, *The Australian Trusteeship*, p. 173, cited by John Ley in 'Hindsight'.
38. John Ley, 'CPC's contribution to the constitutional provisions for the administration of justice', in *ibid.*
39. Morrison, in 'Hindsight'.
40. Cited by Dabb, in 'Hindsight'.
41. David Fenbury, *Practice Without Policy*.
42. Interview, John Greenwell.
43. Eg., William Clifford, Louise Morauta and Barry Stuart, *Law and Order in Papua New Guinea* (Clifford Report), IASER, Port Moresby, 1984; Sinclair Dinnen, *Law and Order in a Weak State*; Sinclair Dinnen and Alison Ley (eds), *Reflections on Violence in Melanesia*, Asia Pacific Press, Canberra, 2000.
44. Peter Bayne, in 'Hindsight'.
45. Dabb, in 'Hindsight'.
46. Dinnen, in 'Hindsight'.
47. CPC Final Report
48. Ley, in 'Hindsight'. So Sir Buri Kidu was not reappointed after his 10-year term.
49. O'Neill, in 'Hindsight', quoting Andrews, Chalmers and Weisbrot.
50. Stephen Pokawin, 'January–December 1979', in Moore and Kooyman, *A Papua New Guinea Political Chronicle 1967–1991*.
51. *Ibid.*
52. Nick O'Neill, in 'Hindsight'. O'Neil was Secretary of the Law Reform Commission.
53. *Ibid.*, quoting Constitution of the Independent State of Papua New Guinea, 1975, schedule 2.1.
54. *Ibid.*, quoting Law Reform Commission, *Report on Punishment for Wilful Murder*, Teport 3, October 1975.
55. *Ibid.*
56. Geoffrey Dabb, in 'Hindsight'.
57. Smithers, cited by Dabb in 'Hindsight'
58. Les Johnson, 'Westminster in Moresby'.
59. Narokobi and Weisbrot cited by Dabb, in 'Hindsight'.
60. Sinclair Dinnen, in 'Hindsight'.