The Suitability of the Legal Sytem and the Legal Method in Papua-New Guinea*

Weaknesses in the legal system and the legal method may be found clearly when discussing Local Courts and the magistrates of those courts and analysing the method of appeals from Local Courts to the Supreme Court of Papua and New Guinea.

Since 1966 when the Courts of Native Matters in Papua and the Courts for Native Affairs in New Guinea were abolished, there has been a move to establish a Local Court in every district. The new courts were more or less the same courts as described above but were given a new name. They had the same jurisdiction and were staffed by District Administration Officers. They have been gradually replaced by full-time magistrates, the graduates of the Administrative College of Papua and New Guinea. The Administrative College runs two courses for magistrates: (i) for mature age men and (ii) for younger men.

The mature age course is of nine months' duration and the men who enter the course have necessarily to be able to read, write, speak and understand English; and must know a vernacular language. They are men of some understanding with social positions, are within the ages of thirty and forty-five and are considered to be respected by their community. The course for younger men takes two years and the men who attend this course are required to pass no prior certificate or its equivalent or higher qualification but they must have ability to comprehend, speak and write fluent English. They spend their first year on general education and then in the second year they learn law which is probably equivalent to the first year law at the University of Papua and New Guinea. As there has not been any graduation of the students in such a course, whether or not such course is successful cannot be discussed here. But when they come out they will be appointed as Local Court magistrates after their twelve months' practical training at a Magistrate's Court. I shall now proceed to make some comments and I will start with the independence of the judiciary at the Local Court level.

Although the Courts of Native Matters and the Courts for Native Affairs were abolished the same officers who had staffed those courts became officers of the Local Courts. Full-time magistrates were scarce and because of the necessity to continue appointing District Administration Officers as magistrates, *the Local Courts have inherited the authoritarian tradition of the past.* Even now, although there are full-time magistrates appointed to the Local Courts, the courts are still part of the Administration Offices. At Ela Beach in Port Moresby, for example, where one of the first graduates of the Administrative College is the magistrate, the court is included in the sub-district office, beside the welfare office and the Red Cross etc. Just how dependent the Local Court is on the Administration is not known, but it is doubtful that it is independent of the executive to the same extent as the District Court and the Supreme Court. Another example is the Local Court in Mendi where the magistrate is one of the graduates of the Administrative College. It appeared to me when I went with a defence counsel on a Supreme Court circuit, that the Local Court and the District Administration were one thing and the court was a tool for the District Commissioner and his officer. The District Commissioner is no. 1 Kiap, A.D.O. or A.D.C. is no. 2 Kiap and the magistrate is one of the no. 3 Kiaps (included with P.O's).

While I feel that the personality and quality of the magistrates of the Local Courts should not be attacked, I think their quality as opposed to their ability may be criticized because their quality is the direct result of the system under which they have been trained. While their knowledge of law may suffice for the purpose for which they have been trained, their natural tendency towards partiality has not been altered. I will discuss the former first. Several times I attended the Local Court at Ela Beach when an officer from the Public Solicitor's Office was

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representing a number of clients, and eventually I came to the conclusion that representation made no difference and it was a waste of time. With due respect, before a magistrate who had not studied case law method and technicalities arising from construction and interpretation of statutes, representation is like giving a Mercedes as a gift to a child of four, who does not know what to do with the gift. Another example: I had a client (during my vacational job with the Public Solicitor's Office) who told me that he was married in a Catholic Church and after the marriage he and his wife came to Port Moresby. For four years they lived in complete harmony until a week before he and his wife came to the Local Court at Ela Beach. They had an argument over their two-year-old son. The mother gave the little boy a spank and the father went to the aid of the child and slapped his wife. Following his statement, the magistrate dissolved their marriage after an hour of hearing. When the question arose as to who would take custody of the child, the magistrate sent the man up to the Public Solicitor's Office. I was in doubt firstly because on that evidence alone the magistrate could not have dissolved the marriage, and secondly in any event the magistrate had jurisdiction only over the proceedings involving marriage by native custom, and had no power to dissolve a marriage which had taken place in a church, as this meant the marriage was celebrated under the *Marriage Ordinance* (s. 14(1)(a) and (c) Local Court Ordinance). I considered the man and the woman were still married, and hence the Public Solicitor could not make an application for the custody of the child on behalf of that man while the child was legally his. I had a telephone conversation with the magistrate concerned and he was evasive and also would not send the record of the proceedings to me on the ground that it was vague and I might find it difficult to comprehend. The result was that the Public Solicitor could not do anything.

My second comment is on the magistrates' prejudice towards folks of the same clans, lineages or districts. This is an extreme example (again with great respect). A taxi driver was sent to two months' imprisonment for committing adultery with another man's wife (native). The man was guilty of course under the *Native Administration Ordinance*. He appealed on two grounds: firstly the term of imprisonment was excessive and secondly there was an unfair trial in that the accused was not given a chance to speak. The complainant came from the same village as the magistrate and they spoke the same language. The whole proceedings were conducted in their language which the accused did not understand at all. After everything was said in that language, the accused was told in Pidgin, "You committed adultery; you are going up to Bomana for two months." The appeal was successful on the second ground and the prisoner was released. It is strongly suggested that magistrates need to be fully trained in the duty to be impartial. Certainly it will be unique to have such training but certainly there is a need for it. In addition to this *there should be a tribunal to supervise the Local Courts.*

To me the appeal system is most unsatisfactory. The appeals at the moment lie directly from the Local Courts to the Supreme Court, no appeal to the District Courts being possible. The only connection which the District Courts have with the Local Courts is in the enforcement of the Local Court decision by the District Court, and where the District Court makes an order staying proceedings at a Local Court if the proceedings are such that they could have been instituted before the District Court. Professor Nash suggests in his paper "The Development of the Magistracy in the Territory of Papua and New Guinea" that an intermediate tribunal should entertain appeals from the Local Courts, and he further suggests that the District Court is the appropriate court. I think instead of creating a new tribunal between the Local Court and the Supreme Court, the District Court may be given appellate jurisdiction in addition to its jurisdiction as a court of first instance.

A great number of customary offences and customary disputes over property are dealt with in the Local Courts. There has never been any published report on how

the decisions have been reached. It is understandable that in a multi-tribal society as Papua and New Guinea, with its varied cultures and customs, it is difficult to have uniformity in decisions, but it is better to have some guideline. Section 10 of the *Native Customs (Recognition) Ordinance* 1963 comes to the rescue where there are conflicts in customs. Where two customs are in conflict the court is to consider all the circumstances and adopt the system which does justice in the case. This presumably is how the conflicts are solved. It is hoped that there will shortly be a Supreme Court division laying down guidelines to the Local Courts in this area of the law.

To conclude, there may be many more weaknesses in the judicial system and judicial method in Papua and New Guinea, but the ones I discussed are certainly outstanding in that *the training of magistrates must be improved in relation to both law and impartiality*, and the *appeals system from the Lower Courts to the Appellate Courts should be improved* inasmuch as an appellate jurisdiction should be given to the District Court as an intermediate appellate tribunal, and the Supreme Court should lay down express principles applicable to native customs which all the Local Courts will necessarily follow.