LAWYERS FOR THE PEOPLE: REVIEWING LEGAL SERVICES IN AN INDEPENDENT PAPUA NEW GUINEA*

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Introduction: The National Goals and Directive Principles

Point Two of the pre-independence Eight-Point Improvement Program called for:

> More equal distribution of economic benefits, including movement towards equalisation of incomes among people and towards equalisation of services among different areas of the country.1

This ideal was given constitutional dimensions by the Independence Constitution's statement of National Goals and Directive Principles:

> 2. Equality and participation.
> We declare our second goal to be for all citizens to have an equal opportunity to participate in, and benefit from, the development of our country.
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> WE ACCORDINGLY CALL FOR:
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> (1)
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> (2)
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> (3) every effort to be made to achieve an equitable distribution of incomes and other benefits of development among individuals and throughout the various parts of the country, and

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(4) equalisation of services in all parts of the country, and for every citizen to have equal access to legal processes and all services, governmental and otherwise, that are required for the fulfilment of his or her real needs and aspirations;2

Furthermore, all persons in Papua New Guinea are guaranteed certain fundamental rights and freedoms, including "... the protection of the law".3

Both the original Eight Point Plan, and the later restatement of the aims of government in the Preamble to the Constitution, emphasise the *equal distribution of benefits*. The aim of this point is to narrow the growing gap between an over-rich and powerful expatriate and local elite which commands the highest incomes and best services, as against the relatively poor classes of urban wage earners and rural peasants. There are two separate, but related, ideas implicit in the notion of equal distribution of benefits, as regards legal services;

1. *Greater Equalisation of Incomes:-* This leads to the principle that the income of lawyers should not be too far above that of the rest of the people.

2. *Greater Equalisation of Services:-* The legal profession should not be organised in such a way that only the rich and only those in some areas of the country, can obtain quality legal services.

It would be too facile, of course, to suggest that elitism can be defeated in Papua New Guinea, or in any other country, entirely through an adjustment of payment schemes. Neither are we suggesting that lawyers alone should be singled out for the equalising treatment. However, income and service differentials are key factors in the creation and perpetuation of elitism, and the government has a constitutional mandate to control elitism among lawyers as well as in the nation generally.

Other National Goals underlying the Constitution, such as development through the use of Papua New Guinean forms of social and political organisation,4 the active facilitation of the organisation and legal recognition of all groups engaging in development activities;5

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2. *The Constitution of the Independent State of Papua New Guinea,* (hereinafter *Constitution*) Preamble, National Goal and Directive Principles.

3. *Constitution*, Preamble, Basic Rights, and S.37, Protection of the Law.

4. *Constitution*, Preamble, National Goals and Directive Principles, S.1(6).

5, *Ibid*, S.2(7).

the opportunity for every citizen to participate in the consideration of matters affecting the interest of his community;6 control over the economy by Papua New Guinean citizens and institutions;7 strict control of foreign investment capital;8 development through the use of local skills and resources;9 and emphasis on small-scale artisan, service and business activity;10 are all relevant to the nature of services to be provided by lawyers, and the nature of the organisation of the legal profession itself. Initially we will concentrate on how "greater equalisation of benefits" can be achieved through changes in the methods of compensating lawyers for their services.

I EQUALISATION OF INCOME

There are, at present, two different systems of payment of lawyers in this country. These include (a) Salaries - for judges, magistrates, government lawyers working for the Department of Justice, the Public Solicitor's Office and the Law Reform Commission, and academic and research lawyers employed by the University, Administrative College, and the Legal Training Institute and for lawyers employed by private practitioners on a salary basis; and (b) Fees - for barristers and solicitors engaged in private practice as partners in legal firms.

The amount of money received by lawyers in the salaried categories can be determined without much difficulty.11 It has been suggested to us that the range of pre-tax income of an expatriate in full-time practice is between K15,000 and K60,000 per annum.12

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6. *Ibid*, S.2(9).

7. *Ibid*, S.3(4).

8. *Ibid*, S.3(5).

9. *Ibid*, S.3(7).

10. *Ibid*, S.5(2).

11. Salaries for national employees range from K3,175 for beginning Legal Officers to K6,530 - K6,765 for a Principal Legal Officer and K9,250 for the Secretary for Justice. Expatriate salaries other than for Filipinos are generally about three times higher than local salaries for the same job classification. A Papua New Guinean salaried employee for a private practitioner would earn about K3,000 to K8,000 per year, depending on the firm and the ability and experience of the lawyer.

12. The wide range of figures is due to factors such as the volume and nature of the practitioner's work, as well as the level of fees to which he considers himself entitled.

The only areas in which scales of fees exist are for costs in the District Court,13 in the Supreme Court and for conveyancing.14 The scales are adjusted according to the amount of the claims. They are not comprehensive - that is, they do not provide for every item for which a practitioner may bill his client. In most other areas, the client is charged according to the nature of his case and the ability of the client to pay. Generally fees are charged at a rate equivalent to those in the Australian home state of the practitioner. On the whole, because of reduced overhead and other factors, the expatriate private practitioner tends to be somewhat better off financially in Papua New Guinea than he would be in an Australian state.

In addition, the main type of work engaged in by the full-time private practitioners tends to be lucrative companies practice for Australian (and with increasing frequency, Japanese) based corporations doing business in Papua New Guinea, rather than criminal or civil practice involving Papua New Guinean clients.

TOWARDS EQUALISATION OF INCOMES

How can the aforementioned methods of payment be adjusted to produce a greater equalisation of incomes than presently exists? It should be noted that the National Goals do not demand *absolute* equality, but rather *more* equality than exists at the moment. This is a realistic aim at the present stage of development of this country. We shall differentiate, for the purposes of this comment, between the relative positions of expatriate and Papua New Guinean lawyers.

Expatriate Lawyers

It is patently obvious that a wide gap exists generally between the incomes of nationals and expatriates. This applies to expatriates in all job categories, but the gap is particularly cavernous in the case of expatriates in private practice. This gap is clearly in breach of the goal of relative equality, yet because insufficient Papua New Guineans have been trained to date, these expatriates have often provided services which would have otherwise been unavailable in the country.15 The important

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13. *District Court Rules 1965* (No. 41 of 1965).

14. *Rules of the Supreme Court (Solicitors' Costs and Fees and Court Fees) (Queensland Adopted).* Schedules II and and IV. The *Costs Rules, 1957* (25th February 1957, made under the Supreme Court Act 1949-1954), deal with conveyancing. The scales provided have been increased twice by 33 1/3% and 100% respectively. They are, however, lower than equivalent Australian scales. Nevertheless, the scales are not comprehensive, and a large proportion of the final amount of costs, e.g. the fee on brief, depends upon the discretion of the Taxing Master. In practice, this tends to bring the amount up to Australian state standards.

15. And law graduates from the University are still produced in insufficient numbers to meet the demands. See the *Report of the Sub-Committee on Manpower Planning, University of Papua New Guinea,* February 1974, Tables 1 - 3. It is projected that in 1977, University of Papua New Guinea law graduates will fill only 35% of the manpower requirement. By 1980, the figure is expected to rise to about 60%. See also *Working Party on the Future of the University: A Report to the Vice-Chancellor,* University of Papua New Guinea, October 1973, pp. 6 - 11, 14 and Tables A - C.

questions in this area are:

(1) Are expatriate lawyers necessary? and (2) should this country always fix salaries according to Australian scales?

The structure of the legal system and the bureaucracy, at present demands the services of experienced expatriate lawyers, particularly in the government financed legal services. In the long run, however, a rapid localisation programme coupled with a re-organisation of the bureaucracy and the legal system will be of great importance in reducing the dependence on foreign lawyers. In the private sector, further entry of expatriates ought to be strictly controlled by the system of visas and work permits.

The answer to the second question depends on what this country can afford to pay, and estimates of what would be the minimum inducement necessary to staff the required legal services adequately. In the current depressed state of the world economy, it may well be that qualified staff could be recruited for less than top-of-the-line Australian salaries. The University took a step in this direction in 1974 by not following Australian scales for the salaries of academics, which are among the highest in the world. The government's approach has, however, been different. It has established different salary scales for different nationalities.16

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16. Until June 1976, expatriate allowances were paid directly by the Australian government, under the Australian Staffing Assistance Group (ASAG) scheme. The government of Papua New Guinea has since taken over the payment of these "overseas allowances", although the Australian government continues to contribute a substantional amount of "untied" financial assistance towards Papua New Guinea's budgetary requirements. The Public Service Commission has now established five basic rates of pay for expatriate workers: (1) ex ASAG, (2) Australian Exempt, (3) British Exempt, (4) New Zealand Exempt, and (5) Filipino, in descending order of attractiveness. Workers from other nations are fitted into one of these five categories or, in rare cases, special rates are contrived. This scheme has resulted in some savings on expatriate salaries for the government, but at the expense of institutionalising an unsavoury discriminatory practice between national groups. The Public Service Commission has shown a marked unwillingness to recruit lawyers from countries other than Australia, New Zealand the United Kingdom. Occasional recruits from other Third World countries are, ironically, generally relegated to the lowest expatriate rate. Rank for rank, the Australian Exempt rate in Papua New Guinea is lower than in Australia. However, overseas recruits normally tend to be appointed at higher levels than could have been attained in their country of origin with like qualifications.

*National Lawyers*17

The salaries of Papua New Guinean lawyers are similar to those of their fellow countrymen with similar qualifications and experience.18 The salaries can be between three and ten times higher than the urban minimum wage, and between six and twenty times higher than the rural minimum wage, in a nation in which the minimum wage is also, to a great extent, the most typical wage.

It is, of course, very difficult to make a meaningful comparison between the urban elite and the rural masses. Again, the goal is relative, rather than absolute, equality. It must be for Papua New Guineans to answer whether the present discrepancies between the incomes of professionals and upper-echelon public servants on the one hand, and the masses on the other, can be justified. Once the relevant policy decisions have been reached, readjustment of income accordingly would not be difficult, at least with respect to government employees.

The greater problem lies in the payment of private practitioners. Until now very few Papua New Guineans have entered into private practice - and all except one have been employed on a salary basis by expatriate firms. The salaries do not appear to have been much higher than Public Service salaries for equivalent job classifications. Moreover, some of the original national entrants into private practice have since left to enter government service where it is still possible to advance rapidly into top-level management positions, or to pursue further studies, using the many schemes currently available which finance graduate work for students from developing nations.

For some time to come, the income of Papua New Guinean lawyers outside government service will depend on the generosity of expatriate partners of firms that service expatriate enterprises, and it will not be easy for them to establish themselves in private practice without some form of external assistance. If the present scheme of a dual legal practice - private and government - is maintained, however, there is little doubt that in the future some Papua New Guineans will establish themselves on the same level as expatriate attorneys, and earn the same handsome rewards by providing services for expatriate businesses and large locally-owned businesses.19 This has been the trend in other developing countries, and a natural by-product of this trend has been the building of business empires by lawyers from their large incomes and business contracts.

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17. There are presently about 75 Papua New Guinean law graduates, 28 of whom are fully admitted to practice, and nineteen of whom have been provisionally admitted. There are about twenty Papua New Guineans currently studying at the Legal Training Institute.

18. See footnote 11, *supra*, for a survey on salaries. However, prospects for promotion within the Department of Justice are at present, considerably slimmer than for other governmental departments. In addition, a Papua New Guinean lawyer admitted to practice after a University degree and a year at the Legal Training Institute enters the Public Service at Clerk Class 5, the same as an Arts graduate with no post-graduate training or professional certification.

19. Six Papua New Guineans have entered into private practice this year. This is a significant change from the pre-existing situation. The steady drift into lucrative private practice is already happening in the medical profession in Papua New Guinea, at the same time that staff doctors for public hospitals must be recruited from overseas.

If this in fact occurs in Papua New Guinea, it would clearly counteract any other moves to implement the principle of a more equal distribution of incomes. It would also mean that the government has subsidised a small segment of the community, through use of public moneys, enabling it to become wealthy by means of the very expensive education that it has provided for free. In addition, it would have important consequences for the corollary goal of equalising services, as once the opportunities for rapid advancement within the public service dry up, a disproportionate number of law graduates would be attracted into private practice, at the expense of the salaried government services which provide the legal work for the bulk of the general population.

It is plain, therefore, that in order to follow the National Goals and Directive Principles, the tendency towards excessive incomes in private practice needs to be controlled. This may be accomplished through either of two approaches. The first approach is to replace the present dual system of private practice and government service with one integrated, salaried, national profession of legal practitioners.

A. *National Salaried Legal Services*

Creating a national, salaried legal profession, and thereby phasing out the private practitioner, sounds like a bold, radical step. In fact, however, most legal services in Papua New Guinea at the moment are *already* provided by salaried public servants, particularly those employed by the Public Solicitor's Office, a division of the Department of Justice.20 It is estimated that about 99% of all criminal defendants are represented by the Public Solicitor's Office,21 and an almost equally high percentage of non-corporate civil litigants.22 It is only in the area of corporate law that the private bar plays the major role.

Thus, for the citizens of Papua New Guinea, the elimination of private sector legal services would have virtually no effect on the quantity or quality of legal assistance available, nor, practically, on the degree of choice available. For national lawyers, eliminating private practice would reduce future career choices, but as indicated above, the current generation of lawyers have largely opted for salaried public service positions over private practice anyway.

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20. The Office of the Public Solicitor was established by S.176 of the Constitution. The functions of the Public Solicitor are outlined at S.177(2). Section 176(5) provides "that the Public Solicitor is not subject to direction or control by any person or authority."

21. Generally representation begins *after* the committal stage. Only in particularly serious cases is the defendant represented by counsel at the hearing. The authors wish to thank Mr. Dermott McDermott, of the Public Solicitor's Office for this information.

22. The bulk of the civil matters - approximately 80% - handled by the Public Solicitor involve automobile accidents and third-party claims. The remaining civil cases are largely non-divorce matrimonial matters, like maintenance, custody , and actions brought under the *Deserted Wives and Children's Act 1951* (No.5 of 1952).

Nationalisation of any kind has a frightening ring to some, and it is arguable that a monopoly salaried legal service should be made as independent of government control as possible. The best method for achieving this would be to provide for a National Legal Services Corporation,23 which would be governed by an independent body consisting of judges, lawyers' representatives government representatives, and members of the public. Additionally, a committee of the National Parliament, or the entire body itself, could be given oversight authority.

Allowance could be made, in the short term, for those who are presently engaged in private practice. Those commercial enterprises that relied on the private bar would, in the future, be served by the corporate division of the National Legal Services Corporation. Lawyers salaried by the Corporation would nonetheless maintain the same attorney-client and fiduciary relationships with the commercial enterprises they serve, as those enterprises would have enjoyed with a private law firm, as required by the ethics of the profession.

The Corporation would employ a sliding scale fee structure, similar to the means test for eligibility currently used by the Public Solicitor's Office,24 which weighs income, dependents, and other factors - like the complexity of the case - in arriving at a reasonable fee. For the vast majority of the population, legal services would continue to be provided at no charge. Whereas those free services are currently paid for out of tax moneys, they could in the future be subsidised in whole or in part, by the large fees paid to the National Legal Services Corporation (rather than to private practitioners) by large commercial enterprises.

To return to the original problem, the establishment of a National Legal Services Corporation, which would employ all legal practitioners on a salary basis, commensurate with ability and experience, and in line with national policy, would clearly facilitate the control, and equalisation, of income, in keeping with the National Goals and Directive Principles. The Eighth Point of the Eight Point Improvement Program called for "*Necessary Government Control and Involvement.* Government control and involvement in those sectors of the economy where control is necessary to assure the desired kind of development." 25 It may be that government control of and involvement in, the legal profession is necessary to achieve the oteer aims the nation has set for itself.

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23. Tanzania has moved towards a similar integrated profession with success. See the Tanzania Legal Corporation (Establishment) Order, G.N. 32/1971, created under authority from the *Public Corporation Act* (17/1969). The Legal Corporation services all para-statal bodies, including the many government owned and operated business ventures, as well as hiring out its services to privately owned corporations and other organisations. The private bar has been retained, but almost all Tanzanian law graduates are bonded, because of their free education, and must work for a government department or the Legal Corporation for five years, before they are permitted the option to join the private sector.

24. Under the *Public Solicitor (Charges) Act* 1976 (No. 83 of 1976), S.2(1), the Public Solicitor may make reasonable charges for services rendered to clients who are able to contribute to the cost of those services.

25. See footnote 1, *supra*. The Eighth Point was also incorporated into the *Constitution*, Preamble, National Goals and Directive Principles, 3(4) and 3(6).

B. *Stricter Controls on Private Practice*

The present "free market" approach allows as many people into private practice as possible. The theory is that fierce competition will require reasonable fees and result in reasonable income levels. However, the over-production of lawyers necessary to create that competitive atmosphere can only be achieved by means of a disproportionate and irrational investment of scarce national resources into their training.. Further, in countries such as India and Nigeria, the free market approach has led to a class of marginally or totally unemployed lawyers, without preventing a small number of lawyers from making vast amounts of money.

If the remedy suggested above, that is, replacing private practice with a national legal services corporation, is rejected as being too drastic a step, an alternative reformist approach would be to allow the continued existence of a private bar, but to control entry into private practice and income derived therefrom, through a number of possible schemes.

1. Compulsory Fee Scales. As mentioned above, fee scales exist in Papua New Guinea in very limited areas of the law.26 Legislation could provide more comprehensive scales of fees covering most areas of legal work, as is done in many other countries. These scales could be adjusted in such a way as to ensure that the average lawyer would earn about the same as his counterpart in the public service, and that the particularly successful lawyer would earn about the same as the highest paid public servants.

Such scales would be difficult to produce, but probably no more difficult than formulating reliable actuarial tables for insurance purposes. Some private practitioners have also suggested that a system of compulsory fee scales might encourage corruption. Nevertheless, if private practice is to be retained, an attempt ought to be made to devise reasonable scales.

2. Taxation. Tax rates on personal income tend to be low in Papua New Guinea, particularly as compared to other developing countries.27 In countries as different as the United Kingdom and Tanzania, very high sur-tax rates are imposed once income goes beyond a certain level. Thus in Britain, at a certain stage, the tax rate becomes ninety-five percent. Revenue raised in this fashion enables the British to maintain a high standard of free or semi-free services, such as education, medicine and legal aid.

In Britain, however, the high tax rates have not been able to establish effective controls at the highest income levels because of the widespread use of tax avoidance and tax sheltering devices, and because of the lack of a genuine interest in achieving equalisation on the part of the government. In Tanzania inordinately high incomes have been prevented partly through the use of tax rates, but mainly because of the fact that a large segment of the economy is controlled by the government, and the legal work relating to this segment is done largely by the National Legal Corporation. 28

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26. See footnote 14, *supra*.

27. The tax rate rises progressively to a maximum of fifty percent on incomes over K30,000. *Income Tax (Rates) Act (Consolidated)* 1976 (No. 73 of 1976).

28. See footnote 23, *supra*.

The government of Papua New Guinea has thus far shown great willingness and ingenuity[29] in using the taxation system to reduce excess profits and redistribute income to the mass of people, particularly in the natural resources field.[30] In the renegotiated Bougainville Copper agreement,[31] for instance, the corporation pays the standard 33 1/3 percent on profits[32] up to a certain point. Where profits exceed this point, the tax is calculated on the basis of a complex formula which limits the corporation to "reasonable profits", that being any amount that will give the company up to 15 percent of the adjusted capital investment after the standard company tax is deducted. An analogous scheme could be created to hold the incomes of legal private practitioners to "reasonable" levels.

An alternative taxation device to reduce incentives to engage in private practice, and to reduce excessive income, is the institution of a "professional tax", which applies to professions such as law, medicine and accountancy. This type of tax is usually levied at a fixed annual rate.

II EQUALISATION OF SERVICES

The principle of greater equality of services, as applied to lawyers, requires that: (i) the system of compensating lawyers should not be such that only a select few can afford proper legal representation; (2) the system of compensating lawyers should not be such that it creates a serious geographic imbalance in services available, with lawyers concentrated solely in a few major centres; and (3) the system of compensating lawyers should not be such that it results in an undue concentration of lawyers in certain fields of the law, such as corporate law, to the exclusion of other fields, such as criminal and civil litigation.

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29. Prime Minister Michael T. Somare has described Papua New Guinea as a "world leader" in developing new tax laws and financial arrangements in the natural resources field. Papua New Guinea *Post-Courier*, 26th November 1976, at p. 14.

30. Prime Minister Michael T. Somare, "Address to the Australian Institute of Directors", 14th March 1974, at p.6.

31. *Mining (Bougainville Copper Agreement) (Amendment) Act 1974* (No. 79 of 1974). See also *Income Tax (Additional Profits for Petroleum) Act 1976* (No. 71 of 1976).

32. Under the *Income Tax (Rates) Act (No. 2)* 1976 (No. 66 of 1976), S.1A, corporations incorporated in Papua New Guinea pay tax at a rate of 33 1/3 percent on taxable income. Corporations incorporated outside of the country pay at a rate of 45 percent. (S.1B). Unincorporated associations pay at a rate of 33 1/3 percent. (S.1C).

At present, the expatriate private profession tends to provide services for only a very limited section of the public, and only in the main towns. The Public Solicitor's Office reaches a wider section of the public, but nevertheless, in a somewhat limited area.33 Several different techniques, involving varying degrees of precedural or substantive reforms, might be effective in ensuring a greater equalisation of services.

A. *The Salaried National Legal Service*

A National Legal Services Corporation has strong advantages over private practice in its ability to provide wider-ranging services, both from the point of view of righting imbalances as between the richer and poorer sections of the community, and as between the main towns and the rural areas.

We have noted that it would not be an easy task to work towards equalisation of incomes or services in the legal profession. Private practitioners will favour the more lucrative clients, in the more lucrative fields of law, and if existing practices are any guide, cluster in Port Moresby and Lae where these clients are mainly found.

A national legal service could be organised on the more rational basis of *need*, rather than on the basis of profitability. Greater legal services could be made available in the rural areas and the poor urban settlements, where large fee-generating cases are very rare, and the means to pay private practitioners are non-existent, but where there is, nevertheless, a need for legal expertise. Legal services personnel would be particularly valuable in assisting in the creation and proper operation of local development groups, and thereby promoting the National Goals of "Equality and participation."34 and "National sovereignty and self reliance".35.

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33. The Public Solicitor's Office presently fields eleven lawyers in Port Moresby, two in Rabaul, three in Mount Hagen, and one in Lae, The Office hopes to add four more practitioners in Port Moresby, and one more in Lae, in the near future. The Rabaul Office is responsible for all the New Guinea Islands, Including the East and West New Britain Provinces, and the Manus, New Ireland and North Solomons Provinces. The Lae Office handles the Morobe and Madang Provinces; Mount Hagen services the Western Highlands and Enga Provinces, and Port Moresby handles all the rest of the eleven provinces in the country. According to staff members, the Office is "coping" with its caseload, but it has insufficient resources to give assistance in most District Court matters, concentrating instead on National and Supreme Court cases, and some of the more serious District Court cases. The Office is also unable to provide legal assistance in divorce actions. For a fuller discussion of this growing problem area, see M. Campbell, "The Problems of Divorce Proceedings in Matrimonial Causes" (Unpublished, presented at the "Divorce in Papua New Guinea - Time for Reform" seminar at the University of Papua New Guinea, 28th June 1976. Ms. Campbell was Deputy Public Solicitor at the time her paper was presented).

34. *Constitution*. Preamble. National Goals and Directive Principles, S.2, See especially SS.2(4) and 2(7).

35. *Ibid*, S.3.

Just as establishing a national legal service would be the most effective means of moving towards greater equality in income, a nationalised bar would also be the most effective means of mobilising legal services within the country to serve the needs of the vast majority of the people, who are, as yet, unable to procure legal assistance from the costly private bar. The National Legal Services Corporation would be in a better position to service the poorer sections of the nation, to shift resources from urban to rural areas, or vice versa, as the need arises; to engage in developmental work and assist small-scale business enterprises; to practice "preventive law", by advising and educating the people about how to avoid running afoul of the law; and generally to handle problems that while important to the parties involved, are unlikely to be lucrative enough to interest a private practitioner.

As indicated above, opposition to such a proposal is likely to be intense from several quarters, including, of course, the existing private bar and the bench. Short of nationalising the bar, there are a number of procedural reforms, and modifications in the legal profession and in legal education, which taken individually or collectively would serve to expand the scope and availability of legal services.

B. *Fee Scales*

At present, the majority of individuals cannot afford the services of a private practitioner. In some cases, such as those involving "pay-back" violence or community land, the resources of a whole clan may be utilised to retain a private lawyer. The advisability of such a high cost for the services of a lawyer must be questioned, however.

One possible reform would be to fix, by statute, realistic and comprehensive fee scales for lawyers' services.36 The scales would slide, of course, to take into account the income of the client, the nature of the legal problem, and the amount of the claim involved, if any. It may be possible to use this mechanism, therefore, to subsidise the cost of services provided at the lower end of the scale to the poor, by shifting the cost to the more affluent business clients, and still ensure that the practitioner receives a reasonably good income. The fee scale system would tend to redistribute legal services much in the same way as the progressive income tax, ideally, redistributes income.

To prevent practitioners from ignoring lower-scale clients, the fee scale legislation should provide that no lawyer may refuse to accept a client who is prepared to pay the prescribed fee, unless exempted by a court, or another appropriate body, for cause. For those who are unable to pay even the scaled-down fees, legal aid would be available from state agencies, like the Public Solicitor's Office.

While preferable to the existing situation, the institution of fee-scaling will not solve all problems associated with the provision of legal services. Fee scales are cumbersome, and may encourage a certain degree of corruption. Secondly, fee scales will not right the geographical imbalance in the provision of services - the private bar will still concentrate in the main centres, to the exclusion of secondary centres and the rural acrea. Thus, the lot of the urban poor may be improved somewhat, with respect to the availability of legal assistance, but for the vast majority of people who live outside Lae and Port Moresby, the situation will not be rectified at all.

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36. See footnote 14, *supra*.

C. *Para-Legals and Diplomates.*

In many areas of the world, a new class of legal workers has been created to meet increasing demands for legal services, called legal para-professionals, or colloquially, "para-legals".37 Para-legals would perform as "brokers" or "link-persons" between the ordinary citizen, and the bureaucracy or the formal court system. Paralegals would be much closer to the people in their lifestyle and income, and would be perceived as being much more accessible than barristers and solicitors. Being "para-professionals", their income expectations would be significantly less than lawyers, so the limited funds available for *pro bono publico* legal services work could be stretched much farther.

Para-legals would be given specialised training equivalent to that being given, at present, to local court magistrates, which would equip them to read and write legal documents, and to handle the kinds of routine or non-complex legal problems that would befall the vast majority of Papua New Guineans. In relatively complicated cases, these para-legal workers would coordinate their activities with more fully qualified practitioners.

Para-legals have been used extensively in the United States in the Neighbourhood Legal Services programme, which provides free legal services for indigent clients. They generally handle non-contested divorces, minor civil claims, counselling of criminal arrestees, and community education and organisation. Despite some initial opposition from the organised bar, para-legals are increasingly found in legal aid programmes, and even in large private law firms and the legal departments of major corporations.

The U.S. Trust Territory of Pacific Islands (Micronesia), which like Papua New Guinea has a shortage of national lawyers and lacks the resources to employ the large numbers of expatriate lawyers needed to meet demand, has turned to the wide-scale use of para-legals with great success.38 After a brief but intensive training period, para-legals are admitted to practice before all courts in Micronesia as "trial assistants". Most trial assistants are salaried employees of the Attorney General's Office, the Public Defender's Office, or the Micronesian Legal Services Corporation, although several have drifted into private practice in recent years.39 These trial assistants, particularly those with considerable practical experience have clearly demonstrated the ability to handle a wide range of legal matters, and also have shown an appreciation of their own limitations - referring difficult cases to private or government lawyers, as the case requires.

The great advantage of para-legals is that they are far less expensive than lawyers, and accordingly, funds provided for legal services would be used more effectively in expanding the scope of assistance. Para-legals could be sent to, or more preferably *drawn from*, rural areas and urban re-settlement communities,

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37. See International Legal Center, *Legal Education in a Changing World* (Uppsala : 1975) pp. 69-71. See also D. Ehmes, "Paralegals in Micronesia" (Unpublished paper delivered at the Law Reform Commission Seminar on Law Reform and the National Goals, Goroka, July 29, 1976).

38. See Ehmes, *op. cit.*

39. A number of successful "trial assistants" have been sponsored by the Trust Territory Public Defender's Office, and are currently undertaking LL.B. studies at the University of Papua New Guinea.

to provide legal services where none have ever existed, and to provide legal workers who are sensitive to the needs of the community, and who are trusted and approachable. Furthermore, para-legals serve as an effective screen for minor, non-complex, and trivial problems, freeing fully accredited legal practitioners from handling such matters, and thereby allowing them to devote more of their time to those matters which really require the attention of a highly-paid professional. In consideration of these benefits, the participants at the recent Law Reform Commission seminar on Law Reform and the National Goals, held in Goroka on 29th July - 1st August 1976, recommended the establishment of para-legal training schemes in Papua New Guinea.40

The Law Faculty of the University of Papua New Guinea is committed to a major revision of the curriculum, which would greatly facilitate the training of para-legals. In response to the *Report of the Committee of Enquiry into University Development, 1974*, which called for a restructuring of higher education in Papua New Guinea,41 the Law Faculty proposed a new program which would divide legal studies into two self-contained "modules". The first module, lasting two and one half years (five semesters), would provide an intensive introduction to basic legal subjects, like Contracts, Torts, Criminal Law et al, as well as practical courses - legal drafting, oral advocacy, clinical programs, practice and procedure, etc. Upon successful completion of the first module, students would be awarded a "Diploma in Law". It is anticipated that the diploma course would replace the current training regimen for magistrates, and also serve as the training course for para-legals.

Students with diplomas wishing to earn an LL.B degree would be required to spend a year in the field, doing research into the customary law of their home areas, and/or giving basic legal advice and assisting in development activities. Those diplomates who choose to return would begin the second module, of one and one half year's duration (three semesters), during which time they would take advanced courses, and specialise in one or two areas of law, such as litigation, commercial and property law, international law and international trade and investment law, public law, community and social welfare law.42

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40. See Gawi, Ghai and Paliwala, "National Goals and Law Reform : A Report on the Goroka Seminar" in this edition of the Melanesian Law Journal, *infra*.

41. The Report, generally known as the "Gris Report", after the Chairman of the Committee, the Vice-Chancellor Gabriel Gris, stressed that the University must keep national objectives in mind. That is, education should be geared towards nation-building, self-reliance, the fostering of a more egalitarian society, and meeting projected manpower requirements for development. The central theses of the Gris Report were that the University system should extend its services much more widely throughout the nation, and that greater emphasis must be given to integrating work with study.

42. For a fuller description of the proposed revised curriculum, see Fitzpatrick and Paliwala, "Report to the Faculty on New Curriculum for Diploma and LL.B Incorporating the Modular Approach" (9 September 1975) (Unpublished), and also R.W. James, "Report to the Academic Board : The Modular Programme for Legal Education" (Undated, unpublished).

This new program was approved by the Law Faculty and the Academic Board. It had earlier received a boost from the National Parliament when that body by an almost unanimous vote passed "the Singeri amendment" to the *Post-Graduate Legal Training (Amendment) Bill* 1976 under which all law students would be required to spend one year doing research in customary law and/or doing community legal work before being admitted to the Legal Training Institute.42A

However, consideration of it by the University Council, which has final approval, has been deferred - in part because of opposition by elements of the organised bar, and the bench, which have claimed that diplomates would be, in effect, "half-baked lawyers", incapable of providing legal services of acceptable quality. One Judge went so far as to condemn the modular approach as a "socialistic experiment".43 These criticisms ignore the Micronesian and American experience, where para-legals who receive considerably less than the two and one half years training proposed in Papua New Guinea, have consistently proved their value, and are no longer even controversial. They also ignore the fact that undergraduate law students at the University of Papua New Guinea do currently act as legal representatives in the Local and District Courts, as part of the University's Legal Aid scheme.44 If further ignores the even more bold and far-reaching British concept of the "McKenzie man", a lay advocate who may provide legal assistance without the requirement of *any* formal legal training. In *McKenzie v McKenzie*,45 the English Court of Appeal reversed the decision in a divorce proceeding where the trial judge did not allow one of the parties to have the benefit of the assistance of an Australian barrister who was not admitted to practice in England. The Court was drawn to the words of Lord Tenterden CJ in *Collier v Hicks*:46

> Any person whether he be a professional man or not, may attend as a friend of either party, may take notes, may quietly make suggestions, and give advice;47

42A. The original "Singeri Amendment" only provided for customary law research. This was substituted by a new amendment under which students may choose to do community legal work. *Post-Graduate Legal Training (Amendment) Act* 1976, S.4. which repeats and replaces S.18 of the Principal Act.

43. R.W. James, *op. cit.* at p.8.

44. Law students in good standing, as certified by the Dean of the Law Faculty, may act as legal representatives for any complainant or defendant for the purpose of a proceeding, by virtue of S.67 of the *District Courts Act* 1963 as amended by the *District Courts (Legal Representation) Act* 1974, and S.24 of the *Local Courts Act* 1963 as amended by the *Local Courts (Legal Representation) Act* 1974.

45 [1970] 3 All ER 1034; [1970] 3 WLR 472.

46. [1831] 109 ER 1290; [1831] 2 B & AD 663.

47. [1831] 2 B & AD at 669.

As the Court further noted,

> That statement of the position has never been criticised since ... It is moreover always, to my mind, in the public interest that litigants should be seen to have all available aid on conducting cases in court surroundings, which must of their nature to them seem both difficult and strange.48

Thus the obiter dictum of Lord Tenterden was given authority by the decision in *McKenzie*, and opened up the courts to non-professional representation, where the services of a barrister could not be obtained.49 In addition, the English *County Courts Act* 1959 S.89(d),50 grants to those courts the power to allow a non-lawyer to represent a party. This permits, for example, a social worker to represent an inarticulate client.51 Recognising these facts, the Minister for Justice, the Secretary for Justice, the Chairman of the Law Reform Commission, and others have strongly supported the introduction of para-legal workers into the Papua New Guinean legal system.52

When the program does become operational (assuming that the University Council grants its approval to the program), it will not only have the effect of providing a training course for para-legals (diplomates), but it will further increase the availability of legal services by requiring those who intend to return to the University for the degree module to spend at least a year in the field, creating something akin to the "national service" requirement imposed by many developing nations. Furthermore, the fieldwork component will have the added benefit of allowing future lawyers to "regain their roots" - becoming more sensitive to the needs of their home communities, and at the same time, hopefully, using their education to demystify the legal system for those with whom they come into contact.

D. *Contingent Fee Arrangements*

The situation regarding the propriety of contingent fee arrangements - that is, contracts whereby the legal counsel is remunerated for his services by a stipulated percentage or portion of the recovery or chose in litigation, in the event of a successful prosecution or defense53 is unclear in Papua New Guinea.

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48. [1970] 3 All ER at 1039 *per* Sachs LJ.

49. See *Cordery on Solicitors* (6th ed. 1958) at p.50.

50. 7 & 8 Eliz 2 c.22, See *7 Halsbury's Statutes of England* (3rd ed.) 356 - 7.

51. See Smith and Heath, *Law and the Underprivileged* (1975) at p.230.

52. R.W. James, *op. cit.*, at p.8.

53. S.M. Speiser, *Attorneys' Fees* (1973), at p.82.

Contingency fees are clearly impermissible in criminal cases in all common law jurisdictions.54 In most common law countries55 and European civil law states alike,56 contingency fees are equally illegal and unethical in civil cases; the agreement itself will not be enforced, as it violates public policy, and it may also give rise to an action in tort, for maintenance by champerty.57

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54. See, for example, Ethical Consideration (EC) 2 - 20, of the American Bar Associations's *Code of Professional Responsibility:* "Public policy properly condemns contingent fee arrangements in criminal cases ..."; and also Disciplinary Rule (DR) 2 - 106(C) of the same code

55. See the United Kingdom's *Solicitors Act* 1957 (5 and 6 Eliz. 2 c.27) S.65; *Pinch v Beattie* (1863) 32 LJ Ch 734; *Re Attorneys and Solicitors Act 1870* (1875) 1 ChD 573; *Bradlaugh v Newdegate* (1883) 11 QBD 1; *Alabaster v Harness* [1894] 2 QB 897, at 900, *per* Hawkins, J.; *Danzey v Metropolitan Bank of England and Wales* (1912) 28 TLR 327; *Wiggins v Lavy* (1928) 44 TLR 721; *aseldine v Hosken* [1933] 1 KB 822. By virtue of the *Criminal Law Act* 967, S.13, maintenance (including champerty) is no longer a criminal offense, but it may still give rise to civil liability.

    For Australia, see Queensland's *Solicitors Act* 1891 (55 Vic. No. 22) S.10; and in Victoria *Reilly v Melbourne Tramway and Omnibus Co.*, 19 VLR 75 (1893).

    For India, see *RamCoomar Coondoo v Chunder Canto Mookerjee* (1976) LR 2 App Cas 186; *Fischer v Naicker* 8 Moore Ind App 170 (1860).

    In Canada, every province except Manitoba holds contingent fee contracts void. See Canon 3(7) of the Canons of Legal Ethics of the Canadian Bar Association.

    See generally Radin "Maintenance by Champerty", 24 Cal L Rev 48 (1935); *Cordery on Solicitors* (6th ed.) (1968) at p.134, 135 and 256 - 258; Speiser, *op. cit.* pp. 82 et seq; Heymanson and Gifford, *The Victorian Solicitor* (2nd ed.) (1963), and *Daniell's Chancery Practice* (5th ed.) at p.1973.

56. See Note, 20 Ohio St L J 336 (1959), and Speiser, *op. cit.*, at 82. France, Belgium, Italy, Switzerland and Germany regard contingent fee agreements as void.

57. See footnote 48, *supra,* for statutory and case authority. "At common law maintenance consisted of unauthorised and officious intermeddling in a suit in which the offender had no interest, by maintaining or assisting either party to the suit, with money or otherwise, to prosecute or defend it. This, said Blackstone, is an offense against public justice, as it keeps alive strife and contention, and perverts the remedial process of the law into an engine of oppression ... Champerty, a species of maintenance, is a bargain made ... with a plaintiff or defendant for a portion of the matter involved in a suit in case of a successful termination of the action, which the champertor undertakes to maintain and carry on at his own expense." Speiser, *op. cit.*, at pp. 69 - 70. See also *Restatement of the Law of Contracts,* S.540 (2).

In the United States, however, contingent fee arrangements are permissible in most civil proceedings to enforce claims.

> The historical bases of their acceptance are that (1) they often, and in a variety of circumstances, provide the only practical means by which one having a claim against another can economically afford, finance, and obtain the services of a competent lawyer to prosecute his claim, and (2) a successful prosecution of the claim produces a *res* out of which the fee can be paid. Although a lawyer generally should decline to accept employment on a contingent fee basis by one who is able to pay a reasonable fixed fee, it is not necessarily improper for a lawyer, where justified by the particular circumstances of a case, to enter into a contingent fee contract in a civil case with any client who, after being fully informed of all relevant factors, desires that arrangement. Because of the human relationships involved and the unique character of the proceedings, contingency fee arrangements in domestic relations cases are rarely justified.58

Thus, the American acceptance of contingent fees recognises that despite the need to maintain professionalism, and the dangers inherent in allowing a lawyer to become financially interested in the outcome of his client's case, many individuals with legitimate claims to press will not be able to do so because they are wholly unable to advance the high costs of litigation.59

As noted above, the vast majority of Papua New Guineans are unable to afford the services of private counsel, except in those rare cases where clan moneys are pooled. Retention of private counsel could be made possible for clients with meritorious causes of action if contingent fee contracts were permitted in Papua New Guinea. If the urban population were able to make greater use of the private bar, then it stands to reason that the Public Solicitor's Office would be increasingly able to provide legal resources for the rural areas - in preventive, educative and developmental roles, as well as for "stopgap" purposes.

The statutory authority governing remuneration of lawyers in Papua New Guinea is the *Legal Practitioners Act* 1954,60 which reads in relevant part:

> 24. -(1) A barrister and solicitor may make an agreement in writing with his client as to remuneration in respect of contentious business or non-contentious business done, or to be done, by him.
> (2) The agreement may provide for the remuneration of the barrister and solicitor by a gross sum, *or by commission or percentage*, or otherwise, and at a greater or a less rate than that at which he would otherwise have been entitled to be remunerated ...
> (Emphasis supplied.)

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58. CANON 2, Ethical Consideration (EC) 2-20, of the American Bar Association's *Code of Professional Responsibility*. See also the Code's Disciplinary Rule (DR) 5-103 (A), DR 2-106 (8), EC 5-7, and ABA CANON 13. See generally, MacKinnon, *Contingent Fees for Legal Services* (ABA Report, 1964).

59. See *Fair v Peck* 6 NY 2d 97 (1959) appeal dismissed and certiorari denied 361 US 374. Also reported in 77 ALR 2d 390.

60. No. 29 of 1954; amended by No. 29 of 1961 and No. 79 of 1971. No. 29 of 1961 removed the restriction on making remunerative agreements with Natives.

Nowhere in the *Legal Practitioners Act* is there found any restriction or qualification on the ability of the practitioner to make such an agreement, except for the provision that allows a Judge, upon motion by the client, to reduce a fee agreement that is "unfair or unreasonable".61

The lack of qualification on a practitioner's freedom to contract for services rendered in the Papua New Guinea act differentiates it sharply from the acts that govern the remuneration of barristers and solicitors in other Commonwealth jurisdictions. For example, Section 3 of Queensland's *Solicitors Act* 1891 62 is virtually identical to Papua New Guinea's *Legal Practitioners Act* Section 24. However, Section 3 is subsequently qualified by Section 10, "Prohibitions of certain stipulations', which provides that:

> Nothing in this Act contained shall be construed to give validity to any purchase by a solicitor of of the interest or any part of the interest of his Client in any suit, action, or other contentious proceeding to be brought or maintained, or to give validity to any agreement by which a solicitor retained or employed to procecute any action stipulates for payment only in the event of success in such action or proceeding.

Queensland's act is itself patterned on England's *Attorneys and Solicitors Act* 1870;63 Sections 3 and 10 of the Queensland Act correspond to Sections 4 and 11 of the English Act. In construing the *Attorneys and Solicitors Act*, the English courts have determined that Section 4

> [G]ives a solicitor power to contract in the widest terms. Section 11 merely qualifies the right given by S.4. 64

Similarly, Sections 262 to 270 of Victoria's *Supreme Court Act* 1890 65 are nearly identical to sections 4 and 11 of the English *Attorneys and Solicitors Act*. In construing these sections the Victorian courts have held that

> A wide latitude is allowed as to the manner of payment, which may be by a sum in gross, by commission, percentage, salary, "or otherwise", that is, in any similar manner, if any such can be conceived, ... The enactments were not passed

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61. *Ibid*, S.24(3).

62. 55 Vic. No. 22, Part I. See 2 *The Public Acts of Queensland* (Reprint) 621.

63. 33 and 34 Vic. c.28 (Imperial). See 18 *Halsbury's Statutes of England* (2nd ed.) 466 - 467.

64. *Haseldine v Hosken* [1933] 1 KB 822, 829, *per* Greer, LJ. See also *In Re Attorneys and Solicitors Act, 1970* [1875] 1 Ch.D. 573 - 575 *per* Sir George Jessel, J.

65. No. 1142. These provisions are a restatesent of the *Attorneys' and Solicitors' Remuneration Act* 1884 (No. 802), ss. 2 - 11.

> to encourage solicitors to speculate in litigation; very far from it. They may have been so expressed as to open a door to practices not contemplaced by the legislature. But the legislature never intended to sanction champertous bargains and has not sanctioned them. On the contrary the 267th Section distinctly aims at the prohibition of such bargains; for it provides that nothing in that group of sections shall be construed to give validity to any purchase by a solicitor of the interest or any part of the interest of his client in any action or to any agreement by which a solicitor retained to prosecute any action stipulates for payment only in the event of success.66

The modern English statute, the *Solicitors Act* 1957 67 endeavours to make the prohibition against contingent, and thus champertous, fee agreements more precise. While it retains the language "by a gross sum, or by commission or percentage, or by salary, or otherwise"68 with respect to agreements for rumeneration for *non-contentious*69 business, agreements as to remuneration for *contentious* business may be "by a gross sum, or by salary, or otherwise ...".70 Furthermore, there is the express restriction of Section 65, which provides that nothing in the preceeding sections shall give validity to the purchase, by a solicitor, of an interest in his client's case, nor to an agreement which provides for remuneration only in the event of success.71

The question remains whether the Papua New Guinea legislature in enacting the *Legal Practitioners Act*, expressly or impliedly "opened the door", to use the words of the Victorian court, to contingent fee agreements by its failure to include a provision with the effect of England's S.65, Victoria's S.267 or Queensland's S.10, of the various practitioners' acts. At least one knowledgeable commentator has written that contingent fees appear to be permissible in Papua New Guinea,72 and construction of Section 24 of the *Legal Practitioners Act* according to the "plain meaning" of the words would seem to confirm that view. In practice, however, contingent fee agreements are unknown to Papua New Guinea, and discussions with leading private practitioners reveal that most regard such arrangements as unethical, if not illegal.73

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66. *Reilly v The Melbourne Tramway and Omnibus Co.* 19 VLR 75, 80-81, (1893) appeal 19 VLR 461 (1893).

67. 5 and 6 Eliz. 2 c.27, Part III; See 32 *Halsbury's Statutes of England* (3rd ed.) 60-69.

68. *Ibid,* S.57.

69. *Ibid,* S.86. That is, non-litigious matters connected with sales, purchases, leases, mortgages, settlements and other matters of conveyancing. (See also Papua New Guinea *Legal Practitioners Act* 1954, S.22).

70. *Ibid, S.59.*

71. *Ibid,* S.65 (1)(a) and (b).

72. J.A. Griffin, *Legal Ethics : With particular reference to Papua New Guinea* (University of Papua New Guinea), p.39.

73. Some ventured the opinion that the Supreme Court, if forced to rule on the legality of contingent fees, would use S.24(3) as an escape clause, finding such fees to be "unfair and unreasonable", as well as unethical for lawyers in the British tradition.

Any consideration of the advisability of contingent fee agreements should carefully weigh the competing interests in terms of social considerations, as well as ethical considerations. Contingency fees in the United States have been criticised, occasionally, as "a kind of a lottery"74 whereby lawyers may "obtain excessive fees completely out of relationship to value of services either in time, effort or talent".75 The fact that a lawyer has a strong financial interest in a case could possibly cloud his free judgement, and conflict with his fiduciary responsibilities and his duties as an officer of the court. However, lawyers are bound by a whole set of ethical and legal constraints which militate against abuse of their position.76 In making the balance, American courts have always held that despite the possibilities for abuse,

> A contract of this character is often the only way by which the poor and helpless can have their rights vindicated and upheld and the injuries they have suffered redressed.77

E. *Class Actions*

A legal strategy that has been used effectively in the United States to press the claims of the disadvantaged is the use of the class action suit.78

Governed in the federal courts by Rule 23 of the *FEDERAL RULES OF CIVIL PROCEDURE*,79

> One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.80

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74. Speiser, *op. cit.* at 85.

75. *Ibid*, at 85 for 13, quoting from 19 Fed Ins Counsel Q 76, 82 (Winter 1968-9).

76. See ABA *Code of Professional Responsibility* EC2 - 20 and EC5 - 7.

77. *Gruskay v Simenauskas* 140 A 724 (Conn. 1928). See also *Gair v Peck*, *supra*, and MacKinnon, *supra*.

78. For an excellent and comprehensive review of the theory, rules, practice, and merits of class action suits, see "Developments in the Law - Class Actions", 89 Harvard Law Review 1318 (1976).

79. As amended 28th February 1966, effective 1st July 1966. Each state promulgates its own procedural rules regarding the use of class action suits in state courts. While some states have more flexible requirements than others - that is, are more encouraging of class actions - most state rules closely parallel the federal rules in this area.

80. FRCP Rule 23 (a). Parts (b), (c), (d) and (e) of Rule 23 further qualify the right to maintain a class action, ensuring that "a class action is superior to other available methods for the fair and efficient adjudication of the controversy". (Rule 23(b)(3)).

In addition, many states have promulgated legislation designed to remove many of the road-blocks to class actions found in the Federal rules. For example, California,81 Wisconsin82 and New York83 have eased the strict notice requirements for class actions imposed by the United States Supreme Court with regard to actions in the federal courts,84 hoping to encourage meritorious consumer class actions in the state courts.

Class action suits may be very useful in spreading legal services to the people, in that they (1) "provide convenient and economical forums for disposing of similar lawsuits" and (2) "provide a device for aggregating substantially similar claims, thereby prorating the cost of litigation among numerous litigants and making suit feasible where it would not be otherwise".85 When combined with the contingency fee, it makes possible litigation on behalf of very large numbers of people with similar injuries, without advancing the high costs of such litigation - in the event of success, the class lawyer may be reimbursed for his efforts out of the award. In addition, many statutes in the United States provide that courts may order unsuccessful litigants to pay the attorney's fees of their opponents - particularly if there has been a showing of bad faith, or the object of the suit was not damages, but rather injunctive or declaratory relief.86

Legal services organisations in the United States have found the class action to be an extremely effective tool in asserting the consumers rights and civil rights of the poor.87 By aggregating individual claims, class members are in a much stronger negotiating position vis-a-vis the class opponent - usually a large corporation - and may more easily obtain a beneficial settlement involving damages and/or injunctive or declaratory relief. By

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81. California Civil Code Annotated. S.1781.

82. Wisconsin Statutes Annotated. S.426.10.

83. New York Civil Practice Laws. SS.901-909.

84. In *Eisen v Carlisle and Jacquelin* 417 US 156, 177 (1974) and *Sosna v Iowa* 419 US 393, 397n.4, the U.S. SupremeCCourt rufle that Rule 23 and Due Process require that every potential member of the class receive individual notice. To avoid this time-consuming and very costly requirement, the California, Wisconsin and New York legislation respectively allows publication of notice, has the state pay the costs of notice, and allows random sample notice. Further, in certain cases, New York actually shifts the burden of the costs of notice to the class opponent. See also 89 Harvard L Rev 1318, 1324 (1976).

85. 89 Harvard L Rev 1318, 1322 (1976). See also Kalven and Rosenfield, "The Contemporary Function of the Class Suit" 8 U Chicago L Rev 684 (1941).

86. See 89 Harvard L Rev 1318, 1606-1618.

87. See Pomerantz, "New Developments in Class Actions - Has Their Death Knell Sounded?" 25 Bus. Law. 1259 (1970).

pooling funds for the maintenance of the action, class members may obtain legal assistance of a quality and quantity that would be well beyond the reach of individual litigants. The class action may have important social consequences as well, bringing to the attention of the judiciary a *pattern* of wrongdoing or deprivation of rights that would not emerge as clearly from individual litigation.

Class actions have their roots in feudal England.88 Antedating the courts of equity,89 they became firmly entrenched in the English common law by the Nineteenth Century, under the "Community of Interest Theory".90 Current English practice allows for such "representative proceedings", under Order 15, Rule 12 of the Supreme Court, which is much less specific in its requirements than its American counterparts, but is filled out to some extent by case law.91

The English class action, or representative proceeding, was carried over into the Australian court system, and from there became part of the law of Papua New Guinea, with the adoption in New Guinea of the Rules of the Supreme Court of Queensland of 1900,92 as amended and in force in Queensland on 5th December 1932, by the Judiciary Ordinance 1932.93 The Rules were made applicable as well to Papua, as from 17th November 1960.94 Order III, Rule 10 of these rules provides that:

> When there are numerous parties having the same interest in the subject matter of a cause or matter, one or more of such persons may sue, and the Court or a Judge may authorise one or more of such persons to be sued, or may direct that one or more of such persons shall defend, in such cause or matter, on behalf or for the benefit of all persons so interested.95

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88. See Marcin, "Searching for the Origin of the Class Action" 23 Catholic U L Rev 515 (1974).

89. See 89 Harvard L Rev 1318, 1335 n.22.

90. *Ibid*, at pp. 1332-1337.

91. See Jacob et al, *The Supreme Court Practice 1976* at pp. 202-210.

92. See *7 Public Acts of Queensland (Reprint)* 123.

93. No. 23 of 1932, made by the Governor General in Council. Published in the *Commonwealth Gazette* on 8th December 1932. See 1 The Laws of the Territory of New Guinea 617.

94. See *The Government Gazette*, 17th November 1960.

95. Representative actions may also be permitted in certain situations involving the administration and execution of trusts and estates. See Order III, Rule 9; Order III, Rule 20; and Order XXV, Rule 5.

While authorised by the Rules, the class action proceeding has never been utilised in Papua New Guinea. The private bar, dealing largely with corporate clients, has never needed to proceed through a representative action, and Public Solicitor's Office, according to a spokesman, "is not geared for it at the moment ... we regard our role as providing a personal service for individuals".96

F. *Rethinking the Myths of Professionalism*

Apart from considering the introduction of a class of para-professionals into the legal system,97 it would also be of value to consider the effects of "professionalism" on the nature and availability of legal services in Papua New Guinea.

For example, advertising and "touting" are serious breaches of professional conduct in common law countries, including Papua New Guinea.98 These restrictions, however, are based on assuptions about society that are not necessarily true of conditions here at this time, *viz.* that most or all members of the public understand the legal system well enough to know when their rights have been violated and give rise to a cause of action at law, how to obtain the services of a lawyer and to proceed with an action, which particular lawyer to retain, etc.

While excesses such as "ambulance chasing" should always be proscribed, it may well be that under existing conditions, lawyers in Papua New Guinea should be under an *affirmative duty* to educate the people as to their legal rights, and bring to their attention actionable, or potentially actionable, violations.

Even in the relatively sophisticated and litigious British society, a recent survey indicated that a very strong majority of the public would welcome, rather than resent, an attorney who approached them to offer legal services.99 In particular, "the least well-educated people were those who, most of all, would welcome being solicited by attorneys".100 The authors conclude that

> The extraordinarily high proportion of people who would welcome the solicitor's initiating contact in the different situations we have posed must seriously question many commonly held assumptions

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96. Personal communication.

97. See Part C above.

98. See, e.g. Victoria's *Solicitors (Professional Conduct and Practice) Rules*, r.2; American Bar Association's Code of Professional Responsibility EC 2-9 to 2-15, and DR 2-101 and 2-102; Griffin, *op. cit.* at pp. 66-70.

99. Professors Campbell and Wilson, "Public Attitudes to the Legal Profession in Scotland" (University of Edinburgh mimeograph, 1973) cited in M. Freedman *Lawyers' Ethics in an Adversary System* (1975) at pp. 115-117. Those interviewed were asked whether they would welcome or resent the solicitation of a lawyer in each of six situations (if you were in an accident, if you were considering buying a house, if you were going into a new business venture, etc.); generally, about 70% would welcome such advances.

100. *Ibid*, at p. 115.

about the correct stance for members of the profession. Taken with the data noted which showed that few members of the public have adequate knowledge of the services solicitors could provide, and would like to know about these (i.e., want more advertisement), there is a coherent and very emphatic call for a more active and positive legal profession.101

This ban on professional advertising has similarly come under fire in the United States, were critics hold that the anti-solicitation rules are "directed against competition, rather than for the maintenance of moral standards in the public interest."102 Solicitation for test-case clients in public interest litigation has been authorised by the U.S. Supreme Court,103 as has the practice of labour unions directing members to approved lawyers in ordinary personal injury cases.104 The United States Department of Justice recently commenced a legal action against the American Bar Association under federal anti-trust laws, alleging that the Association has conspired to restrain competition among lawyers by restricting advertising, and the United States Consumer Union has filed suit against the Bar Association's advertising ban on anti-trust and freedom of speech grounds.105

In England, the Monopolies and Mergers Commission has declared the solicitors' ban on advertising to be a monooply, and has recommended its elimination. The government has required the Law Society to formulate new rules, in consultation with the director general of fair trading.106

While the gaudier aspects of advertising and touting should never be permitted - that is, advertising which is likely to bring the profession or the legal system into disrepute, which contains misleading or inaccurate statements, or which involves gross self-promotion or claims of superiority over other attorneys - some accommodation should be reached, in Papua New Guinea, which allows for *education* of the public as to their legal rights and duties, and how to effectively use legal services and the court system to vindicate their rights. In many areas of the country, while the criminal

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101. *Ibid*, at pp. 115-116.

102. *Ibid*, at p.115. See also Cohen, "Confronting Myth in the American Legal Profession : A Territorial Perspective" 22 *Ala L. Rev.* 513 (1970).

103. *NAACP v Button* 371 US 415 (1963).

104. *Brotherhood of R.R. Trainmen v Virginia ex rel Virginia State Bar* 377 US 1 (1964); *United Mine Workers v Illinois State Bar Association* 389 US 217 (1967); and *United Transportation Union v State Bar* 401 US 576 (1971).

105. *Consumers Union of United States, Inc. v American Bar Association* (E.D. Va., C.A. No. 75-0105-R, 1976).

106. 62 A.B.A.J. 1480-1481 (Nov. 1976).

justice system has made some impact, civil proceedings for damages or injunctive relief are all but unknown.107 To the extent that this reflects the fact that many disputes are still settled through traditional means of mediation, compromise and compensation, there is no problem. To the extent that this reflects ignorance and uncertainty about how to use the formal courts to obtain relief, however, a serious problem regarding lack of educational initiatives is indicated.

In addition to the restraints on advertising and touting, other unappealing consequences of "professionalism" should be reviewed, such as the social and economic distance between attorney and client,108 the very high costs of legal services,109 and the often needless complexity. The success of China's "barefoot doctors" demonstrates that needed quality services can be provided without all the expensive trappings of the profession.110

III CONCLUSION

In the period since Independence, there has been a growing feeling, encouraged by the Papua New Guinea Law Reform Commission, that there should be a fundamental re-appraisal of the introduced law and its institutions, to preserve those aspects which are judged to be of lasting value, and to change those aspects of the present system which conflict with, or stifle, traditional Melanesian concepts of fairness and justice, and national development strategies. Such a review, of necessity, must take into consideration the National Goals and Directive Principles embodied in the Constitution.

Thus far, this re-appraisal has focused on the reform of the substantive law - for example, repealing the discriminatory Native Regulations, and making *custom* the principal source of the underlying law - and the introduction of new forums (e.g. the Village Courts) which stress negotiation, mediation and compromise, rather than Western-style adjudication. Little attention has been directed, however, towards reviewing the nature and role of the legal profession in Papua New Guinea, which is no less alien and introduced than the Queensland Criminal Code, the Matrimonial Causes Act, or the strict procedural rules of the Supreme Court.

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107. For example, a review of the Local and District Court records of the rural Saidor Sub-Province, Madang Proiince, for the past twelve years reveals that there have only been *two* civil proceedings - an adoption, and a petition to stop maintenance and child support for an ex-spouse who has remarried. (The petitioner in the latter case was not a Papua New Guinean).

108. Discussed Part I, *supra*.

109. Indeed, professional conduct forbids lawyers from "cutting fees", that is, working for "less that that fixed by the appropriate scale of costs for that work". Victoria's *Solicitors (Professional Conduct and Practice) Rules*, r. 2(4). See also Griffin, *op. cit.* at pp. 65; American Bar Association's *Code of Professional Responsibility* EC 2-16; 31 *Halsbury's Laws of England* (2nd ed.) 311; *re a Solicitor* [1951] 2 All ER 108.

110. See generally, Science for the People, *China : Science Walks on Two Legs* (1974).

The authors hope that this article will open up discussion on how the legal profession may best serve the needs of the people of this country, and what structural changes are necessary towards that end. The profession in Papua New Guinea is still young, and relatively small, and changes of even great magnitude may still be undertaken with a minimum of inconvenience and unfairness to practitioners. Conversely, if no changes are effect at this time, the bar will grow, consolidate its interests, and become much more resistant to change in the name of the public interest.

Several reforms, requiring varying degrees of fundamental change, are outlined above, which might, taken individually or in some combination, serve to make real the Constitutional goals of equalisation of services and greater equality of incomes. In making reference to the experience of other nations, it is not our desire that Papua New Guinea become blindly imitative of the United States, Tanzania, or Micronesia, in ordering its legal profession. On the contrary, we hope to show that there are reasonable, and workable, alternatives to the present British-style system which may be more appropriate to local conditions, and suited to local needs. As indicated, we feel that the establishment of an all-encompassing national legal services agency would best effectuate the national goals. It is, however, for the people of this country to determine which set of alternatives they prefer, after considered debate.