# LEGAL PUBLISHING IN PAPUA NEW GUINEA: SEVERING THE COLONIAL LINK.

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## 1. *Introduction.*

It is the purpose of this article to examine the effectiveness of communication of the law to the people of Papua New Guinea through the device of law publishing. The primary emphasis, as in any discussion of law publishing, will be on the written form, by which law reports, statutes, and law texts are produced by established law publishers. However, a critical analysis of law publishing needs to have an ambit which includes other media - such as the radio, film and computer.1 Another important point is that the audience of law publishing is not an undifferentiated whole. The main difference is between the layman and the potential or actual law experts. Yet, even among law experts there are different needs among practitioners, academics, students and para-professionals. Changes in publishing to one group will necessarily affect the other.

The people are ultimately affected by law-publishing whether such publishing is directed to them or to professional lawyers. This may sound a little strange when one considers the turgidity of the typical law book. However, such turgidity is symptomatic of the mystifying role of law and lawyers in society. Such a role provides the context of, and restrains any changes in, law publishing. Thus, it is usually assumed that law involves highly technical skills which can only be utilised through the medium of the lawyer. The primary focus of traditional law publishing is the lawyer. Others, such as politicians and bureaucrats come a poor second, and the people of course, come last.

## II. *The Papua New Guinea Context: The Colony-Metropolis Link.*

The link between law publishing and the role of law and lawyers in society has a special significance in Papua New Guinea, as the country is in the process of de-colonisation.

Papua New Guinea shares with other under-developed countries the experience of poverty, illiteracy, the colonial past, the lack of a fully developed legal profession and the interaction of customary and colonial laws. It has also some peculiar problems in that the country has a large geographical area (47,000 sq. km.), but a small population (about 3 million) fragmented into some 700 language groups. For many parts of the country, contact with colonialism and its concomitants of western style under-development, law, professions and education have come only in the last twenty years.

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1. The computer, however, may not have a great relevance to a developing country with a small market.

Thus at present there are just 65 national lawyers in Papua New Guinea, and 120 national magistrates. Of the lawyers there are only three academics. Many of the law graduates from the University of Papua New Guinea end up doing non-legal administrative work. Apart from the nationals there is a highly significant group of expatriate lawyers working for the government and in private practice. The law school at the University of Papua New Guinea is small and has been in existence for barely ten years, and until recently has been completely staffed by expatriates on short-term contracts.

The most important influence on the law and law publishing in Papua New Guinea has been the colony-metropolis link between Papua New Guinea and Australia. Australia is really a sub-metropolitan power - it had itself a colonial relationship with England. This latter factor has had a special influence on the law in that Papua New Guinea's "received" colonial law is a mixture of Australian and English laws.

The legislative schemes, the judicial system, and the professions in Papua New Guinea differ very little from their Anglo-Australian counterparts. Statutes are framed in the same drafting language as in Australia or England. There is a high judiciary comprised of the Supreme and National Courts, before which English or Australian barristers and solicitors, or Papua New Guineans, with an LL.B. from the University and one year practical training at the Legal Training Institute practice. The lower courts, however, are staffed by magistrates with varying degrees of para-professional training. The Village Courts are unusual in that they are being staffed by lay village magistrates chosen by the people.

The common law link produces the dependence of Papua New Guinea on metropolitan legal materials; for the most part Australian and English texts are used in the country. Moreover, even materials devoted particularly to Papua New Guinea, including the Law Reports, are published in Australia. Some years ago, it would not have been possible to detect much difference between the standard equipment of a Papua New Guinean lawyer, academic or student and that of his Australian counterpart. That is, available legal materials reflected the dominant legal culture, which was Anglo-Australian.

It can be said of the legal literature prior to 1973 that it was sparse, lacking in depth and mostly took the form of a Papua New Guinean gloss on the dominant Anglo-Australian legal culture.2 The *Melanesian Law Journal* only commenced publication as a slim volume in 1971.

Any information on characteristics of Papua New Guinea law which were peculiar to this society had to be gleaned from the work of anthropologists or through assiduous research into primary materials, including the odd cyclostyled paper written for limited purposes and audience by a government lawyer.

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2. Some works such as K. Young's, *Outline of Law in Papua New Guinea* (1971) leave one with the impression that the subject is not law in a *developing* country.

The colonial link has a great impact on the ideological level. The legal materials from England and Australia are abundant, have a long tradition, and are apparently certain. For example, our judges find it much easier and comforting to rely on Australian precedents than to take on the challenging task assigned them by the Constitution of developing an underlying law suitable to the circumstances of the country.3 This reinforces the belief that the common law is a superior and more sophisticated legal system whose diffusion into the former colony can be of great benefit to the new society.4 In the comments received on the Law Reform Commission's working paper, it was often argued that the great disadvantage of customary law is its uncertainty as compared with the common law which is a 'certain' system. Consequently, it is argued that the needs of a country such as Papua New Guinea can be best met by "pruning the English oak".5 However, any objective examination of conditions in Papua New Guinea will reveal that the soil and climate are not suitable for English oaks. In fact, according to Bayne, it is doubtful whether the genuine common law was ever trans planted on Papua New Guinea soil.6 The received law of this country can at best be described as 'colonial law'.

One aspect of this colonial legal system was the merger of judicial and administrative powers in the hands of the *kiaps* (patrol officers). The substantive law itself had some special features, produced by a curious blend of racial discrimination against, and paternalistic protectionism of Papua New Guineans. At the same time, the interests of foreigners were safeguarded in the laws relating to land, labour, mining and contracts.7 Customary law survived to a limited extent in the lower courts, but flourished in the unofficial courts.8

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3. However, see the recent statement by the then Deputy Chief Justice that our courts should rely more on Papua New Guinea judgments in criminal cases in *The State v. Laiam Kiala and Mairi Gomosi* (N.118, unreported, 1977). As for the courts' law development role, see Schedule 2.2 and 2.3 of the *Constitution*. For more radical proposals see Law Reform Commission's Draft *Underlying Law Bill* 1977, and the soon to be released *The Role of Customary Law in the Legal System* (LRC Report No.6, 1978).

4. For a discussion of this 'diffusionist' approach to law see Paliwala, Zorn and Bayne, *Law, Economic Development Strategies, and the Changing Legal System of Papua New Guinea* (1977) (unpublished manuscript) 14.

5. R.S. O'Reagan, *The Common Law in Papua New Guinea,* (1971).

6. P. Bayne, "Legal Development in Papua New Guinea; The Place of the Common Law" (1975). 3 *Melanesian Law Journal* 9. See also Paliwala, Zorn and Bayne, *op. cit.* at p.21; Edward P. Wolfers, *Race Relations and Colonial Rule in Papua New Guinea* (1975).

7. See Paliwala, Zorn and Bayne, *op. cit.*

8. See M. Strathern, "Official and Unofficial Courts: Legal Expectation in a Highlands Community" *New Guinea Research Bulletin* No. 47, (1972).

Yet, apart from the ideological factors involved, there are other influences which put into question the colony - metropolis link. These include communication problems, the cost factor and the time factor.

A. Communication Problems.

Anglo-Australian materials are inadequate for Papua New Guineans in that they do not form an adequate tool of communication. This is mainly because English is usually the third language for Papua New Guinean people. Complicated words and long sentence style results in the meaning being lost, especially on the students and trainee magistrates. Moreover, slow reading speeds make large law books difficult hurdles.

Much in Anglo-Australian materials, and particularly in cases, is lost on our people because they do not know about the society from which the cases and the law emanate. I was brought to an abrupt halt in the middle of a "traffic lights" case in class by the realisation that no such things existed (at that time) in Papua New Guinea. Cases involving complicated items of machinery, as in *Farr v. Butters*[9] can be extremely difficult for our students.

This does not mean that such cases are irrelevant. The point is intended to illustrate a difficulty. One way out of this difficulty in the classroom is to use cases more attuned to local circumstances, whether from Papua New Guinea or from similar jurisdictions. If this is not possible, then care has to be taken by the text writer in illustrating the case - by diagrams if necessary. The country's languages and culture also have special qualities which can be utilised to great advantage. The use of *'tok bokis'* (metaphor) and imagery are particularly important.[10]

But the problem should not be seen merely as one of improving text books, but of improvement in the whole range of legal materials. The most important area in which improvement is needed is in the drafting of legislation. Many Papua New Guineans, including lawyers, become baffled by the language of legislation. Again, written texts are not necessarily the best means of communicating information on customary law. The most important aspect of customary law is the dispute settlement *process* and not the norms. In the circumstances media such as film and slides become much more relevant.

B. Cost Factor.

Imported law books are extremely expensive for people in under-developed countries. They constitute a drain on scarce foreign exchange reserves. For the student it means that his book allowance of K100 per year is not sufficient to adequately supply his needs for the eight different courses he may have to take. For the practitioner

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9. (1932) 2 K.B. 602.

10. B. Narakobi, "We the People: We the Constitution" (Paper delivered at the 7th *Waigani Seminar*, Port Moresby, 1973) is an excellent example of this.

it means an enormous outlay on books if he is going to have an adequate law practice. This does not put back the expatriate Port Moresby law firm, accustomed as it may be to high earnings. However, it does pose a considerable burden for the Papua New Guinean practitioner intending to set up a rural practice.11 In the short term, as most Papua New Guineans can get easy bank loans, this may not appear to be a big problem. However, the easy finances may dry up in the future. Secondly, the high cost of books will contribute to a high fee structure, and together with other factors, make the lawyer even further out of reach of the ordinary Papua New Guinean than he is already.

Australian prices tend to be much higher than English ones. It might be considered that costs could be reduced by switching over to English works rather than Australian. Unfortunately, this way of reducing costs is blocked by the Australian "mark-up". Under this system Butterworths (UK), for example, will not sell directly to a Papua New Guinea distributor. Instead all book sales have to be made through Butterworths (Aus.). Consequently, Thornton's *Legislative Drafting*, which costs £8.80 ($A15.00) in England costs $A28.00 in Australia and K29.00 in Papua New Guinea.12 It may be possible for Australian lawyers with their extremely high earnings to afford these luxuries. But, in Papua New Guinea it becomes a prohibitive cost. The differential in price can only be explained on the basis of the existence of two profit centres.

The English Language Book Society provides a small range of cheaper text books. However, service is limited and the books do not seem to be bound for tropical conditions and tend to come apart in the heat.13

The only bookshop which makes any serious effort to stock law books is the University Bookshop (Port Moresby). However, for financial reasons the bookshop only stocks text books which have been prescribed for a particular course. That is, there is normally not even a choice between Winfield and Salmon!

For those individuals who are able to afford it, direct purchasing from Australian, English or American book stores or publishers can increase the range of choice; for the rest there has to be a heavy reliance on the resources of the library.

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11. This has been mentioned to me by several Papua New Guinean lawyers.

12. The second edition has just been published with an English price of £10.50. The Australian price should be in the region of $32.00. The exchange rate is approximately K1 = £ stg. 0.73 = $ Aust. 1.19 (April 6, 1978).

13. The Book Society's offerings are used as a prescribed text for one course only. Fowler's *Modern English Usage* is used for Legislative Drafting.

The Library at the University has not been lacking in money, and it has been possible to order books in multiple copies. Also the Australian Universities inter-library loan scheme and the Commonwealth Attorney General's Office provide reasonable access to books. Nevertheless, all this still leaves lawyers in Papua New Guinea at a disadvantage in comparison with the vast resources available to lawyers in a developed country.

High costs of books means that the materials available to a lawyer in an underdeveloped country are very poor compared with those in western countries. In the circumstances, it is important to make rational use of available money. For example, there is no reason for any student to purchase new law books every year when these books are often out of date within the next two or three years. Book lending and exchanges would save money which could then be used to provide richer materials for the student or the lawyer.

Libraries could obtain some of the benefits of these savings which could be used to supply the students and practitioners with much better research materials, particularly in areas where the lawyer has to deal with counterparts from Western countries.

C. The Time Factor.

Ordering books, whether for practitioners or students, has the added hazard posed by time. Books take about six weeks to arrive from Australia. However, if you are ordering an English work and the Australian distributor is out of stock, it can take anywhere between six weeks and a year to have them delivered to Australia and several more weeks to transship. As a consequence, badly needed student texts often do not arrive until halfway through the semester, in spite of the fact that orders were placed several months ahead.

III. *The New Direction: Disengagement, Liberation, and Fulfilment.*

The need for disengagement from the colony-metropolis link in legal literature arises from the desire of Papua New Guineans to fashion a new legal system. The old system finds hardly any proponents. As a former Minister for Justice put it:

> "In this country the law was an instrument of colonialism and a means whereby the economic dominance of the white man was established over us".14

Perhaps the greatest need for change will emerge out of the Law Reform Commission's proposals on the Underlying Law.15 The basic proposal is that customary law which is being creatively developed by the courts should form the basis for the underlying law. The common law should only have a subsidiary role. This demands completely new legal

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14. J. Kaputin, Policy statement delivered as Minister for Justice, reprinted in "The Law: A Colonial Fraud?" (1975) 10 *New Guinea*, Vol. 10 No. 1, p.4.

15. *The Role of Customary Law in the Legal System, op. cit.* Substantial legislative changes have occurred or are occurring in such areas as company law, land law, family law and succession, the criminal law, and the structure of the court system.

thinking on the part of our lawyers. It is vitally important to establish a Papua New Guinean legal literature which is relatively independent of the colony - metropolis link.

There are four requirements for an independent legal literature. The first one is the availability of sufficient research resources for monitoring the life of the law in action. There is no use basing the legal system on customary law if there is no way of finding out, simply and efficiently, what this law is.

Secondly, there is need to develop legal materials, both of a primary and a secondary nature which are readily available to the different audiences which exist for the law.

Thirdly, it is obvious that standard western legal materials, whether for students or for practitioners, can be highly misleading in their static emphasis on the "law as it is" and on western legal concepts. The criteria for the suitability of legal materials in Papua New Guinea need to be different, and should include: (a) the understanding of law in its political economic context; (b) the appreciation of changeability of law; (c) the integration of Melanesian norms and values into the law.

Lastly, building from a customary base means utilising the peoples' own law. If the legal changes taking place are to be effective they should actively involve the people. Therefore, apart from the need to monitor the people's law, it becomes important for the government to communicate effectively to the people how it is shaping the new system.

Some changes have been taking place in legal publishing since self-government in 1973. It is now intended to discuss what the present situation is in relation to different aspects of communication of the law in relation to our four objectives. It is, however, important to bear in mind that the audience for the legal literature is not homogeneous. For our purposes the two main types of audience are the ordinary people and the law experts. Both can be further sub-divided Among the ordinary people, the main division is between the literate and the non-and semi-literate. Among the 'legal experts' one finds four main classes. These include: (a) the fully qualified lawyer including the judges and the practitioners; (b) the magistrates; (c) the bureaucrats, professionals and business people whose work involves the law; and (d) the law students.

This disparate audience needs different levels of communication. However, the practicalities of a small jurisdiction often dictate that one medium must suffice for many classes. This is apparent in publications undertaken by commercial publishers.16 As the market needs to be as wide as possible to be attractive, the publication is tailored towards a wide audience and may often lose in quality. An alternative approach is that of the Law Reform Commission, which aims at three different levels at once. The summaries in Pidgin, Motu and English aim at the widest possible audience. The Report section aims at the educated public and some legal experts. The draft legislation, and particularly, the annotations aim at the legal expert.17

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16. See text accompanying fn. 39, *infra*.

17. See, e.g., *Report on the Role of Customary Law in the Legal System, op. cit.*

The following is a review of the different types of legal literature, highlighting some of the problems connected with each type.

A. PRIMARY SOURCES.

1. Customary Law.

As has been stated already, customary law is intended to be the basis of underlying law of Papua New Guinea. Yet, in terms of legal literature it is the least developed. There is hardly any primary source material on customary law. What little exists is in the form of works by anthropologists.18 Yet, the primary concern of anthropology, including legal anthropology, has been to study customary law from a western comparative perspective rather than from a law development perspective.

Primary source material of varying quality exists in the form of local and district court judgments in cases involving customary law. However, this is not recorded or kept in any systematic fashion. Village courts are also an important potential source of information on customary law, but at present the recording of Village Court decisions is not sufficiently detailed to make them a good source of customary law literature. The National and Supreme Courts have had very little to do with customary law.

This dearth of information calls for a systematic approach to the compilation of primary source material on customary law. It is not the purpose in this paper to discuss the merits of different ways of recording customary law, such as legislation, restatements, or case studies.19 For present purposes it is important than an organised study should be made and the information collected should be systematically recorded and be made available.

Two recent developments need to be mentioned in this connection - the government has recently approved a project for the study of customary law by the Law Reform Commission. The Commission will appoint a co-ordinator who will be responsible for co-ordinating information from a wide variety of sources, including magistrates and student research assistants.

Secondly, a recent study done for the Law Reform Commission by Professor Twining recommends the establishment of a Legal Information Centre.20 The centre will serve a wide need for co-ordinating the two-way processes of communication of information

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18. See, e.g. M. Strathern, *op. cit.*, A.L. Epstein (ed.), *Contention and Dispute*, (1974).

19. The Law Reform Commission's perspective on this issue can be seen in the discussion paper "Reference on Customary Law" (1976).

20. W. Twining: "Information about Law in Papua New Guinea" in Law Reform Commission, *Legal Information Centre*, Working Paper No. 8 (1977).

about law of all kinds. This will be of great benefit for the documentation and communication of customary law. However, the view is rightly taken that information about customary law cannot be isolated from information on other sources of law if we are to develop an integrated legal system.

2. Archives and Court Records.

Archives and court records form a primary source from which research can take place. Yet, until recently, there has been no archival policy in relation to the keeping of legal records in Papua New Guinea. Legal materials contained in the National Archives are not kept separately.

Court records are not kept at the Archives, but are retained at the individual court houses. This did not pose a big problem for the Supreme and National Court because of the centralisation of the courts. The records are kept in a fairly organised form. Important published judgments are regularly indexed. This is very important for the legal researcher because there were no law reports prior to 1973, and because even now the Papua New Guinea Law Reports are limited in nature.

If the situation at the National court is generally fairly satisfactory, that at the lower courts is chaotic. Each court maintains its own records with no policy as to which records to maintain and which to dispose of. This poses a particular problem for collecting information on customary law, because it is the lower courts rather than the National Court, which tend to deal with customary law cases. The Land Titles Commission and the Land Courts, however, have a better organised system of documentation.21 This is important in an unregistered customary land system because judicial settlements are often not accepted by the public, and disputes on the same parcel of land can run for generations.

The situation is really difficult in the case of Village Court records.22 The present system of keeping court records provides very inadequate information for a person intending to minitor the courts. There is more space on the record for the names of magistrates than for factual information about the case. A better system is now being devised. However, a more important problem is that most of the court clerks are at best semi-literate, and find it difficult to put down accurate and comprehensive information.

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21. The Commission dealt with all land disputes relating to customary land and to whether land was customary or government land. The Commission's functions in relation to proved customary land have now been taken over by the land courts, which consist of Local and District Court magistrates sitting with members of the community.

22. Village Courts are staffed by members of the village community. The magistrates are often illiterate.

The proposed Legal Information Centre can fill an important gap in the collection of legal records.23 Ideally all legal records which are more than five years old should be centralised. The primary need is not for centralisation, however, but for co-ordination.24 The Centre can help in establishing firm guidelines for the keeping of the records and for their manner of keeping. It can also organise the monitoring of appropriate information from different sources and its communication to the appropriate legal audience. In relation to the Village Courts, the Centre could establish links with the more articulate Village Court clerks to obtain deeper information on village case law. Similarly, Local and District Court magistrates could send a selection of their judgments to the centre.25

Apart from the proposal to establish a Papua New Guinea Legal Information Centre, there was in 1975 a proposal by the British Government for the establishment of a Pacific Law Centre for the members of the South Pacific Forum countries.26 Port Moresby was mooted as a base for the centre. However, a number of governments, including the Papua New Guinea government, opposed the centre on the basis that it would have long-term financial implications for them and that it was not a priority area. This was unfortunate because much could be gained by the pooling of resources and information in the South Pacific countries.

3. Law Reports.

Formal law reporting only started in Papua New Guinea in 1963. The *Papua New Guinea Law Reports* are produced in an annual volume of about 450 pages by the Council of Law Reporting which is chaired by the Chief Justice. However, the editing and printing is done in Australia by the Law Book Company. There is a commercial arrangement under which the government guarantees to purchase 300 copies, making the printing a financially viable proposition from the point of view of the Law Book Company. The *Papua New Guinea Law Reports* only report selected judgments. The resultant gaps are filled in two ways. First there is the practice of the courts under which most significant National and Supreme Court decisions are circulated in a cyclostyled form to selected members of the legal profession.

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23. See W. Twining, *op. cit.*

24. The Chief Magistrate has agreed to provide for the centralisation of court records either at the National Archives or at the New Guinea Collection of the University of Papua New Guinea.

25. This function is not a substitute for the statistical monitoring of court records, but is intended to provide law development information.

26. The countries comprise, apart from Papua New Guinea, the South Pacific territories of the United States such as American Micronesia and Samoa, British territories such as the Solomon Islands, French territories, such as New Caledonia and independent countries such as Fiji, Western Samoa, Tonga and Nauru.

Secondly, since 1974, the University of Papua New Guinea Law Faculty has produced a digest called *Papua New Guinea Law*.27 This attempts to digest all available National and Supreme Court decisions, and is sold at an inexpensive rate to the legal audience. Production of the digest has been heavily dependent on the availability of a qualified research assistant to do the work. Although the Editor of *Papua New Guinea Law* has recently decided that selected lower court cases will also be digested, this does not in itself solve the problem of communicating information on the crucial parts of the law which are dealt with by the lower courts.

The present system of publishing the Law Reports is not inefficient and is relatively economic and one would not wish to distub it unless the alternative system was at least equally efficient. One difficulty is that of the limited availability of skilled manpower. At the present time, if the production of the Law Reports were to be localised, there would probably be a need to appoint an expatriate editor, as suitably qualified Papua New Guineans are all in other high status positions. However, if the law reporting unit was combined with the proposed Legal Information Centre, this would result in considerable rationalisation and cost saving.28

In particular, the centre could take over *Papua New Guinea Law*. There are serious gaps in law reporting from the perspective of precedent creation and law development. Judgments tend to concentrate on the normal 'fodder' of the national court work. The main areas are serious crime, particularly homicide, and commercial litigation between foreign firms. This is notable because apart from criminal cases very few cases concerning Papua New Guineans come before the National Court. As a result, precedent creation in civil cases is based on the concerns of an expatriate bourgeoisie.29 This bodes ill for the development of an underlying law based on customary law.

A body of precedent which better reflects the concerns of the majority of the population could be established if there were more appeals, particularly in customary law cases, from the lower courts. This has not been the case until now because the limited resources of the Public Solicitor's Office have been concentrated on criminal work involving indictable offences.

The quality of the Law Reports needs to be questioned in another respect. The judgments reported reflect an overwhelming dependence on Australian and English precendents and a lack of imagination in adapting them to local conditions. For this to change there is need for a bench and a bar which is committed to legal transformation in accordance with the Constitution.30 This can take place either by appointment of committed national judges or of expatriate judges who have the appropriate experience and commitment to the needs of a developing country such as Papua New Guinea.

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27. The digest is prepared by a research assistant, whose salary is appropriated from the research funds of the University.

28. See W. Twining, *op. cit.*

29. See Paliwala, Zorn and Bayne, *op. cit.* at 55.

30. In this respect note the statement by the then Deputy Chief Justice, cited at fn. 3, *supra*.

The main change which has to be made in the policy of law reporting is for there to be a greater consciousness of the developmental role of law reports in Papua New Guinea. This means care in the selection of judgments for reporting. However, perhaps even more important, there may be need to make selective reports of lower court cases, including Village Court cases. The implementation of this policy does not in the short term demand 'localisation' of law reporting. The Council for Law Reporting can make the appropriate arrangement with the Law Book Company. However, in the long term the operation could be better organised by the Legal Information Centre.31

It may be argued that reports of lower court cases can be best dealt with by *Papua New Guinea Law* and the Law Reports should be reserved for the higher court cases. However, the number of areas in which the higher courts have no jurisdiction is increasing.32 The function of the Law Reports should be to communicate to the different legal audiences the important land marks in the case law during the year.

4. Legislation

The Statute Book can be divided into two basic parts. Until 1945, there were separate statute books for Papua and New Guinea. Since 1945 there is a merged set of the Laws of Papua New Guinea. This was in line with the administrative merger of the two territories. The pre-1945 statute books are in the form of complete editions in five volumes divided in chapters according to subject matter. Volume 5 is the index. The book contains both ordinances and statutory instruments. The post-1945 practice has been to produce annual volumes, printed in Queensland, containing both Acts and Statutory Instruments, arranged chronologically. The last printed index to these laws goes only up to 1973. However, an unofficial table of all laws in force up to Independence Day (16 September 1975) has been produced by the Office of the Legislative Counsel. Current legislation is printed by the Government Printer, but sometimes appears up to one year late. The latest annual bound volume of Laws of Papua New Guinea is for 1973. This chaotic situation is soon going to be brought under some control by the printing of the *Revised Laws*. These will be printed by the Secretary for Justice under the *Printing of Laws Act* 1975 and will be comprehensive until 1 January, 1976. The new statute book will be organised on a loose leaf basis and will be kept up to date by replacement pages. The printing is done by computer and the system of revision is therefore likely to be efficient.33

No computerised information retrieval facility has been envisaged, but the system may be easily adaptable to such a facility. Setting up our own system of information retrieval may, however, be expensive. A possible alternative would be to negotiate with the Australian government to use the facilities of the comprehensive

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31. See W. Twining, *op. cit.*

32. The *Village Courts Act* 1973, the *Land Disputes Settlement Act* 1975, and the *Adultery and Enticement Bill* 1977, all remove certain types of cases from higher courts.

33. The cost of the enterprise is, however, estimated to be approximately K300,000.

retrieval system established by the Commonwealth Attorney-General. A feasibility study in this area would be a useful starting point. It may, however, be that the demand for such a system would be too limited for it to be warranted.

The main problem with our legislation, a problem which is shared by most common law countries is the complexity of drafting. Many useful changes have been made in the drafting by legislation providing for the simplification of form and interpretation. This is now contained in the *Interpretation (Interim Provisions) Act* 1975. However, the need to simplify drafting is greater in Papua New Guinea than in many other nations. Many of our politicians find it difficult to comprehend the complex language that they are enacting. Even the lawyers find the legislation difficult to understand. The problem of simpler preparation of legislation and drafting has been a very important concern in recent years. The proposals and initiatives made elsewhere should be a starting point for our legislators.34

Apart from simplification of drafting, the question of the language of drafting needs to be considered. It is too premature to propose drafting in a "national language". At present there is no consensus as to adoption of a national language, and English is going to continue to dominate by default. It is clear, however, that the two most important lingua franca, Pidgin and Motu, can be sufficiently developed in the future for drafting or translation.35 In the short term it would be satisfactory to provide simple summaries in Pidgin and Motu of the legislation36 for communication to a wider public.

## B. SECONDARY LITERATURE

It would seem from the foregoing that the organisation of primary materials needs improvement. In the case of secondary materials, the problem can be said to be even greater. In the category of secondary materials it is intended to include intra-professional communication, bibliographies, educational literature, scholarly monographs, practitioners' works and government publications, such as reform documents. A healthy body of secondary literature is essential if a legal audience is to make an adequate use of the available primary materials. An over-reliance on foreign secondary sources can contribute to an over-reliance on foreign precedents. This can result in the ignoring of important legislative policies and a tendency to interpret

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34. See for example, Statute Law Society, *Statute Law Deficiencies: Report of the Committee Appointed by the Society to Examine the Failings of the Present Statute Law System*, (1970); Statute Law Society, *Statute Law: The Key to Clarity: First Report of the Committee appointed to propose solutions to the deficiencies of the Statute Law System in the United Kingdom*, (1972); Renton, *Report of the Committee on the Preparation of Legislation*, (1975) H.M.S.O. 50, Cmnd. 6053, Dale, *Legislative Drafting: A New Approach* (1977). The solutions proposed would result in improvement rather than revolutionary change.

35. This was indicated in an experiment conducted by myself and a legislative drafting class, which successfully translated the *Land Groups Act* 1974.

36. The work of the Law Reform Commission in this area could provide useful models.

legislation in accordance with prescriptions in Anglo-Australian texts.37

1. Intra-Professional Communication

Intra-professional communication can be a primary source material if for example, it is in the form of practice directions. However, it is best to treat it as a secondary source as it comprises a broad range of things.

It has already been mentioned that the National and Supreme Courts have the practice of circulating cyclostyled decisions. Practice directions on matters such as sentencing policy are circulated in the same manner in some places. However, this latter device has not been used much in Papua New Guinea.

Intra-professional communication is much more important for magistrates, as their access to primary materials is often limited. Also, the extent of their training does not fully equip them to deal with complicated legislation and case law. In the circumstances, much is done by way of instructions to magistrates on matters relevant to their work. The publication *Magisterial Notes,* which has had an intermittent life, can be a source of valuable information to magistrates. It is hoped that the establishment of a permanent Magisterial Services Commission under the Constitution will make *Magisterial Notes* more permanent as well.

2. Bibliographies

A good bibliography is essential for adequate law research. The only bibliography of law in Papua New Guinea in existence is that by Michele Potter on Traditional Law.38 Unfortunately, this bibliography is limited in its source material. The law librarian at the University of Papua New Guinea has, however, recently undertaken to produce a comprehensive bibliography of legal materials.

3. Educational Literature

Educational literature is meant mainly to satisfy the needs of students. In the case of Papua New Guinea, at any one time, there are two categories of law students. Students for the LL.B degree are trained at the University, and total about 150. There are normally about 30 magisterial students in training at the Administrative College. Magisterial training has until now been on a lower educational base and therefore the needs of these students have been different from those of University students. This situation may be changed as a result of a recent proposal to incorporate magisterial training in the Law Faculty programme.

The above figures serve to illustrate the important problem that the market is far too small to support overseas commercial

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37. See statement of the then Deputy Chief Justice, cited at fn 3, *supra.*

38. M. Potter, *Traditional Law in Papua New Guinea: An Annotated and Selected Bibliography* (1973); for a review of the bibliography, see P. Bayne, "The Future of Traditional Law" (1974) 2 *Melanesian Law Journal,* 276.

publishing done especially for Papua New Guinean students, and consequently commercial publications of legal texts are designed to appeal to a wider audience, particularly magistrates, private practitioners, and interested laymen. Thus, the works which have been approved for publication have with one exception, been those directed either at a general audience or at practitioners. Chalmers and Paliwala's *Introduction to Law in Papua New Guinea*[39] is intended to satisfy the needs of the complete legal audience as well as being attractive to the educated reader in Papua New Guinea. This does not make authorship easy. Griffin's work on Criminal Procedure is a work of a different nature[40] - it is a simple criminal procedure manual, and is used in the criminal procedure course at the University. Another work, Ottley's *Criminal Law of Papua New Guinea* is not ready yet.[41] It is different in that it will be in the tradition of Anglo-American cases and materials book and was originally produced for internal circulation among students. Lastly, Edward S. Hayes and R. O'Reagan's work on the Criminal Code needs to be mentioned. It is also in the tradition of an Anglo-American cases and materials book. Yet, it is a strange experiment in attempting to bring under one umbrella the very different societies of Papua New Guinea, Queensland and Western Australia,[42] which share the Criminal Code devised by Sir Samuel Griffin.

The real progress in developing a student-based legal literature has been made on a self reliance basis. This has been done by utilising the University Printery and where necessary, commercial printers in Papua New Guinea. Editorial costs are absorbed by the work and typing being done by university staff. As the printing is done by photo-offset devices, there are no type-setting costs and printing is fairly cheap. The students are charged only for the printing, labour and material costs plus a distribution charge by the University Bookshop. Individual lecturers have now prepared relevant course books in Introduction to Law, Legal Writing, Customary Law, Land Law, Criminal Law, Law and Development, Legal Ethics, and Family Law.

4. Scholarly Mimeographs

Somewhat surprisingly, it has been easier to find publishers for scholarly works. This is probably because much of the writing is meant for a broader academic audience and has attraction for social scientists overseas. O'Regan's brief tract on the *Common Law in Papua New Guinea* had as its theme that the legal needs of this country could be served by the minor adaptation of the common law - [43] a theme which has since been rejected by this country. The work edited by Bernard Brown on *The Fashion of Law in Papua New Guinea* is a

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39. D. Chalmers and A. Paliwala, *An Introduction to Law in Papua New Guinea*, (1977).

40. J.G. Griffin, *Criminal Procedure in Papua New Guinea*, (1977).

41. All three works will be published by the Law Book Company.

42. E. Edwards, R. Hayes and R.O'Regan, *Cases on the Criminal Code, Being Cases and Material on the Criminal Codes of Queensland, Western Australia and Papua New Guinea*, (1976).

43. See R.O'Regan, *op. cit.*

selection of essays of varying quality.44 Both works are in the nature of Papua New Guinean glosses on an Anglo-Australian literary base.

Peter Sack has been involved in the production of three works dealing mainly with customary land law and the administration's policy towards land from a historical perspective.45 Wolfer's work on *Race Relations and Colonial Rule in Papua New Guinea* is another historical work whose thesis is that colonial law was an instrument of racial domination.46 Amirah Inglis' work *Not a White Woman Safe* deals with the history of the *White Women's Protection Ordinance* which provided the death penalty for molesting of white women by Papua New Guineans.47 The work edited by Jean Zorn and Peter Bayne on Foreign Investment is a collection of seminar papers on foreign investment delivered at the 7th Waigani Seminar on *Law and Development* in 1973, and are of mixed value.48 *Lo Bilong Ol Man Meri* contains a selection of seminar papers from the same seminar, but on the subject of traditional law and popular justice.49 The work is interesting for two reasons. First, it is a local publishing venture which was financed with a subsidy from the International Legal Centre. It has been an extremely successful publication from the sales point of view, with wide circulation in Papua New Guinea and abroad. A reason for its success is that it was the first legal work which indicated the aspirations of Papua New Guineans for de-colonising their legal system.

Legal anthropology has made some contribution to the study of customary law. The emphasis has been on the dispute settlement process. This literature has had a salutary effect on preventing a rigid rule-based approach to customary law. However, it has not given much insight into the substantive customary law.50

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44. B. Brown ed., *The Fashion of Law in New Guinea: Being an account of the past, present and developing systems of law in Papua New Guinea,* (1969).

45. P.G. Sack, *Land Between Two Laws; Early European Land Acquisitions in New Guinea,* (1973), P.G. Sack ed. *The Problem of Choice: Land in Papua New Guinea's Future,* (1974), P.G. Sack and B. Sack, *The Land Law of German New Guinea: Being a Collection of Documents,* Canberra, A.N.U. Department of Law and Research School of Social Sciences, 1975.

46. Wolfers, *op. cit.*

47. A. Inglis, *Not a White Woman Safe: Sexual Anxiety and Politics in Port Moresby* 1920-34, Canberra, A.N.U. Press, 1974.

48. J. Zorn and P. Bayne ed. *Foreign Investment, International Law and National Development,* Papers Presented at the 8th Waigani Seminar, Port Moresby, 1974 (1975).

49. J. Zorn and P. Bayne ed. *Lo Bilong Ol Man Meri: Crime, Compensation and Village Courts,* University of Papua New Guinea, 1975.

50. E.g. works by M. Strathern and A.L. Epstein, *op. cit.*

It is important to mention here that much scholarly work is never published, but is privately distributed to interested lawyers. This often has an important law development role. However, distribution and ultimately storage tends to be haphazard.51

5. Practitioners' Works

There is no work at the moment which can qualify as being a practitioners' work in the Anglo-Australian tradition. The only two works which could satisfy the needs of practitioners are Griffin's *Criminal Procedure in Papua New Guinea* and Chalmer's and Paliwala's *Introduction to Law in Papua New Guinea*.52 As has been mentioned already, Griffin's is a simple manual and a practitioner can only use it as a starting point. It does not attempt to be imaginative or to point the direction in which our criminal procedure could move. The work by Chalmers and Paliwala, on the other hand, attempts to describe the existing legal system but at the same time discusses the way in which restructuring of the legal system can take place. However, once again the work is limited in its attempt to satisfy a wide audience.

6. Periodicals.

The country has since 1971 been reasonably served by the *Melanesian Law Journal* which now comes out twice a year. Originally, the Journal was published and distributed by the Law Book Company in Australia. However, in 1974, the Law Faculty took over the publication but arranged for overseas distribution by the Law Book Company. The local publication was at a considerably reduced cost, because of the use of photo-offset printing and lower labour costs, and the journal showed a profit. Unfortunately, the University mandated that distribution be taken over by the University Bookshop. This proved a disaster because the Bookshop lacked the competence and facilities to distribute adequately. This situation has only been rectified recently by the new editor who has taken over the business side of the Journal including distribution. Steps are now under way to restore the Law Book Company as our overseas distributors.

The Journal has emphasised a thinking approach to the law, rather than acting as a pure service to the practitioner, and has been used as the main instrument for analysing the trends towards the transformation of the legal system. This emphasis is correct in that in a changing legal system all lawyers need to be made aware of the changes taking place. However, it may be in order for the Journal to provide a practical service for the practitioner as well, by including shorter practical articles, more case-notes and commentaries on current legislation.

Apart from locally based periodicals, overseas periodicals have occasionally been venues for articles relevant to Papua New Guinea. However, few overseas periodicals tend to accept specialised work on Papua New Guinea law. Also, there is a conflict between the stylistic needs of a Papua New Guinea audience and those overseas. When one is writing for an overseas periodical, the intention is really to tell an overseas audience about the law in Papua New Guinea.

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51. C.J. Lynch, the former Legislative Counsel, has been one of the most prolific producers of unpublished works.

52. Chalmers and Paliwala, *op. cit.*

Apart from the *Melanesian Law Journal*, other locally oriented periodicals sometimes contain articles relevant to law. These include *Administration for Development*, published by the Administrative College, and *Yagl Ambu*, a social science review. The Bulletins produced by the former *New Guinea Research Unit* of the Australian National University provided venue for law oriented materials. The Institute for Applied Social and Economic Research, which has replaced the Unit, could also provide a similar service.

## C. SOME SPECIAL PROBLEMS OF LEGAL LITERATURE

### 1. Human Resources: Research and Writing.

The creation of a national legal literature demands human resources for such creation. Much legal writing is done by academic lawyers, although practitioners often contribute - particularly towards practitioners' works. In this country, the Law Faculty is relatively young and has only 14 full-time members of staff. Recent financial stringency has led to the University employing fewer senior staff, and to an increasing amount of time being spent on teaching in place of research and writing. Library resources are limited and primary materials are difficult of access. In the past, the research situation was not helped by the many law school staff who were heavily engaged in private practice. The University now discourages such practice. A further problem has been that most overseas staff have been employed on short-term contracts, and they often leave the country before they have had time to make significant contributions to the legal literature.

An obvious answer to the problem of transiency is the development of a group of committed national academics. This would have the further advantage of creating a group of academics committed to national aspirations, and, hopefully, without the ethnocentric biases of western-trained academics. The Law Faculty has vigorously pursued a policy of localisation, and five of the present staff members are Papua New Guineans. Past experience has shown, however, that there are strong temptations for national staff to leave the University for positions in the public service or private enterprise, which offer more room for rapid advancement, are often far more lucrative, and appear to be more exciting. It is very important for the future of legal development that the University alter its present policy which over-emphasises teaching, and create an environment in which national academics will be encouraged to stay and contribute to research and writing.

### 2. Monitoring the Legal System: A Legal Information Centre.

I have already discussed some of the problems involved in obtaining materials on customary law. Two proposals, one for research in customary law and one for a legal information centre have been mentioned. It is essential for a healthy national literature that means exist for the monitoring of the legal system in its various aspects. A legal information centre such as has been suggested by Professor Twining could provide a co-ordinated approach to such monitoring of the system.53 Moreover, such a centre could include in its task the function of co-ordinating the communication of the law to various audiences.

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53. W. Twining, *op. cit.*

## 3. Towards Local Publishing

The government has the responsibility for publishing the legislation; in the case of the Law Reports, however, responsibility lies with the Council for Law Reporting, although actual publication is done by arrangement with a commercial publisher. However, no responsibility is assumed by the government for secondary materials apart from reform documents. This leads to great inadequacies in the availability of material suitable to local needs and a consequent dependence on Anglo-Australian materials.

One approach to the problem is self-reliance publishing as has been attempted by the Law Faculty. This principle could be extended to practitioners' works and scholarly mimeography, and even to the law reports. It is not necessary in an underdeveloped country such as Papua New Guinea for legal literature to be in the highly polished form favoured by commercial publishers. Where cheap technology exists such as photo-offset printing, this should be used. A considerable improvement in quality of print can be gained by use of relatively cheap devices such as automatic typewriters. The main advantage of such self-reliance publishing would be a relative independence from the editorial policy and the market considerations of the Anglo-Australian publishing houses. Its disadvantage lies mainly for the authors, who may find that there is less status associated with such ventures.

In many ways, the localisation of literature in this country would be greatly improved by a rationalisation and expansion of the publishing function of the University. As the University is a teaching and research institution, it is right that it should have a wider responsibility to the legal community. Financial considerations make such wider responsibility unlikely and may even bring into question existing responsibilities. It is important, therefore, that additional financial resources need to be made available either to the University, which would then be able to expand its present functions, or to a specialised law publishing body. Twining has proposed a law publication revolving fund on the Scottish or Irish model.[54] Such revolving funds operate by financing publishing ventures through commercial law publishers. Publication therefore becomes economically viable for the commercial publisher. The fund receives the receipts from sales. If administered efficiently, such a revolving fund would provide services without being a drain on the national resources.

In the context of Papua New Guinea, it may be more relevant to utilise such a fund for self-reliance publishing rather than make the otherwise inevitable arrangement with Australian commercial publishers. If the University is willing to shoulder the responsibility, it may be appropriate to put it under the aegis of the Legal Information Centre.

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54. *Ibid.*

## 6. Regionalism and Internationalism.

On the surface, there appear to be great advantages in international co-operation between the developing countries, and particularly between the developing common law countries. A work which would be of common interest to lawyers in developing countries generally could get over the disadvantage of the lack of market in small jurisdictions. A particular area in which there may be common concerns is the discussion of policy issues related to law, such as the role of law in development, the structure of the legal profession, the decolonisation of the law,55 the law relating to public enterprises, and the control of foreign trade and foreign investment.56 The whole area of international law has problems in which developing countries which were left out of the formative stage of international law have common concerns.57

Unfortunately, the emphasis to date has largely been on regional literature. For example, India is entirely self-sufficient in law materials. In Africa, apart from some works of a general nature on African law, most of the effort has been on the subregional or even on the individual country basis. This can be seen, for example, in the *Law in Africa* series produced by Sweet and Maxwell.58 The *African Law Reports* series provides an attempt at producing primary source materials. This regional or national bias in literature in developing countries makes it difficult for such works to be used as other than secondary reference works in Papua New Guinea.

There is need for materials which are more general in nature but attuned to the needs of developing countries. This is not easy, however, the main problem being that legal balkanisation becomes an even greater reality after independence than during the period prior to it. For example, there is little interaction between lawyers or legal academics in African countries. Political developments also lead to different countries going in different legal directions. A change-oriented literature should, in fact, be able to capitalise on these differences. Yet, the task of the researcher attempting to produce such general works must be very heavy.

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55. Note in this respect, the *Studies of Law in Social Change and Development* series published jointly by the Scandinavian African Studies Institute, Uppsala, and the International Legal Center, New York.

56. See, e.g, Y. Ghai (ed.) *Law in the Political Economy of Public Enterprise* (Studies of Law in Social Change and Development No. 1, Scandinavian African Studies Institute, Uppsala and International Legal Centre, New York, 1977).

57. F. Okoye, *International Law and the New African States* (1972), again deals only with Africa.

58. Exceptions include, R.B. Seidman, *A Sourcebook of the Criminal Law of Africa,* (1966) and F. Okoye, *op. cit.*, The series produced by the Scandinavian African Studies Institute may, on the other hand, be deliberately aiming towards a pan-African audience.

Thus, although it may be desirable to move towards producing legal literature of a general nature for developing countries, it is clear that the obstacles (both in terms of research and writing and publishing) are great and many.

## 7. Communication of the Law to the People

In western countries a growing, but still inadequate, amount of popular literature plus some radio and television programmes dealing with law are becoming a feature of popular culture. Such developments are not easily achieved in places like Papua New Guinea where there is a general lack of resources. Non-literacy, and the fragmentation into several hundred language groups pose difficult problems. Lingua franca exist, such as Pidgin and Motu, but there is no universal medium of communication.

In the circumstances the only relevance of popular writing on the law is for the better educated groups.59 The University Extension Programme attempts to fulfil this need by producing simple pamphlets of general interest.60 The Law Reform Commission, in an attempt to get its ideas across to as wide a section of the educated population as possible, has produced their pamphlets complete with bright, eye-catching covers. It has started the practice of providing simple summaries of reports in Motu, Pidgin and English. The Commission does much work in explaining at meetings and seminars the existing law to the people as a prelude to soliciting suggestions for change.

These attempts, however, do not reach the majority of the rural and urban people. And yet, because of the important legal changes taking place in Papua New Guinea which are establishing the path toward development, the need for communication between the government and the masses is particularly great. At present, apart from a few adventurous experiments, the normal modes of "mass" communication are the radio, and government officials visiting an area and talking with the people. The provincial radio networks play a useful role, but do not seem to have worked out any co-ordinated strategies for mass-communication. A recent study has indicated that very little of the message of the information media gets through to the people.61

A government intent on involving the people in its strategies needs to pay great attention to adult literacy. Unfortunately, no drive for literacy exists at present. Moreover, communication must be seen in wider terms than the written word. Experiments are taking place in Papua New Guinea with rural films, slide-shows, discussion groups and mobile and village libraries. The latter would include, apart from books and newspapers, posters, radio, tape-recorders and film-projectors. The ideal is both to teach and learn from the people.

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59. School teachers, for example, may help the masses to understand the law.

60. Pamphlets have been produced for example, on the Constitution and making a will. There is no strategy on what subjects need to be covered.

61. H. Barnes and D. Turner, "Information Services in the Rural Areas" (Unpublished paper, 1975).