ECONOMIC DEVELOPMENT AND THE CHANGING LEGAL SYSTEM OF PAPUA NEW GUINEA

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Papua New Guinea, which gained its independence from colonial rule on 16 September 1975, is an island nation located in the South Pacific between Australia and Indonesia. Though small in size and population,[1] it is a country of great contrasts. The terrain varies from the palm-shaped beaches and rain forests of the coast to the rugged mountains of the interior, and the climate from low-lands tropical heat to the perpetually temperate spring of the high mountain valleys. The people vary, too, from lithe coastal Polynesians to the hardy Melanesians of the mountains, with occasional admixtures of Micronesian and Malay.

Colonial rule and the vagaries of development have imposed further contrasts upon the country. The economy, divided between an export sector based on capital-intensive technology and a subsistence agricultural sector characterized by minimal use of technology, suffers from extreme disarticulation. The most obvious example of high capital intensity is Bougainville Copper Ltd., a copper mine, 53.6% of which is owned by an Australian subsidiary of the Rio Tinto Zinc group of companies based in the United Kingdom, 20% by the Papua New Guinea government, and 26.4% by public shareholders. In 1973-74, the production of some 4,000 workers amounted to $270 million, an average productivity of nearly $70,000 per worker.[2] In contrast, the entire subsistence output of over 2 million people was estimated at $165 million in the same year, or little more than $80 per worker.[3]

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Aside from the copper mine, Papua New Guinea's modern sector consists of a few urban centers, located on the coast and along the highways of a nation otherwise comprised of small rural villages, where technology is simple and clan kinship systems predominate. Within the towns, air-conditioned office buildings tower above the tin roofs of squatter settlements. The only occupations of almost 50 percent of the population are still subsistence gardening, hunting, and fishing, and the mean income for this sector has been estimated at no more than $130 per year.[4] In contrast, the mean annual wage of the 60,000 Papua New Guineans employed in the urban sector was approximately $2,300 in 1975-76.[5] This small urban-sector work force is almost equally divided between government and private industry, with approximately 30,000 in the public service, education, and defence forces, and 30,000 employed by companies and individuals.[6] The urban workforce is divided between the large proportion of workers who earn the minimum wage of $1,500 per year and public servants in the higher echelons of the bureaucracy who may earn more than five times that amount. There is also a growing number of small businessmen. Between the extremes of the urban worker and the subsistence gardener lie those who enter the modern economic sector only tangentially or occasionally. It has been estimated that more than half the people in Papua New Guinea grow small plots of coffee or other cash crops for the market, earning on the average $400 annually for this endeavor.

To further complicate the picture, the colonial era has left a public service and many businesses still heavily staffed by expatriates, who continue to draw salaries considerably higher than those of their Papua New Guinean counterparts. In 1976, 36,000 expatriates remained in Papua New Guinea, down from a pre-independence high of over 55,000. Most of these were Australians, and most were employed by government. Their mean annual income was $12,500 (compared to a mean of $2,300 for Papua New Guineans employed in the modern sector, and $180 for Papua New Guineans overall).[7]

Papua New Guinea is not unique in the fragmentation and the accelerating class distinctions that characterize it today. Like other Third World countries, it moved directly from colonial rule to an economic situation that some social scientists characterize as neo-colonialism and others call development. There are numerous theories about the proper aims of development and the procedures most likely to ensure those aims, and Papua New Guinea has in recent years been subjected successively to various development programs based on several of the more

important theories. Though intensive efforts to develop Papua New Guinea's economic and social resources did not begin until 1963, the country has become in that brief period almost an object lesson on different development models.

A striking feature of development, as it has taken shape both in Papua New Guinea and other Third World countries, has been the reliance on law as an initiator and shaper of the development process. In this paper, we shall begin by outlining briefly the major development models that have been influential in Papua New Guinea and contrast these with an alternative theory. We shall highlight the relationships between these models and the law. Our ultimate aim, aside from demonstrating the interdependence of law and economic change, is to explore the possibilities for Papua New Guinea's future as revealed by the lessons of her recent past.[8]

I. MODELS FOR DEVELOPMENT

Most developing countries, including Papua New Guinea, are linked through trade, investment and borrowing, with international venture capitalism and with major western nations that represent that system. A significant minority of developing nations, however, including China, Vietnam and Cuba, are not part of this system. And some countries -- Tanzania is an example -- are attempting to pursue a middle way, nationalizing large sectors of the economy in order to construct socialism while retaining some links with foreign capital.[9]

If the purpose of a development model is to explain underdevelopment, and to suggest ways a country can cease to be underdeveloped, then the crucial issues in development theory should be the nature of the link between a country's development and its internal political and economic system and the relationship between the country's economy and international capitalism. Much of Western development theory has been based upon the assumption that development will occur only if underdeveloped countries practice liberal democracy at home and establish close ties with international capital abroad.[10] We have termed this model of development "diffusionism" because it posits that development results from the diffusion of western ideology (including western political and legal values), western technology and western products to underdeveloped countries and the diffusion of the raw materials produced in underdeveloped countries to the west.

In the last 15 years, the proponents of diffusionism have come under severe criticism from people like Andre Gunder Frank, who see in the ties of developing countries to world capitalism the root cause for the continuing lack of development of such countries.[11] Frank has used the term "development of underdevelopment" to describe his alternative theory of the causes of underdevelopment and the means to achieve development. It is the second model which we shall discuss. The third major development model attempts to achieve for the developing countries the redistribution of wealth and the political and economic equality that are often promised by the revolutionary ideals under which campaigns for national liberation are conducted, without foresaking the economic growth that is assumed to accompany capitalist investment and trade. It is, in other words, an attempt to follow Frank without entirely foresaking diffusionism. We have borrowed the name "redistribution with growth" for this model.[12]

A. Diffusionism

Many development theorists assume that the solution to the problems of the Third World lies in creating economic systems in these nations that are copies of those of the West.[13] This "diffusionist" approach is summarized by Manning Nash:

> . . . the general features of a developed economy are abstracted as an ideal type and then contrasted with the equally ideal typical features of a poor economy and society. In this mode, development is viewed as a transformation of one type into the other . . . The second mode is the acculturation view of the process of development. The West diffuses knowledge, skills, organisation, values, technology and capital to a poor nation, until over time, its society, culture and personnel become variants of that which made the Atlantic community economically successful . . [14]

While diffusionism continues to be encouraged in many countries, especially in its economic implications, its shortcomings have begun to emerge. Brazil, Uruguay and Chile are excellent examples both of the economic emphases of diffusionism and of its drawbacks. The trend in these countries is towards authoritarian political systems, despite diffusionism's promise that the adoption of western economic structures will ensure liberal democracy. While the diffusion of capitalist economic values might occur, there is no real diffusion of liberal democratic values. Given this trend, some western development theorists have accommodated authoritarianism, justifying it on the basis of cultural specificity or on the necessities imposed by rapid change in pre-democratic societies. Apter has put it in this way:

> Such systems require both sympathy and understanding. The language of politics needs to be adjusted in part to account for them. All lie somewhere between the familiar extreme categories of political forms. To approach such societies as pre-democratic allows us to view certain institutions of coercion as perhaps necessary to the organisation and integration of a modernising community.[15]

A more likely explanation for the inability of liberal democracy to accompany economic liberalism in former colonial societies is that the interests which continue to dominate the economy after independence find it convenient to continue the machinery of the colonial state in another form.[16]

The other political failure of diffusionism has been its unpopularity with the masses in developing countries when the full implications of free-enterprise capitalism -- for example, westernization of culture and the growth of poverty and unemployment -- become apparent.

B. Development of Underdevelopment

The assumptions of diffusionism are challenged most directly by the theory of the development of underdevelopment. This theory is based on a general critique of the capitalist system, and on the consequences of the integration of developing countries into the western capitalist system in particular.[17] It considers the existence in a country of dual, nonintegrated economic sectors -- one traditional and one modern -- to be less important in explaining lack of development than is the integration of most economies into the international capitalist system. As Frank puts it:

> It is widely believed that the contemporary underdevelopment of a country can be understood as a product or reflection solely of its own economic, political, social and cultural characteristics or structure. Yet, historical research demonstrates that contemporary underdevelopment is in large part the historical product of past and continuing economic and other relations between the satellite underdeveloped and the now developed metropolitan countries. Furthermore, these relations are an essential part of the structure and development of the capitalist system on a world scale as a whole. A related and also largely erroneous view is that the development of these underdeveloped countries and within them of their most underdeveloped domestic areas, must and will be generated or stimulated by diffusing capital institutions,

> values, etc., to them from the international and national capitalist metropoles. Historical perspective based on the underdeveloped countries' past experience suggests that on the contrary in the underdeveloped countries economic development can now occur only independently of most of these relations of diffusion.[18]

The most powerful evidence for the development of underdevelopment theory is the state of the Third World, caught in a spiral of increasing poverty in which the gap between the rich and the poor is ever widening.[19]

At the same time that it restores a historical perspective to development theory, the theory of the development of underdevelopment also emphasizes class analysis, which western development theorists consider irrelevant.[20] The development of underdevelopment theorists assert that international class relations also dominate class relations on the internal level in developing countries.[21] These theorists point out that the dominant contradiction both internationally and within underdeveloped countries is between the international bourgeoisie (which is represented in the developing countries by the multinational enterprises) and the masses. In developing countries, the local ruling class also plays a key role in class relations because of its control of state functions and power. Normally, it believes that its interest lies in an alliance with the multinationals. However, in an increasing number of states the ruling class has attempted to break away from the dominance of international capitalism by pursuing policies of economic non-alignment; one example is the construction of state capitalism which permits the local ruling class or the nation to accumulate capital in its own behalf instead of allowing that capital to be drained away by foreign investors. Thus, in countries such as Tanzania, the government began by nationalizing important segments of the economy, seeking to reduce the dominance of the foreign private sector so that it would become subsidiary to the nationalized sector. According to Oskar Lange:

> The development of a nationalised sector and its more rapid growth than that of the private sector of the national economy is, under present historical circumstances, a necessary condition for the industrialisation of the underdeveloped countries.[22]

The concept of class is crucial to the theory of the development of underdevelopment, which posits that the underdevelopment cycle can be broken either through the national ruling class organizing itself into a bureaucratic bourgeoisie for the purpose of a national accumulation of capital or through the workers and peasants overthrowing the national

ruling class in the process of proletarian socialist revolution. In many underdeveloped countries conditions may not be right for a socialist revolution. In the circumstances, state capitalism is considered a progressive alternative by some adherents of this theory.[23]

Like any theory, that of the development of underdevelopment must be subjected to experience in order to test its validity. Has it, in fact proved true that economic development will not occur unless the developing country severs all ties with the international capitalist system? Recent history tends to suggest that the theory holds true at least insofar as it posits that developing countries pursuing diffusionist policies will not achieve the benefits said to accompany development -- a stable and progressive political system, an industrial sector well integrated with the rest of the economy, and a share by all classes in the society's new wealth. Integrated national development has not occurred in most cases. Even pure economic growth has occurred only in certain circumstances: in the oil states, which possess a near monopoly over scarce resources and have achieved the difficult task of united action; in those states so richly endowed with natural resources relative to population that even unfavorable contracts with the multinationals may still produce economic growth.[24] A third situation conducive to growth occurs where one Third World state has obtained a favored position because it was the first to develop its extensive natural resources and to acquiesce to the desires of multinational enterprises. Brazil is an example of this last category:

> Brazil's high rate of growth in industrial production, attained in the last five years (1968-72) after a period of relative stagnation (1961-67), has been obtained through very successful governmental policy which aims at attracting the MNC (Multinational corporations) and fostering the expansion of branches of such corporations already installed in the country. By various means the government has been guiding the process of income distribution in order to produce the demand profile most attractive to the MNC's.[25]

However, in all these situations, though economic growth takes place, its benefits are claimed mainly by the multi-national corporations and by a small elite within the country which channels the proceeds of growth to satisfy its consumption demands. The standard of living of the masses remains low or declines further.[26] Thus, for the masses of people in the Third World, diffusionism is still underdevelopment, even when it has produced economic growth.

C. Redistribution with Growth

The theory of redistribution with growth attempts to seek a middle ground between diffusionism and the Frank school, hoping that a way can be found to improve the standard of living of the masses in developing countries (to redistribute some of the benefits of economic development to them) without depriving Western capitalism of its Third World producers and markets. The model has been worked out in a series of papers commissioned by the International Labor Organization and the World Bank.[27] While conceding some value to the theory of the development of underdevelopment, the proponents of redistribution with growth consider that its practical application -- i.e., withdrawal from the world economy -- would be dangerous or, at least, dubious:

> There are uncertain gains and enormous costs in withdrawal from the world economy, even on a partial basis or for a limited period. For a small country, many forms of withdrawal are virtually impossible as shown by the limited extent to which withdrawal has been practiced even by those states which have emphasised economic independence and self-reliance. The principle of greater selectivity towards foreign investment and imports is widely acceptable. But what this means in terms of specific policies in any particular instance is much more debatable.[28]

The World Bank's theorists are willing to forego some economic growth, if the sacrifice will result in a more equitable distribution of benefits. The strategy emphasizes the role of the state in this redistribution of benefits through the ability of the state to intervene in major areas of policy, including the allocation of capital resources.[29] However, a mixed economy -- with both private and state-owned elements -- is to be retained. The state is to have more functions than it would under pure capitalism. It is, for example, to control foreign investment so that investors serve national needs. The alleviation of unemployment through the creation of job opportunities -- for example, by encouraging the informal sector and by devices to ensure redistribution into rural areas -- is also conceived as a state function in this model.[30] The role assigned to the state has the necessary implication of an increase in the size of bureaucracy and of the bureaucracy's intervention in the management of the economy.

The redistribution model posits no contradiction between foreign investment and development. Whereas the development of underdevelopment model assumes that development will come only through the ownership by the state or by the masses of at least the important sectors of the economy and the subordination of foreign investment, the redistribution model assumes that it is only necessary to control the foreign investor by rules and regulations that encourage him to be a "good citizen." Secondly, it assumes that a country cannot achieve any redistribution of wealth from the elite to the masses unless it sacrifices some of the economic growth based on foreign investment. The model assumes that the best a developing country can do is to ameliorate the social problems created by growth. Thirdly, it assumes that redistribution can be accomplished without revolution, without even an election, that the ruling class of a country will sacrifice some of the benefits of economic growth which it had been receiving and give these to the masses. In fact, the elite has seldom been known to sacrifice more than the palliatives necessary to maintain mass support, and even those are curtailed in times of world recession or when the threat of popular discontent is assumed to be low.

II. DEVELOPMENT MODELS AND THE LAW

Any approach to development chosen by a post-colonial society will demand some transformation of the colonial society though the transformation will take different forms depending on the development model being pursued. As part of the superstructure of society, the law will reflect the effects of this transformation, and at times, the law will be used as an instrument in this transformation. Where the development strategy supports the interests of all classes in that society, the law will be effective as an instrument of change, but whether or not effective and whether or not consciously used as a developmental tool, the legal system will reflect the changes taking place in society.[31]

In this part we shall examine the ways in which the law adapts to changes in development strategies. Since the base from which any change takes place in post-colonial societies is the colonial law, we begin our review of the role of law in the development process with a discussion of the nature of colonial law.

A. The Nature of Colonial Law

A view of colonial law, widely held during colonial times, was that it was a civilizing influence, producing order and rationality where

before there had been nothing but savage anarchy:

> British administration in overseas countries has conferred no greater benefit than English laws and justice. That may be a trite observation but I offer no apology. It has been said so often by so many people - as many laymen as lawyers and perhaps by more Africans than Englishmen - that it must be assumed to be true.[32]

But more enlightened thinkers, like Woddis, have pointed out that the law imported by the metropolitan power functioned primarily to exploit the colonized:

> This overall political power (of the colonial state) was directed to two main objectives - to keep the colonial people in political subjection; and to make possible the maximum exploitation of the people and the country's resources. This was clearly reflected in the laws and Government decrees.[33]

According to Woddis, colonial law was a specific instrument for achieving the objectives of the colonial state. The law exported from England to the colonies was not the common law of England but a colonial version of that law. The colonies received neither the system of checks and balances which restrained the excesses of English justice nor the statutes which mitigated its hardships.[39] Justice was dispensed to the majority of the colonized population by colonially appointed native courts or by members of the colonial administration.[35] Injustice was also facilitated by a discriminatory form of legal pluralism, under which different systems of law were applied to colonists and colonized. The only area where English law was more or less fully applied was in the export-dominated commercial sector, where the only litigants tended to be expatriate individuals and companies.

B. Diffusionist Law and Development

The view that colonial law is not the same as "modern" English law is implicitly accepted even by proponents of diffusionism. The diffusionists are of two kinds -- those who see the modernization of law as an expression of development and those who see it as the major instigator of development.[36] The two schools are united in their belief that "modernization" and "westernization" are the same, and that westernization is a desirable goal.[37]

Galanter cites eleven attributes that developing countries should try to attain in order to have a "modern" legal system,[38] including: the association of the law with a hierarchical system of courts run by professionals on the basis of bureaucratic organization; a clear differentiation between the finding and application of law by the courts and the operation of other governmental processes; the imposition of universally applicable obligations by means of unvarying rules of a territorial rather than personal nature; rules based on transactions rather than status.[38] In effect, Galanter has described the English or American legal systems as lawyers would like those systems to operate.

Two aspects of colonial law are considered by the diffusionists to be particularly inconsistent with the attempt to "modernize" legal systems. First, the colonial system's toleration of legal pluralism is derided for permitting customary law to flourish, even in truncated form:

> Custom does not merit respect. It is the fault of custom that African societies have remained at an extremely low level and it is the cause of underdevelopment in all its forms.[40]

Second, colonial law is criticized because as a legal system it is neither specialized nor bureaucratized. The courts that affect most people in the colonial system are either native courts established by the colonial regime or hearings run by administrative officials.[40]

A close companion of the modernization of law theory is the theory of modernization through law, which sees the law as an instrument for introducing modern values and practices into society. Since legal reforms are viewed as ways to bring about change in society and since the desired change is westernization, law-makers emphasize the transformation of traditional agriculture through the individualization of land tenure, or the development of a free enterprise market economy by introducing the kind of commercial laws that suit foreign investors.[41] The reforms also attempt to create a westernized ruling class -- first, by giving the new middle class access to institutions previously reserved for the colonial interests, and second by alienating the middle class from traditional life. The alienation of the new elites is accomplished in part by the passage of laws that promote individualism at the expense of group ties and that depersonalize social relationships:

> A modern system breaks the tie of law with local and group opinion - this can be liberating for the dissenter and the deviant. The individual is freed from the prescriptive usage of the local group; the group itself must now be responsive to the norms of a much wider collectivity.[42]

Development through law has its limits. New laws cannot ensure the creation of liberal democracy, for example. Diffusionists who attempt to use the machinery of the state, the legal system, to impose liberal political values are assuming that law alone can succeed in the face of contrary trends in the society. Engels has pointed out that this is impossible:

> We discover that in modern history the will of the state is on the whole determined by the changing needs of civil society by the supremacy of this or that class, in the last resort by the development of productive forces and relations of exchange.[43]

Diffusionism through law fails to promote liberal democracy because of the structure of the state in most developing countries. This structure is often based on authoritarian rule by a class which uses its power to monopolize access to economic institutions. Thus, those aspects of diffusion that support the self-aggrandizing ends of the ruling class will always succeed, whereas the legal system's expressions of liberal democracy too often remain only a superstructural facade, if that.

In the post-colonial situation, the new ruling class finds it quite acceptable to perpetuate the machinery of the colonial state for its own benefit. Thus Leys has pointed out that in Kenya the authoritarian machinery of the colonial state was maintained after independence and is now used to perpetuate the partnership between the local ruling class and international capitalism.[44]

C. The Development of Underdevelopment and Law

Theories of revolutionary change accord little importance to the role of law. The law is seen as an instrument of class rule rather than the disinterested fount of justice for all classes that the diffusionists like to imagine, and revolutionary theoreticians point out that legal changes cannot transform reality unless they are in harmony with the political and economic structure of socity. This determinism is not absolute, however:

> The economic structure is the basis but the various elements of the superstructure - political forms of the class struggle and its results, to wit constitutions established by the victorious class after a successful battle, etc., juridical forms and even the reflexes of all these actual struggles in the brains of the participants, political, juristic, philosophical theories, religious view and their further development into systems of dogmas - also exercise their influence upon the course of historical struggles and in many cases preponderate in determining their formation.[45]

Thus, while revolutionary theorists place their primary emphasis on the political and economic transformation of society and on the severance of links with international capitalism, they agree that a revolutionary transformation of society does not automatically determine the shape of the law, and, at the same time, that while legal changes by themselves cannot transform society, they may not be totally ineffective.

The law plays an important role in disentangling the national economy from international capitalism. In a country gradually building state capitalism, the state must be organized to take over large sectors of the national economy. New relationships must be established with foreign investors in which the latter take a subordinate rule, through devices such as management agreements. There are likely to be moves towards the control or limitation of private economic rights, which may often lead to a substantial change in the role of law and the legal system. In particular, the private legal profession is likely to disappear. However, the ruling class under state capitalism often finds it necessary to preserve the machinery of the colonial state in order to perpetuate its power.

The law may also play a role in effecting more revolutionary changes. Those legal institutions that supported colonial rule or are likely to be devices for middle-class rule in the future are dismantled.[46] A bureaucratic legal system based on Weberian rationality is replaced by a system that emphasizes popular justice, defined as participation by the people. Thus, customary legal rules and institutions are often revived as a means of accomplishing this transformation.[47] The goal in such a resurgence of customary law in the context of revolutionary change is the building of socialism, not merely the idealization of a customary or pre-colonial past.

D. Legal Implications of Redistribution with Growth

The model of redistribution with growth has not yet generated very much legal theory. It concentrates on ameliorating the impact of a

development strategy otherwise aimed entirely at economic growth. Such amelioration requires much involvement by the state, which may use the law as its tool, not to end the country's economic relationship with the international capitalism, but to impose greater controls over international trade and investment.

The law would also be used to allow the masses greater access to government decision making to redistribute wealth to the masses (for example, through royalties to landholders or by requiring foreign investors to train and employ nationals), and to cushion the dislocating effects of the development process upon nationals.[48] Where diffusionism values the depersonalization of social relationships in order to create the individualism believed necessary to release free market forces, redistribution aims to protect people from overly rapid or radical social change. In the context of a traditional society such as Papua New Guinea this means the creation of legal institutions which, though they promote development, are nonetheless recognizable adaptations of traditional institutions.[49]

Amelioration of the adverse effects of rapid change is an important reason for giving legal recognition to traditional dispute-settlement procedures.[50] These traditional procedures are also useful in that they bring the law to people in rural areas at relatively low cost. The legal services required by western-style courtroom procedure would be prohibitively expensive in a Third World country, in terms of both monetary and manpower resources.

A major goal in countries pursuing the model of redistribution with growth is the reduction of unemployment. Two methods by which this is attempted are the promotion of traditional economic institutions in rural areas and of the formal sector in the cities (street trading, for instance). The role of law in such a program is to be self-effacing, through repeal of the many legal obstacles developed during the colonial or diffusionist periods, such as licensing and building regulations, that inhibit the traditional and informal sectors.[51]

We would expect a legal system based on the redistribution with growth model to follow the diffusionists in giving to law a major and instrumental role in social and economic change. Although the ideal of redistribution resembles that of the revolutionary theorists, the failure of the former to contemplate structural change in the economy or in class relationships means that far-reaching structural change will not occur in the legal system either. Those legal changes that are made in countries embracing this model may have little effect, because enactment, interpretation and enforcement of the new laws ostensibly aimed at

redistributing benefits from the elite to the masses will be the responsibility of the legislators, administrators and judges whose interest as members of that elite would be harmed.

III. THE DEVELOPMENT OF PAPUA NEW GUINEA'S LEGAL SYSTEM

We shall now turn from the theoretical framework within which we view changes in the legal systems of developing countries to a case study of Papua New Guinea, in order to illustrate the interaction between development models and the legal systems that accompany them.

Our review only takes Papua New Guinea from the onset of the colonial period at the end of the nineteenth century to independence on September 16, 1975. Thus, we omit two phases in the development of the legal system that are of great importance -- the long and fruitful period before colonialism when customary law and customary dispute settlement mechanisms were supreme, and the period after independence. Our narrowed focus, however, allows us to investigate in some detail the process of change from colonialism to independence. From colonization to 1975, Papua New Guinea went through three distinct phases: (1) Colonialism began in the 1880s but reached its peak when Australian rule was re-established at the end of World War II, following the Japanese occupation of much of New Guinea. (2) The period from 1963 to 1972 saw immense changes and frantic, almost tumultuous activity on the part of the colonial administration because, after years of colonial rule, it had suddenly been decided that Papua New Guinea must be readied for independence as rapidly as possible. The Australian Administration initiated a concentrated and all-out effort to modernize Papua New Guinea on all fronts, embracing the principles of diffusionism with unprecedented fervor. (3) In 1972 Papua New Guinea became self-governing, though not yet independent, and the elected coalition government set out to undo what it saw as the ills of colonialism and diffusionism, and to achieve redistribution with growth.

A study of the development of Papua New Guinea's legal system during these three phases shows, once again, that the relationship between approaches to development and the legal system is two-edged. On the one hand, the development model had an effect on the character of the legal system and laws, which were markedly different in the colonial, diffusionist and redistribution periods. On the other hand, the legal system was used in each of these periods as a tool for implementing desired policies, so that the development model was itself shaped by law and legal policy.

A. THE COLONIAL PERIOD

Although we treat the period from colonization to the 1960s as a whole, shifts of policy did occur within it. From the 1880s until World War II the Australian territories of Papua and of New Guinea were administered separately; nevertheless, they were subject to policies that did not markedly differ. The government sought to pacify the local inhabitants through a system of very direct rule, thereby providing a base for European economic activity in the mining and plantation sectors. However, with few exceptions, the colonies were not regarded as very significant either by Australia or by the rest of the world, and the scale of expatriate activity within them was never great. World War II brought administrative unification of the two territories, but little in the way of economic or legal development, except that labor laws were implemented more harshly and more inhumanely. In the period 1945 to 1949, the Labor Party was in power at the federal level in Australia, and its social reformist policies were reflected to some extent in policies towards Papua New Guinea. That government's strong commitment to the United Nations, the conversion of New Guinea to a Trusteeship, and the emergence of a Third World bloc, combined to bring Australian colonial policy under closer international scrutiny. A conservative government replaced the Australian Labor Party in 1949, and remained in power until 1972. This change in government led to a reaffirmation of the primacy of Australian capitalist enterprise as the mainspring of economic development in Papua New Guinea, but when Paul Hasluck became the Minister responsible for the Territories in 1951, he emphasized a more moderate pace. Hasluck's main contribution was the establishment of an administrative base on which later development rested, but some diffusionist policies do have their roots in this period.

The lands that now comprise Papua New Guinea (namely, Papua to the south and New Guinea to the north and east) were colonized by Germany (New Guinea) and Britain (Papua) in 1884. Though German interest in the former Territory of New Guinea was generally related to the commercial enterprises of German traders who had operated in the south-west Pacific from the 1850's, the immediate cause of annexation was the formation of the Neuguinea Kompagnie by a consortium of German financiers and businessmen. The charter granted to this company in 1885 was the basic constitutional document for the colony until 1899, when it was revoked after the bankruptcy of the company, and the Reich assumed full control.

German control of New Guinea ended in 1914, when Australian military forces occupied the colony at the invitation of the British government. In Rowley's view, "The response can easily enough be explained if only by reference to a background of competition between German and Australian firms for the copra and stores trade of the south-west Pacific."[52] The Australian government assumed formal legal control over the former German colony when the Council of the League of Nations conferred on Australia a Class C Mandate. Australian spokesmen at the time emphasized the strategic importance of New Guinea to Australia, and no doubt this formed an important element in their eagerness to obtain full control. However, there was also considerable emphasis upon the commercial prospects of the territory, an emphasis that seemed misplaced for many years, since Australia was to do very little to develop the territory commercially until the 1960s.[53]

The former colony of Papua also has a complex constitutional history. It was declared a British protectorate in November 1884 (after an abortive annexation by the Queensland government in 1883), transformed into a colony in September 1888 (once the Australian colonies had agreed to finance it), and became a territory of Australia in September 1906. It is the view of Joyce, the leading Australian historian of the period, that "The primary Australian interest in New Guinea was economic . . . ."[54] There were policy differences between the British government and the governments of the Australian colonies. In general, it may be said that the British were less solicitous of commercial interests, and the action of the British in originally annexing Papua can be interpreted as a move to protect the indigenous population from the Australians. The British were criticized in writings by Australian interests of the time for being too protective of natives. In the 1890s, however, the clash became one between the interests of British capital on the one hand and Australian capital on the other. Australian policies and Australian capitalists prevailed after 1906.[55]

The assumption of Australian control over Papua produced statements of colonial policy which were not substantially altered until after World War II. In 1905, Atlee Hunt, the permanent head of the Australian ministry responsible for papua, advocated that the goals to be sought were:

> to encourage the development of the country under the European auspices by the employment of imported capital to be expended under European direction, employing native labour, and at the same time to extend the influence of the Government until the whole Possession is brought under control.[56]

The so-called White Australia Policy was another important component of Australian policy in and towards its colonies. Joyce argues that the policy underlies the neglect by Australia of the welfare of Papuans, and cites one instance where labor law was altered to prevent Papuans from entering Australia.[57] The influence of the policy was more clearly evident in New Guinea than in Papua. During the discussions with the League of Nations which led to the Mandate, the Australian Prime Minister insisted that Australia be able to apply the White Australia Policy to New Guinea. His primary objective was to halt further migration by Japanese and Chinese into the territory, an objective which the Australians pursued for many years thereafter. In New Guinea the White Australia policy coincided with the interests of Australian commerce, which wished to keep out Japanese businessmen and to minimize competition from the resident Chinese.[58]. However, Australian planters in New Guinea, who wanted to be able to import labor from India and Southeast Asia, opposed the implementation of the policy within the territory.[59]. The white Australia Policy also underlay restrictions placed on travel by Melanesians and Asians to Australia. A central assumption of the White Australia Policy is that other races, particularly Melanesians, are culturally inferior to Australians, an assumption that might explain other important aspects of Australian policy in its colony, such as the Australian preference for direct rather than indirect rule and the constant concern for maintaining racial distinctions in all areas of colonial life.

Australia's long rule over Papua and New Guinea was characterized by a mixture of authoritarianism and neglect. Until well after World War II, most people in and most governments of the mother country were essentially uninterested in the tropical possessions. The plantations that had been acquired free from the Germans were sold at low rates to Australians who had served in World War I, thus performing the double function of adding to the government's treasury and rewarding returning soldiers. For a few years in the 1930s the discovery of gold near Bulolo provoked a rush of immigrants, but interest in the mines dwindled when it became evident that they did not contain vast riches.

Other than that, Papua New Guinea simply had little to offer most Australians. Once the developed German plantations had been sold, few new settlers could be convinced to hack plantations out of the rain forest. After all, Australia itself still possessed millions of acres of undeveloped land. The colony provided neither raw materials nor a rich market for manufactured goods. Even as a source of cheap labor it was limited. Transportation into the rugged interior or along the marshy and malarial coast was difficult, with natural hazards compounded

by fear of the inhabitants; consequently, much of the country's mineral and timber wealth remained unknown to commercial interests.

Papua New Guinea was, for the colonizers, primarily a plantation economy, heavily dependent upon the export of copra, and at times a gold mining center.[60] But it was a marginal economy at best. There were few plantations; the colony's exports never earned more than $60 million a year.[61] Although the plantations never employed more than 100,000 workers, the system of short term contract labor meant that a significant proportion of the population was influenced by the plantations over time. Many able bodied young men worked in plantations, and some cash seeped back into the villages to pay for trade store goods.

The most important legal bases for the maintenance of the colonial plantation and mining economy were the land and mining laws and the indentured labor system.

The contribution of law and legal institutions to the role of expatriate interests in the economy of Papua New Guinea will be considered by examining these three aspects, since they had the greatest influence. They operated within a system of public law designed to pacify, order, and stabilize the indigenous population so that European economic activity and other European interests might be pursued.

The purpose of the land laws was to provide for the acquisition of land by the government, which then sold or leased much of it to Australian planters. Three legal devices were used by expatriates to obtain land in Papua New Guinea.[62] First, land could be purchased from Papua New Guineans under terms set down in the Land Act, which provided controls against undue exploitation. Unfortunately these controls were often little more than symbolic, and the relatively low prices paid together with the circumstances under which many acquisitions took place created enormous resentment among Papua New Guineans. This resentment crystallized in the 1960s, several generations after most of the major land purchases had occurred, when the formation of a legal services office (termed, the office of the Public Solicitor) provided Papua New Guineans with their first opportunity to present their claims to land previously acquired from them by Australians. The lawyers of the Public Solicitor's office prosecuted a flood of land claims. The courts found ways to deny most of the claims, but Parliament reacted with new legislation which, in part, granted funds to Papua New Guineans with which they could buy back alienated land.[63]

The second device used by the Australian administration to obtain land for expatriates in Papua New Guinea was to take possession of land

deemed to be ownerless. All allegedly unoccupied land could become crown land after a "waste and vacant declaration." Since most Papua New Guinea societies practiced shifting agriculture, leaving large areas of land lying fallow for as long as six years, these declarations were often in fact expropriatory.[64]

Thirdly, the law allowed the administration to acquire land by compulsory process in retaliation for unlawful acts by the person or group who owned it.

Within this legal framework, the Australian administration and expatriate settlers acquired as much land as they required for their purposes. The pattern of Australian administration of land laws in New Guinea has been described as a system where "native claims . . . could be disregarded or dealt with administratively so as not to disturb the existing pattern of expatriate land holding" rather than one where such claims would be "judicially determined according to equity and good conscience."[65] Although official policy required that a balance be struck between the interests of the native inhabitants and the expatriates, the application of that policy often favored the expatriates. Hasluck's account of land alienation in the Highlands in the early 1950s leaves little doubt that it was done with scant regard for the official policy that a careful assessment of native needs must be made and that alienation must be accompanied by measures to improve the use of land that the natives retained.[66]

Under the mining laws, all minerals belonged to the crown, even though the surface land was held either in freehold or in customary tenure.[67] Land holders had no right to the minerals beneath their land, and though expatriate land holders received an occupation allowance from prospectors for damage to the surface of the land or improvements upon it, Papua New Guineans holding land in customary tenure did not.[68]

In both Papua and New Guinea, indigenous labor was central to the success of Australian economic enterprise.[69] Radi's comment in relation to the period 1921-41 in New Guinea is applicable to the whole period up to World War II and for a substantial time thereafter:

> Throughout the period it was generally accepted that a viable economy depended on the success of the plantation industry. The organisation of the industry made cheap labour essential, so its expansion meant more natives employed as labourers. This was the crucial factor in determining the role of each racial group. The natives should labor and the planters should profit.[70]

A ready supply of indentured labor was also esential to Australian mining activities. The law concerning labor served these needs, and was adjusted from time to time to reflect changing demand. There were some differences between the policies followed in Papua and in New Guinea, a consequence of differing colonial traditions in the two territories and a higher level of European commercial activity in New Guinea, where settlers consequently gained more influence over government policies.[71]

The feature of the indenture system that distinguished it from the general law of employment was that both parties were bound to each other for the duration of the contract, so that breach by the employee was not a matter for a civil suit in damages by the aggrieved party, as it would be at common law, but rather a matter for a criminal penalty of fine or imprisonment. Dissolution of the indenture required the intervention of a magistrate, and was otherwise not possible even by mutual consent.

In New Guinea, corporal punishment by employers was permissible until 1933, and was used informally and illegally after that time. The law did permit the use of casual or "free" labor, but on the whole employees preferred to rely on indentured labor because "The contract gives the assurance that the whole labour force will not knock off at a moment's notice and go home".[72]

In Papua, the basic law governing the indenture system was the Native Labour Ordinance of 1907 which provided for a maximum term of indenture of three years, or eighteen months in the case of mining and carrying work. Later amendments placed limits on re-engagement. A fine or imprisonment could be visited upon a laborer who refused to perform work or deserted. The ordinance did have certain provisions aimed at the protection of indigenous laborers, which permitted government supervision of the engagement, the conditions of employment, and the repatriation of laborers. A similar ordinance existed in New Guinea, but its protective provisions received less emphasis. The native affairs branches of the colonial administrations were concerned mainly with the supervision and enforcement of these standards.

It is difficult to ascertain whether the law was even-handedly administered and whether administration officials were conscientious in protecting laborers from abuses. There are observers who argue that the administration of the system was "essentially benevolent and paternalistic" and even that it was "on a human level . . . neither brutal nor particularly oppressive."[73] However, the overall impression is that Australians and other white expatriates were treated more leniently

than were indigenous workers.[74] Australians received warnings where indigenous workers were prosecuted, and sentences for convicted Australians were relatively light. There was certainly an expectation among Australians that they would be treated differently under the law, and this expectation was at times either officially recognized or reflected in specific cases. Moreover, Australians could readily violate the law with respect to their employees without being noticed or reported to the administration, but laborers were seldom able to breach a contract condition without being reported. There were also occasional situations in which government officers were themselves parties to abuses of the employment law.[75]

Other aspects of colonial law also supported the plantation economy and its labor needs. For example, payment of wages in kind, severely limited in Australia, was a feature of the colonial legal regime. Although the limited penetration of the money economy in Papua and New Guinea rendered that policy more applicable there than in Australia, it was not always popular with the workers, and its continuance may have been related to the fact that the major employers also controlled the stores.

Any attempt to organize labor would have met the full rigor of an unreformed common law, and those limited attempts that did occur were met with violent antipathy by the European community, as evidenced by the prosecutions and repression following a stike in the port city of Rabaul in 1929, and the aid given by the administration to quell another strike in Rabaul by casual workers in 1937.[76] Legal rights to compensation for injury at work were also governed by an unreformed common law. Despite the fact that work conditions, especially on the gold fields, produced abnormally high death and injury rates, there was no attempt to provide a statutory base for compensation.[77] In New Guinea, for a period, there was a maximum as well as a minimum wage scale.

Forced labor was an explicit instrument of policy under the German administration in New Guinea. Its announced aim was three-fold: to bring the indigenous population under control, to construct public works, and to maintain government plantations. The Australian military administration that succeeded German rule did not repeal the ordinance permitting forced labor, and continued to make use of it, albeit in a less systematic fashion. Forced labor in New Guinea was prohibited in 1920 by section 15(s) of the New Guinea Act, which was the constitutional charter for the administration of New Guinea until 1942. In Papua, forced labor was never given a legal base, although in 1908 an Encouragement of Industry Bill, which provided that adult males who

were otherwise unemployed on plantations should work on government plantations or public works projects for one month every year, and which was supported by both the Australian government and the administration in Papua was withdrawn only after public hostility in Australia.

Despite official opposition to forced labor, there were various devices used in both Papua and New Guinea to maintain it under other names. For example, administrative officers, in their capacity as policemen, magistrates, or gaolers, or even without any pretense to official sanction, often simply directed indigenous people to perform work. This widespread practice continued at least through the early 1960s.

Another device used to force men into labor for the plantations and administration was the imposition of a head tax on adult males. Since only Australians had money, the only way to pay the head tax was to sign up to work for Australian planters or the administration. In New Guinea, the head tax was explicitly designed to force males into indentured labor, and there was an exemption for those so employed. In Papua in 1906-08, there was strong support in Australian and Papuan government circles, and in the settler community, for a head tax to produce a labor pool, and the Encouragement of Industry Bill was drafted in that climate. Although that Bill was withdrawn, a head tax was a feature of the Native Taxes Ordinance of 1918. In debates preceding passage of that ordinance, Murray argued that the head tax was primarily designed to produce funds for the promotion of native interests, but it was nevertheless true that the ordinance stimulated natives to become indentured laborers, and there was a rise in the number of such laborers following its passage.[79]

Papuans were not only forced to work for Australian planters but compelled to produce for the cash economy on their own plantations as well. A prominent feature of the Papuan tax scheme was the Native Plantations Ordinance of 1918. By 1916, Australian settlement in Papua and Australian development of plantations had slowed considerably, and this shortfall in expected development was an important factor underlying the Ordinance, which required that plantations be developed on village land by village labor. The Ordinance introduced a system "in which the government declared native land to be a plantation, supplied the seeds and the tools, while the villagers worked out their tax upon such a plantation and shared the profits equally with the government whose own share should be paid into a fund for the exclusive use of natives."[80] Murray saw this system as supplementing European capitalist development, and saw no conflict between them, although his view was not shared by the settlers.[81]

Papua New Guineans were forced or encouraged to produce cash crops for export by various means, but the marketing cooperative, a standard means for encouraging the production of export crops in other parts of the world during the colonial period, was not tried until after World War II. It was one of a number of changes introduced in the immediate post-war period.[82] The cancellation of existing indentures in October 1945 was little more than a dramatic gesture in recognition of the sacrifices that had been demanded of the indigenes during the war. Of greater consequence were the 1946 amendments to the Native Labour Ordinance which were designed to bring the indenture system completely to an end by 1951. Thereafter, the indenture was replaced by an agreement, and employers were now left to civil remedies for each breach. However, though these changes brought about a substantial improvement in working conditions, the major elements of the system were retained. The labor agreement was not treated as it would have been at common law, for there were many elements of penalty in the remedies that could be obtained for each breach. The agreement system remained a significant source of labor through 1960.

Other aspects of the labor system also began to change in the post-war period. By the end of the 1950s Hasluck, the Australian minister, had secured the passage of a comprehensive worker's compensation law and a basic industrial safety law, against opposition from both the administration and employers in Papua New Guinea.[83] Forced labor was no longer widely used, although it was still fairly common in the Highlands. The head-tax remained in the form of a local government tax, but the rate was such that it no longer formed a heavy financial burden. The laws requiring Papua New Guineans to plant cash crops had not proved successful, and in the 1950s the concept of marketing co-operative, was at last introduced. The Co-operative Societies Ordinance 1950 and the Native Economic Development Ordinance 1951, respectively, provided complex and simple models of co-operative legislation. Ostensibly, co-operatives are group enterprises and are intended to encourage economic development. However, as Fitzpatrick and Southwood point out:

> The co-operative was basically a device used for containing group ventures. It represented a response of the colonial administration to an upsurge of group economic activity after the second World War.[84]

The economic system of the colonial era in Papua and New Guinea was founded upon an immutable caste division between

the colonizers and the colonized supported by the administrative and legal systems. Since Papua New Guinea was considered by Australia to be commercially unprofitable, the Australian legislature never provided the colonial administration with sufficient funds for more than a ludicrously small staff.[85] Faced with similar problems in Africa, the British had greatly expanded the capacity of a few Englishmen to administer vast areas by the system of indrect rule under which local leaders, though ultimately responsible to British overseers, continued to govern their people. The British also conserved manpower by maintaining a dual legal system, so that on most issues Africans were ruled by customary law.[86] But the Australian administration, wedded to the notion that Papua New Guineans were children unable to care for themselves, were loathe to use the devices the British found so effective.

For the maintenance of "law and order," the Australians relied on an authoritarian system of administration and of substantive law. The main instrument of administration was the patrol officer (called kiap by the Papua New Guineans). Though the kiaps were at the bottom of a hierarchy that wound upwards through sub-district and district officials to the Lieutenant Governor or Administrator, they had almost unlimited power--and unlimited duties--within their own domains. Each patrol officer, assisted by Papua New Guinean police constables, was in charge of all the villages in an area that might be as large as a hundred square miles. From his patrol post he kept the peace, made occasional forays into new areas to bring more villages under Australian control, protected missionaries and other expatriates under his jurisdiction, heard court cases, settled disputes, collected taxes, rounded up men to build roads and airstrips, took the census, and generally enforced the manifold rules created by the administration.

The kiap single-handedly embraced all the functions of the legal system. As an administrator, he relayed government policy to his charges. As a policeman, he arrested them when a rule was broken. As prosecutor, he charged them, and as magistrate, he meted out their sentences. This centralizing of executive, judicial, and legislative roles into one person occurred at the top of the hierarchy as well. Sir Hubert Murray, who was Lieutenant Governor of Papua from 1908 to 1940, was solely responsible for legislating for Papua until 1933, when legislative and executive councils, composed primarily of Australians, were appointed to assist him. He was also Papua's Chief Judicial Officer.[87]

Papua New Guineans had no voice in this system, which was designed to change their lives. Representatives (called luluais and tultuls) were appointed in each village, but their major functions were to round up the villagers when the kiap appeared, to provide him with men to work on the roads and other government projects, and to report infractions of the rules to him.

Patrol officers did not act by consensus. They dealt with Papua New Guineans by giving orders, and expected to be obeyed. They were assisted in maintaining this style of government by the Native Regulations which, together with the Criminal Code, were the major element of the white man's law that affected most Papua New Guineans.[88] The Regulations covered every aspect of Papua New Guinean life. They ruled the relations of Papua New Guineans with expatriates, telling Papua New Guineans that they could not remain in the white sections of towns after 9:00 p.m. and, while in town, they could not wear clothing above the waist. They ruled life in the villages, telling Papua New Guineans that they must build latrines, bury rubbish, burn brush, fill in mosquito breeding grounds, kill diseased crops or pigs, submit to examinations for venereal disease, plant trees, pull down trees, and destroy unclean clothing or bedding. The Australians even tried to promote cash crop development through the Regulations.

But whether the purpose of a regulation was the improvement of health or the provision of men to build roads, whether it was a spur to development or a prohibition of what Australians considered improper behavior, all the regulations were phrased as negative sanctions. Whatever the regulation's ultimate purpose, it attempted to achieve that purpose by providing imprisonment or a fine for anyone who disobeyed it. As Mair has said, "the theoretical basis of the system was the idea that the natives should do as they were told."[89] As a result, Papua New Guineans were encouraged to view government as an authoritarian institution that interfered in their lives only to give orders and punish wrongdoers.

The colonizers, of course, saw the Regulations as important keystones in their civilizing mission. But Wolfers has pointed out that they served other purposes.[90] Chronically shortstaffed patrol officers, constantly on the look-out for men to build patrol posts and roads or for bearers to cart supplies as they trekked from village to village, were not above drafting prisoners into these jobs, and they got the prisoners by discovering infractions of the Regulations. More basically, the Regulations were one of the ways in which a very few men could rule a very large population. Regulations governing every aspect of life, even the most personal, stifled

initiative among villagers and kept them from developing indigenous leaders or from learning to associate in ways that would threaten Australian control.[91]

Australia did not govern Papua and New Guinea by Regulations alone. A common law country itself, heir to the British tradition, it imported into its colony and territory the full panoply of common and statute law, as well as a system of common law courts.[92] But though the laws were copied almost word for word, and the courts magistrate for magistrate, from Queensland and New South Wales, they did not survive the journeys to Papua New Guinea without being changed. The most important change lay in the fact that the imported laws, lawyers and courts were not, as they may have been in Australia, a uniform system, meting out equal justice to everyone in the country. The imported legal system existed in Papua New Guinea to serve the imported expatriate community that resided in its coastal towns and on its plantations.

The court systems of both Papua and New Guinea, for example, were ostensibly unified, but contained an element of dualism that dominated in practice. The highest court in each territory, the Supreme Court, had unlimited civil and criminal jurisdiction. Below the Supreme Courts were District Courts with limited civil jurisdiction and criminal jurisdiction over non-indictable offences. The major business of all these courts concerned suits for breach of contract or for unpaid debts, the normal judicial fodder of a commercial world. Suits of these kinds involved planters, suppliers, and traders; they did not involve Papua New Guineans, who were still excluded from commerce. A Papua New Guinean saw the Supreme Court only when he had committed an indictable offence.

Courts designed to regulate the affairs of Papua New Guineans were of two kinds. Officially, there were the Courts for Native Affairs, which had unlimited civil and criminal jurisdiction "as between natives and over natives" and were the means for enforcing the Regulations.[93] Magistrates were sometimes appointed to full-time positions in these courts in the towns, but throughout most of the country the kiap served as magistrate of the Court for Native Affairs. Indeed, in many areas, kiaps also served as magistrates of District Courts.

The Courts for Native Affairs did not in fact handle many civil cases "as between natives" because the second kind of "court" available to Papua New Guineans consisted of their own dispute settlement procedures, which had been established in every village from time

immemorial. These customary courts applied customary law in customary fashion. They operated unofficially, with no support or recognition from the Australian authorities, and with occasional attempts by such authorities to stamp them out altogether, but they were the forum most Papua New Guineans preferred (and still are).[94] With no state-backed power to impose sanctions--and, in fact, with earlier powers destroyed by the hegemony of Australian laws and courts--they still managed to settle disputes and maintain peace in the villages.

Though the British had demonstrated in Africa that the colonized can be successfuly co-opted into the colonial system by recognizing and institutionalizing their courts, the Australian administration refused to give official backing to courts in which Papua New Guinean people applied customary law. Section 63 of the Papua and New Guinea Act 1949 (the umbrella legislation under which successive administrations ruled the territories) permitted the establishment of such village courts, and anthropologists conducted government-sponsored research into their feasibility, but no moves were ever made to implement this provision.[95]

Arguments against formalizing the flourishing unofficial courts were premised on a lack of respect for indigenous legal systems, a concomitant assumption of the cultural superiority of British justice, and a very clear notion of what was desirable for the colonial administration. These arguments were summarized as late as 1960 by D.P. Derham, who had been commissioned by the administration to study its courts and suggest changes:[96]

> The proposals [to create village courts] may undermine the priniciples which the Australian Government commonly accepts with respect to the administration of justice . . . The individual is more likely to receive justice through an extension of British courts than through a system of village courts.[97]

Secondly, Derham argued that it was undesirable in a society already changing under the impact of colonial policies to allow Papua New Guineans to decide their own custom in their own courts: "The question becomes one not of taking account of native custom but one of deciding who should decide new problems as they arise," and this must be "some agency of the Central Government."[98]

The administration that rejected village courts repudiated even the suggestion that Papua New Guineans be trained to serve as magistrates of Courts for Native Affairs. Early administrators had

appointed some indigenous magistrates, but by 1924 Murray's view was that there was no part of Papua "where native administration of justice could be introduced with any prospect but the certainty of absolute failure."[99] By 1937, he had changed to the point of hoping that some Papuans might be found to deal with "trivial native cases" but he felt it almost impossible to find men of sufficient "strength of character" for the task.[100]

A major reason why Papua New Guineans preferred their own customary courts over those introduced by the administration was that for many years the customary law of Papua New Guinea was not applied in the administration's formal court system. Until 1963 indigenous laws remained almost entirely unrecognized by the formal courts. The Supreme Court only took account of custom in two areas: as a reason for lightening the sentence of a Papua New Guinean convicted of an indictable offence,[101] and in questions concerning the ownership of land by clans and individuals.[102]

In other areas of the civil law there was a difference in approach between courts and ordinances in New Guinea and those in Papua concerning the formal recognition of custom. The Native Regulations of New Guinea provided that courts should take judicial notice of customs unless contrary to the general principles of humanity or to written law; they also gave specific recognition to the customary law of marriage and succession.[103] The Papuan Regulations gave recognition to customary law only in succession cases.[104] For all other civil cases, the only duty of magistrates was to "appease quarrels and disputes about property and rights, real or imaginary, and to prevent as much as possible the strong taking advantage of the weak."[105] Sir Hubert Murray's position on customary law was that there was not much to it and what there was was probably highly unsuitable.[106]

In sum, the introduction of the common law and its courts into Papua New Guinea left the people of the territory suffering all the indignities but none of the satisfactions of a dual system. They had appeared in the higher courts only as criminal defendants. Even in the courts purportedly designed for them, the Courts for Native Affairs, their laws were seldom used. And they had no impact on policies, for magisterial duties were performed by Australian kiaps and not by Papua New Guineans.

The Australians attempted to make the common law paramount in Papua New Guinea. Though they succeeded for a time in undermining the confidence of the people in customary law, they never succeeded in introducing the common law. Despite the presence in Papua New

Guinea of Australian courts and judges, despite the statutes receiving the common law into the territories, the common law as a set of values and principles did not in fact exist in Papua New Guinea.

In his essay, "What is the Common Law," Professor A.L. Goodhart has identified four fundamental characteristics: (a) the jury system; (b) the writ of habeas corpus; (c) the independence of the judiciary, both from the executive and from the conduct of proceedings before the court; and (d) the guarantee that "under the common law, no one, however great the position he may hold, may open my door unless he does so under the specific authority of the law."[107]

Papua New Guinea diverges from the common law model on all four of Goodhart's points. First, the virtual absence of juries has been a distinctive feature of the legal system in Papua New Guinea.[108] Second, the writ of habeas corpus, though theoretically available, was of little practical value to Papua New Guineans, since they had no lawyers to tell them of their rights or to protect them from abuses during most of the colonial period. The Public Solicitor's office, which provided legal services to Papua New Guineans, was not established until 1958. At no time has it been able to employ more than 20 lawyers, most of whom have by necessity been based in Port Moresby or other large towns, so that even after its creation most Papua New Guineans find themselves without readily available legal counsel.[109] As for lawyers in private practice, their numbers have always been few, they have also settled exclusively in the urban centers, and their practice has been confined almost entirely to the business and personal interests of expatriate commercial clients.[110]

Third, as we have noted, the judiciary in Papua New Guinea was not independent of the executive. Kiaps served as magistrates both in District Courts and in Courts for Native Affairs. In the Supreme Court, judges played a major role in the presentation of evidence in criminal trials because neither the accused nor the prosecution was represented by counsel.[111]

Fourth, no Papua New Guinean could rest secure in the assumption that his privacy and property were protected by due process of law. The law and practice of the colonial administration showed little respect for the personal integrity of the colonized. In making initial contact or in patrolling "difficult" areas, administration officers respected neither the property of the villagers nor, in several cases, their lives.[112] Those officers brought to court as a result of excessively brutal behavior found judges sympathetic to the point of straining the law.[113] And once contact had been made and the area pacified, the

Native Regulations still permitted massive government interference in personal and property rights.

Finally, we might add a fifth category to Goodhart's list of common law fundamentals: the existence of a unified body of principles and laws, applying equally and evenhandedly to everyone within the jurisdiction.[119] In colonial Papua New Guinea, for the most part, whites and blacks lived under two different sets of laws. the rules and principles of the common law were, in effect, the personal law of the largely Australian expatriate community. For Papua New Guineans the common law was displaced by statutes and regulations many of which, as has been explained above, were diametrically opposed to common law principles.

While all of these departures from the common law model can be explained by pointing to the difficulties of exploration and pacification, the fact remains that fundamental notions of English law were sacrificed to the colonizing process. The law had a discriminatory cast so pronounced that even Murray observed:

> "It is, in fact, quite impossible to administer evenhanded justice in these countries - public opinion is so strong against it and one has to be so certain that one is right; and a native must have a very strong case indeed to get a conviction against a white man."[115]

B. Diffusion of Western Values

The switch by the Australian administration from the colonial policies described above to diffusionist policies was sudden and unexpected. In the early 1960s, it seemed that Papua and New Guinea might continue forever in colonial somnolence. While the African nations were rushing towards independence, Papua and New Guinea were called "unique" by their colonial administrators. Expatriates predicted that independence for Papua or New Guinea would be impossible for at least a hundred years.[116] Education and income levels among Papua New Guineans were very low. The administration had not opened its first primary schools until the 1950s, and ten years later they were educating less than 30 percent of school-age children.[117] High school education was even rarer. Papua New Guineans were employed as domestic servants or plantation workers, if at all. On the plantations, young men were bound to three-year contracts at a weekly wage of $2 and rations doled out by the ounce. A few higher status jobs were available for native policemen, mission catechists, or clerks.

But the patterns of colonialism were to be dramatically and irrevocably shattered in 1963, when the United Nations sent a mission to appraise Australia's administration of its Trust Territory. The mission was highly critical of Australia and reported that major changes were needed to bring Papua New Guinea to immediate independence.[118]

In 1965, Tom Mboya (the Kenya trade union leader and politician) said of Papua New Guinea, "For Africa, this is just another colony in which Australia (a white man's country) holds power over a country of coloured people".[119] In 1970 Ali Mazrui, comparing the British and Australian styles of colonialism, concluded that "[T]he British were exploitative; but the Australians were indifferent. There is only one thing worse than exploitative colonialism - and that is indifferent colonialism".[120] In response to the criticism from the United Nations, Australia mounted a massive campaign for development in Papua New Guinea. For the first time, money flowed freely from Canberra to Port Moresby. Secondary schools were rapidly constructed; the appointment of a Commission of Higher Education resulted in 1967 in the creation of the Institute of Technology and the University of Papua New Guinea, with a Law Faculty as one of its first departments. The Legislative Council, a body of Australian officials who advised the Administrator, was disbanded and replaced by the House of Assembly, with a majority of elected indigenous members. In local politics, elected local government councils were created which replaced luluais and tultuls, and took over some of the kiaps' functions.

The most obvious changes were in the economy. A World Bank mission visited Papua New Guinea in 1964 and advised the adoption of a five-year plan that would promote industry and increase export earnings, particularly through foreign investment.[121]

The World Bank Report paid little attention to the consequences of its policies for the legal system, but there was an influential lobby of Australian lawyers, based largely in Australia, who argued that a transformation of the legal system should accompany and facilitate the kind of economic change proposed for the five-year plan. An address delivered in 1968 by Mr. Justice Kerr (as he was then) crystallizes the assumptions that were implicit in many of the legal developments of this period.[122] Kerr assumed that Australian legal and political institutions should be implanted in Papua New Guinea and recognized that this would require the displacement of the indigenous social structure by a social structure similar to that in Australia. He quoted the views of an anthropologist, Peter Lawrence, for the proposition that the Australian social order "is

largely dominated by the economic system based upon specialization, expansion and continual change," and that "[T]he surest course may be to foster economic development which should speed up the rate of social change and so create the need for judicial reform - the process which, mutatis mutandis, is taking place in the large towns."[123] In his own words, Kerr recognized that the extension of a "judicially and impartially administered legal system" throughout Papua New Guinea "will follow to a large extent, upon the conversion of the New Guinea economy from a subsistence to a money economy and will doubtless take far longer to occur than will be involved in the transition, at the political level, to self-government."[124]

For the short term, he proposed to foster Australian constitutional and legal values through an indigenous elite. He argued that "[J]ust as the present economic policy in New Guinea, under advice from the World Bank, seems to be concentrating upon areas capable of producing the best developmental results, so it may be necessary to concentrate, in the constitutional and political field, upon an elite, the education of which in intellectual, professional and practical terms would need to have a high priority."[125] He further argued that Papua New Guinean lawyers had an especially important role to play: "[S]uch lawyers in politics, administration and judicial administration could achieve real freedom from their former cultural ties at the high level of political and legal comprehension.[126] This thinking influenced many of the lawyers instrumental in shaping legal policy in Papua New Guinea. The legal system was adapted to the economic policies contained in the World Bank plan in a number of ways: some were aimed explicitly at creating a favorable climate for foreign investment, others at freeing Papua New Guineans from the discriminatory laws dating from the era of the plantation economy, and from the customary practices, which were seen as inhibiting individualization.

The most important legislative change intended to attract foreign investment was the Industrial Development (Incentives to Pioneer Industries) Act 1965. This provided a tax holiday for enterprises given pioneer industry status. In 1966, the House of Assembly passed a Development Capital Guarantee Declaration promising that foreign investors would not be subject "to expropriation, nor to discriminatory taxation or other like levies, nor to oppressive trading legislation nor to unreasonable limitations on repatriation." The resolution directed future parliaments not to revoke its guarantees without a referendum.[127] Despite this directive, declarations of one parliament are not binding on future meetings of the legislature.[128]

In major areas of foreign investment, such as mining, the administration developed the practice of concluding specific agreements with each foreign investor regulating their relationship. By far the most significant was the Bougainville Copper Agreement, which was given legislative force by the Mining (Bougainville) Copper Agreement Act 1967.[129] The agreement granted the company maximum access to the resources of a land area of several hundred square miles through a 41-year renewable lease; minimum government interference with mining operations, including guarantees against expropriation; extraordinarily generous financial terms, including a complete or partial tax holiday for eight years and a total tax rate thereafter (including royalties and disturbance payments) of less than 50 percent, and special legal status. A 5 percent royalty for local landowners was provided as an afterthought, at the insistence of House of Assembly members from Bougainville, and over the opposition of the Australian administration.[130]

The Bougainville agreement was representative of the way in which special legal relationships were to be established with multi-national corporations, granting the corporation substantial independence from the ordinary laws of the country.[131] The Australian administration saw it as the beginning of a new era in which the territory would become increasingly dependent on multi-national capital and consequently less dependent on Australian aid.[132]

The 1960s also saw the creation of an urban labor market free from the restrictions of the plantation-based native labor laws. The number of laborers under the indenture system rapidly declined while the numbers of free laborers increased.[133] With the growth of the free market came the growth of trade unions. The colonial administration responded by enacting the Industrial Organizations Act 1961. This was a containment measure intended to give unions a "constructive" direction and to prevent the "strong likelihood" of unions being used for "purposes which were basically non-industrial, perhaps subversive," as one Australian spokesman on the Legislative Council put it.[134] The major effect of these laws has been to discourage trade union activity in Papua New Guinea.[135]

Diffusionist theories of development generally assume that economic growth requires the creation of an indigenous elite who accept western values of work and investment, who are free of clan and village ties, and who are thus able to function as entrepreneurs in western-style free markets. In this belief, planners sought to transform Papua New Guineans into progressive farmers (that is, farmers who would forsake clan ownership and subsistence farming

for individual ownership of farms producing cash crops), westernized individual entrepreneurs, and members of a bureaucratic elite.

In pursuit of the second of these goals, it was considered important to remove Papua New Guineans from what was viewed as the restrictive hold of custom and give them access to western commercial laws. As a result, commercial laws introduced into Papua New Guinea were conscious borrowings from Australia. In an address delivered in 1969, the then Registrar of Companies considered whether the Companies Act, a straightforward copy of the Australian legislation was applicable in Papua New Guinea, and decided that the legislation would promote "the economic development of the Territory" by mobilizing capital into "usefully large agglomerations."[136] A "further vital reason" was that "quick growth must depend very heavily on the attraction of overseas capital," and the Australian act encourages this flow by reducing the risk to foreign investors because it "is familiar to those overseas sources . . . likely to invest in the Territory . . . and its adoption, rather than that of a different but equally protective code, provides a desirable commercial convenience for the large majority of enterprises active in the Territory with Australian connections."[137] Discussing whether the Companies Act was too complex to be used by indigenous entrepreneurs, he remarked that it would be "very undesirable to attempt to legalize any form of business enterprise capable of being used by persons clearly unable to undertake a business venture with any chance of success, and irresponsible to allow such persons to use the savings of unaware investors."[138]

Other developments in the commercial law in Papua New Guinea in the 1960s also illustrate the influence of diffusionist thinking. The debate on the Hire Purchase Bill of 1966 is illustrative. There were aspects of the Bill designed to protect consumers, but the Secretary for Law was concerned that these should not stultify "the functioning of business firms" (which at that stage were all Australian-based finance companies). It was recognized that the concept of hire purchase was new to the indigenous people but no one questioned whether it was an appropriate concept, for it was assumed that "as the cash incomes of indigenous people increase we can expect them to take increased advantage of this method of adding to their material possessions."[139] Although the Secretary of Law stressed the protective elements of the legislation, it went little further than equivalent Australian legislation, and he made it clear that there was a conscious attempt to parallel Australian developments in this field.[140] In 1970, the Australian administration opposed a motion by an indigenous member of the House to provide for suspension of hire purchase repayments when a vehicle

was out of commission due to a lack of spare parts or delays in the processing of insurance claims. The spokesman stressed that such a requirement would be unjust to the hire purchase companies and that all sections of the motor vehicle trade were concerned with the implications of the proposal. Although he conceded that there were some "very real problems," he suggested that Government agencies such as the Business Advisory Service and Development Bank were available to assist people in understanding credit arrangements.[141]

Specific laws that had denied Papua New Guineans access to the commercial life of the country during the colonial period were repealed. For example, the New Guinea Companies Act was amended by repealing Section 5, which had prohibited the incorporation of a company for most purposes unless two-thirds of the members were British subjects, which Australians are and Papua New Guineans were not. The establishment of a Department of Business Development and a Development Bank was intended to train Papua New Guinean entrepreneurs and to give them access to commercial and lending institutions.

Two other important areas in which the administration attempted to loosen the hold of custom were land tenure and succession. Ironically, these constituted almost the only areas of customary law that had been recognized by the administration during the colonial period. The administration's land policy was influenced by the Report of the East Africa Royal Commission.[142] It led to the Land (Tenure Conversion Act) 1963 which enabled Papua New Guineans to remove land from clan ownership and obtain individual freehold title over it. But the Act was only used sporadically, and did not include machinery adequate to the task of converting all agricultural land in the colony from clan ownership to individual title, as the Australian administrator would have preferred.[143] In 1970-71, an attempt was made to effect such a massive change through a process similar to that used in Kenya in the late sixties. Simpson, the British expert who had drafted the Kenya legislation, was called upon to make recommendations for Papua New Guinea. As a result of his Report, four bills were introduced into the House of Assembly in 1971.[144] If passed, they would have provided for committees throughout the territory with authority to mark boundaries and allocate plots of land to individual owners. However, by this time the elected House had a majority of members opposed to such radical changes in the system of customary land tenure, and the bills were withdrawn.[145]

Although customary succession rules varied from one clan to another, they were generally similar throughout Papua New Guinea in that the possessions of the decedent tended to be inherited by the

clan or extended family as a whole, rather than by the children alone. Wills were virtually unknown; property descended to those customarily entitled to it, not to those the decedent might have chosen. The administration believed that intestate succession within the nuclear family alone and the right to dispose of property by will would help to develop economic individualism. In effect, the administration decided to impose Australian succession rules on Papua New Guineans, probably on the assumption that doing so would make Papua New Guineans more like Australians. Thus, the Wills Probate and Administration Act 1966 was originally intended to cover not only Australians resident in the territories, but all Papua New Guineans as well. As Watkins, then Secretary for Law, said in introducing the Bill:

> With the growth of commercial and economic enterprise in the Territory the law relating to probate and administration in the Territory requires revision. Difficulties have also been encountered with the lack of provision for administering small estates and for indigenous persons to bequeath their personal belongings to the beneficiaries of their choice. Where a man does not make a will the property will go on his death to the same classes of relatives as it would if he were an Australian dying in Australia.[146]

However, opposition from Canberra to the Act delayed its effective date until 1970. By then, it had been amended to provide that its rules regarding intestacy would apply only to expatriates resident in Papua New Guinea. Customary law would continue to rule the intestate succession of the property of Papua New Guineans. Even as amended, the Act permitted Papua New Guineans to will property if they chose and Papua New Guineans have been encouraged to make wills by institutions such as the Development Bank, thus cutting off clan rights to their property.

Other laws were also changed to promote individualism and the diffusion of western values and behavior. The strategy underlying most changes was to give Papua New Guineans access to the benefits of western laws, by removing the rigid discrimination between colonizers and colonized. Thus most of the Native Regulations, which had applied only to Papua New Guineans, were abolished, and replaced by Police Offences Acts, intended to be applied equally to everyone. But the law as an instrument of change is only as effective as its administrators, and many Australian public servants, trained in the colonial period, were not in sympathy with the notion that Papua New Guineans were their equals. Thus, though the Police Offences Act applied to everyone, it was most often enforced against Papua New Guineans and seldom against Australians. Similarly, though the aim

of the Development Bank, as expressed in its charter, was to assist Papua New Guinean enterprise, most of the loan funds in its early years went to expatriates.

The administration believed that economic growth could not be achieved unless western institutions were introduced. Faced with the continuing preference of Papua New Guineans for their own customary legal system over the imported forms, the administration sought to entice Papua New Guineans into western courts by interpolating some customary laws into the common law system. Thus, Papua New Guinean customary law was at last recognized, but in a way that strictly contained its role to the settlement of certain disputes.[147] The Native Customs Recognition Act 1963, Section 8, provided for the application of customary law by judges and magistrates in the formal courts, mainly in the areas of disputes among Papua New Guineans over rights to customary land and over marriages and divorce.

Customary law was considered irrelevant to commercial transactions, so the Act provided that custom could apply only to those transactions between Papua New Guineans in which the parties had intended that it should apply or justice "required" its application. The Act did not establish courts which would apply customary dispute settlement procedures. Instead, it gave judges and magistrates of the formal courts the discretion to decide land and family cases on the basis of customary rather than common law. Even in these cases, custom could be ignored if "repugnant to the general principles of humanity" or unfair to children or if the judge believed it would be unjust to follow it.[148] Customary law could not be used in a criminal case, except in establishing mens rea or in setting the penalty.[149]

The Derham Report had recommended that Papua New Guinea's courts be restructured into a single system with courts at all levels open to both Papua New Guineans and Australians, and this was implemented during the 1960s. To the Supreme Court was added an appellate division called the Full Court. The Courts for Native Affairs were abolished and a two-tier system of lesser courts established, the Local Courts and District Courts. All courts were to be open to white and black litigants alike. The Local Courts' jurisdiction was limited to violations of town or local government council ordinances, to minor criminal offences, and to civil suits where the claim was under $200. The jurisdiction of District Courts extended to non-indictable criminal offences and to civil suits valued at less than $2,000. The Supreme Court had unlimited civil and criminal jurisdiction.

In practice, because of the great economic and social differences between Papua New Guineans and expatriates, the new system of courts has not succeeded in giving equal access to both. The local Courts in effect took over the role of the old Native Courts as the forum in which Papua New Guineans most frequently appear, while the District Court's clientele is more mixed and the Supreme Court continues to be dominated by expatriate interests. A study of cases tried in Port Moresby in a three-month period in 1975 found that, in both civil And criminal cases, the Local Courts dealt almost entirely with Papua New Guineans, whereas only 177 out of 236 civil compainants in the District Court were Papua New Guineans and 3 out of 63 plaintiffs in The Supreme Court As criminal defendants, however, Papua New Guineans are to be found at every level of the court hierarchy: 206 Out of 225 defendants in the District Court, and 120 out of 122 defendants in the Supreme Court.

The effect of their new, if limited, access to western courts was Not always favorable to Papua New Guineans as seen in a review of suits seeking the return of land belonging to their forebears and obtained by expatriates, either through an alleged purchase or through a waste and vacant declaration. Papua New Guinean plaintiffs argued that their ancestors had not intended to alienate the land permanently, since such transfers were not permissible under customary law. In the 1960s at least 20 cases were appealed to the Supreme Court and the Full Court from the Land Titles Commission, which had original jurisdiction over disputes concerning land ownership between Papua New Guineans and expatriates.151 In each, the courts insisted on deciding the legality of the transfer by reference to principles of the introduced legal system of the buyers rather than those of the customary law of the sellers, and rarely invalidated it. In the few cases where the court did, it did not authorize the return of the land but granted compensation at the value of the land when originally sold. As noted above, the government of self-governing Papua New Guinea eventually established legislation aimed at partial compensation of those whose land had been taken, and providing funds for the repurchase of alienated land from expatriate holders.

The 1960s also saw attempts to divorce the judiciary from the influence of the executive, attempts •that were more successful in the Supreme Court than in the lesser courts. Vacancies in the Supreme Court were filled from the legal profession in Australia, rather than From the ranks of the colonial administration, as had previously been The practice. But though the new judges showed much less sympathy for arguments about administrative convenience than had their predecessors, they had little understanding of Papua New Guinean customary law.152

The attempt to appoint enough full-time magistrates to the District and Local Courts so that the administrative officers would no longer be needed was impeded by lack of funds allocated for the purpose and by lack of interest from the Law Department. An administration lawyer involved in the training of Local Court magistrates observed, "The Government appears to have instituted a legal revolution without creating any authority to give it direction."[153] By 1972, there were still only 23 full-time magistrates in the District Courts and 55 magistrates and 140 assistant magistrates in the Local Courts.[154] As a result, kiaps continued to sit as magistrates, hearing cases in the manner described in the following vignette from a government report on tribal fighting:

> In the past, few pleas of "not guilty" were recorded. This was because the arresting officer usually ascertained on the spot who was fighting and who was not. All members of the groups involved would be asked separately if they were fighting and those claiming that they were not fighting were separated. In the event of no one being able to identify them as having taken part in the fight, they were released. Subsequently, the same officer would hear the case against the rest and, because the magistrate had arrested and already investigated the accused, few would at that stage deny their guilt . . . Even if the magistrate was not involved personally in breaking up the fight, his experience as a patrol officer strongly inclined him towards seeing the administrative necessity for the government law to seem strong and certain. The most important thing was to put those who fought in jail.[155]

It is little wonder that Papua New Guineans in the villages and urban settlements saw very little difference between the Local Courts and the kiap courts.

Early colonialists had derided or ignored Papua New Guinean customary laws and legal institutions, and the administrators who prepared the colony for independence in the 1960s were not much more sympathetic. It never occurred to them to change the courts to reflect more closely the laws or values of Papua New Guinean society. Their aim was not to suit the courts to Papua New Guinea, but to educate a generation of Papua New Guinans who would be able to use western-style courts. One result of the diffusionism of the 1960s was that Papua New Guineans were for the first time trained to be magistrates of the lesser courts. The introduction of Papua New Guinean magistrates went slowly at first because funds for training were severely restricted. By 1976, however,

of the 125 full-time magistrates in Papua New Guinea, only eight were expatriates and most of those were working in supervisory or teaching positions.[156] The Supreme Court judges are all still expatriates, however, and in a speech given shortly after independence the then Chief Justice announced that it would be at least ten years before a Papua New Guinean would be ready for an appointment to the bench.[157]

The commitment to create a westernized legal system was also apparent in the early years of the University of Papua New Guinea Law Faculty. The Faculty was staffed mainly by Australian lawyers, who engaged in private practice for expatriate clients on the side. The curriculum followed that of law schools in Australia, even using Australian cases and text books. In addition to their course work, students were required to spend one semester of their third year clerking in a solicitor's office in Australia. This was defended as enabling the law student to see "how the law which he has learnt is applied in practice in a developed community, and where he will absorb something of the admosphere, ideals and traditions of an independent and close-knit profession."[158] Absorption of the proper legal atmosphere was high on the list of the Faculty's aims. The Dean of the Faculty recognized that his students would become part of the affluent urban elite--and applauded the notion:

> The lawyer does not belong in the village society. His practice and his usefulness are necessarily in the towns and larger communities. . . . In many cases his home was in a village community and it will be the purpose of the law course in one respect to divorce him from that community. It is not an aim of education to isolate people, but when the differences between the educated and uneducated are so great as they are in Papua New Guinea, it is an inevitable effect of education to isolate the educated members from the rest of the community.[159]

It is open to question whether the staff achieved these goals. By the end of the 1976 academic year, 75 Papua New Guineans had received LL.B.s from the University. Contrary to the aims expressed above, only nine went into private practice. On the other hand, only two others went home to serve their villages. The rest live in urban centers and have taken positions in the Department of Justice, the Public Solicitor's office, and other government agencies. Thus, for most Papua New Guinean litigants or would-be litigants, particularly those in rural areas, a lawyer is still an unattainable luxury.

The 1960s were a product of diffusionist theory with respect to both development strategies and the legal system. The World Bank's five-year plan emphasized the encouragement of foreign investment and access by a few Papua New Guineans to western economic, cultural, and legal institutions. As a result, though gross national product grew, the vast majority of Papua New Guineans derived few direct or substantial benefits from the growth of the monetary sector.

The five-year plan, inaugurated in 1969, did what it aimed to do, although not for the reasons the planners had supposed. Gross monetary sector product grew by more than 16 percent a year between 1968 and 197 Wage employment increased by 50,000 persons and the value of exports by more than 300 percent. Capital investment--virtually all of it from overseas--totalled approximately $1,000 million. Per capita income for those employed in the modern sector reached more than $250 per year by 1973.[160]

However, the economy of Papua New Guinea did not develop into a unified system. Instead, a number of separate and distinct mines, plantations, and towns were created, each of which contributed to gross production figures without creating an integrated economy. Consequently, employment rates and tax revenues did not achieve the levels the planners intended. Papua New Guinea remained a traditional subsistence farming society with a few outposts of the modern economy scattered haphazardly in the countryside. The great leap forward in gross domestic product and in the value of exports was overwhelmingly due to a single fortuitous cause--the development of the Bougainville copper mine, which began operations only in 1972. Although the mine had not been included in any of the projections on which the five-year plan was based, it accounted for more than a third of gross domestic produce and three-fourths of the value of exports. In other ways, however, its effect was minimal. It contributed only 10 percent of government revenue in those years, and still accounts for less than two percent of total employment.[161]

Economic growth was also assisted by the development of plantations producing coffee, tea, cocoa, and oil palm for export. The projects, heavily subsidized by the administration and financed by the government-owned Development Bank, were owned by expatriates. Papua New Guineans received little direct benefit from them. The large expatriate plantations were expected to form nucleus estates around which small-scale locally-owned ventures could cluster, but few did, partly because the creation of the expatriate-owned plantations involved the alienation of large tracts of land in areas already over-populated. Though the plantations provided thousands of new jobs, the minimum weekly wage was only $6.40.

The attempt to attract manufacturing to Papua New Guinea was not entirely unsuccessful. The value of manufacturing output grew from $62 million in 1968 to approximately $100 million in 1973.162 Manufacturing represented 10 percent of gross domestic product and employed some 17,000 people, of whom more than 90 percent were Papua New Guineans.163 However, manufacturing remained heavily concentrated in the major towns, and consisted for the most part of last-stage processing or assembly plants producing light manufactures such as beverages, tobacco, and plywood. Large-scale industries like steel mills or chemical plants, which could become growth centers for an integrated economy, are non-existent.

Foreigners continued to command the major share of economic benefits, owning most of the enterprises and accumulating most of the capital. The income of the average expatriate grew by $3,000 per year, while the income of the average Papua New Guinean grew by only $30 per year.164 The structural effects on the society of these policies were even greater than these numbers would suggest. A small grout of relatively rich farmers did begin to develop in the countryside,165 and a small group of local entrepreneurs in the urban areas.166 Moreover, the public service was training Papua New Guineans to be bureaucrats. These three groups would form a small but powerful elite whose interest would lie in the perpetuation of the economic and social system of the diffusionist period. Finally, the creation of a relatively wealthy elite introduced the first economic and social disparities between rich and poor Papua New Guineans, which inflicted tremendous strains on the traditional laws and social patterns that had once bound villages together and maintained peace.

C. Redistribution with Growth

The five-year development plan that had been suggested by the World Bank in 1968 focussed on growth and on the diffusion of western values and institutions within Papua New Guinea. This led to an extreme disarticulation of the economy and to disparities between rich and poor. The first House of Assembly, elected in 1968, had acquiesced in the policies of the five-year plan. The second House, however, was dominated by a coalition of pro-independence parties. Self-government was declared on 1 December 1973, and responsibility for all the agencies of the government, except defence, foreign affairs, and law, was handed over to the coalition whose stated ideology was contrary in many ways to that of the five-year plan.167 The new ideology was formally embodied in the coalition's mining policy,168 in its guidelines for foreign investors,169 and in the Eight Point Improvement Programme170 which called for:

1. A rapid increase in the proportion of the economy under the control of Papua New Guinean individuals and groups and in the proportion of personal and property income that goes to Papua New Guineans.

2. More equal distribution of economic benefits, including movement towards equalisation of services, agricultural development, village industry, better internal trade and more spending chanelled to local and area bodies.

3. Decentralisation of economic activity, planning and government spending, with emphasis on agricultural development, village industry, better internal trade and more spending channelled to local and area bodies.

4. An emphasis on small-scale artisan, service and business activity, relying where possible on typically Papua New Guinean forms of organization.

5. A more self-reliant economy, less dependent for its needs on imported goods and services and better able to meet the needs of its people through local production.

6. An increasing capacity for meeting government spending needs from locally raised revenue.

7. A rapid increase in the equal and active participation of women in all forms of economic and social activity.

8. Government control and involvement in those sectors of the economy where control is necessary to achieve the desired kind of development.

The Eight Point Improvement Programme was rooted in economic nationalism, as opposed to the simple diffusionism of the five-year plan, and contradicted the aims of pure economic growth and diffusion in several ways. Because few Papua New Guineans possessed large capital reserves, the emphasis of the Programme on a rapid increase in the proportion of the economy under local control meant both that the country would have to forego expensive, large-scale projects in favor of small ventures and that there would be an increase in government involvement in large-scale ventures. Similarly, the focus on self-reliance implied severe restrictions on imported capital,

whether loans or investments, which would significantly decrease the growth rate.

The expressed intention of the coalition's Programme, however, was neither to build socialism nor to break all ties with international capitalism, but merely to achieve a more equitable distribution of the benefits of economic growth. Members of the coalition and their economic advisers were strongly influenced by the example of Tanzania, which was following a redistribution model, and the so called Faber Report, prepared by the Overseas Development Group, University of East Anglia, and financed by the World Bank.171 It is ironic that the same lending agency, the World Bank, helped to propel Papua New Guinea towards both the growth orientation of the first five-year plan and the redistribution orientation of the Eight Point Programme. The Faber Report suggested:

> the development of a mixed capitalist economy in which there are two important sources of dynamic transformation - one is the modern enclave (our bureaucratic sector) drawing on imported capital, technology and skills, the other is the indigenous evolution of small-scale rural and urban activities (both petty capitalist and collective in different sectors); the role of the government will be to attract, control and draw resources from the modern enclave and to devote the major part of its own material and administrative resources towards creating the environment in which informal activities may flourish. This view of development contrasts with any . . . theory which thinks of the modernisation process solely as the need to graft a western type modern sector (including what we have called the 'small firm' sector) to an assumed indigenous subsistence economy.172

During the period between self-government and independence the legal system was adapted in a variety of ways to reflect, and encourage the realization of, the social and economic policies implicit in the Programme. But in some key areas, such as labor law, no major changes were instituted, and in others the new policies met resistance from the public service, the judiciary, and the private sector, all of which perceived their interests as threatened. The impetus toward change focussed on relations with foreign investor, the involvement of more Papua New Guineans in the economy, and the initiation of various programs aimed at ameliorating the socially disjunctive consequences of rapid economic change.

If a government expects to achieve redistribution with growth, it must attain greater influence over the amount and nature of foreign investment into the areas where it is most needed for development and distribution, as well as to obtain for the country a larger share of the profits of each venture. These were major themes in the single most important achievement of the coalition government, the renegotiation of the Bougainville copper mine agreement. In 1973, profits from the newly-producing mine had exceeded $151 million, of which less than $30 million went to the government and people of Papua New Guinea. During renegotiation, there were some calls from the coalition's left-wing members for nationalization of the mine.[173] However, the coalition decided to seek instead a substantial increase in the government's share of the profits and some measure of control over the activities of the operating company. It was successful in these aims, increasing its share of total profits from the mine to approximately $90 million in 1974. The parties agreed to a new tax basis for the mine, which would guarantee the government 52 percent of normal profits and 70 percent of so-called excess profits in all future years, compared to an original agreement that had provided a maximum revenue of 50 percent after the five-year tax holiday.[174] The renegotiated agreement also included requirements that the operating company participate in redistribution. The company was to train and employ Papua New Guineans at all levels, and finance and staff a Bougainville development agency.

The aim of greater control over foreighn investment was also reflected in the National Investment and Development Act 1974, which set up a National Investment and Development Authority (NIDA) to oversee foreign investors. The Act provided for the creation of a Priorities Schedule, which would permit only those foreign investments necessary to development, and Investment Guidelines, which authorized NIDA to require foreign investors to hire Papua New Guinean workers, buy Papua New Guinean products, and establish linkage industries.[175] Other legislation, in specific areas such as fisheries and timber, was also intended to give the government added control over foreign investors. At the same time, operation of the Industrial Development (Incentives to Pioneer Industries) Act 1965, which had guaranteed tax holidays to foreign investors, was suspended.

The government's attempts to obtain effective control over foreign investment required the use of various legal mechanisms, including contract law, legislation, and the creation of specialized agencies. Redistribution of the benefits of economic growth also employed legal devices. First, it was thought advantageous to permit people access to the cash economy through informal markets

and other means less destructive of the traditional order than individualized farming or membership in the bureaucracy. To permit informal sector activity to exist, however, it was necessary to relax or repeal a great deal of legislation adopted or received during the colonial period, especially rules relating to trading and to licensing standards.

The coalition also instituted other programs to involve more Papua New Guineans in the economy and to extend the benefits of development to rural areas. Prior to 1972 Development Bank had given more than 50 percent of its loan funds to foreign companies or to joint ventures in which expatriates were the majority parties;[176] now it was ordered to concentrate on loans for the creation of small businesses owned by Papua New Guineans and to ease its security and mortgage requirements to make this possible. The Village Development Task Force was organized to promote rural projects and to educate rural people in the construction and use of small-scale, intermediate technology. The Rural Improvement Programme channelled funds to Local Government Councils and other rural organizations to help them establish businesses, buy farming machinery, or install water pumps and other technology needed in the villages.

New legislation was passed recognizing customary groups as lawful business entities so that they might organize modern business ventures without giving up traditional clan ties. Until then, traditional groups had been hampered in their attempts to start group businesses by their lack of recognized legal status, which prevented them from using their land as security for loans, for example.[177]

The Land Groups Act 1974 aided the entry of traditional groups into business by enabling them to hold land as a corporation and work it as a group. The Act was also part of a larger program that aimed at employing traditional institutions for the exploitation of land resources. In the diffusionist period, it had been assumed that the only viable form of land tenure was the freehold acquired either by expatriates owning plantations or through the conversion of customary land into individual ownership. This policy was severely criticized by the Commission of Inquiry into Land Matters, which conducted extensive investigations culminating in a Report issued in 1973.[178] The Commission, comprised primarily of Papua New Guineans, with some expatriate advice and staffing, discussed ownership of and succession to customary land, the proper policies to follow in relation to alienated land, the settlement of disputes over land, and numerous other matters. The Report was accepted in its entirety by the House of Assembly, and has been partially implemented.[179]

The Commission recommended that the government return all land alienated by Papua New Guineans and currently held by the government, without being used, whether that land had originally been obtained legally or illegally, by purchase or by waste and vacant declaration. The Commission also advised against immediate expropriation of land currently held by expatriates. Instead, it recommended repurchase of most expatriate plantations by the government and the redistribution of these lands to their original owners and conversion to government leasehold of the remaining expatriate plantations so that enough plantations would remain to produce needed export income.[180]

The Commission's ultimate aim was a substantial reduction of the expatriate-owned sector of the rural economy and its eventual replacement by farms owned by traditional groups. This endorsement of customary institutions was even more marked in the Commission's proposals regarding the registration of land, which were firmly against individualization. The Commission urged suspension of the operations of the Land (Tenure Conversion) Act 1963, and recommended that registration of individual titles to land should occur only sparingly. The Commission envisioned group ownership, with the group able to choose whether the land would be utilized communally or by individuals.

In its recommendations on land dispute settlement, the Commission's preference was, again, for a modified customary procedure to replace the administrative apparatus of the Land Titles Commission and the common law bias of the courts. This proposal has been embodied in the Land (Disputes Settlement) Act 1975, under which disputes over land are brought before land mediators--village elders or local leaders who attempt to achieve a compromise or a negotiated settlement between the parties, rather than adjudicating one party the winner. If negotiation proves unsuccessful, the dispute may be appealed to a Local Land Court, composed of a magistrate and one or more mediators, which conducts a new hearing. Procedures and rules of evidence are deliberately flexible; for example, the magistrate may call for the production of whatever information he deems necessary for a full understanding and solution of the case.[181]

Redistribution of the benefits of development was viewed in Papua New Guinea as including social as well as economic benefits. Thus, the proposals of the Commission aimed not only at ensuring Papua New Guineans the economic benefits associated with land ownership, but also at mitigating the disturbing side-effects of development--such as the breakdown of traditional values and social groups--and allowing these groups to function as part of the modern economy.

The legal system was also used for this purpose. First, the law itself had become antipathetic to Papua New Guineans under colonialism, and it was important to change this view. In addition, law was necessary to create an economic and political climate more consistent with traditional Papua New Guinean values. The coalition's intention to create a legal system that could balance the demands of development with the need to recognize customary laws and dispute settlement machinery was expressed in a speech by Mr. Michael Somare, then Chief Minister (and now Prime Minister):

> We are facing, at this very moment, the need to devise a system of laws appropriate to a self-governing, independent nation. The legal system that we are in the process of creating must ensure the orderly and progressive development of our nation. But, in addition, it must respond to our own needs and values. We do not want to create an imitation of the Australian, English or American legal systems. We want to build a framework of laws and procedures that the people of Papua New Guinea can recognize as their own - not something imposed on them by outsiders.[182]

There was much debate, however, about what this framework of laws and procedures should be. Some members of the coalition, such as John Kaputin, then Minister for Justice, argued that a complete return to customary law was necessary, since the legal system imposed during the colonial period was merely an instrument for class rule by the colonizers.[183] The Papua New Guinean members of the Constitutional Planning Committee, the parliamentary committee established to draft a constitution for the new nation, were also of the opinion that customary law should be the principal basis for the new underlying law of Papua New Guinea. But others in the coalition proposed a less radical change, either out of the belief that it would be too disruptive to abandon all introduced legislation and common law principles, or out of the fear that the customary law of small pre-industrial societies would be unfit for the needs of a large, industrializing nation. New Guinea constitution provides that the common law (adapted by judges to the circumstances of Papua New Guinea) is the underlying law, for the time being. Custom presently has a subsidiary role, limited to specific issues, such as succession and family law. However, the constitution permits subsequent Parliaments to revise this, and a Law Reform Commission has been appointed, charged with formulating a body of customary law, modified to meet the demands of development, that could replace current statutes and common law doctrine.[184]

While the debate over the substantive law continues, important changes have been made in the court system and in procedure, re-introducing customary law concepts into both. The adversary procedure, in which one side wins and the other loses, is foreign to the negotiation and compromise that resolve customary law cases. Nor does custom value the disinterestedness of the judge. In the villages where disputes are decided by customary law principles and processes everyone, including those who will judge the issue, has some interest in the outcome of every dispute. Those who are not parties are related to one or both disputants, or at least concerned to maintain peace and harmony in the small village where all must go on living together. This focus on the over-riding need to restore social harmony by putting an end to the quarrel between the factions determines the dispute settlement procedure. Mediation and compromise, rather than winning and losing, are the goals. Though the rules and principles of customary law are known to all, there is no rigidity in their application. They can be bent to serve the larger social end of achieving a compromise solution satisfactory to all parties.[185]

The coalition government did not attempt to destroy the common law courts that had been constructed during the colonial period. Instead, they decided to add another set of courts, which would apply customary law in customary fashion, operating parallel to the common law courts. The Village Courts Act came into operation in 1974, with the following mandate:

> The primary function of a Village Court is to ensure peace and harmony in the area for which it is established by mediating in and endeavoring to obtain just and amicable settlements of disputes.[186]

Although the Village Courts have jurisdiction over people of all races and nationalities (and have exercised it), they were intended to serve primarily Papua New Guineans. Thus the first Village Courts were set up in rural areas, though a few have recently been inaugurated in urban settlements as well. The Village Court Secretariat was empowered to establish Village Courts area by area, wherever local people showed sufficient interest in having one. By the end of 1976 there were 252 Village Courts operating in 30 areas throughout Papua New Guinea, staffed by 1185 magistrates and serving a population of 544,632.[187] Although there are jurisdictional limits on Village Courts in both civil and criminal matters, they apply only when the magistrate has failed to achieve a settlement through mediation and must adjudicate.

In general, Village Courts are supposed to apply customary law, both in substance and in procedure. Thus no distinction is made between civil and criminal cases; the court is free to order a fine, the performance of community work, the payment of compensation, or any combination. The courts are not restricted by common law rules of procedure or evidence and may work flexibly, in the style of a village meeting, mediating rather than adjudicating that may achieve the peaceful settlement of a dispute.

There is evidence that village people are making frequent use of the Village Courts.[188] Nor have these experienced any of the problems that their detractors predicted: there have been no suggestions of corruption and very few hints of favoritism.[189] If anything, they err in the opposite direction: some Village Courts have been too rigid and formal, too disinterested and adjudicatory, in the conduct of hearings and assessment of sentences. Some Village Court magistrates feel they should behave like Local and District Court magistrates, since many villagers believe there is status and dignity in the law and procedures of the powerful white man and none in the old village ways of doing things. Imitation of the higher courts can be seen both in the formal procedures that some Village Courts magistrates have adopted and in the tendency of many Village Courts to emphasize their criminal rather than their civil powers. As a result what were conceived as informal people's courts in which magistrates amicably mediated disputes are in some instances turning into village-level copies of the rigid colonial system.

People occasionally show a preference for the white man's substantive law, as well as for his procedure. A few litigants have claimed they should not be tried under customary law because the imposed law is superior.[190] The Village Courts Act provides that a Village Court is "not bound by any law other than this Act . . . but shall . . . decide any matter before it in accordance with substantial justice,"[191] and that the court shall apply customary law whenever it is relevant.[192] The courts have not found it easy to apply substantive customary law. The customary law of Papua New Guinea today is not the same as that which obtained before the advent of the colonial period. People and their customs have been influenced by the ways of colonial justice and by the vast socio-economic changes that have swept Papua New Guinean society.

The creation of Village Courts may be only the first step in a gradual transformation of the entire judicial system from the common law to some modified form of customary law. At a recent

seminar, attended primarily by Local and District Court magistrates, a consensus was reached in favor of introducing customary law procedures into these courts, beginning with the use of mediation and compromise to solve certain disputes. The process will be gradual, partly because people must be re-educated about the value of their traditional institutions, and partly because it will require time and experience to adjust customary law to the demands of a changing society.

Papua New Guinea's new legal system requires a legal profession attuned to its aims and able to carry out its mandates. Judges, magistrates, and lawyers trained in adversary procedures and in the technicalities of the common law, or used to dealing with sophisticated corporate clients, would have difficulty orienting themselves in a legal ambience that believes precedents are made to be broken in the interest of a larger social good. The Supreme and Full Courts are still staffed by judges who receive their legal training and get their legal experience in Australia or England, but Papua New Guinean lawyers and magistrates are beginning to be trained in new approaches and methods. The University of Papua New Guinea Law Faculty underwent a radical change in its philosophy of legal education in 1972, with the appointment of a Dean who had served most recently in Tanzania. He attracted lecturers to the Faculty from the West Indies, Africa, India, the United States, and Canada. The curriculum was revamped, the requirement that students practice in Australia for six months dropped, and new courses offered in customary law, law and development, and trade and investment. To ensure that all courses would be relevant to legal practice in Papua New Guinea, faculty members prepared their own collections of Papua New Guinean cases and materials for such courses as introduction to law, criminal law, and land law.[193]

A problem facing every educated professional group in a developing country is the possibility that its members will become an elite, separated by income and life style from the mass of the people. This problem is particularly meaningful in the legal profession because lawyers, pre-eminently, are supposed to be servants of the people. To diminish the distance between law students and village people and to ensure that there will be lawyers in the rural villages and smaller urban settlements, the Law Faculty has proposed a modular approach to teaching. After two years of basic legal courses all law students will be sent out for a year to work with the people. Parliament has recently enacted legislation making this mandatory for future lawyers. The diploma granted at the end of two years will permit students to appear in lower courts, and their two years of legal training will give them the information they need to serve the

legal needs of Papua New Guinea's communities. Those who do return to University for another two years after the work break will be trained in the highly specialized skills needed by government lawyers--negotiation with foreign investors, treaty making and international law, and appellate practice.

Although the coalition has succeeded in planting the seeds of a program based on the model of redistribution with growth, its record in bringing that program to fruition is mixed, at best. An example of partial failure is the Papua New Guinea Constitution. Colonial rule had bred in Papua New Guineans both a desire for independence and the fear that they were not yet ready to be independent, as their colonial administrators had said. To overcome these fears, the coalition government promised that independence would await passage of a Constitution for the new nation. Thus the making of the Constitution became the coalition's last act as head of a partially self-governing but yet not independent nation, and it embodies both the promise of the self-government period and the handicaps that made the promise so difficult to achieve. There is a great gulf between the Report of the Constitutional Planning Committee and the document that eventually became the Constitution. The Report is in some respects a revolutionary document:

> The process of colonisation has been like a huge tidal wave. It has covered our land, submerging the natural life of our people. It leaves much dirt and some useful soil, as it subsides. The time of independence is our time of freedom and liberation. We must rebuild our society, not on the scattered good soil the tidal wave of colonisation has deposited, but on the solid foundations of our ancestral land. We must take the opportunity of digging up that which has been buried. We must not be afraid to rediscover our art, our culture and our political and social organizations. Wherever possible, we must make full use of our ways to achieve our national goals. We insist on this, despite the popular belief that the only viable means of dealing with the challenges of lack of economic development is through the efficiency of Western techniques and institutions.[194]

While the Report calls for the liberation of society from its colonial past, the Constitution itself, apart from its preamble, is a pedestrian copy of western legislation and western values. Initially, the gulf between the Committee's proposals and the views of the government was both formal and substantive: the government view was that the country needed only a "short" constitution establishing the basic organs of government and that civil rights provisions could

follow later. After a long period of negotiation the government accepted a long-form Constitution. But the Committee may have lost in substance what it gained in form, for the differences between the Committee's Report and the Constitution ultimately passed were significant. The government and the conservative opposition joined forces in what was essentially a diffusionist development program; on the other hand, the Constitutional Planning Committee was committed to redistribution with growth, if not to revolution. Speaking to the Report in the House of Assembly, Fr. John Momis, chairman of the Constitutional Planning Committee, described its work as follows:

> We do not agree at this time that we should only allow gradual changes to take place in this country. . . . This is a society where everyone is regarded as equal. It is a society in which everyone shares the happiness and the sorrows of his fellow man, whether he be rich or poor. However, today, in the type of society we have already adopted and accepted, our equality is defined by our wealth. . . . The existing institutions are run by a minority that the government often speak of defending and whose rights they fight for. The minority are, in fact, the educated, the rich, the powerful who are ruling this world. . . . Today I still believe that our country as a new nation is still weak and therefore we must stand firm against outside pressures, because the structure and the system we have already accepted is not our own. . . . The Constitutional Planning Committee tried to promote a society in this country in which there will be participation by everyone. . . . Today, with the sort of system that we are accepting, our people will be led to corruption. When we eventually achieve independence this system will be legitimized and will never be changed. After independence the only means of establishing such change will be by revolution.[195]

The major points of difference between the Committee and the government related to economic policy. First, the citizenship proposals of the Committee, which would, in effect, have prohibited Australian residents in Papua New Guinea from acquiring Papua New Guinean citizenship for some years, were defeated by the combination of the government and its opposition, despite the Committee's argument that there was a need to give indigenous Papua New Guineans time to establish their own economic base more firmly before sophisticated outsiders began to compete as citizens. The government and the opposition, which included some Australian businessmen ranks, favored prompt naturalization and this view prevailed.

Second, the Committee favored constitutional entrenchment of a foreign investment code, but the government and the official opposition successfully excluded it, arguing that such a code would be too inhibitive of foreign investment.

A third major difference concerned the Committee's recommendations designed to diffuse political power more widely. The colonial administration had been highly centralized, and its bureaucrats had become accustomed to exercising policy-making power. The Ministers of the National Coalition government had become part of this system. The Committee sought to dilute Ministerial power by the creation of parliamentary committees as a vehicle for backbench influence. The government strongly criticized these recommendations and, although the opposition was somewhat sympathetic to the view of the Committee, the result was a compromise that tended to favor the government view.

A fourth major point of difference concerned the Committee's proposals to decentralize power by the creation of a system of provincial government which incorporated federalist elements. After intense bargaining in the House of Assembly, the final draft contained no reference to provincial government.

There were other differences as well between the constitutional Planning Committee and the majority in the House. The Committee's Report called for customary law to be the underlying law of Papua New Guinea. The Constitution says blandly that the common law and custom shall share that role, with custom subordinate. Although the Report proposed that the nation's leaders should not own businesses or rental buildings while in office, the Constitution provides merely that they should let the ombudsman know how much they do own. Where the Report says that freedom of speech, assembly and religion shall be guaranteed, the Constitution says they shall be permitted only so long as they do not interfere with other governmental aims.

The difference between the proposals put forward by the Constitutional Planning Committee and those ultimately adopted is symptomatic of a general failure fully to implement policies of redistribution with growth. The explanation for the failure does not lie in personalities, nor even in political maneuvering, but in the realities of a nation that remains politically and economically dependent upon western industrial nations, despite the grant of independence. In the view of Papua New Guinea's ruling class the attainment of redistribution depends upon the maintenance of good relations with the West to ensure a continuing flow of foreign aid and investment:

> A strong healthy economy is one which is characterised by growth, stability and sectoral balance; it is important so that the country can continue to borrow overseas and repay these loans; be an attractive place for investment; be able to afford the necessary level of imports; slowly reduce dependence on aid, and be able to maintain stable internal economic policies.[196]

The coalition believed it necessary to maintain at least the level of services that had been provided during the colonial period. In the worldwide recession of the 1970s, with prices for copper and agricultural exports plummeting, the coalition believed that the national budget could be met only by increasing reliance on foreign aid and investment. To procure such aid, it was thought necessary to tailor domestic programs and those aimed at control of foreign investment to suit the needs and values of the western governments and investors.

Opposition to redistribution of the economic and political benefits of development came not only from foreign investors but also from groups within the country. The coalition government attempted to achieve its redistribution policies through a bureaucracy that was structurally unchanged from that of the colonial state, except for the replacement of a few Australians with Papua New Guineans. Because the coalition attempted neither to politicize the mass of the people nor to establish direct links with the masses, the government was weak against powerful vested interests. An entrenched public service and an expatriate business community constantly criticized the government's attempts to limit foreign investment, to spread development to the rural areas, and to promote group enterprises.[197] As a result, many of the new statutes and agencies emerged so hedged with limitations and restrictions that it has been difficult to utilize them effectively,[198] and new programs have been severely hampered both by inadequate funding and by the opposition of those public servants whose function it is to implement them. These problems were noted by the Prime Minister, Mr. Somare, who has said that the coalition's failure to bring about redistribution can be traced to the government's attempt to impose its programs from the top instead of involving the people in planning and implementation.[199]

When Independence was attained (on September 16, 1975), it became evident that the coalition had succeeded only partially in implementing policies of redistribution with growth. Major programs were hampered or cut back. Lack of resources has made it impossible

for the National Investment Development Authority adequately to institute and enforce controls on foreign investors. Moreover, NIDA has emphasized its role in attracting additional foreign investors rather than its control functions. The National Investment Priorities Schedule, as ultimately drafted, reserves only small-scale activities for Papua New Guinean enterprises, permitting continued dominance of major businesses by expatriates.[200] Attempts to enact legislation permitting development of the informal sector have foundered upon the very considerable opposition of public servants worried about maintaining licensing standards.[201] Thus, the informal sector remains noticeable by its absence.[201]

The Business Groups Act and the Land Groups Act were intended to encourage the formation of businesses that would be consonant with traditional Papua New Guinean social groupings. However, the number of business groups formed under the first act is very small, and to date only one land group has been formed. A major obstacle is the bureaucracy, which has hesitated to implement what it views as insufficiently complex legislation.[202] Other commercial law reforms have been defeated by opponents who claim that eliminating the common law will destroy commerce. Although much new land legislation has been enacted, key recommendations of the Commission of Inquiry into Land Matters have been shelved, particularly those dealing with the registration of land by customary groups and the limitations on absentee ownership.

Despite the initial success of Village Courts and the approval by higher court magistrates of the introduction of customary law into the formal courts, reform of the legal system slowed after the defeat of the Constitutional Planning Committee's proposals. The Law Reform Commission was hampered by insufficient staffing. The Law Faculty's attempts at curriculum reform have met considerable opposition, primarily from the judiciary and the established legal profession, both of which are still dominated by expatriates, and from the University bureaucracy, which has refused to permit the proposals to be implemented, even those enacted by Parliament, on the ground that more time for study is needed.

V. CONCLUSION: POLICY IMPLICATIONS FOR POST-COLONIAL SOCIETIES

During the colonial period, Papua New Guinea's economy was dependent on the economy of Australia, just as most colonies are economically linked to their colonizing nations. With political independence, the colonial economy may be transformed in any one of several directions. If the newly independent nation chooses the diffusionist

approach, it will maintain the links with the international capitalist system that were established during the colonial period. But these tend to be transformed from dependence upon the colonizing country alone to multi-lateral dependence on international capitalism generally. A primary requisite for a country wishing to implement diffusionist policies is a stable government which can inherit the colonial bureaucracy. Thus a new class comes into being in many post-colonial nations, which assumes the political and economic roles previously occupied by the colonial interests. These new ruling clases tend to be less closely tied by traditional bonds to the rest of the people, since traditional ties interfere with individual entrepreneurship. The legal system of the diffusionist country supports the individualization of this class, a process supported by many western development theoreticians:

> To establish a modern society capable of self-sustaining economic growth at a reasonable rate requires in broad cultural terms the attainment of political stability and a reasonable impartiality of government administration to provide a political and institutional framework within which individuals and enterprises (whether working for their own gain or within the public sector) can plan innovations with maximum certainty about the future environment.
>
> It requires the establishment of a legal system defining rights of property, person and contract, sufficiently clearly, and a judiciary system permitting settlement of disputes sufficiently predictably and inexpensively to provide a legal institutional framework within which production and accumulation can be undertaken with a minimum degree of non-economic risk. And it requires the establishment of a social system permitting mobility of all kinds (both allowing opportunity and recognising accomplishment), and characterised by the depersonalisation of economic and social relationships to provide maximum opportunities and incentives for economic advancement on the basis of productive economic contribution.[203]

The theory of the development of underdevelopment provides both a critique of the diffusionist model and an alternative. It demands that the ex-colony cut all links with developed nations, either gradually through the introduction of state-capitalism or immediately through socialist revolution, and that development begin with the

politicization of the masses. It is not a model that Papua New Guinea has followed.

A more moderate program is provided by the model of redistribution with growth, in which the ex-colony remains dependent on links with international capitalism, through both foreign aid and foreign investment, but attempts to channel foreign investment to the uses of the country and to distribute the benefits of development more equitably among the people. In these circumstances, the law is used as a control on foreign investors and as an instrument of redistribution.

The coalition government of Papua New Guinea made an attempt to replace the diffusionism of the 1960s with redistributive policies. As a result, significant reforms were made in the legal system. However, the country has faced the problem common to all attempts to induce development using a redistribution model. It may, indeed, be impossible for a country to achieve redistribution of economic and social benefits so long as that country maintains its dependence on foreign capital. Since neither the structure nor the interests of the elite change and since their power remains undiminished, they are able to obstruct or to deny redistributive programs whenever they perceive these as potentially harmful to the maintenance of their position or of the foreign trade, aid, and investment that provide them with employment and services. However well meaning they may be, the national elite in Papua New Guinea have not been willing totally to forego their own interests in favor of benefits for the masses. In consequence, Papua New Guinea's pursuit of the policies of redistribution has been continually impeded.

NOTES

1. Together the main island and numerous small island chains that comprise the territory of Papua New Guinea total a land mass of approximately 180,000 square miles, roughly the size of Japan or California. The population is estimated to be about 2.75 million.

2. C. Lepani, "Planning in Small Countries Developing Economies: A Case-Study of Papua New Guinea." (Sussex, Institute of Development Studies, 1976). Throughout this paper, money is expressed in United States dollars: Papua New Guinea currency is the Kina, equivalent to $1.25 US.

3. Papua New Guinea Central Planning Office, Papua New Guinea's 1973-4 Improvement Plan, (Port Moresby, 1973), p.30.

4. Ibid.

5. Testimony presented by the Papua New Guinea Department of Finance before the Urban Minimum Wages Board, April 1976.

6. Papua New Guinea Public Service Board, Annual Report 1974-1975 (Port Moresby 1975) 13.

7. Papua New Guinea Central Planning Office, op. cit., page 31.

8. We have chosen to explore this interdependence because it appears to us to provide the key to an understanding of the most significant features of legal development in Papua New Guinea. However, it must be recognized that other factors also influenced the direction of legal change; in particular, in a racially plural society such as Papua New Guinea, racial discrimination was an important influence on legal policy. See A. Kuper, Race, Class and Power. (London: Duckworth, 1977).

9. I. Shivji, Class Struggles in Tanzania (1976) argues that this approach still leaves the country dependent on international capitalism.

10. See D. Apter, The Politics of Modernisation (1965), passim, and B. Hoselitz (ed.), The Progress of Underdeveloped Areas (1962), (passim).

11. A. Gunder Frank, "The Development of Underdevelopment" in Frank & Johnson (eds.) Dependence and Underdevelopment: Latin American Political Economy (1972), 3-4.

12. Based on H. Chenery, J. Duloy & R. Jolly (eds.). Re-distribution with Growth: An Approach to Policy (1973).

13. See B. Hoselitz, op. cit.; M. Nash and R. Chin (eds.), "Psychocultural Factors in Asian Economic Growth" 29 Journal of Social Issues (1963), 5. W. Rostow, The Stages of Economic Growth (1960) is based on the assumption that growth takes place in a series of stages leading ultimately to modern capitalism.

14. M. Nash, "Introduction: Approaches to the Study of Economic Growth in M. Nash and R. Chin (eds.), op. cit., 5.

15. D. Apter, op. cit., 2; in relation to Latin America, see Id. at 235

16. C. Leys, Underdevelopment in Kenya: The Political Economy of Neo-Colonialism 1964-71 (1974), 12-13.

17. See P. Baran, The Political Economy of Growth (1957); A.G. Frank, op. cit.; A Griffin, Underdevelopment in Spanish America (1969) 31-48 for historical analysis. For Papua New Guinea, see Amarshi, Good, and Mortimer, "Cultivating Capitalism in Papua New Guinea" (1977) (unpublished manuscript). H. Brookfield (ed.), Colonialism, Development and Independence: The Case of the Melanesian Islands in the South Pacific (1972) is useful for an historical analysis for Melanesia.

18. Frank, op. cit., 3-4.

19. See R. Macnamara, One Hundred Countries, Two Billion People: The Dimensions of Development (1973), passim.

20. T. Parsons, The Social System (1951).

21. Frank, "Economic Dependence, Class Structure and Underdevelopment Policy" in Frank & Johnson, op. cit., 19.

22. O. Lange, Papers in Economics and Sociology (1970), 17.

23. Ibid.

24. The phosphate-rich island of Nauru is an example.

25. Furtado, "The Brazilian 'Model' of Development" in C.K. Wilber (ed.), The Political Economy of Development and Underdevelopment (1973) 297, 302-2.

26. Economic growth that produces ever-greater gaps between the few rich and the many poor in a country has been termed "dependent development." Theorists of the dependent development school, such as Furtado (supra), criticize Frank for rejecting the possibility of capitalist growth in Third World economies. For Frank's answer, see his Lumpenbourgeoisie Lumpendevelopment (1972), 148. For discussion of the debate, see Booth, "Andre Gunder Frank: An Introduction and Appreciation," in Oxaal, Barnett, and Booth (eds.), Beyond the Sociology of Development (1975), 50.

27. H. Chenery, J. Duloy, and R. Jolly, op. cit.

28. Bell and Jolly, "The Elements of Strategy," in Ibid., 8.

29. Introduction, Ibid., 1.

30. Bell & Jolly, op. cit. at 14.

31. International Legal Center, Law and Development: The Future of Law and Development Research (1974), 15-18, outlines the different views of the role of law in the development process. For a critique of this paper see A. Paliwala, "Towards a Political Economy of Law in Underdeveloped Countries" 2 Melanesian Law Journal 357 (1975).

32. Sir Kenneth Roberts-Wray, "The Adaptation of Imported Law in Africa," 4 Journal of African Law 66 (1960). For a similar view, expressed by an African, see B.O. Nwabueze, Constitutionalism in the Emergent States of Africa (1973), 39, but contrast W.R. Crocker, On Governing Colonies (1947), 84, who wrote with some experience in the British Colonial Office: "[T]he first result of British justice, then is to impose European and capitalistic items of property and economic relations." (The other

results, as listed by Crocker, were to make law less just, to foster crime, and to encourage expensive litigation). The opinion of Mr. Justice R.T. Gore, who was for many years the Chief Judicial Officer in Papua, was even more blunt than that of Roberts-Wray. At the conclusion of a book that had dealt with his experiences in Papua, he said "[The Papuans] are infants in history, and have no right to be arrogant or demanding. All they know, which is worthwhile, has been taught them by Europeans." Justice versus Sorcery, (1965), 218.

33. J. Woddis, Introduction to Neo-Colonialism (1972), 15. For a very similar approach to colonial law in Papua New Guinea see J. Kaputin, "The Law: A colonial Fraud?" 10 New Guinea 4 (1975); B. Narokobi, "The Adaptation of Western Law in the Pacific: The Papua New Guinea Experience," paper delivered at the 3d South Pacific Judicial and Legal Conference, Port Moresby, 1977.

34. Cf. R. Seidman, "The Reception of English Law in Colonial Africa Revisited," 2 Eastern Africa Law Review 47 (1969); P. Bayne, "Legal Development in Papua New Guinea: The Place of the Common Law," 3 Melanesian Law Journal 9 (1975). See also E.P. Wolpers, Race Relations and Colonial Rule (1975) for a demonstration of the validity of this approach in Papua New Guinea.

35. See H. Morris, "Native Courts: a Corner Stone of Indirect Rule," in H. Morris and J. Read (eds.), Indirect Rule and the Search for Justice: Essays in East African Legal History (1972), 131, for the operation of native courts in East Africa.

36. International Legal Center, op. cit., 16

37. D.M. Trubek, "Towards a Social Theory of Law: An Essay on the Study of Law and Development," 82 Yale L.J. 1 (1972), is a review of the theoretical approaches on the subject. See also M. Rheinstein, "Problems of Law in the New Nations of Africa," and in C. Gertz (ed.), Old Societies and New States: The Quest for Modernity in Asia and Africa (1963), 220, and M. Galanter, "The Modernization of Law," in L. Friedman and S. Macaulay (eds.), Law and the Behavioral Sciences (1969), 989. More recently, the International Legal Center, op. cit., 15, has concluded that "development, as we use the term, is not a unilinear process in which poor nations necessarily repeat the historical experience of the wealthier ones."

38. Op. cit., 990-91. Nevertheless, it is not clear whether Galanter is a proponent of diffusionism.

39. R. David, cited by J. Costa in A. Milner (ed.), African Penal Systems (1969), 369.

40. See for Papua New Guinea, D.P. Derham, Report on the System for the Administration of Justice in the Territory of Papua and New Guinea (1960), passim.

42, D. Trubek, op. cit.

42. M. Galanter, op. cit., 997.

43. F. Engels, "Feberbach and the End of Classical German Philosophy," in selected works, Vol. V. (1886) 337, at 369-70.

44. C. Leys, op. cit., at 243-51.

45. F. Engels, "Letter to J. Bloch" in op. cit., Vol. V. (1886) 487.

46. For example, the private legal profession effectively disappeared in Tanzania after the establishment of the National Legal Corporation under the Tanzania Legal Corporation (Establishment) Order, G.N. 32/1791.

47. For example, in China traditional communalistic dispute settlement mechanisms find a continuing role in the communist practice of solving most disputes informally within the brigade; J.A. Cheen, The Criminal Process in the People's Republic of China 1949-1963 (1968) 51. In Tanzania, use is made of customary dispute settlement mechanisms in the new form of arbitration tribunals.

48. For the access model, see J.C.N. Paul, "Notes on the Study of Access as an Approach to the Comparative Study of the Development of Legal Systems" (unpublished, 1975). On a general discussion of redistributive strategy, see J.C.N. Paul and Clarence J. Dias, "Law and Resource Distribution: A Report on a Series of Workshops co-sponsored by the International Legal Center and Various Regional Organizations during 1976-1977," (unpublished, 1977). The theoretical approach is merely a translation of the redistributive justice tradition from developed countries to the developing countries.

49. The most important examples in Papua New Guinea are the Land Groups Act 1974 and the Business Groups Incorporation Act 1974 which give corporate status to customary groups.

50. For Papua New Guinea, see the Village Courts Act 1973, the Land Disputes Settlement Act 1975, and the Business Groups Incorporation Act 1974.

51. See P. Fitzpatrick and L. Blaxter, "Legal Blocks to Popular Development" (1974) 1 Yagl-Ambu 303.

52. C.D. Rowley, "The Occupation of German New Guinea 1914-21," in W.J. Hudson (ed.), Australia and Papua New Guinea (1971), 57.

53. H. Radi, "New Guinea under the Mandate," in W.J. Hudson, op. cit., 75.

54. R.B. Joyce, "Australian Interests in New Guinea before 1906," in W.J. Hudson, op. cit., 8.

55. Ibid. 18.

56. Quoted in B. Jinks, P. Biskup, and H. Nelson (eds.), Readings in New Guinea History (1973), 86. These goals were in substance those of the Royal Commission appointed in 1906 to make recommendations concerning future Australian policy, and of Hubert Murray, who was Lieutenant-Governor from 1908 to 1940; see Ibid., 81-116. The Australian policy was not without its critics. In a debate in the Australian Parliament in August 1910, William Higgs argued that policy in Papua was in the interest of capitalists seeking higher dividends from their investments in the colonies, and that the Australian grant should rather be used to support mission-based Education programs, in order "to teach these natives trade, so that they may produce wealth for themselves in a co-operative way," Commonwealth of Australia, Parliamentary Debates, House of Representatives, Vol. LIX, 6641, August 1910. The Minister responsible for Papua responded: "[t]he Papuan is primarily an agricultural worker; . . . We are teaching him to develop his agricultural instincts, and the only way in which that can be satisfactorily done is to commit his employment," Ibid. 6642. The views of the Minister were those generally applied in the territories, although in later years Murray gave more emphasis to promoting Papuan development independent of European activity. However, the administrations of the two territories did not at any stage see serious conflict between the pursuit by Europeans of their economic interests and the interests of the indigenous people. In addition, neglect of education for the indigenous population remained a cardinal feature of Australian policy in both territories until after World War II.

57. Joyce, op. cit. 49.

58. Radi, op. cit., 74-5.

59. N. Sharp, "Millenarian Movements: Their Meaning and Significance," (1976) La Trobe Sociology Papers No. 25, 37: "[R]epeatedly planters pressed for Asian labour, yet despite a labour shortage this was always refused." See H. Nelson, "Papua is the Country!,"

(1969) 3 New Guinea No. 4., 39, 43 for a description of the similar situation in Papua.

60. See tables in H. Nelson, Black, White and Gold: Goldmining in Papua New Guinea 1878-1930 (1976), 266, 268.

61. Department of External Territories, Compendium of Statistics (Canberra, 1973).

62. For a history of law relating to land acquisitions in New Guinea, see F. Beaumont Phillips, "Native Land: Its Acquisition under German and Australian Law (to year 1930)" in Brown (ed.), The Fashion of Law in New Guinea (1967), 237. For Papua, see W.A. Lalor, "Land Law and Registration," Ibid., 137. The present powers are contained in the Land Act 1962, s.16. A formal system for land acquisition was necessitated by the decision of the Australian High Court that colonization had not done away with the rights of the people over their land. See Administration of the Territory of Papua and New Guinea v. Daera Guba (1937) 130 C.L.R. 353, 397.

63. J. Zorn, "Fighting Over Land," 4 Melanesian Law Journal 7 (1975).

64. The German New Guinea Company Charter of 17 May 1885 gave the company exclusive rights to take possession of "ownerless" land. In Papua under the British the crown automatically became owner of all "waste and vacant" land through the Act of State involved in the conquest or "taking into possession of the territory by proclamation. See In the Matter of the Land Titles Commission and in the Matter of Arthur Agevu and Others (1977) National Court No. 90. Land Ordinances, both for Papua and for New Guinea, provided for specific waste and vacant declarations to be made for the acquisition of administration title to the land, Land Ordinance 1911 (P.) s.8; Land Ordinance (1922-1961 (N.G.) s.11. Under the Land Act 1962 s.7 all land which is not "customary land" automatically vests in the government. However, section 83(1) provides for declarations under which land will be "conclusively deemed to be government land."

65. W.A. Lalor, History of the Kabaira Bay Land, Gazette Penninsula, New Britain (1972) Typescript, 17.

66. P. Hasluck, A Time for Building (1976), 121-22.

67. The common law rule, which was received, provides only that gold and silver belonged to the crown: Case of Mines (1967) 1 Plowd. 310, 336. However, for the colonies this rule has been expanded by legislation to include all minerals. See Mining Act 1928 (N.G.) s.191 and Mining Act 1937 (P.) s.166.

68. Section 67 of the Papuan Act and Section 190 of the New Guinean Act. These provisions have been repealed and replaced by the consolidating legislation of 1966, Part VIII for New Guinea and Part VI for Papua. For a historical account of mining in the colonial period see H. Nelson, op. cit. Nelson's work illustrates how the law operated primarily in favor of the expatriate miner, with the exception of a few provisions aimed at minimal protection of Papua New Guinean rights.

69. A.M. Healy, "Bulolo: A History of the Development of the Bulolo Region, New Guinea," New Guinea Research Bulletin No. 15 (March 1967), 42-43.

70. H. Radi, op. cit., 82.

71. H. Murray, The Scientific Method as Applied to Native Labour Problems in Papua, (1931), 9, quoted in P. Fitzpatric, "Labouring in Legal Mystification," (1976) 4 Melanesian Law Journal 133. L.P. Mair, Australia in New Guinea (2nd ed. 1970), chs. 9, 10, and 11, and D.W. Smith, Labour and the Law in Papua New Guinea (1975), Australian National University, Development Studies Centre, Monograph No. 1, passim, provide accounts of the historical development and details of the indenture system.

72. Murray, in Papua Annual Report, 1929-30, 9; see also A.M. Healy, op. cit., 82.

73. D.W. Smith, op. cit., 37; Smith relied heavily on F.J. West, "Indigenous Labour in Papua-New Guinea," (1950) 77 International Labour Review no. 2., 89-112.

74. Fitzpatrick, op. cit., 136. Fitzpatrick at 138, notes that Rowley, a knowledgeable and moderate observer of the system, saw "the (long illegal) use or threat of violence as the basic labour incentive," citing C.D. Rowley, The New Guinea Villager (1965), 115.

75. H. Nelson, op, cit., 170, 178, and I. Willis, Lae: Village and City (1974), 71, provide specific examples.

76. See W. Gammage, "The Rabaul Strike, 1929," (1975) 10 Journal of Pacific History 3, for an account of the only (short-lived) general strike. The strike leaders were convicted of criminal conspiracy: "21 were sentenced to three years' imprisonment, and 12 to terms of between 12 and 30 months. No man could serve his sentence in or near his home area," Ibid., 24.

77. Healy, op. cit., 84.

78. F.J. West, Hubert Murray (1968), 85.

79. Ibid., 184. For a contemporary account of the influence of the tax, see F.E. Williams, "Seclusion and Age Groupings in Papua," (1939) 9 Oceana 359, 378-79.

80. F.J. West, op. cit., 185.

81. Papua Annual Report 1945-1946, 3. N.D. Oram, Colonial Town to Melanesian City: Port Moresby 1884-1974 (1976), 75-82 details the administration of the labor law during the war.

82. See generally D.W. Smith, op. cit., 44-59.

83. P. Hasluck, op. cit., 235-37.

84. P. Fitzpatrick and J. Southwood, "The Community Corporation in Papua New Guinea" (1976) Institute of Applied Social and Economic Research, Discussion Paper 14.

85. Australia gave an annual average of 45,000 pounds ($250,000) to the territories until 1950, E.P. Wolfers, "Trusteeship without Trust," in F. Stevens (ed.), Racism: The Australian Experience, Vol. III (1972), 62, 99. The colonial administration's yearly reports to Canberra were replete with plaintive requests for more funds and detail how thinly patrol officers had to be spread. H.M. Murray, Native Administration in Papua (1929). The Australian grant left no excess for service projects, such as schools, hospitals, agricultural training or other necessities. Funds for these programs (when they existed at all) came from head taxes imposed on Papua New Guineans; there was no income or property tax on expatriates until 1959.

86. See H. Morris and H. Read, op. cit.

87. Of significance, too, was the character of the judicial process in the superior court. The Judges in Papua, and to a lesser extent in New Guinea, played a major role in the presentation of evidence in criminal trials and, except for capital offences involving Europeans, operated without juries. See generally P. Bayne, "Legal Development in Papua New Guinea: The Place of the Common Law," (1975) 3 Melanesian Law Journal 9, 13-16.

88. Actually, the Native Regulations in Papua and Native Administration Regulations in New Guinea. The regulations were promulgated by the Lt.-Governor or Administrator, under powers granted by the Native Regulations Ordinance 1908 (Papua) and Native Administration Ordinance 1921 (New Guinea). Wolfers, Race Relations and Colonial Rule (1973), is a comprehensive survey of the regulations.

89. L. Mair, Australia in New Guinea (2nd ed. 1970), 66.

90. Wolfers, op. cit., 66.

91. The Criminal Codes also took a hand in discouraging indigenous leaders and movements; many so-called "cargo cult" leaders were jailed for spurious infractions of the Code. See J.K. McCarthy, Patrol into Yesterday (1963), 223-28, on the trial of Yali of Madang. Accretions to the Code, which was otherwise imported without change from Queensland, included the Criminal Code (New Guinea) Amendment Ordinance 1934, which punished miscegenation between a white woman and a black man, and reflected peculiarly colonial policies; this section was not repealed until 1958 (No. 40 of 1958). In addition, the Marriage Ordinance 1935-1936, sec. 14, provided that a "native" might marry "any other person" only with the written consent of a District Office. This section was not repealed until 1963.

92. For a brief sketch, see Mattes, "Sources of Law in Papua and New Guinea," (1963) Australian Law Journal 148.

93. Actually, they were termed Courts for Native Affairs in New Guinea and Courts for Native Matters in Papua. They were created under the Native Regulations Ordinance 1908 (Papua) and the Native Administration Ordinance 1921 (New Guinea).

94. See the figures on the use of informal courts provided by N. Oram, in A. Clunies-Ross and J. Langmore, Alternative Strategies for Papua New Guinea (1973) 12. For a discussion of the operation of informal dispute-settlement agencies, even in heavily colonized parts of Papua New Guinea, see M. Strathern, "Official and Unofficial Courts, Legal Assumptions and Expectations in a Highlands Community," New Guinea Research Bulletin No. 47 (1972).

95. See I. Hogbin, "Local Government for New Guinea," 17 Oceana (1946) 33.

96. D.P. Derham, Report on the System for the Administration of Justice in the Territory of Papua and New Guinea (Canberra, (1960), hereinafter cited as the Derham Report.

97. Derham Report, 31. See also P. Hasluck, op. cit., 354; J. Kerr, op. cit.

98. Derham Report, 36.

99. Quoted in B. Jinks, P. Biskup, and H. Nelson, Readings in New Guinea History (1973), 186-90. Murray's remarks were made in criticism of the Ainsworth Report, which recommended that the New Guinea Mandate administration continue to recognize the judicial functions of luluais, Ibid., 256-57 (these recommendations were rejected). Not all colonial administrators were opposed to the appointment of indigenous magistrates. Before 1900 Governors in Papua had appointed such magistrates, T. Barnett, "The Courts and the People of Papua New Guinea," 1 Journal of Papua and New Guinea Society (1967) 95, 96. Hahl gave some recognition to the traditional dispute settlement procedures in German New Guinea, B. Jinks, P. Biskup, and H. Nelson, Readings in New Guinea History (1973) 186-90; C. Rowley, The Australians in German New Guinea (1958) 223-28. But the early attempts in Papua were not continued by Murray, who became Lieutenant-Governor in 1908.

100. Quoted in B. Jinks, et al, op. cit., 259.

101. Derham Report, App. H.

102. See footnote 62 supra.

103. Native Administration Regulations 1924, Regs. 57, 65, 70. The Germans used the luluai system to apply both German law and

customary law, but this was not continued by the Australians, C. Rowley, The Australians in German New Guinea (1958) 214, 225.

104. Native Regulations 1939, Reg. 115.

105. Native Regulations 1939, Reg. 114.

106. J.H.P. Murray, Native Custom and Primitive Races (1926), 9, claims that contract and tort never arise in custom as status is the major factor in dispute.

107. A.L. Goodhart (ed.), The Migration of the Common Law (1960) 7-10.

108. Jury Ordinance 1907 (Papua); Jury Ordinance 1951 (New Guinea); Juries Repeal Act 1964.

109. Wootten, "The Development of a Native Legal Profession" (Mimeo, 1964).

110. Ibid.

111. Greves, "Criminal Jurisdiction of the Supreme Court of Papua New Guinea," 25 A.L.J. (1952) 582, 596.

112. The shooting of Papuans by miners and government officers was criticized by Lt-Governor Murray in 1906. Jinks, Biskup and Nelson, op. cit., 103. For more recent examples, see Salisbury, "Despotism and Australian Administration in the New Guinea Highlands," 66 American Anthropologist 225-226 (1964); J. Nilles, "The Kuman People," 24 Oceania 1, 15-16 (1953). Recently Papua New Guineans have begun to comment on this aspect of their colonial history, see J. Waiko, "A Payback Murder," 4 Journal of Papua New Guinea Society (1970), 27.

113. Even as late as 1962, see R. v. Alder (1962), Supreme Court (unreported). R. O'Regan, The Common Law in Papua New Guinea (1971), 31, observes that Chief Justice Mann's interpretation of the Criminal Code was "exceptional."

114. P. Bayne, "Legal Development in Papua New Guinea," 3 Melanesian L.J. 9 (1973).

115. Quoted in A. Inglis, Not a White Woman Safe (1974), 79, who provides examples at 79-80, 117, 129-30.

116. J. Sinclair, Behind the Ranges (1975).

117. Papua New Guinea Dept. of Education, Five-Year-Plan (Draft, 1975).

118. Report of the 1962 United Nations Visiting Mission to the Trust Territory of New Guinea (1962, passim.

119. T. Mboya, "These Are Our Brothers," (1965) 1 New Guinea No. 1., 11, 12.

120. A. Mazrui, "An African's New Guinea," (1970) 5 New Guinea No. 3, 45, 56.

121. International Bank for Reconstruction and Development, The Economic Development of the Territory of Papua and New Guinea (1965); for a summary of the Report, see Papua New Guinea Office of Programming and Co-ordination, Programmes and Policies for the Development of Papua and New Guinea (Port Moresby, 1968), Chapter 1.

122. J.R. Kerr, Law in Papua and New Guinea (Australian Institute of International Affairs, Townsville, Queensland, 1968); see also G. Nash, infra.

123. Ibid., 7

124. Ibid., 10-11.

125. Ibid., 19.

126. Ibid., 20.

127. Territory of Papua and New Guinea, House of Assembly Debates, Vol. 1, no. 10, 1627 (1 September 1966).

128. A. Paliwala, "The Bougainville Agreement: Is a Deal a Deal?," (1974) 2 Melanesian Law Journal 130, 135-36.

129. Papua New Guinea Central Planning Office, Papua New Guinea's Improvement Plan 1973-1974, 20 and passim.

130. Territory of Papua and New Guinea, House of Assembly Debates. vol. 1, no. 11 (24 November 1966).

131. S. Zorn, "Bougainville: Managing the Copper Industry," (1973) 7 New Guinea; A Paliwala, "Is a Deal a Deal? The Bougainville Agreement," 1974 2 Melanesian Law Journal 130.

132. Although Australian capital was ostensibly involved in Bougainville in the form of investment by Conzinc Rio Tinto of Australia, this company is a subsidiary of Riotinto Zinc Ltd. of the United Kingdom. The enterprise was financed primarily by loan capital from western banks. See S. Zorn, op. cit.

133. C.D. Rowley, "Labour Administration in Papua New Guinea," (1958) 9 South Pacific 540, 543-44. The movement towards freeing both employer and employee from legislative restrictions has been incremental rather than revolutionary; for example, it was not until 1971 that payment of an all-cash wage was lawful. The provisions of the Act as they stood in 1975 are reviewed fully by D.W. Smith, op. cit., Chapter 5.

134. Territory of Papua and New Guinea, Legislative Council Debates, Vol. VI, No. 3, 230 (26 September 1961).

135. Fitzpatrick, op. cit., 140, and the references cited therein; N.D. Oram, op. cit., 140-42.

136. C. Healy, "Companies in Papua New Guinea: The Legal Framework," Third Waigani Seminar (1969, unpublished typescript), 5.

137. Ibid., 7

138 Ibid., 10.

139. Territory of Papua and New Guinea, House of Assembly Debates, Vol. 1, No. 8, 1209 (3 March 1966).

140. Ibid., 1361 (9 March 1966).

141. Ibid., Vol. 11, No. 12, 3641 (17 November 1970). Another example of conscious replication of Australian commercial law is the 1970 Amendment to the Bills of Exchange Act, which was justified on the basis that "[B]ecause the banks operating in the Territory are all branches of Australian banks, it is important that the law covering Banking practice is the same in the Territory as it is in the Commonwealth of Australia," Ibid., Vol II, No. 11, 306 (3 September 1970).

142. East Africa Royal Commission, Report (1955) Cmd 9475, paras. 77-78.

143. In answer to the question why proposed laws regarding land conflicted with traditional tenure systems, the Secretary for Law for Papua New Guinea propounded a simple analysis: "[T]he Administration has introduced a system of land ownership which is quite different from the customary systems of the people of the Territory. The chief reason for this is that ownership according to custom is not adequate in a developed society. The system which the Administration has introduced is similar to that used in Australia and has been developed to meet the needs and pressures of a busy economy such as we hope will grow up in the Territory." Territory of Papua and New Guinea, House of Assembly Debates, Vol. II, No. 6, p. 1703 (4 September 1969. See T. Bredmeyer, "The Registration of Customary Land in Papua New Guinea," (1975) 2 Melanesian Law Journal 267, 276.

144. S.R. Simpson, "Report on Land Problems in Papua New Guinea," in M.W. Ward (ed.), Land Tenure and Economic Development: Problems and Policies in Papua New Guinea (1971), New Guinea Research Bulletin No. 40, 10-11.

145. See A.D. Ward, "Agrarian Revolution: Handle with Care," (1972) New Guinea Vol. 6, No. 1, 25-34.

146. Territory of Papua and New Guinea House of Assembly Debates, Vol. I, No. 8, 1351, 1352 (9 March, 1966).

147. There is no study of the role of customary law in its entirety in the "official" system but see J. Zorn, "The Land Titles Commission and Customary Land Law: Settling Disputes Between Papua New Guineans," (1974) 2 Melanesian Law Journal 151; Law Reform Commission of Papua New Guinea, "Criminal Responsibility: Taking Customs, Perceptions and Beliefs into Account," Working Paper No. 6, February 1977.

148. Native Customs Recognition Act 1963, s. 6.

149. Ibid. s. 7.

150. The research was carried out by law students at the University of Papua New Guinea on behalf of the Law Reform Commission of Papua New Guinea.

151. J. Zorn, "Fighting Over Land," 4 Melanesian L.J. 7 (1976).

152. P. Bayne, "Legal Development in Papua New Guinea," 3 Melanesian L.J. 9, 23 (1975).

153. T. Barnett, "The Local Court Magistrate and the Settlement of Disputes," in B. Brown (ed.) Fashion of Law in New Guinea (1969) 159, 164.

154. Papua New Guinea Report 1971-72, 52.

155. Committee Investigating Tribal Fighting in the Highlands, Report (1973) 27-28.

156. Figures supplied by Papua New Guinea Magisterial Services Commission.

157. Quoted in Papua New Guinea Post Courier, November 26, 1975.

158. Nash, "Problems of Legal Education in Papua New Guinea," in B. Brown (ed.) Fashion of Law in New Guinea (1969) 230.

159. Ibid., 221, 226.

160. Papua New Guinea Central Planning Office, Papua New Guinea's Improvement Plan 1973-1974, 20 and passim.

161. S. Zorn, op. cit.

162. Papua New Guinea Central Planning Office, Papua New Guinea's Improvement Plan 1973-1974, chapter 2.

163. Ibid., 14.

164. Ibid.

165. B. Finney, Big Men and Business (1973) passim.

166. L. Andrews, "Business and Bureaucracy: A Study of Papua New Guinea Businessmen and the Policies of Business Development in Port Moresby," (1975) New Guinea Research Bulletin No. 59, passim.

167. P. J. Bayne and H.K. Colebatch, "Constitutional Development in Papua New Guinea 1968-1973) New Guinea Research Bulletin No. 51, chs. V, VI, and VII detail the stages of this process. M. Somare, Sana (1975), 83-110, is an account by the present Prime Minister of the formation of the 1972 government and of its policies.

168. "New Mining Policy for Papua New Guinea, Statement by the Minister for Mines, Mr. Paul Lapun, to the House of Assembly, 12 June 1973," reprinted in J. Zorn and P. Bayne (eds.), Foreign Investment, International Law and National Development (1975) 160-62.

169. "Foreign Investment Guidelines, Statement by the Chief Minister, Mr. Michael Somare, to the House of Assembly, 27th November, 1973," reprinted in J. Zorn and P. Bayne, op. cit., 163-65.

170. Government Publication No. 7125, October 1973.

171. Overseas Development Group, University of East Anglia, A Report on Development Strategies for Papua New Guinea (1973).

172. Ibid., para 4.15.

173. J. Momis and J. Kaputin, "Call for Papua New Guinea Control of Bougainville Copper," Press Release (4 February 1974).

174. Mining (Bougainville Copper Agreement) (Amendment) Act (1973; M. Faber, "Bougainville Renegotiated: An analysis of the new Fiscal Terms," Mining Magazine, December 1974; S. Zorn," Renegotiating the Bougainville Copper Agreement," United Nations Centre on Trans-National Corporations, Training Seminar, New Delhi, April 1975.

175. National Investment and Development Act 1974, Part III. Section 44 and Schedule 5 of the Act prohibit nationalization and expropriation only if not in accordance with law or not for a public purpose defined by law, although payment of compensation as defined by law is guaranteed.

176. Papua New Guinea's Improvement Plan 1973-74, 108.

177. Business Groups Incorporation Act 1974; Companies (Amendment) Act 1974; Land Groups Act 1974.

178. Commission of Inquiry into Land Matters, Report (Port Moresbby, Government Printer, 1973).

179. The implementing legislation includes the Lands Acquisition Act, Lands Redistribution Act 1974, Land Groups Act 1974, Land Trespass Act 1974, and Land Disputes Settlement Act 1975.

180. The Constitution of the Independent State of Papua New Guinea further emphasizes the trend toward Papua New Guinean ownership by providing that no freehold land may be owned by a non-citizen, section 56.

181. See generally J. Zorn, "Fighting Over Land," (1976) 4 Melanesian Law Journal 7.

182. M.T. Somare, "Law and the Needs of Papua New Guinea's People," in J. Zorn and P. Bayne (eds.), Lo Bilong Ol Manmeri: Crime, Compensation and Village Courts (Port Moresby, 1974) 14.

183. J. Kaputin, "The Law: A Colonial Fraud?," (1975) 10 New Guinea 4.

184. Constitution of the Independent State of Papua New Guinea, schedule 2; see generally C.J. Lynch, "The Adoption of an Underlying Law by the Constitution of Papua New Guinea," (1976) 4 Melanesian Law Journal 37. The Law Reform Commission has foreshadowed proposals that would assert the primacy of customary law: "Declaration and Development of the Underlying Law," Working Paper No. 4. (1976).

185. On Papua New Guinea dispute settlement procedures, see A.L. Epstein (ed.), Contention and Dispute (1974); on restoring harmony as the primary aim, see A.L. Epstein, "Introduction," in Ibid., 20.

186. Village Courts Act 1974, S. 19.

187. Figures supplied by the Village Courts Secretariat, Port Moresby, November 1976.

188. For example, in January 1976, the Tulum Village Court, which serves a population of 1800 in the Southern Highlands, issued 30 compensation orders, 25 orders to pay fines, and 1 order to do community work, and jailed 7 persons. See A. Paliwala,

"Village Courts: People's Courts or Colonial Courts?," paper delivered at the Goroka Seminar on Law and Self Reliance 1976.

189. On the corruption issue, see M. Strathern, "Sanctions and the Problems of Corruption in Village Courts," in J. Zorn and P. Bayne (eds.), Lo Bilong ol Manmeri, op. cit., 48.

190. A. Paliwala, op. cit., passim.

191. Village Courts Act 1974, s. 30.

192. Ibid., s. 29.

193. See generally R.W. James, "Developments in Legal Education in the Faculty of Law, University of Papua New Guinea," (1975) 3 Melanesian Law Journal 185.

194. Constitutional Planning Committee, Final Report (1974) Ch. 2, para. 98.

195. J. Momis, "Values for Involvement," (1975) 5 Catalyst No. 3, 3-18.

196. Ministry of Labour, Commerce and Industry, Papua New Guinea National Investment Strategy (1976) 15; D. Denoon, op. cit., 346.

197. See D. Denoon, "Papua New Guinea," (1975) Australian Journal of Politics and History 435, 436-37, 442.

198. This is particularly important to note in the history of the Business Groups Act 1974. The legislation had its genesis in a much wider proposal for a General Purpose Corporation Bill which was intended to provide a simple form of incorporation for a wide variety of purposes. The Business Groups Act is a very emasculated version of the original idea. A representative Public Service attitude is this statement by a former head of the Department of Business Development, "I do not think you can run modern business along traditional lines" cited in a speech by C. Lepani. (16 Nov. 1974)

199. Papua New Guinea Post-Courier10 March 1977.

200. National Investment and Development Authority, Third Investment Priorities Schedule, 1977.

201. Investment Priorities Schedule, 1977. L. Blaxter and P. Fitzpatrick, Informal Sector Discussion Papers (Unpublished, 1973).

202. See footnote 198, supra.

203. H. Johnson, Economic Strategies Toward Less Developed Countries (1963).