"The Rule of Law, Economic Development, and Peace and Welfare and Good Government"
Sir Buri Kidu Lecture
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When I was a child, I spoke as a child, I understood as a child, I thought as a child; but when I became a man, I put away childish things.

1 Corinthians 13:11

When I was a child, I commenced my legal studies at the University of Queensland Law School. I was then 16, going on 17 years of age. The rule of law was a topic covered in the first year subject, "Introduction to Law". Notwithstanding the best endeavours of the Honourable Margaret White AO, as she later became, who then lectured in that subject at the law school, the rule of law was to me an abstract concept. My understanding of it was as a child. Approaching half a century later, my understanding of the rule of law and its importance is very different. For on this subject I have put away childish things.

The title of the lecture is hardly novel. In the first part, it draws its inspiration from an incisive book authored by Professor Kenneth Dam of the University of Chicago Law School, "The Law-Growth Nexus: The Rule of Law and

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Note: The views expressed in this paper and the related public lecture are the author's personal views, not those of the judicial arm, or any other arm, of government in either Papua New Guinea or Australia.

Economic Development".[2] Professor Dam's experience is much wider than academia. He served as a Deputy Secretary of State and as a Deputy Secretary to the Treasury in separate United States administrations. In his book, he draws on his collective experience as a lawyer, economist and diplomat to offer an answer as to why, in so many developing countries, notwithstanding decades of foreign aid and multilateral lending on generous terms from institutions such as the World Bank, so many remain in poverty.

Professor Dam's thesis, with which I respectfully agree, is that the crucial determinant of increasing general prosperity in a nation or stagnation and poverty is adherence to the rule of law.

The remainder of this lecture's title was inspired by a formulation for the grant of sovereign legislative power to a self-governing British colony or dominion, or newly independent nation, "to make laws for the peace welfare and good government of the [place] in all cases whatsoever".[3] Papua New Guinea's Pre-Independence Constituent Assembly chose a variant of this formulation, also much used throughout the Commonwealth and the former British Empire,[4] for the specification of the delineation of the extent of legislative power, subject to the Constitution, granted to parliament by the PNG Constitution – "peace, order and good government".[5] The attraction of that addition, as I hope to demonstrate, is that the rule of law is crucial not just for economic development but for a society's peace, welfare [order] and good government.

But what is the "rule of law"?

Most academic instruction as to the answer to this question, mine included as I recall, attributes the concept and content of the expression, "the rule of law" to that offered in the late 19th century by Professor A V Dicey, Vinerian Professor

[2] K W Dam, The Law-Growth Nexus: The Rule of Law and Economic Development, Brookings Institution Press, 2006.

[3] As in, for example, s 2, Constitution Act 1867 (Qld).

[4] Hakeem O. Yusuf, Colonial and Post-Colonial Constitutionalism in the Commonwealth: Peace, Order and Good Government. Routledge, 2013, p. 95.

[5] s 109, PNG Constitution.

of English Law at the University of Oxford, in his enduringly influential work, "Introduction to the Study of the Law of the Constitution". In truth, Dicey was describing a concept that had come to be accepted in the United Kingdom for two centuries by then. Dicey discerned three major elements in what he termed the supremacy or rule of law, the security given by the law to the rights of individuals:

(a) Penalisation only according to law and then only before the ordinary courts – "[N]o man is punishable or can be lawfully made to suffer in body or his goods except for a distinct breach of law established in the ordinary legal manner before the ordinary Courts of the land."[6]

(b) Equality before the law – "[N]o man is above the law, but (what is a different thing) that here every man, whatever be his rank or condition, is subject to the ordinary law of the realm and amenable to the juris-ordinary diction of the ordinary tribunals".[7]

(c) In the absence of contrary intention, express or necessarily implied, the construction of statutes so as not to derogate from the common law freedoms as ascertained and developed by the courts – "the constitution is pervaded by the rule of law on the ground that the general principles of the constitution (as for example the right to personal liberty, or the right of public meeting) are with us the result of judicial decisions determining the rights of private persons in particular cases brought before the Courts; whereas under many foreign constitutions the security (such as it is) given to the rights of individuals results, or appears to result, from the general principles of the constitution".[8]

Dicey contrasted what he termed the rule of law with systems of government where arbitrary power and wide discretions were exercised by government and

[6] Albert Venn Dicey, Introduction to the Study of the Law of the Constitution, 3rd Edition, Macmillan & Co, 1889 (Dicey), p. 175.
[7] Dicey, pp. 180- 181.
[8] Dicey, pp. 182-183.

where different segments of society were subject to different laws or to no law at all. His paradigm example of this was pre-revolutionary France under the Bourbon monarchy, although he detected a legacy of this in the French *droit administratif* .

What has all this got to do with Papua New Guinea and, even more so, with economic development, peace, welfare [order] and good government?

The answer is a very great deal.

When, on 24 February 1974, Her Majesty The Queen opened the then newly constructed Law Courts at Waigani, where I sit when I exercise my judicial commission here, she observed: "The people of Papua New Guinea are about to set out on the great adventure of Independence, and if they are to be successful in it, it is essential that the rule of law shall grow and flourish. Experience shows that it is hard to establish, and that great vigilance is necessary to maintain it."[9]

At the time when Her Majesty delivered that speech, Dicey had been dead for over half a century. Undoubtedly, however, it was the rule of law as understood and explained by him to which Her Majesty was referring as essential for a newly independent Papua New Guinea to grow and flourish.

The following year, on 15 August 1975, the people of Papua New Guinea, via their Constituent Assembly, adopted the Constitution of the Independent State of Papua New Guinea (PNG Constitution), which came into force on Independence Day, 16 September 1975.

The PNG Constitution clearly envisages that Papua New Guinea will be a country governed, and its society conducted, according to law, the law as chosen made by the people of Papua New Guinea. It makes express provision for what constitutes the laws of Papua New Guinea[10] and then details a National

[9] Speech by H M Queen Elizabeth II on the Official Opening of the Law Courts, Waigani, 24 February 1974, Signed original now framed and displayed in the Chief Justice's Conference Room at the Law Courts, Waigani, NCD, Papua New Guinea.

[10] s 9, PNG Constitution.

Legal System[11] in the form of a hierarchy of laws at the apex of which is the PNG Constitution and then descending through Organic Laws, Acts of Parliament, Emergency Regulations, provincial laws and subordinate legislation to the Underlying Law.

At the time of the adoption of the PNG Constitution, the Underlying Law, as set out in Schedule 2 to that Constitution,[12] consisted of custom (to the extent not inconsistent with the Constitution, organic and statute law and basic principles of humanity) and the common law and principles of equity of English law as at Independence. Subsequent statutory prescription continues this understanding of the content of the Underlying Law.[13]

The PNG Constitution enshrines, rather than leaves unstated but assumed, certain elements of Dicey's understanding of the rule of law. As to penalisation only according to law, this may be seen in s 37 (Protection of the law) and s 42 (Liberty of the person). It also provides for qualified equality before the law in that citizens are unremarkably afforded certain privileges which non-citizens do not enjoy such as the right to vote, to hold elective office and to own freehold land – s 55 (Rights of citizens).[14] Subject to these qualifications, equality before the law is either explicit (via the reference to "persons" in constitutionally entrenched freedoms or implicit, as part of the Underlying Law. The general rule of construction that statutes should not be construed so as to derogate from basic rights and freedoms is picked up via both the Underlying Law and the constitutional entrenchment and thus paramountcy, subject to the PNG Constitution, of basic rights and freedoms.

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[11] Part II, Division 1, PNG Constitution - The Laws of Papua New Guinea.

[12] s 20, Part II, Division 1, PNG Constitution specifies that until otherwise provided by statute, the Underlying Law is specified in Schedule 2.

[13] s 3 of the Underlying Law Act 2000 provides:

3. Source of underlying law.

(1) The sources of the underlying law shall be—

(a) the customary law; and

(b) the common law in force in England immediately before the 16th September, 1975.

[14] See also the Acknowledgement of this qualified equality in the Preamble to the PNG Constitution.

The PNG Constitution also distributes sovereign national power between three arms of government – legislative, executive and judicial.[15] Moreover, the system thus established requires that the members of the Ministry be members of parliament and that the Ministry is responsible to parliament.[16] It also provides for an independent National Judicial System.[17]

As a member of the Commonwealth of Nations, Papua New Guinea is also one of those nations which endorsed, at the Commonwealth Heads of Government Meeting, at Abuja in Nigeria in 2003, the Commonwealth Principles on the Three Branches of Government (the Latimer House Principles) as earlier agreed by the Commonwealth's Law Ministers.[18] Each of these principles repays careful study. They are completely congruent with the PNG Constitution and the National Legal System. Given the topic of this lecture, I intend to mention three of them:

(a) relations between parliament and the judiciary;

(b) the independence of the judiciary; and

(c) ethical governance.

On these subjects, the Latimer House Principles provide:

- *Parliament and the Judiciary*

  "(a) Relations between parliament and the judiciary should be governed by respect for parliament's primary responsibility for law making on the one hand and for the judiciary's responsibility for the interpretation and application of the law on the other hand.

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[15] s 99(2), PNG Constitution.

[16] s 141, PNG Constitution.

[17] s 157, PNG Constitution.

[18] See: https://commonwealthlawyers.com/wp-content/uploads/2018/12/LatimerHousePrinciples.pdf Accessed, 5 March 2022. The popular term, "Latimer House Principles" is derived from a conference sponsored by the Commonwealth Parliamentary Association, the Commonwealth Legal Education Association, the Commonwealth Magistrates' and Judges' Association and the Commonwealth Lawyers' Association, which was held in the United Kingdom at Latimer House, Buckinghamshire, in June 1998, where these principles were drawn up. It was these principles to which the Commonwealth's Law Ministers agreed and which its Heads of Government endorsed.

(b) Judiciaries and parliaments should fulfil their respective but critical roles in the promotion of the rule of law in a complementary and constructive manner promotion of the rule of law in a complementary and constructive manner."

- *Independence of the Judiciary*

  "An independent, impartial, honest and competent judiciary is integral to upholding the rule of law, engendering public confidence and dispensing justice. The function of the judiciary is to interpret and apply national constitutions and legislation, consistent with international human rights conventions and international law, to the extent permitted by the domestic law of each Commonwealth country."

  One of the means by which this independence is secured is stated thus:

  > "Interaction, if any, between the executive and the judiciary should not compromise judicial independence.
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  > Judges should be subject to suspension or removal only for reasons of incapacity or misbehaviour that clearly renders them unfit to discharge their duties."

- *Ethical Governance*

  "Ministers, Members of Parliament, judicial officers and public office holders in each jurisdiction should respectively develop, adopt and periodically review appropriate guidelines for ethical conduct. These should address the issue of conflict of interest, whether actual or perceived, with a view to enhancing transparency, accountability and public confidence."

So much for formal public law provision and policy. What of its operation in practice and the related ramifications for the subject of this lecture?

In terms of personal experience, I was offered this perspective of Papua New Guinea by a foreign diplomat (not Australian) in 2012, across the table from whom I happened to be seated at a dinner in Australia. That diplomat remarked to me, “It feels like Zimbabwe.”

At the time, I knew, immediately, what that diplomat meant.

As I related in a paper recalling my experience of my first year as a member of the PNG judiciary,[19] I had attended, when in practice, an international conference of independent referral Bars known as the "World Bar Conference" in Edinburgh in 2002. One of the speakers at that conference was The Hon Anthony Gubbay, the former Chief Justice of Zimbabwe. He described the progressive deterioration of the rule of law there and the intimidation of judges by the government of President Mugabe after a series of court rulings declaring particular government initiatives illegal. In November 2000 a group of pro-government militants had stormed the main courthouse while police stood by and watched.

Zimbabwe, the former Rhodesia, gained freedom from its former colonial power, the United Kingdom, in 1980. Over four decades later, how has it fared? Once, it was considered “the bread basket of Africa”, a great exporter of grain; now 60% of its population is subject to food insecurity.[20] According to the World Bank, its latest annual growth rate is -4.1%, an improvement of sorts on the previous -6.5%, its annual inflation rate is 66%, up from 60.61% and its interest rate, a steady 60%.[21] Zimbabwe’s economy and with that the ability to

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[19] J A Logan, A Year in the Life of an Australian Member of the PNG Judiciary, Paper delivered at the 18th Commonwealth Law Conference Cape Town, South Africa, 15 April 2013: https://www.fedcourt.gov.au/digital-law-library/judges-speeches/justice-logan/logan-j-20130415 Accessed 5 March 2022.

[20] Ms Hilal Elver (Turkey), Special Rapporteur on the Right to Food: Once the breadbasket of Africa, Zimbabwe now on brink of man-made starvation, UN rights expert warns: United Nations High Commissioner for Refugees, November 2019: https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=25363 Accessed 13 March 2022.

[21] World Bank Development Indicators, Trading Indicators, Zimbabwe Indicators: https://tradingeconomics.com/zimbabwe/indicators Accessed, 6 March 2022.

improve the standard of living of the population generally is contracting, not expanding.

Zimbabwe's present position, as revealed by these statistics, offers a paradigm example of the impact on a nation of institutional failure in governance in practice, notwithstanding courageous endeavour to prevent that by persons such as Chief Justice Gubbay. The Zimbabwe Constitution provides for the vesting of national judicial power in an independent judiciary[22] but that did not prevent the violent storming of its main courthouse and the sustained intimidation of its Chief Justice in 2002.

On 12 December 2011, the Supreme Court of Papua New Guinea gave judgment in *Re Reference to Constitution section 19(1) by East Sepik Provincial Executive*.[23] At the heart of that case was whether the great architect of Papua New Guinea's independence and then Prime Minister, Grand Chief the Rt Hon Sir Michael Somare had, by an absence from three meetings of Parliament, forfeited his seat in Parliament and thus also his office as Prime Minister. By majority, the court held that he had not. The corollary of this was a conclusion that the Hon Peter O'Neill, who was at least purporting then to serve as Prime Minister in a government in coalition with the Hon Belden Namah as Deputy Prime Minister had not been duly elected as Prime Minister.

The members of the majority included the then Chief Justice, Sir Salamo Injia and Justice Nicholas Kirriwom.

A period of high political tension, even turmoil, attended this court case and its aftermath.

The judicial branch was not unaffected by this.

[22] ss 79 and 79B, Zimbabwe Constitution.
[23] [2011] PGSC 41; SC1154.

In between November 2011 and May 2012, Injia CJ was twice purportedly suspended from office and twice arrested.[24] There was no substance in any of these purported suspensions and arrest charges. Justice Kirriwom was also arrested, again without any substance in the charge.

As to the second occasion on which Injia CJ was arrested and according to evidence tendered in a later Leadership Tribunal proceeding, [25] while the Chief Justice was engaged in May 2012 in hearing a contempt proceeding at the Law Courts at Waigani, the Hon Belden Namah, accompanied by some other MPs and members of the Royal Papua New Guinea Constabulary and Defence Force stormed into the courtroom with Mr Namah shouting:

> "Chief Justice, I want your immediate resignation now. Resign now Chief Justice, your immediate resignation. You are not a credible person. You are bringing country down. You have got to respect the people of Papua New Guinea. You are only one man, you are bringing this country down. Arrest him, follow him. Arrest him, arrest him, Arrest him. Enough is enough. Enough is enough. Take him straight to the car. *Paitim em* [ie seize him]. Arrest him. He asked for it, he will get it."

According to that evidence, the Chief Justice exited the court room. His Associate attempted to close the door behind him but was injured in this endeavour and the door was forced open by some of the accompanying police officers and soldiers, who then rushed through searching for the Chief Justice. Proceedings on the charge against the Chief Justice were in short order stayed and it was later dismissed.

Although this Leadership Tribunal concluded that Mr Namah engaged in misconduct to which the evidence mentioned attested and made a recommendation to the Governor-General that Mr Namah be dismissed from office, the National Court later held,[26] on an application for judicial review of its decision by Mr Namah, that this recommendation had been made without

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[24] I detail the circumstances of these purported suspensions and arrests in my paper, A Year in the Life of an Australian Member of the PNG Judiciary.

[25] *Namah, In re* [2018] PGLT 1; N7194 (LT), at [30].

[26] Namah v Higgins [2020] PGNC 189; N8415.

affording him an opportunity to be heard as to penalty. Further, taking into account delay in the institution of proceedings before a Leadership Tribunal, that this was the second occasion in which such a proceeding had been brought before such a tribunal, that the Tribunal's reasons had conflated in a way not able to be disentangled findings as to the occurrence of charged conduct and penalty, that contempt proceedings against Mr Namah in respect of the same alleged conduct had been discontinued in 2013 and that Mr Namah had, since the alleged misconduct, twice been re-elected to parliament, the court decided to quash this tribunal's decision and recommendation and to permanently stay Leadership Tribunal proceedings in respect of the alleged incident. An appeal against these orders was subsequently dismissed as an abuse of process.[27]

The position which therefore obtains is that there is no subsisting finding of a court or tribunal on the evidence mentioned that the Hon Belden Namah was guilty of misconduct.

Also in the period November 2011 to May 2012, parliament enacted the *Judicial Conduct Act* 2012. This provided for a mechanism for the suspension and removal of judges which was not readily reconcilable with the provisions in the PNG Constitution on these subjects.[28] I visited Papua New Guinea for two Supreme Court sittings over this period, in February and in April 2012. How well I recall the air of tension that pervaded the judicial branch during this period, especially in April 2012. For resident judges, their very livelihood and life's vocation in the Law was in jeopardy via the Judicial Conduct Act. And how enduring is my admiration for the way in which the PNG judiciary continued independently to do justice according to law, business as usual, in those unusual times.

[27] Independent State of Papua New Guinea v Namah SC2037, 16 December 2020.

[28] PART VI—Division 5, Subdivision H.—Removal from Office of Senior Judicial and Legal Office-holders., PNG Constitution.

Were this account to stop here, many might conclude that Papua New Guinea was indeed just like Zimbabwe.

2012 was an election year in Papua New Guinea. The election was duly held mid-year. In the sequel, Mr Namah ceased to be Deputy Prime Minister. The new parliament, with the Hon Peter O'Neill as Prime Minister, repealed the *Judicial Misconduct Act* in short order.[29] Chief Justice Injia served the balance of his term as Chief Justice without further incident. He retired from that office in 2018. Justice Kirriwom also continued in office. His service to the Nation was later recognised in the national honours system.[30] Sadly, he died in office in April last year as a consequence of the COVID-19 pandemic.

Since 2012, Papua New Guinea again duly held a national election in 2017 and will again later this year. Over this period, there has been a change of government, based on an ability to command a majority in parliament. Moreover, in the immediate aftermath of the death last year of Sir Michael Somare, the Hon Belden Namah made a fulsome and public apology for his behaviour in that period of tension in 2011 to 2012 in and in relation to Sir Michael Somare, Sir Salamo Injia and the judiciary generally. So, too, did the Hon Peter O'Neill tender a public apology for his part in the political impasse which occurred as a sequel to the Supreme Court's decision.[31]

No such sequel occurred in Zimbabwe in relation to the intimidation of Chief Justice Gubbay and other members of the judiciary. Truly, Papua New Guinea is not like Zimbabwe. But it could become like it, unless the great vigilance mentioned by Her Majesty when opening the Law Courts is maintained.

Events in 2012 marked the most dramatic but not the first major period of tension between the executive and the judiciary. The PNG Constitution

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[29] Judicial Conduct (Repeal) Act 2013.

[30] The Honourable Nicolas Robert Pakek KIrriwom was appointed Companion of the said Most Distinguished Order of St Michael and St George (CMG) for services to the judiciary and to the legal profession in the 2014 Queen's Birthday Honours List: The London Gazette, Supplement 60898, Page b50, 14 June 2014.

[31] Post Courier, 16 March 2021.

provided[32] that the Pre-Independence Chief Justice and other judges of the Supreme Court of the Territory of Papua and New Guinea would automatically become, on Independence, the first Chief Justice and judges of the Supreme and National Courts of Papua New Guinea. In 1979, the then Minister for Justice, the Honourable Nahau Rooney, published a letter highly critical of the Supreme Court judiciary's lack of sensitivity to what she described as a "growing national consciousness". At the time, the bench was comprised mainly of expatriate, Australian judges who, immediately before Independence, had held office as judges of the Supreme Court of the Territory of Papua-New Guinea. Each of these had translated into the office of a judge of the Supreme and National Courts of PNG upon Independence.

In response to Mrs Rooney's letter, the then Chief Justice, Sir William Prentice, convened a sitting of the Supreme Court to condemn what was perceived by the judges as an attack on judicial independence. The Minister's response was to state that, she had "no confidence in the Chief Justice and other judges....It appears that the foreign judges on the bench are only interested in administration of foreign laws and not the feelings and aspirations of the nation's political leaders." For this and the initial publication she was convicted of contempt by the Supreme Court and sentenced to 8 months' imprisonment. When, after having served but one day, she was released on licence by the then government, the Chief Justice and the remaining members of the court resigned. Another judge had earlier resigned in respect of a related matter.

There are indications that the memory of what has passed into history as "the Rooney Affair" lingers in public consciousness in Papua New Guinea to this day, even though its main participants have all now passed away. In preparing this paper, I came across a most thought-provoking letter to the editor

[32] s 271, PNG Constitution.

(footnoted), [33] published in The National shortly after the 45th anniversary of Independence in 2020. The author of that letter mentions the Rooney Affair in the context of the continued presence of Australian advisers and aid. He raises profound questions about whether Papua New Guinea's National Legal System, drawing as it does on statutory models and a common law found in Australia, the former administering power and other developed country jurisdictions is in any way apt for, or even understood by, the country. His exhortation is, "We should be focused on taking back PNG from the colonial masters."

Yet, with respect, the people of Papua New Guinea took their country back from their former colonial master, Australia, peacefully and with Australia's blessing and ongoing goodwill, in 1975. It is a striking feature of the PNG Constitution that it is not, as were what have proved to be the first constitutions

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[33] Mr Manu Marikina, Letter to the Editor, The National, 18 September 2020: https://www.thenational.com.pg/png-not-functioning-as-fully-independent/ Accessed 6 March 2022.

IT is our 45th birthday but still we are still being told what to do and how to act by our colonial master.
The Australian government advisers and police liaison officers do nothing to encourage development.
They are taking us back to the days of the Rooney Affair raising the clash between the executive and judiciary.
We have more laws than many countries of our size and the most of these laws have no relevance to the most Papua New Guineans.
How many commissions of inquiries do we need to spend millions of kina on when the basic laws of the country cannot be enforced?
Why is our present health emergency a law and order issue?
How many betel nut bans and litter laws do we need to pass with no sign of enforcement?
There are road rules, registration rules, tax laws, company registration rules, and banking rules which are all aimed at helping us but we do not see any good result.
Australian aid is no different to those of other countries.
Are our laws relevant? Are they worth the money they cost to draft and legislate them?
What is their purpose?
Are we not entitled to get a return out of this investments?
Have the laws become vehicles for corruption to serve only the privileged?
We know about the roadblocks, spot fines but where is the enforcement?
Is there a line up at Vulupindi Haus where infringement notices are being paid?
I think not.
Why do I continue to see not roadworthy PMVs and taxis swerving around like racing cars with no masks on?
Why do I see betel nut markets, roadside barbecues and stores with no regard for public health and safety?
Are taxpayers paying for fat police to sit around chewing the very product (betel nut) that is banned?
It is about time we change the way we think and start being serious about serving our people with love and pride.
We should be focused on taking back PNG from the colonial masters.

Manu Marikina, Via email

of so many countries of The Commonwealth, a schedule to a statute or Order in Council of a former colonial power.

In contrast, the PNG Constitution was adopted by the people of Papua New Guinea[34] via their Constituent Assembly. Australia's *Papua New Guinea Independence Act 1975* (Cth) does nothing more than relinquish any claim to sovereignty on the expiration of the day preceding Independence Day, repeal certain Australian legislation inconsistent with Independence and provide for the making of consequential regulations.[35] Unlike, conspicuously at present, Russia in relation to the Ukraine, Australia has never manifested any intention, or even expressed any intention, to resume sovereignty of any part of Papua-New Guinea.

The content of Papua New Guinea's National Legal System is and always has since Independence been a matter for the people of Papua New Guinea. Papua New Guinea's encounter with British, German and then Australian culture and values forever changed not just the lives of her people but also their destiny. The very idea of nationhood and the boundaries of that nation are a legacy of the colonial era. So, too, is the Christian faith, so deeply and sincerely embraced in Papua New Guinea as made manifest in the Preamble to the PNG Constitution.

Yet the ties of custom are also strong and the depth of encounter and understanding, even today, with introduced and locally embraced inherited culture and values is greatly variable. Papua New Guinea's rugged terrain on the island of New Guinea and its myriad of scattered islands large and small have always made personal, physical communication difficult. But the increasing pervasiveness and reliability of digital communications and the internet is already impacting, and will ever increasingly and exponentially impact, upon local isolationism.

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[34] See the Preamble to the PNG Constitution.

[35] See ss 4, 5 and 6, Papua New Guinea Independence Act 1975 (Cth).

One way of highlighting the immensity and complexity of the challenge this amalgam of custom and introduced laws presents in relation to the rule of law in Papua New Guinea is to relate another observation made to me about the country.

A few years ago, I had the benefit of an informal discussion with a senior, local law reform official. I mentioned the Law and Justice Sector (and related Australian aid) priority of "restorative justice at village level" via Village Courts, the courts at the base of the National Judicial System.[36] That official was very well aware of this and of its present value but made an observation to this effect to me, "But we are trying to give Papua New Guinea a modern legal system and this restorative justice priority is at odds with that."

In a country with over 800 language groups,[37] what is custom to some may be unheard of or perhaps a source of offence to others. The only truly national code of behaviour, civil and criminal, in so many aspects of life in Papua New Guinea, may only be laws which, like the Nation itself, are a legacy of the colonial era.

The potential tension between these priorities of restorative justice at village level and a modern legal system is evident in the amendments made to the *Village Courts Act 1989* by the *Village Courts (Amendment) Act 2014*. As amended by that Act, s 2B(1)(c) of the Village Courts Act provides that one of the Act's objects is that:

> "Village Courts are to make decisions in accordance with custom and the principles of restorative justice."

Yet s 2B(2) of the Village Courts Act, as amended provides:

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[36] See s 172(2), PNG Constitution and the Village Courts Act 1989 and an illuminating discussion by S Dinnen, Building Bridges: Law and Justice Sector Reform in Papua New Guinea, Bell School, Australian National University Discussion Paper: https://bellschool.anu.edu.au/sites/default/files/publications/attachments/2015-12/2002_02_dinnen%5b1%5d_0.pdf Accessed 6 March 2022.

[37] C Levy, Language Research in Papua New Guinea: A Case Study of Awar, Contemporary PNG Studies: DWU Research Journal Vol. 2, May 2005, p 79.

> (2) A decision of a Village Court made in accordance with custom is of no force and effect to the extent that -
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> (a) it is inconsistent with a law of Papua New Guinea; or
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> (b) its application and enforcement would be contrary to the National Goals and Directive Principles and the Basic Social Obligations established by the Constitution; or
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> (c) its application and enforcement would be contrary to the basic rights guaranteed by Division III.3 (Basic Rights) of the Constitution.

The potential for tension in practice between sincerely held local customary belief and a paramount national law is obvious.

Only by pervasive, long term, intergenerational education and experience, and much goodwill and understanding, will this potential for tension diminish. The sentiments evident in the letter to the editor I have mentioned should, I respectfully suggest, lead all arms of government, members of the academy and the legal profession to conclude that there is much to be done, which needs to be done, to educate the wider community generally about the National Legal System long ago now adopted by the people of Papua New Guinea. A corollary of this is that these same groups must lead by example in conforming with the National Legal System and, if thought fit, in promoting its reform.

The letter to the editor mentioned also serves as a reminder about the importance of a free press. In a democracy, one of the many vital roles which a free press serves is by publishing such letters thus giving voice to a range of community views, challenging complacency and provoking remedial reforms and action. Another vital role, of course, is, by fearless but principled investigative journalism, to shine light into the dark corners where lurk departures from the rule of law.

An immediate legacy of the judicial resignations which were a sequel to the Rooney affair was a need in short order to appoint a new Chief Justice and other superior court judges. In this regard, it is impossible to overstate the value of the service rendered to the Nation by the Honourable Sir Buri Kidu, in the

respectful memory of whom this lecture series is named, in assuming the office of Chief Justice in the wake of these resignations. Under his leadership, the doing of justice according to law in Papua New Guinea, as contemplated by the PNG Constitution, was maintained. Papua New Guinea was blessed by his service, as it has been by that of his successors in office.

Although I have, on occasion when sitting on the Supreme Court, differed from colleagues as to the outcome of appeals or reviews, not once in over a decade of judicial service have I ever felt that the difference was anything other than one of principle. This type of difference is by no means uncommon in courts exercising ultimate appellate jurisdiction. Not once have I ever felt that a colleague was pressing for an outcome other than for reasons of principle.

To my observation and in my experience, a strong and enduring ethos of judicial integrity and independence permeates the judiciary of Papua New Guinea.

What is truly remarkable about this is that Papua New Guinea's judges do not enjoy the same security of tenure as do I and the other members of the senior judiciary in Australia. Reflecting a hard learned lesson over the course of the 17th century in England as to the essentiality of continuity of tenure after appointment, as manifested in the *Act of Settlement 1701* (Eng) but modified in Australia so as to specify an age limit,[38] Australia's judges enjoy tenure after appointment and during good behaviour and capacity until attaining 70 years of age. This type of judicial tenure is typical throughout the Commonwealth.

In contrast, in Papua New Guinea, even citizens who are appointed to the senior judiciary are appointed for no more than 10 years, although they may be re-appointed (For non-citizens, the maximum term of appointment is three years, although, again, they are eligible for re-appointment).[39]

[38] s 72, Australian Constitution.

[39] s 2, Organic Law on the Terms and Conditions of Employment of Judges.

This departure from well-accepted practice reflects a deliberate decision of the Constitutional Planning Committee, so that judges do not become "status conscious" and "remote".[40] However, if, as is so very desirable, the senior judiciary is to be recruited from the ranks of the most senior, able and experienced legal practitioners, it takes a singular patriotism to give up practice at the height of one's earning power to take up a judicial appointment with no security of tenure beyond 10, or perhaps only 3 years. The present provision is, I respectfully suggest, in need of reform.

Professor Dam's thesis as to the essentiality of institutional integrity in practice to economic growth and development is exactly congruent with a view expressed by the Asian Development Bank in its 2014 publication, "The Challenges of Doing Business in Papua New Guinea":

> The quality of economic, legal and social institutions is a key determinant of long run growth. The government supports these institutions' mandates by shaping formal policy, rules and regulations. These "rules" determine the ease of operating a business in the formal sector. Complicated, burdensome rules increase compliance costs, encourage informality and block new investment. …
>
> Investment is encouraged by a stable set of supportive rules, regulations and policies. Unfortunately, the business surveyed were concerned about the stability of these factors.[41]

The Asian Development Bank's report focussed on the position in Papua New Guinea in 2012, the first half of which was, as I have mentioned, a time of great political instability. As to political instability, the Bank opined, "When the normal risks of doing business are compounded by political risks, investors demand higher returns and shorter payback periods."[42]

The Asian Development Bank report also identified corruption as a "serious issue for businesses in PNG".[43]

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[40] Constitutional Planning Committee Report, Chap. 8, para. 67.
[41] Asian Development Bank, The Challenges of Doing Business in Papua New Guinea, 2014, p 20.
[42] Asian Development Bank, The Challenges of Doing Business in Papua New Guinea, 2014, p 15.
[43] Asian Development Bank, The Challenges of Doing Business in Papua New Guinea, 2014, p 25.

Corruption is a blight on, and the antithesis of, the rule of law. Instead of equality before the law, an individual buys either preferential treatment under the law or a departure from the law (or both) from another in a position to facilitate such treatment. A whole Division of the Criminal Code, Division III.2A,[44] is devoted to the penalisation of particular ways in which such corrupt conduct can manifest itself via secret commissions.

Professor Dam highlights how departures from the rule of law affect both human rights and private dealings:

> "[A]side from human rights issues, the rule of law is likely to be compromised even in purely private law matters if the leadership of a country or if privileged individuals can act arbitrarily against others. Rules applicable between private parties may mean entirely different things when one of the parties has the power of the state behind it – say, through political interference (crony capitalism) or corruption.[45]

Crony capitalism or corruption are by no means confined to the developing world. Two examples from my home Australian State, Queensland, drawn from each end of the political spectrum, illustrate this.

In *Theiss v TCN Nine Limited (No 5),*[46] a defamation proceeding instituted by Sir Leslie Theiss against a media company and others, a civil jury found that imputations in an impugned publication that Sir Leslie had bribed the Queensland Premier, Sir Johannes (Joh) Bjelke-Petersen on a large scale and on many occasions and obtained the Winchester South coal concession by bribery were true. Those findings were not overturned on appeal. Sir Leslie Theiss and Sir Joh Bjelke-Petersen were of similar age, outlook and background and longstanding friends. Nonetheless, on the evidence, the jury's conclusion was that these imputations were true.

It must be recorded at once that Sir Joh Bjelke-Petersen was not a party to this proceeding, was never convicted of official corruption and passed away still

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[44] Added by Criminal Code (Amendment) Act 1989 (No. 2 of 1989), s7.
[45] Dam, p 16.
[46] [1994] 1 Qd R 156.

entitled to the presumption of innocence. But Sir Leslie Theiss was a party to the proceeding in which the finding was made. He, too, was never convicted of any criminal offence in respect of the conduct revealed in this civil proceeding. His absence of criminal conviction is in contrast to the position of Mr Gordon Nuttall, a former member of the Queensland Legislative Assembly and sometime Minister. In *R v Nuttall*,[47] his appeal against conviction, in respect of his conviction on 36 counts of receiving secret commissions was dismissed. The conduct concerned included receiving monthly secret commissions over a sustained period from a Mr Ken Talbot, a sometime Queensland mining magnate later killed in an aircraft crash in Africa while journeying to mining investment sites there.[48] Mr Talbot was awaiting trial in Queensland in respect of related bribery charges at the time of his death. Mr Talbot also died entitled to the presumption of innocence.

Mr Nuttall also sought, unsuccessfully, leave to appeal against his sentence. In respect of each of the 36 separate counts on which he was convicted, he was sentenced to concurrent terms of imprisonment of seven years (the maximum penalty for one such offence) with the date upon which he would be eligible to apply for parole fixed at 2 January 2012. In dismissing Mr Nuttall's challenge to this sentence, the Queensland Court of Appeal stated:

> [T]he appellant received the payments with the seriously corrupt state of mind identified earlier, he was the instigator of the payments, the offending occurred over a substantial part of the period during which the appellant was a Minister, and he did not disclose any of those payments despite the well known requirements for disclosure in a Queensland Cabinet Handbook, a Ministerial Handbook, and a Code of Ethical Standards adopted by the Legislative Assembly.[49]

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[47] [2011] 1 Qd R 270.

[48] Sydney Morning Herald, 22 June 2010: https://www.smh.com.au/business/mining-executives-confirmed-dead-in-african-plane-crash-20100622-ysn5.html Accessed, 6 March 2022.

[49] R v Nuttall [2011] 1 Qd R 270, at [49].

The Court of Appeal also cited with approval these observations made by Lee J in another Australian (New South Wales) Ministerial corruption case, *R v Jackson & Hakim*:

> "We live, and are fortunate to live, in a democracy in which members of Parliament decide the laws under which we shall live and cabinet ministers hold positions of great power in regard to the execution of those laws. A cabinet minister is under an onerous responsibility to hold his office and discharge his function without fear or favour to anyone, for if he does not and is led into corruption the very institution of democracy itself is assailed and at the very height of the apex. Democracy can only survive when ordinary men and women have faith in the integrity of those whose responsibility is the preservation of integrity of Parliament in all its workings. It is particularly important that those who have the privilege, the honour and the responsibility of cabinet rank should not, for their personal advantage, abuse their position."[50]

Is it possible to find a case law example of such conduct in or in relation to Papua New Guinea? It is. Given the topic of this lecture, there is no use in not confronting the findings made in the case.

The case concerned is *Public Prosecutor v Lim Ai Wah and Thomas Philip Doehrman*,[51] which was a criminal prosecution, heard in the Singapore District Court in 2016. The facts as found by the trial judge revealed an elaborate money laundering and bribery scheme[52] relating to the establishment of community colleges in Papua New Guinea to the end of paying five secret commissions in the total amount of $US784,000 into a Singapore bank account in the name of Sir Michael Somare. Mrs Lim and Mr Doehrman were each convicted of offences against these Singaporean statutes: s 477A read with s 109 of the *Penal Code* (Cap 224, 2008 Rev Ed) ("PC") and s 47(1)(b) of the *Corruption, Drug*

[50] (1988) 33 A Crim R 413, at 435.
[51] [2016] PGSC 249: https://d6mljhs7208w9.cloudfront.net/uploads/2017/11/Public-Prosecutor-v-Lim-Ai-Wah-and-Thomas-Philip-Doehrman-PNGi.pdf Accessed 7 March 2022.
[52] The scheme is related in Public Prosecutor v Lim and Doehrman [2016] PGSC 249, at [3] to [10].

Trafficking and Other Serious Crimes (Confiscation of Benefits) Act (Cap 65A, 2000 Rev Ed). Mrs Lim was sentenced to a total of 60 months' imprisonment and Mr Doehrman to a total of 70 months' imprisonment. Responding to a report of these convictions, Sir Michael issued a public statement in which he stated, "I would like to state from the outset that at no time in my political career have I received inducements or bribes."[53]

Sir Michael Somare was never convicted either in Singapore or in Papua New Guinea of any offence in respect of the receipt of any sum arising from the scheme detailed in the case against Lim and Doehrman. Like Sir Joh Bjelke-Petersen, he, too, is entitled to the presumption of innocence and passed away last year so entitled.

On any view, the Lim and Doehrman case highlights how sophisticated can be a scheme by which a secret commission may be paid, irrespective of who in fact is the recipient. It takes an equally sophisticated combination of able and experienced investigatory agencies and legal professionals and an independent, high quality judiciary to deal fairly and competently with such schemes. Self-evidently from that case, Singapore has such a combination. The challenge for Papua New Guinea, I suggest, is to replicate such a combination.

By its very nature, a secret commission is, or is intended to be, "secret". Proving the paying and receiving of such a commission beyond reasonable doubt and by admissible evidence may be thus be difficult, especially where the payment is received off-shore. Not infrequently, and *Theiss v TCN Nine Limited (No 5)* is an example, the proof offered includes evidence from a former employee who has fallen out with one or the other of the participants in the bribery scheme.

It is a serious mistake to consider that the criminal justice system is the only mechanism by which official corruption may be addressed. What is needed is a multi-agency approach.

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[53] PNG Report, 5 September 2016: https://www.pngreport.com/png/news/1111459/somare-denies-bribe-claim Accessed, 13 March 2022.

An ill-gotten gain is no use to the miscreant unless it can be enjoyed. Often, that gain manifests itself in the acquisition of assets either in the jurisdiction or accessible and enjoyed abroad. Or it may manifest itself in expenditures on overseas holidays, school fees or medical treatment the amount expended for which is inconsistent with the disposable income after tax of a particular office. By its very nature, a corrupt payment is inherently unlikely to be declared to the Commissioner-General of Internal Revenue. Income tax law, via the mechanism of an assets betterment statement after audit activity culminating in a default assessment[54] can be a potent and effective way of eliminating the benefits of corrupt conduct, even if criminal prosecution for official corruption is not possible.

An asset betterment statement entails an audit of a person's assets and expenditures in Papua New Guinea or elsewhere, an examination of that person's declared income and expenses and thus disposable income and the formation of an opinion as to whether those assets and overall expenditure could have been acquired or expended over time with that disposable income. If not, an estimate is then made as to the amount of income which would have been necessary in order to acquire such assets or make such expenditure. An assessment or amended assessment is then raised based on that estimated income.

When in practice, I saw this multi-faceted approach to combatting official corruption deployed to good effect in conjunction with the inquiry conducted by The Hon G E (Tony) Fitzgerald QC into official misconduct and police corruption in Queensland.[55] I appeared for the Commissioner of Taxation not before that inquiry but rather in some of the "spin-off" tax cases. A special investigation team from the Australian Taxation Office monitored the evidence

[54] s 229, Income Tax Act 1959.a calculation is then made as to

[55] Report of the Commission of Inquiry Pursuant to Orders in Council ("Fitzgerald Inquiry), July 1989: https://www.ccc.qld.gov.au/publications/fitzgerald-inquiry-report Accessed 8 MArch 2022.

given in public in that inquiry and then initiated consequential audit, assessment and tax recovery action based on what was revealed. In relation to brothel keepers apparently failing to declare income from the conduct of then illegal places of prostitution, an examination was made of payments by credit card and a view formed as to what proportion of overall takings this likely represented (the cash-credit card ratio) with assessments or amended assessments being raised based on the estimated, resultant overall income of an individual.

There is no time limit in respect of the making of an amendment to an earlier assessment if the Commissioner-General forms the opinion, after his investigation, that there has been an avoidance of tax due to fraud or evasion.[56] Such an assessment, like any other assessment, may be the subject of an objection lodged with the Commissioner-General. A person dissatisfied with such an assessment may either seek a review by the Review Tribunal or appeal to the National Court. On any such review or appeal, the onus of proving the assessment falls on the taxpayer.[57]

These provisions in Papua New Guinea's income tax law are not materially distinguishable from equivalent provisions in Australian income tax law. As to the onus of proof in an income tax review or appeal, the High Court of Australia has in *Federal Commissioner of Taxation v Dalco*[58] and *Trautwein v Federal Commissioner of Taxation*[59] held that, in order to succeed on a review or an appeal, a taxpayer must show not only that an assessment is excessive, but also the extent to which it is excessive. The corrupt recipient of a secret commission may be disinclined to undertake that task.

Moreover, by s 257 of the Income Tax Act, it is provided that, "The fact that an appeal or reference is pending does not in the meantime interfere with or affect the assessment the subject of the appeal or reference and income tax may be

[56] s 232(2)(a), Income Tax Act 1959.
[57] s 250(b) Income Tax Act 1959.
[58] (1990) 168 CLR 614, at 626.
[59] (1936) 56 CLR 63, at 88.

recovered on the assessment as if no appeal or reference were pending." So there is no reason to defer a recovery proceeding until a review or appeal is finalised.

The Commissioner-General also has a power to garnishee from those holding money for a taxpayer or who owe money to a taxpayer the amount of tax owed by that taxpayer.[60] There has long been an equivalent provision in Australian income tax law.[61] In conjunction with default assessments, this ability to garnishee has long been a potent weapon in Australia in the recovery of tax owing on undeclared income.

Sometimes, in Australia, the first a person learns that they have been subject to covert audit by the Commissioner of Taxation is when they are given notice of the amended assessment in conjunction with a notice that the Commissioner has required the bank in which they have savings to pay the amount in that bank account, subject to the amount of the assessment, plus penalties, to the Commissioner pursuant to the statutory garnishee power. The plus penalties refers to the additional tax which may be imposed for the lodgement of an earlier incorrect return or a failure to return anything by way of income hitherto. Fraudulent avoidance of tax is also an offence,[62] punishable by a fine or by imprisonment for up to five years, although any such offence must be commenced within six years of the commission of the offence.[63] Notoriously, in the United States, what put the gangster of the Prohibition era in the 1920s, Al Capone in the then Federal Penitentiary at Alcatraz in San Francisco harbour was not bootlegging, racketeering, and murder convictions but rather federal tax evasion convictions.[64]

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[60] s 272, Income Tax Act 1959.

[61] See, for example, the now former s 218 of the Income Tax Assessment Act 1936 (Cth). There are successor provisions in the Schedule to the Taxation Administration Act 1953 (Cth).

[62] s 321(1), Income Tax Act 1959.

[63] s 321(2), Income Tax Act 1959.

[64] See: How Tax Evasion Toppled Al Capone (+ The Tax Man Who Nailed Him): https://www.mightytaxes.com/al-capone-tax-

One thing that has always surprised me about Papua New Guinea is the dearth of tax liability and recovery appeals in the Supreme Court's lists. This is in marked contrast to my experience in Australia, both in practice and as a judge. The lists of the Administrative Appeals Tribunal, the Federal Court of Australia in original and appellate jurisdictions and the High Court of Australia and, in relation to tax recovery, State courts exercising federal jurisdiction, include many tax proceedings every year. The lists are also well-populated by personal insolvency and corporate winding up proceedings as a consequence of a failure to meet tax liabilities and related judgments.

When I visit Papua New Guinea for judicial duties, I see ever-increasing signs of active trade and commerce all around the National Capital District, yet no tax liability, recovery or insolvency cases. It is very difficult indeed to accept that this is the result of universal, ready compliance, even to the extent of declaring voluntarily to the Commissioner-General any secret commission received. And why, one asks rhetorically, is there not one case example in the reports disclosing that a person came to be a prisoner at Bomana or some other correctional centre because of conviction and sentence for fraudulent tax evasion?[65]

In its publication, *Tax Administration and Corruption Topic Guide*, Transparency International has this to say on that subject:

> Revenue administration covers the collection and management of domestic revenues such as taxes, customs duties, revenues earned from state-owned enterprises and other forms of revenues. Tax administration in particular is often perceived as one of the sectors most vulnerable to corruption due to complexity of tax laws, the high discretionary powers of tax officials and the low cost of punishment. Corruption undermines a country's tax structure and its revenue collection capacity, resulting in significant loss of revenues and funding available for public service provision. Not

evasion/#:~:text=On%20Oct.%2017th%2C%201931%20Al%20Capone%20was%20convicted,only%20two%20years%20in%20prison%20with%20good%20behavior. Accessed, 8 March 2022.

[65] A search of the Pacific Legal Information Institute databases for the National Court and Supreme Court of Papua New Guinea on 8 March 2022 disclosed no such case.

> only does it lower the tax to GDP ratio, but also causes long-term damage to the economy by increasing the size of the underground economy, distorting the tax structure, corroding the tax morality of taxpayers as well as eroding public trust in government institutions.[66]

A very similar perspective is offered in relation to another developing country, Pakistan, by two authors resident in that country:

> Developing countries are typically unable to generate sufficient amounts of revenue from taxation because these countries face a number of problems in the process of revenue generation. One of the main problems is corruption in tax administration. The two important components of revenue generation are tax administration and tax system reforms … The main objective of these is to increase the efficiency of tax administration, specifically by reducing corruption and tax evasion. The second main problem of low revenue generation is political instabilities in developing countries. One of the important characteristics of political instability is … incoherent policy framework, which hinder in the process of long-term reforms in the system.
> The quality of governance as a whole is also relevant in this context. It is widely agreed that the presence of tax evasion and corruption of public officials is a social phenomenon that can significantly reduce tax revenue and seriously hurt economic growth and development.[67]

I do not know why it is there is a dearth of tax cases in the court lists in Papua New Guinea. To be clear, I cast no adverse imputation on the Commissioner-General or his staff or past such officials. But I respectfully suggest that the absence of such manifestation of tax compliance activity does raise an interrogative note warranting inquiry and action.

If a case such as *Public Prosecutor v Lim and Doehrman* came to the attention of the Commissioner-General, there would be no need for that official to await the institution, trial and conviction of an individual in this jurisdiction or elsewhere before raising a default assessment in respect of income apparently

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[66] M Morgner and M Chêne, Tax Administration and Corruption Topic Guide, Transparency International, 2014, p 1.

[67] T Ajaz and E Ahmad, The Pakistan Development Review, Vol 49, No 4 (2010) p 405.

received by way of secret commission. The Commissioner-General is not obliged to act only on evidence admissible in a court, only on material reasonably supportive of administrative conclusions. Once raised, and in the event that an objection is dismissed, it then falls to the recipient of the assessment to prove that it is excessive.

A corrupt official ought, I respectfully suggest, to sleep uneasily at night, wondering whether it will be tomorrow that a default assessment arrives in the mail box and the bank rings to say it has paid a related tax liability by garnishee notice into the consolidated revenue account nominated by the Commissioner-General.

Papua New Guinea is a party to a number of Double Taxation Agreements, which also provide for the sharing of information between national revenue authorities. One such agreement is with Australia.[68]

A failure to declare secret commissions is, hardly surprising, given the immorality entailed in the seeking and receipt of such payments. But that type of immorality can also be symptomatic of a wider malaise whereby an underground economy is conducted and income thereby derived without there being any compunction about not declaring that income or goods and services tax liability to the Commissioner-General. The temptation for otherwise honest traders who become aware of such corrupt practices, and the absence of any or any effective enforcement and recovery counter-measures by government, also to engage in tax evasion can be overwhelming. The general integrity of the public sector can be similarly eroded by knowledge that those gaining advantage by corruption are not being brought to account.

Corrupt practices inflate the cost of projects public and private. Those inclined to secure advantage by bribery are not altruists. The cost of the bribe is factored

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[68] Agreement between Australia and the Independent State of Papua New Guinea for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with respect to Taxes on Income [1989] ATS 37: http://www.austlii.edu.au/au/other/dfat/treaties/1989/37.html Article 25 is directed to the exchange of information.

in as a project cost with the overall benefit obtainable from finite public or private sector funds available to be committed being diminished accordingly. Corruption truly is a cancer which can spread across an entire society.

Every kina due but never collected under taxation law is a kina not spent on schools, hospitals, roads, reliable power and water supply, other infrastructure and law and order, national defence or servicing public debt. But the effects of corruption are, as I have mentioned, far from confined to revenue law compliance.

Papua New Guinea, latterly, has not been idle in adopting additional laws to augment measures available under existing law to combat corruption. In November 2020, Parliament adopted, unanimously, the *Organic Law on the Independent Commission Against Corruption 2020* (ICAC Law).[69]

This, with respect, was a landmark development. The ICAC Law confers on the Commission established (ICAC) inquisitorial powers which have proved necessary in combatting organised crime and corruption in Australia and elsewhere. Care must be taken to ensure such powers are not abused.

Given the definitions of "relevant agency" and "regulatory agency" in s 4 of the ICAC Law, it appears to me, *prima facie* at least, that ICAC could permissibly share under s 36 of the ICAC Law information it gathers with the Commissioner-General, facilitating the multi-faceted approach against corruption I have already mentioned.

In conjunction with amendments made by the *Proceeds of Crime Amendment Act 2015 and the Whistleblower Act 2020*, Papua New Guinea now has a comprehensive, modern statutory framework of laws with which to address official corruption.

However, addressing corruption requires more than just a legal framework. Without adequate financial and human resources, such laws are but a façade.

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[69] https://icac.gov.pg/wp-content/uploads/2021/07/Certified_ICAC-Act-2020.pdf Accessed 8 March 2022.

For the ICAC to be effective, competent staff are required.

I noted with interest when reading the newspapers the weekend before last that ICAC had advertised beyond Papua New Guinea for such staff. Especially in its formative years, ICAC will need to draw, if possible, on the experience elsewhere in the operation of such bodies. However, the University, the Legal Training Institute and peak accounting bodies have a vital role to play in relation to the provision of suitably competent, local professional staff.

If standards of university and professional practical education are lax, so too will be the resultant quality of local professional staff across government, including ICAC and in the private sector.

This year will mark a decade of my association with the Legal Training Institute. I am always deeply impressed by the keenness of the student body there. But this coming year the student intake at the Legal Training Institute will only be about 85 students.[70] I doubt that number is anywhere near sufficient to supply the high quality entrants to the profession that are necessary to service the needs of various public sector departments and agencies, including ICAC, let alone the needs of business and the wider community via the private profession. But the staffing and facilities do not presently permit a much higher output. And it would be utterly counter-productive even to seek to increase quantity if the price for that were a reduction in quality.

Successive Chief Justices of Papua New Guinea, in their capacity as Chair of the Institute's governing body, have actively sought to combat idiosyncratic thinking and practice by exposing students at the Legal Training Institute to international best practice by encouraging the volunteer involvement of judges and barristers from the Queensland and Victorian Bars in the conduct of specialist practical legal training at the Legal Training Institute. The sustained, ready, volunteer response to this encouragement is testimony to the closeness of

[70] Personal discussion by the author with the Acting Director of the Legal Training Institute.

the bonds between Australia and Papua New Guinea. However, even though these busy judges and practitioners volunteer their time, their deployment would not have been possible without related Australian aid assistance. It is to be hoped that this aid assistance continues. For that involvement is at present and to my observation and in my experience truly essential.

There is also a vital need for this volunteer assistance to be supplemented by much greater volunteer support from Papua New Guinea's legal profession. A core ethos of any learned profession must be volunteering to bring on the next generation in that profession. That ethos is not, with respect, anywhere near sufficiently abroad in the local legal profession.

There have been times when teaching at the Legal Training Institute when I have had cause for concern about the depth of legal theoretical tuition offered to the students by the Law School. Long term, any laxity in tertiary educational standards will affect not just the effectiveness in practice of a bodies such as ICAC, the taxation, public prosecutor's and public solicitor's, Titles, Companies and Solicitor-General's offices and the legal profession generally but also the quality of the judiciary and of the magistracy.

In turn, a high quality tertiary legal and post graduate practical legal education is dependent upon the quality of the national education system for its intake. Without high standards of literacy, it is impossible to grasp, apply and communicate even the most basic legal concepts. Yet only a week ago when delivering a continuing legal education session for the Law Society I had senior members of the profession voicing concern to me about the ability of some recent admittees even to write basic legal correspondence.

In a developing country, the challenges of maintaining a high quality education system can be immense, given the opportunity cost entailed relative to other areas of need. To recognise this is to underscore the absolute importance of addressing revenue leakage via an underground economy and addressing any inflation in the cost of public works by allowance for secret commissions.

Yet another threat to a high quality practising profession, magistracy and judiciary is anything other than insistence on merit, not gender or "representative" quotas or kin, either in the initial filling of university entry places or, later, in appointments in the National Judicial System.

Judges and magistrates do not "represent" any constituency other than the people of the Nation as a whole, exercising on their behalf their sovereign power so as to do justice according to the PNG Constitution and the laws made thereunder without fear, favour, affection or ill-will. The role of representing constituencies is for politicians seeking to be elected on particular policy platforms, not judges and magistrates.

The folly of thinking otherwise was never better expressed than by the Rt Hon Sir Harry Gibbs in an oration delivered by him upon the opening of the Rare Books Room in the Queensland Supreme Court in 2000:

> Although everyone would pay lip service to the notion that judges should be independent, it is not unnatural for some members of government, like most people, to prefer to hear what they want to hear rather than what they ought to hear. The independence of the judiciary depends as much on the sort of persons who are appointed to the bench, as on the safeguards which protect the holder of the office once it is attained. Similarly, nowadays everybody would pay lip service to the notion that appointments to the bench should be made on merit, which of course includes character and temperament as well as ability and experience. In practice, inappropriate motives do sometimes influence judicial selection in many if not most countries.
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> Personal patronage has been exercised ever since Queen Elizabeth I appointed as her Chancellor Sir Christopher Hatton, who had never been admitted to the bar, but was "chiefly famed for his handsome person, his taste in dress and his skill in dancing". Political affiliation was once almost universally regarded as a reason for judicial appointment. It is claimed that in Great Britain political appointments have not been made since Lord Chancellor Jowitt put an end to the practice in the 1940's, but in the United States and Canada there is barely any attempt to disguise the fact that appointments are made on political grounds. Political appointments have not been

> unknown in Australia, but they are never acknowledged as such. At one time in Queensland religion seemed to be a determinative factor but those days fortunately have long since gone. A more recent heresy is that the bench should be representative and that the sex of the aspirant or perhaps his or her ethnic origin should be a more important consideration than merit. The bench can never be representative, for there are many sections of society which it would be impossible to represent; what is more important, the bench should never be representative, for the duty of a judge is not to represent the views or values of any section of society but to do justice to all. I do not of course suggest by this litany that bad appointments make up a large proportion of the bench. Further, of course, a good appointment may sometimes be made for a bad reason.
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> However, one insufficiently qualified judge is capable of inadvertently doing substantial injustice and an unmeritorious appointment disturbs the morale of the bench and the faith of the legal profession in the system. [71]
>
> [Footnote reference omitted]

Moreover, and with respect, insufficiently qualified judges or magistrates do not just disturb the morale of the bench and the faith of the legal profession in the system of justice. They also disturb the faith of the commercial community and the wider community in the rule of law. After all, an important feature of the rule of law is that cases will be decided according to law, thus making advice as to outcomes if particular evidence is accepted reliable.

So, too, do delays in the quelling of disputes, criminal and civil, by an exercise of judicial power erode that faith. To my observation, some of those delays are due to poor case analytical skills by some in the local legal profession and the related institution of ill-conceived civil claims, appeals and reviews. In any profession, there will always be a range of competencies. However, even allowing for this, I see too many advocates of indifferent quality in the Supreme Court. It is also obvious from appeal records that this is the same in the National

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[71] The Rt Hon Sir Harry Gibbs GCMG, AC, KBE, retired Chief Justice of the High Court of Australia, Oration on the Occasion of the Opening of the Rare Books Room, Supreme Court of Queensland, Brisbane, 11 February 2000: Queensland Supreme Court Library Catalogue: https://sclq.tind.io/record/95002?ln=en Accessed, 9 March 2022.

Court. I respectfully suggest that the time has come for Papua New Guinea to develop an independent, specialist referral Bar. That type of evolution in the profession occurred in Australia even in formally amalgamated local legal professions as a critical mass of legal work developed. The legal professions of South Australia and Western Australia offer notable examples of this kind of evolution.

In combination, insufficiently qualified judges and magistrates, laxity in professional standards and delays in hearing and determining cases erode faith in, and adherence to, the rule of law. They encourage criminal and civil disobedience and the treating of the National Legal System as nothing more than a collection of aspirational statements, which may be obeyed or not obeyed according to whim, fancy or political, financial or gang power.

The Judicial and Legal Services Commission has a grave responsibility to exercise in relation to the maintenance of a high quality judiciary for the Nation. Discharging that responsibility requires, I respectfully suggest, wide consultation, public notification of vacancies and, sometimes also, "head hunting" of talent, so as to ensure that candidates of suitable ability and experience are appointed to fill vacancies.

It is for the other arms of government to ensure that there are sufficient numbers of judges and magistrates, sufficient funding to attract and retain suitable candidates for appointment and to support them in the discharge of their duties by qualified staff and suitable premises.

It is not only government in its judicial and executive arms that must draw upon a high quality legal profession. Access, if required, to a high quality legal profession for advice and representation in relation to all transactions great and small, public and private, unsurprisingly runs hand in hand with the rule of law. None of the other learned professions participates so pervasively and essentially in the conduct of society according to law as does the legal profession.

Many, if not most, of the profession's services never manifest themselves in litigation. This is a good thing. Wills are drawn up, estates are administered, interests in land are conveyed, securities prepared and registered and contracts are drawn up every day by the legal profession, all according to law and without any litigation.

When in William Shakespeare's Henry VI, the character Dick the Butcher responds to Jack Cade's rabble rousing of an anarchist mob by urging, "The first thing we do, let's kill all the lawyers", he is counselling the removal of those who are essential in giving daily operation in practice to the rule of law. Is the exhortation of that author of the letter to the editor, quoted above, any different to that of Dick the Butcher?

In truth, in a democracy such as is Papua New Guinea, the rule of law is nothing more or less than a society conducting itself according to the norms of public, commercial and private behaviour which that society has, via their elected representatives, chosen for itself.

The rule of law provides a set of standards by which investment decisions can be made with confidence in terms of type and certainty of title, integrity of other public registers, content of banking and finance regulation and means of contracting. But the evidence of the rule of law, and the consequences, real and potential, of adherence to it, and departures from it, is much wider than this. It is all around us, if we care to look. When we drive on the left and within speed limits or stop at stop signs, we are ordering our behaviour according to the rule of law. When we buy fuel for our car at the service station at the nominated price, instead of stealing it by force of arms, we are making and honouring a contract. When we pay our rates and charges for the occupation of leasehold land registered in our name after a purchase in good faith, as opposed to squatting on the land of another or perhaps even bribing an official in the Titles Office, we are conforming with the rule of law. The examples one might cite are

as endless as numerous as the activities of the Nation and those who wish to invest in it on any given day.

That is why the rule of law is so essential not just to economic development but to peace, welfare, order and good government.

In such a society, one measure of the importance which its members place on justice according to law is the quality of its court buildings. But that, in turn, must be an outward manifestation of the quality of justice found inside.

The court building opened by Her Majesty in 1974 was, for its time, a grand edifice. Almost half a century later, the people of Papua New Guinea are well-embarked on the great adventure of Independence. As is so evident now at Waigani in the magnificent extension to that original building, they have chosen, by appropriation via their elected government, to make an emphatic statement affirming the ongoing importance which they place on justice according to law.

It therefore behoves all of us to give that affirmation practical voice.

Only if we do this will Papua New Guinea grow and flourish to its full potential.