



**Rejecting Neo-colonialism – the Supreme Court Decision by
which Papua New Guinea obtained Independence**

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Foreword:

The relationship between Papua New Guinea and its neighbour Australia is critically important to both countries. Understandably, both as neighbours and, with Australia as the former colonial power and major regional economy, there can at times be tetchiness; some would call it a love-hate relationship.

Papua New Guineans know much about Australia, if only at a distance for most, watching its sports and TV shows, and admiring many of its institutions and idols. They are frustrated, however, when Australian leaders at times appear patronising or overbearing, and irritated by slights and apparent targeted restrictions, for example upon regional labour mobility.

Australians used to know PNG well in times gone by, but allowed it to slip off their radar, belatedly regaining an interest, but unduly from the viewpoint of potential security threat. Those Australians (and others) who do know Papua New Guinea well have come to appreciate and admire the country and its people, whilst recognising it as a complex society with its fair share of difficulties. Those who have not visited or are less familiar sometimes highlight only the negative aspects.

A sound lasting relationship starts with knowledge and empathy. The population and leaders from both countries need to take the time and provide the opportunity to learn more from each other, through extensive interaction, through: - tourism, sharing each others workplaces, educational institutions, sport and cultural events.

This paper by Laurentia Laracy, who worked as a lawyer for several years in PNG and has a long family association with different parts of Melanesia, explores aspects of the historical relationship between PNG and its former colonial rulers leading up to Independence in 1975, and the legal and social concepts of independence subsequently. Whilst PNG's Constitution is highly enlightened, many of the institutions (including laws) of the new State were inherited from the former colonial powers. Ms Laracy argues that the Supreme Court ruling, which revoked the policing component of the Enhanced Cooperation Program (ECP) as un-constitutional, using the very principles of law upon which the Western states were founded, demonstrated a level of judicial maturity and a firm demonstration of self-determination.

Whatever the motives of the different players in this process, and recognising that there is strong public support for firm action to tackle PNG's excessive crime and inadequate policing capacity, including through Australian police (and related) assistance, this paper raises significant legal and social issues. The nature of the relationship and how and in whose interest actions are taken, and adequate appreciation of each others' concerns and sensitivities are critical. PNG is a major Pacific nation, with a population of around six million people. It has great potential, but needs to overcome extensive problems, including poor social indicators and governance difficulties. Australia's assistance in overcoming these problems and helping PNG achieve its potential will be critical and appreciated by the PNG population, but only so long as it is offered in the right spirit and legal context.

Hopefully, Laurentia Laracy's paper will contribute to an appreciation of the issues and in turn fostering an appropriate mature relationship between partners, rather than between a former colonial power and its wayward offspring.

Some might wonder, in the era of increased globalisation, how realistic conventional notions of independence are, when we are all mutually dependent for markets and trade, security and the state of our climate and marine environment. Global and regional clubs and rules are increasingly

prevalent. One's capacity, as a country or individual, to remain discrete (like Bhutan, or more negatively N Korea), have become increasingly unrealistic, faced with the need for interdependence, but more concernedly for the individual, the increasing encroachment of security cameras and big-brother. Finding ways to balance cherished national and local cultural, social, environmental and institutional character, with constructive membership of the wider global community is a challenge for now and the future.

Paul Barker

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About the Author

Laurentia Laracy (BA, LLB, PGDipArts), originally from Auckland spent a number of years working as a lawyer in Port Moresby. This paper was first written in late 2005 in partial fulfilment of the requirements for a Master of Arts degree from Auckland University.

Author's Acknowledgments

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This publication is dedicated to my son Daniel.

THE PURPOSE OF THIS PAPER

This paper represents an attempt to examine the historical relationship between Papua New Guinea (“PNG”) and its former colonial overlord and current major financial aid donor Australia for the purpose of supporting the proposition that political Independence for PNG did not come with the declaration of Independence on 16 September 1975 but was achieved by virtue of a PNG Supreme Court decision SCR No2 of 2004 – Special Reference Pursuant to section 19 of the PNG Constitution (the “**Constitution**”) released on 13 May 2005 (the “**Decision**”).

The Decision had the effect of terminating the Policing component of the Australian funded aid program known as the Enhanced Cooperation Program (“ECP”). By virtue of its invasive nature its detractors regarded the ECP as not simply an aid package but as a neo-colonial overture by Australia. That is, a mechanism whereby Australia could reassert its colonial position by returning Australian Police to active duty in PNG and regaining control of that country’s key Government agencies.

To place the ECP and the Decision in the context of Imperialism and International law and to understand the events that give credence to the proposition that the effect of the ECP was to perpetuate PNG’s former mandate and trust status it is necessary to first review PNG’s European and colonial past, for the ECP and the Decision have their roots in history, to this end this paper is divided into the following 6 Parts:

- Part 1 Introduction to the ECP;
- Part 2 European Discovery of Papua and New Guinea;
- Part 3 Colonization, Decolonization and Independence;
- Part 4 The development of the Constitution;
- Part 5 Neo Colonialism in PNG;
- Part 6. The Supreme Court decision that marked Independence.

Each Part addresses a particular time in PNG’s history culminating in Part 6 which is an examination of the Decision in the context of the other 5 Parts. Part 6 highlights the effect of the Decision in acting as the substantial indicator of self-determination and judicial maturity in the face of a neo-colonial threat.

Throughout this paper, I have made frequent jumps in time and place as I link historical events to current events and as I compare policy and language that have repeatedly occurred in PNG’s post European history. Throughout the paper the original German territory is interchangeably referred to as ‘New Guinea’, the ‘Mandated Territory’, or the Trust Territory depending on the context of the discussion. The name ‘Papua’ on its own refers to the territory which was “British New Guinea” the control of which eventually transferred to Australia. The name “Papua New Guinea or PNG” applies to the combined territories of Papua and New Guinea

Eve Darian-Smith has perhaps clearly articulated what it is that I am endeavouring to illustrate in this paper, namely to highlight in the context of PNG “the links between historical and currently volatile relations of law and concepts of statehood, nationalism and the unfolding of international and global political and social arenas; how legal issues relate to the new conditions of informing cultural politics and ethnic identities at national, sub-national and trans-national levels [and] the ongoing associations and mutual dependencies between the West and non-West and how post-colonialism intersects with the process of global capitalism in imperial and contemporary worlds.”¹

¹ Darian-Smith E, ‘Post-colonialism: A brief introduction’ *Social & Legal Studies* 1996 page 291

PART 1

INTRODUCTION TO THE ECONOMIC COOPERATION PROGRAM

The Solomon, Bismarck and Coral Sea;
The Strickland River, the Markham and the Fly;
Yule, D'Entrecasteaux, and the Duke of York Islands;
Mt Wilhelm, Mt Victoria and the Owen Stanley Ranges.

Looking at modern map of PNG, it is not hard to see that PNG is a country with a substantial European history, a history created by explorers, adventurers and dreamers. Some of the names that these passers by bestowed are inherently romantic and conjure up pictures of vast treasures, other names pay homage to European Kings and Queens. Some of the explorers were obviously so proud of their own achievement that they named islands and highlands after themselves while other names, such as the Coral Sea, offer an insight into the first impressions of the men who sailed into her blue / green waters.

From out of this European history, there emerged first administered territories; then, in the case of the north eastern quarter, a mandated later trustee territory; and finally, thirty years ago in 1975, the independent nation of Papua New Guinea was born from these components with the exotic and coveted Bird of Paradise as its national symbol.

In an ironic twist to history the 30th anniversary of PNG Independence on 16 September 2005 was marred by events that have been interpreted by many as heralding the re-colonization of PNG by Australia. The events in question were the execution on 30 June 2004, by the foreign ministers of Australia and PNG at Port Moresby, of the Joint Agreement on Enhanced Cooperation (“**Agreement**”) and the ratification the following month by the PNG Parliament of the enabling legislation; the Enhanced Cooperation between PNG and Australia Act 2004 (“**Act**”). The Agreement has been adopted as part of the Act, in the Schedule to the Act, and therefore the Agreement forms part of the Act and has the force of law.

Following the execution of the Agreement and the passing of the Act the Enhanced Cooperation Program (“**ECP**”) was to have been activated in PNG in 2005. The ECP was developed as a five-year assistance package and was additional to Australia's existing aid budget and projects. Prior to the ECP over a third of Australia's bilateral aid budget and a fifth of its total aid program was dedicated to PNG. The aid funding that Australia has historically dedicated to PNG goes further than satisfying Australia's humanitarian obligations and acknowledging historical ties; the generous aid budget is a firm indicator of Australia's level of concern regarding its boundary with PNG and the necessity of cultivating and maintaining stable, solvent and friendly neighbours².

The ECP consisted of two parts - a Governance part and a Policing part. This two pronged program had originally been promoted by Australia as being “unique to PNG and has been designed to re-establish investor confidence and provide an enabling environment for broad-based development”³. This confidence was to be regained by the appointment of Australian Civil Servant to manage PNG's key Government institutions (the Governance part) and by deploying 210 Assisting Australian Police Personnel (“**AAP**”) to active duty policing PNG's cities alongside the Royal Papua New Guinea Constabulary (“**RPNGC**”).

By opening the ECP umbrella Australia was aiming to bring and maintain strength and stability to PNG through the management and good governance of PNG's own institutions.

Under the ECP Australia was to have spent:

“An extra \$800 million in PNG over five years, in addition to our development assistance program. Law and order - the most pressing concern for PNG - will be a focus of the ECP. Up to 230 Australian police personnel will collaborate with the Royal PNG Constabulary, initially in Port Moresby and Bougainville. They will help develop the skills and professional standards of the PNG police.

² Australia has also been instrumental in the development and implementation of the Regional Assistance Mission to the Solomon Islands.

³ www.ausaid.gov.au April 2005

The program also addresses the justice system, economic management, public sector reform, customs, border management, and transport safety and security. Up to 18 Australian specialists will help strengthen PNG's judicial system and more than 30 Australian officials will work in key agencies to support PNG's economic development. They will help control government spending, improve budget procedures and raise public sector performance⁴.

The inherent irony of the ECP is that the current PNG political environment is almost a mirror image of PNG's political scene in September 1975 when PNG so proudly proclaimed independence. Just as he was at Independence, Sir Michael Somare is the Prime Minister and issues such as the secession of Bougainville are still news.

On account of the ECP's reliance on Australian personnel many people in PNG (including the Governor of Morobe, Luther Wenge) regarded the ECP as not simply an assistance package but a subjugation of PNG's sovereignty, a means by which Australia may regain and reassert control of PNG's institutions. Of particular concern to its detractors was the belief that the Act was inconsistent with the Constitution, as not only did the ECP provide for a two tiered system of Police accountability with different entitlements and reporting lines for the AAP and the RPNGC, but the Act also provided immunity to the AAP from any prosecution by any person whose rights under the Constitution may have been breached or for any other remedy provided by law. Pre independence such an immunity would have received little public attention, for while under Australian administration crimes by colonial officials very often went un-prosecuted⁵. Post independence, however, such a clause prompted much public disquiet.

Taking up the people's concerns the Morobe Provincial Executive ("MPE"), led by Luther Wenge, questioned the constitutional legality for the basis of the ECP and to this end filed a Special Reference under s19 of the Constitution seeking the Courts opinion on the validity of the Act. Following a two day hearing the full bench of the Supreme Court considered the seven⁶ questions asked by the MPE and subsequently released the Decision, which provided that the Act was inconsistent with the Constitution on a number of grounds and consequently the ECP lacked validity.

Michael Potts, Australia's High Commissioner to PNG summed up Australia's interpretation of the Decision as follows:

"... it means that the Australian Assisting Police have no legal authority for exercising police powers in PNG; nor do they have the right to bear arms in a manner compatible with the use of firearms by the Constabulary. The command structure of the AAP whereby AAP personnel are subject to day to day RPNGC control but ultimate AAP command has been found to be unlawful. The criminal and civil liability of all ECP employees (not just the police) has been greatly increased.⁷"

Australia's response to the Decision was swift. Within days of the Decision being released the deployment of AAP, already in PNG was terminated and all AAP personnel repatriated to Australia (the deployment of the Civil Servants, pursuant to the Governance part of the ECP, was unaffected by the Decision).

The termination of the active policing component of the ECP was commonly recognised as an impediment to the success of the ECP as it compromised Australia's authority to actively pursue PNG's law and order problems. Following the withdrawal of the AAP the job of policing the country reverted to being the sole responsibility of the RPNGC – a responsibility they have had since 1942 ^{when the Papuan and New Guinea Police forces combined under a single command}⁸.

Contrary to claims that the ECP was a unique and original program, a review of the historical literature reveals that its structure is not so alien in the PNG landscape, as in 1968 the Colonial administration also announced a 5 year plan for the development of New Guinea. Whilst the 1968 program involved implementing development schemes

⁴ Department of Foreign Affairs, Media Release 30 June 2004

⁵ Fitzpatrick P, *Law and State in Papua New Guinea*, Academic Press, University of Kent at Canterbury, page 66

⁷ Pott's speech to the PNG Update Conference, UPNG, Port Moresby, 24 May 2005

⁸ McCarthy *op.cit.* page 106

and targets contained in a World Bank Report, in contrast to the ECP the focus in 1968 was not on expatriate expertise but on the “indigenization” of the economic effort⁹.

While the Declaration of Independence is an objective marker of the date of political independence, the importance of the Decision is that it is a subtler indicator of legal and intellectual independence. Law was a fundamental instrument of colonial rule, so to have interpreted and exercised the rule of law against Australia indicates a mastery by PNG of not only its own empowering doctrines but also indicates that PNG has gained the confidence and judicial maturity whereby it can utilise the Western colonial legacy of the rule of law in defence of its own sovereignty. To fully appreciate the significance of the Decision it is however, necessary to have an appreciation of PNG’s European and colonial past.

PART 2

EUROPEAN DISCOVERY OF PAPUA AND NEW GUINEA

From the sixteenth century onward European exploration, conducted in the pursuit of trade routes, science and enlightenment, was seen as a necessary and honourable pursuit. Like an international jousting contest the prize for the winning explorer was originally the glory of God, but gradually the prize became the appreciation of a secular sovereign. For the sovereign itself the prize was entitlement to the newly discovered lands and all the riches that they contained. For European countries fighting to prove their political strength and their own nationalism these new lands represented the means to generated great wealth and power. Little thought was originally given by the Explorers and Politicians in Paris, London or Madrid to the prospect that newly discovered lands may already be inhabited.

To early colonists, indigenous people were a nuisance, an impediment to easy occupation and in many cases the Europeans could and did eliminate this impediment. It is even arguable that those indigenous people who were colonised by their European invaders were fortunate people as the alternative option of genocide, as occurred in Tasmania and South America was a viable option for Europeans seeking unencumbered, vacant possession of land. Indeed when the ‘newly discovered’ lands were found to be already occupied, the concept that these original occupiers could have valued the land was inherently unacceptable to the Europeans. An acknowledgment of a prior existing land right would have raised the spectre of not only indigenous entitlement to the land, but may also have required an acknowledgment of the proposition that ‘savages’ had similar values to Europeans. At a more esoteric level acknowledging existing land title would have also bought into question the very purpose for exploring (pure science alone not really being a good enough reason) “namely, is it possible to discover a land that has already been discovered?”

The dismissing of indigenous people as ‘savage and subhuman’ was a convenient position for the imperialist to take, as it enabled the Europeans to eradicate, with a clear conscience, the indigenous, subhuman people from the new and desirable lands – as was the case of the Spanish and the “Indians” of South America. Francisco de Vitoria was a lone Spanish voice who recognized that the Indians were human and possessed of reason and legal rights. Unfortunately, however, Vitoria’s reasoning was fundamentally flawed and unhelpful in aiding Indian emancipation as the reasoning that Vitoria deemed the Indians to possess was Spanish reasoning and consequently any violations or lapses of that reasoning could legitimately be judged by Spanish norms.¹⁰

Had Vitoria managed to make the intellectual leap from his starting point of acknowledging the Indians’ humanity and established society to the next step, being that, Indian society was different from, but equal to, Spanish society – then the Imperialist position of Spain may well have been undermined and its justification for its brutal imperialist practices discredited. In an age, however, where slow disembowelment was still a punishment for heresy, it would have been an extraordinary man who would have publicly compared Spanish civilization to the Indian way of life. After all, as Michel de Montaigne recorded in his third book of *Essays* (published in 1588), the Spaniards knew how to identify humans - a human was someone who wore breeches, had one wife, didn’t eat spiders and slept in a bed.¹¹

⁹ Biskup, P Jinks, B Nelson, H (Ed) *A short History of New Guinea (Revised Edition)*, Angus and Robertson Sydney 1968 page 175

¹⁰ Based on information in Anghie A, ‘Francisco de Vitoria and the Colonial Origins of International Law’ *Social & Legal Studies* 1996

¹¹ De Botton A, *The Consolations of Philosophy* Penguin Books 2001 page 141

If the standard of proof required to satisfy an entitlement to be acknowledged as “human” was the wearing of breeches, then it is perhaps fortunate for Papua New Guineans that in the 16th century Spain and Portugal were preoccupied in South America, as otherwise Papua New Guineans may well have been subject to the same torments as were felt by the Aztecs and Incas. Indeed, the “discovery” of PNG by the Portuguese in 1526¹² and the Spanish in 1545¹³ seems to have carried little weight in Lisbon and Madrid. This imperialist reprieve was, however, only brief as other European explorers were not so complacent about their discovery of the territory. After the Spanish and Portuguese the Dutch (Jansz 1605/6, Cartensz 1623, Tasman 1642-43), the English (Dampier 1700, Carteret 1767) and the French (D’Entrecasteaux 1792, Bougainville 1768) all played a role in the discovery of PNG.

One can only imagine how Captain (later Admiral) John Moresby felt in 1873 when he sailed the HMS *Basilisk* into a sheltered harbour and Port that came to bear the Moresby names. It is possible to surmise that the people on his mind were not the indigenous Motu people, but rather his family back in England, in particular his father Rear Admirable Fairfax Moresby as it is after his father that Captain Moresby named the harbour – Fairfax Harbour¹⁴.

Port Moresby was not, Captain Moresby’s first landfall in the region. Prior to reaching “Port Moresby” John Moresby had already ventured through some straits at the eastern end of New Guinea and, upon encountering three previously-unknown islands, landed and raised the Union Jack - although this particular claim to British sovereignty was not ratified until 1884¹⁵. Perhaps the delay in ratification was due to the fact that in 1873 the British Government was preoccupied with West Africa, where war had been declared against Ghana’s King Kofi KariKari, who was involved in the trading of slaves. The war had ended by July and the British went on to establish their Gold Coast colony of Ghana¹⁶.

Of all the European explorers who “discovered” PNG, Louis Antoine de Bougainville, a French nobleman dispatched in 1766 on a voyage around the world, is arguably the most well known, as after him the flower Bougainvillea and the island of Bougainville were named. Unfortunately, over the past few decades the island of Bougainville has been associated more with war than botany. While events on Bougainville are on the periphery of the discussion in this paper, in terms of an example where imperialism, nationalism, neo-colonialism and international law have all collided there is nothing peripheral about Bougainville. Like a rock pool on the edge of a colonial sea, the history of Bougainville contains everything that is good and bad about colonialism. Due to the dedication of Marist missionaries Bougainvillians were once one of the best-educated people in the Pacific¹⁷. With the discovery of an immense and valuable deposit of copper on the island Bougainville’s economy should have blossomed like a glorious crimson Bougainvillea.

When the copper mine at Panguna opened in 1964 it was one of the largest open cut mining ventures in the world. At the time PNG was still under the Australian colonial administration and Canberra viewed the mine as the means for underwriting the economy of PNG as it moved to national independence¹⁸. The discovery of the copper did not, however, bring freedom and riches to Bougainville, but ultimately brought misery, civil war and the closure of the mine. Any hope by officials and economists in Canberra that the mine would act as a precondition, enabling a ‘Rostovian’ takeoff to occur in PNG, must have been quickly disregarded at the outset of hostilities.

The causes for the war on Bougainville are complex and, as is the case in all civil wars, there were divided loyalties on both sides, with not everyone on Bougainville, for example, supporting the secessionist, the Bougainville Revolutionary Army (“BRA”). The BRA, led by Francis Ona, were seeking ratification for a number of historical and contemporary grievances, including what they saw as Imperialist cartography of the Anglo-German Agreement

12 Portuguese sailor Jorge de Meneses is the first European visitor. He names one of the islands "ilhas dos Papuas" or "land of fuzzy-haired people"

13 Ynigo Ortiz de Retes in the ship San Juan bestowed the name Nova Guinea because the people that he saw reminded him of those in Guinea, in Africa

14 Rear Admiral Sir Fairfax Moresby, K.C.B., K.M.T., D.C.L. had been Commander in Chief of Her Majesty's naval forces in the Pacific

15 Lieutenant Yule in the HMS Bramble, had in 1846 claimed the eastern part of New Guinea for Britain but this claim was not formalized until 1884 when the south-eastern part of New Guinea was annexed as a Protectorate of Great Britain

16 www.worldhistory.com

17 Laracy HM “*Imperium In Imperio*”? The Catholic Church in Bougainville’, in Regan A and Griffin H (ed.), *Bougainville before the conflict*, Pandanus Books, Australian National University, Canberra 2005

18 Oliver, D, *Bougainville A Personal History*, Melbourne University Press 1983 page 4

of 1899. As a consequence of the Anglo-German agreement Bougainville, which is ethnically closely aligned to the Solomon Islands, was incorporated into German New Guinea.

From a sociological perspective the civil war on Bougainville was also particularly unfortunate in that, while there has always been fighting in PNG, such fights have traditionally been locally based tribal fighting, but in the civil war the fighting was between two sides who were not historical enemies namely the BRA and the PNG Government, which is based in Waigani, Port Moresby, located within Central Province. Indeed, on account of Bougainville's geographical remoteness, it is almost inconceivable and illogical that historically anyone from Central Province could have had a tribal grievance against anyone from Bougainville. The regional difference for which PNG is renowned was even apparent in the language of the rebels' leader. In leading the BRA and the secessionist rebellion Francis Ona tapped the sentiments of dispossession and provincial nationalism, branding non Bougainvillians, "redskins" on account of their lighter colouring, as compared with the distinctive jet-black skins of most Bougainvilleans¹⁹.

With the benefit of hindsight it is possible to believe that had the 19th century politicians and cartographers paused to take the time to appreciate and understand Bougainville's ethnic and geographic position, then history would have been different. With a greater appreciation of Bougainville's ethnic linkages common sense would have precluded the island from being included as part of German New Guinea and ninety years later the subsequent bloody fight to secede from Papua New Guinea would have been avoided²⁰. The same comment applies to many African states that suffered similar bloody and unfortunate effects arising out of colonial boundary drawing exercises.

A more publicly recognizable and contemporary grievance for the BRA involved the land upon which the mine exists. In particular the BRA took issue with the way villagers in the Panguna area, many of whom had been unwilling to give up their land for the mine (regardless of the amount paid for it), had been forcefully dealt with by the authorities. Following opposition to the "sale" of the Panguna site a settlement for the acquisition of the land was eventually reached, but not before special officers and police had been sent to the area to explain the situation to the people and exert the Australian Administration's control over them²¹. As former residents of the one time German territory, the Nasioi people of Panguna inherited traditions (or had experience of...?) about heavy-handed government "pacification" and land policies. Given the sentiments expressed during the official occupation of Rabaul in 1914, they might have been entitled to expect more from the Australian administrators on account of the latter's British legacy. "You look him new feller flag; you savvy him, belong British, English. He more better than other feller Master", intoned Colonel Holmes, the Australian commanding officer on that occasion²².

While both the British and the Germans administrations were initially concerned about protecting native title in their respective territories (the British were more proactive in this endeavour than the Germans) it is interesting to note the selective nature of this protection. In both Territories the extent of this protection was to restrict sales with respect to non-Government purchases, meaning that it did not preclude purchases by the Administrations themselves. Whilst both administrations' may well have felt righteous in preventing the purchase of land by devious colonial settlers, this was a self-serving justification, as there is an essential illogicality in the creation of such restrictions, whilst reserving for themselves the right to acquisitions. In Papua to legitimize its right to acquire land the British (even?) passed legislation, such as the British Land Regulation Ordinance of 1888 and the Crown Lands Ordinance of 1890.

Under the British Land Regulation Ordinance no Papuan land could be acquired except by the Administration. While on its face, this may appear to have been an Ordinance protecting native title, it was also an Ordinance that enabled the administration to "legally" purchase the best and most desirable land for its own purposes. The Colonial

¹⁹ *Sydney Morning Herald* 29 July 2005

²⁰ In July 2005 one month after PNG implemented the peace agreement on Bougainville (reached with the assistance of the United Nations) that ended the long secessionist fighting and paved the way for the swearing-in of the new Autonomous Government of Bougainville the leader of the secessionist rebels Francis Ona died. Since his death there has been much speculation as to its cause. Given the role he played in the war the recording of the official cause of death as Malaria (no autopsy was performed) has proved questionable. For those in PNG who believe in sorcery (and there are many) a more sinister explanation is also plausible.

²¹ Biskup P, Jinks B, Nelson H (Ed) *A short history of New Guinea (Revised edition)* Angus and Robertson 1968 page 176

²² Jinks, B et al (ed), *Readings in New Guinea History*, Sydney 1973 pg 202-203

Office considered that ‘without the funds arising from the sale and lease of lands, it would be impossible to provide for the government of a country’²³.

Pursuant to the Crown Lands Ordinance, the Crown granted to itself the right to acquire “waste and vacant” land, provided that it ‘was not used or required or reasonably likely to be required by native-born Papuans for building, agriculture or other industrial purchases’²⁴. As the “waste and vacant” test indicates, an English definition of land use was applied to Crown land acquisitions.

The purchase of land by the British and German administrations paved the way for development and settlers. In Papua the Administration had, by 1886, purchased 552 acres near the harbour, as well as land for Government House and a commercial centre²⁵, whilst in German New Guinea the *Neu Guinea Kompagnie* established stations and purchased large tracts of land in expectation of the arrival of German colonialists.

PART 3 COLONISATION, DECOLONISATION AND INDEPENDENCE

The discussions on colonisation, decolonisation and independence have been combined in one section, because from an imperialism and international legal perspective, they are a trinity. While each part is a separate subject in its own right, the three sections are also intrinsically linked; combining to form a clearly identifiable period of 131 years in PNG’s history (1846 - 1975).

Colonisation

Colonisation of the Pacific followed closely behind its Discovery and, just as the European powers found themselves in a “scramble for Africa”, so to were they drawn into a smaller scramble in Oceania²⁶. PNG is a classic example of a country caught up in this desperate scramble for power and territory. Drawn up by 19th century cartographers on the instructions of politicians and administrators, PNG’s international boundaries illustrate the map drawing exercises of European powers in the last throes of colonial expansion. The British, Dutch and Germans all laid claims to different parts of the region. After Britain first laid claim to the south eastern part of ‘Papua’ the Dutch, at the behest of the Dutch East India Company, and in an effort to protect the Dutch Far East trade empire, laid claim in 1828 to West ‘New Guinea’ (now Papua Province – though they’ve now further divided it into 2 provinces - under Indonesian control). Following the Dutch, the British and Germans staked simultaneous and coordinated official claims in 1884; (there were several unratified earlier claims, e.g. by Yule in 1873). Although the German chancellor Bismarck was not originally anxious to acquire Pacific territories, his Government was committed to supporting German companies operating in the region. To this end on 3 November 1884 the first of a number of German annexation ceremonies was held in respect of territory in the North East²⁷. It is interesting to speculate, for instance, on the extent to which the negotiations that occurred in Berlin Africa Conference in 1884-1885 regarding the division of Africa may have affected the negotiations between Germany and Britain in relation to Papua New Guinea (and exchanges made over Tonga for Bougainville).

An academic enlivening insertion into the discussion of Imperialism and International law in relation to PNG is the fact that Hugo Grotius, the father of the international law, served as the lawyer for the Dutch East India Company²⁸. One can only speculate on what the response would have been had Grotius been approached and asked for his opinion on this “scramble” culminating in the partitioning of PNG. On the one hand with the wisdom of Solomon he may have thought that partitioning was one way of maintaining peace in the region, while on the other he would

²³ Oram ND ‘Land and Race in Port Moresby’ in Haynes CEP, *Land Law and Land Policy in Papua New Guinea: Text, Cases and Materials* UPNG Printery 1986 page 5

²⁴ *Ibid* page 7

²⁵ *Ibid* page 6

²⁶ Fitzpatrick, *op.cit* page 3

²⁷ McCarthy, *op.cit*, page 67

²⁸ Anghie A, *Imperialism, Sovereignty and the Post Colonial State* Cambridge University Press 2005 page 224

no doubt have been concerned about the seeming legal vacuum in which the German and English “Protectorates” were established²⁹.

In addition to the political leverage the addition of colonies also had economic advantages. With dreams of an Oceanic ‘Eldorado’, the imperialists were interested in the treasures that they believed PNG held including, gold, sandalwood, beche de mer, trochus (birds of paradise feathers, esp. in W Papua) and pearls. The growth of industry in Europe and the United States also created a demand for products of plantation agriculture, which could be supplied from the region such as sugar and copra.

Strong pressure for Britain to annex Papua had come from the Australian colonies, in particular, the Government of Queensland which was concerned about German movements in the region. Britain, however, perhaps fearing that colonisation would not occur peacefully but would involve considerable “pacification costs³⁰,” was initially reluctant to respond to Queensland’s request and annex the region. When eventually Britain did annex Papua, the Administration in an attempt to avoid conflict with the indigenous people took steps to ensure that the Papuans did not lose their land to aggressive and determined Australian settlers³¹. Britain’s concern for native title is reflected in the words of the Proclamation which was read by Commodore Erskine RN in 1884 when he declared Papua to be a British Protectorate:

for the purpose of preventing the occupation of portions of the country by persons who proceedings, unsanctioned by any lawful authority, might tend to injustice, strife and who under the pretence of legitimate trade and intercourse, might endanger the liberties and possess themselves of the lands of such native inhabitants.

Is it possible to infer from Erskine’s words that the British were anxious to avoid in Papua a repetition of the bloody land wars that had been fought in New Zealand or alternatively were the British administrators of Papua simply enlightened people? The answer to this question is perhaps a mixture of both. The British were concerned over the cost of war (they had also recently been involved in a war in Ghana) while at the same time both Erskine and Sir Peter Scratchley (the first Special Commissioner for Papua – British New Guinea-) were living in the age of the Enlightenment where the Noble Savage was entitled to benefit from the Rights of Man (albeit the “Savage” received a diluted entitlement). Following on from Erskine’s proclamation, Scratchley, who was certainly an enlightened man for his stance on Papuan rights, went further than simply being concerned about the fraudulent purchase of land by Australians; Scratchley believed that “New Guinea must be governed for the natives by the natives³²”.

Unfortunately, the well meaning and enlightened sentiments expressed by Erskine and Scratchley are not reflective of future administrative views and are in marked contrast to the position taken by the Australian colonial administration in 1964 when it acquired on Bougainville the land for the Panguna copper mine. Australia’s rise to being a colonial power arose out of its desire to assert the strength and obtain the benefits that its own newly found sovereignty had bought. The territory of Papua was the first territory that Australia obtained when the British handed it over in 1906. While Australia would eventually obtain control of both Papua and New Guinea, the possession of German New Guinea came nearly a decade later.

Just as New Zealand’s control of Western Samoa arose out of WW1, so did Australian control of what was originally German New Guinea arise out of the same conflict. At the request of Britain, Australia had early on in the Great War sent troops to capture and occupy German New Guinea. After the war at the 1919 Paris Peace Conference the Australian Prime Minister Billy Hughes as partial reward for his country’s efforts, was granted the right to administer the former German territory of New Guinea subject to the terms of a mandate (the “**Mandate Territory**”). The administration responsible for the Mandate Territory was, however, different from the administration with responsibility for Papua.

²⁹ Peter Sack discusses this question in detail in his unpublished manuscript *Protectorates and Twists: Law, history and the ‘annexation’ of German New Guinea* 1981

³⁰ Fitzpatrick, *op.cit* page 51

³¹ Point taken from Haynes CEP *Land and Land Policy in PNG: Text Cases and Material*, UPNG Printery 1986

³² Oram ND, ‘Land and Race in Port Moresby’ in Haynes CEP, *Land Law and Land Policy in Papua New Guinea: Text, Cases and Materials*, UPNG 1986 page 4

During the 1920s and 1930s Australia administered the Mandated Territory relatively humanely but under a regime of financial stringency³³. Not surprisingly, Australia's financial management was criticized by many in the territory who were accustomed to the generosity of the Germans who "for many years subsidized their territory's budget at a rate of over \$100,000 annually and during the years of the military occupation Australia had spent over \$1,800,000 in the colony but financially things changed after 1921. From 1921 the Mandate Territory had to pay its own way and all health services, education and public works had to be paid for from local revenue"³⁴.

Decolonisation

This section on decolonisation will illustrate how Australia has historically kept both Papua and New Guinea firmly within its grasp and under its control. Much of this next section is narrative rather than analysis as it sets out the scene for the lead up to independence and introduces the characters who were involved.

The establishment of a separate government for the Mandate Territory meant that there was originally little contact between that territory and that of Papua. Indeed the Australian administration of the Mandate Territory has come under much criticism, as with the benefit of historical analysis it can be seen that Australia was much harsher in its economic expectations for the Mandate Territory than it was for Papua. The main criticism of the government of the Mandated Territory was, however, that it placed rapid economic development, which would benefit Australia "above the needs of the New Guinea people"³⁵ - the same critical comments are made today in respect of Australian aid to PNG. Luther Wenge for example has called the ECP "Boomerang Aid"³⁶ while in 1921 the Australian development policies in the Mandated Territory were criticized on the basis that Australia "gave with one hand and took away with the other"³⁷. Both the historical and current criticism illustrate a similar cynical suggestion that the Australians were primarily interested in creating an environment conducive to their exploiting the resources of PNG for their own gain.

With the onset of WW2, when colonialism was an impediment to the assertion of the moral high ground by the Allies³⁸, the move to decolonise began. In Australia the succeeding to power of an anti-imperialist Labour Government in 1941 hastened the discussion on the morality of colonialism. In respect of its colonial territories the obligation of Australia (as explained by the then Minister for External Affairs, Dr HV Evatt in 1942) was to assist Pacific people "along the road to self Government"³⁹. Evatt also strongly supported regionalism as a basis for post war security arrangements⁴⁰. Perhaps Evatt, like Erskine and Scratchley before him, was a man with views beyond his time, certainly his views on regionalism would not be incompatible with current Australian foreign policy in the Pacific. In respect of Australia's current aid to PNG and the Solomon Islands the level of funding goes further than satisfying Australia's humanitarian obligations and acknowledging historical ties, the generous aid budget is a firm indicator of Australia's level of concern regarding the necessity of cultivating and maintaining stable, solvent and friendly neighbours.

Following the war in the Pacific (1939- 1945) and the dissolution of the League of Nations Australia interest in the Mandate Territory was transformed into a United Nations Trust Territory (the "**Trust Territory**"). In accepting, in August of 1946, the Trusteeship of the Mandate Territory of New Guinea from the United Nations Ben Chifley on behalf of the Australian government said:

"We recognize and gladly accept the general duty laid down in the Charter [of the United Nations], to promote the welfare and advancement of the inhabitants of New Guinea."⁴¹

³³ Hudson, WJ *Australia and the Colonial Question at the United Nations*, Sydney University Press 1970 page 13

³⁴ Biskup P, Jinks B, Nelson H (Ed) *op.cit* page 97

³⁵ Biskup P, Jinks B, Nelson H (Ed) *op. cit* page 107

³⁶ *PNG Post Courier* 12 April 2005

³⁷ Biskup P, Jinks B, Nelson H (Ed) *op.cit* page 107

³⁸ As a consequence of the execution of the Atlantic Charter in 1941, whereby the Allies (excluding Stalin) agreed to "respect the rights of all people to choose the form of government under which they will live".

³⁹ Hudson, WJ *op.cit* page 15

⁴⁰ *Ibid* page 17

⁴¹ Biskup P, Jinks B, Nelson H (Ed) *op.cit* page 117

The promises that Chifley made in respect of the Trust Territory also applied to the Territory of Papua and so, from 1946, Australia endeavoured to combine its interests and unofficially advanced both territories as the one territory. Officially the two territories did not fall under the same administrative umbrella until 1949, when the Labour Party lost to the Liberal Party in a general election⁴². The effect of this election result on the Trust Territory was significant as from 1949 Canberra maintained closer, more formal control of the Trust Territory. No longer were an Administrator and local civil servants responsible for running the Trust Territory. This control was eventually codified in the Papua and New Guinea Act (“PNG Act”)⁴³ which enabled the Trust Territory and Papua to be officially treated as one. [Note: with Australia clearly in control of the Trust Territory, from this point onwards in the discussion the name New Guinea will again be used rather than the terms Mandate Territory or Trust Territory].

Canberra’s active intervention in New Guinea was not greeted warmly by all in the territory. With vocal opposition (that repeats itself in the similar sentiments of the ECP detractors), Canberra’s intervention in New Guinea drew criticism from people living in the region who called upon Canberra to withdraw its offshore administrations on the grounds that New Guineans knew what was best for New Guinea and that the region should be left to manage itself without interference from Australia⁴⁴.

In the 1951 election in Australia the Liberal Party returned to power and with the benefit of another term was able to further continue the policies it had developed in New Guinea during its previous term. With the benefit of words which echo loudly, the rhetoric that was utilized in 1951 appears just as applicable to the conveners of the ECP – for, just as is the case with the ECP, it was thought in 1951 that for New Guinea to develop politically and economically it would be necessary for the territory to have strong Australian management. To this end a new Administrator with strong reporting lines to the Minister for Territories in Canberra was appointed to New Guinea.⁴⁵

By the 1960s Australia’s position as colonial overlord of Papua and New Guinea had become something of an embarrassment for Australia. There was increasing pressure from many in the Territories for self government and by 1960-61 the anti colonial offensive in the United Nations General Assembly had also reached an advanced point⁴⁶. Following the 1960 adoption by the United Nations General Assembly of the declaration for the abolition of colonialism thirty “new states” emerged between 1960 and 1962⁴⁷. It is not, therefore, surprising that the General Assembly was increasingly critical of Australian conservatism with respect to disengaging in the Territories and her “slowness to accommodate the fact of decolonization”⁴⁸.

Australian reticence at advancing the decolonization of the Territory is easily explained. In 1960’s, as in 2005, Australia saw territorial security in being dependent on her ability to control the Territories. The fear for Australia was binary; it was concerned with the prospect that the territories may fall:

- (a) into an anarchic state, or
- (b) under the control of another foreign power.

Arguably Australia’s concern with anarchy has been proven true. It is precisely because of the law and order problems in PNG and the failure of the elected Government to manage its key institutions that has resulted in the development of the ECP. The “failure” of PNG’s elected government to maintain law and order or create an economy conducive to development is regarded by some people as not being simply ‘indigenous incompetence’ but as being a by-product of colonialism, a direct result of Australia not educating and employing Papua New Guineans in preparation for Independence. “In 1939, a member of the Permanent Mandates Commission said that she knew of no territory under the mandate in which education progressed so slowly [as it did in New Guinea]⁴⁹” Discriminatory policies in education have curtailed and limited PNG development. Up until Independence the Public Service that Australia established in PNG was organized along the same lines as the Australian Public

⁴² *Ibid* page 130

⁴³ The Papua and New Guinea Act supersedes the Papua Act which the Australian Parliament passed when the Territory of Papua passed into Australian in 1905. Biskup P, Jinks B, Nelson H (Ed) *op.cit* page 71

⁴⁴ Biskup P, Jinks B, Nelson H (Ed) *op.cit* page 132

⁴⁵ Points taken from Biskup P, Jinks B, Nelson H (Ed) *op.cit* page 132- 135

⁴⁶ Hudson, WJ *op.cit* page 175

⁴⁷ Fitzpatrick *op.cit* page 109

⁴⁸ *Ibid* page 177

⁴⁹ Biskup P, Jinks B, Nelson H (Ed) *op.cit* page 107

Services and, on account of the fact that until 1950 few Papua New Guinean's had an opportunity for an education, most public servants in the Territory were Australian. Under the UN mandate over New Guinea, Australia was required to set-up the institutions required for self-government and in 1963 the first plans were made for a House of Assembly; an embryonic parliament. However, according to Sir Michael Somare, there were more expatriates than local members in the House and "major decisions were made by the expatriates"⁵⁰.

Whatever the reasons, whether as a response to the practices of the colonial administration or to distinguish the values of the new state from its former overlord, the way in which the concept of education was dealt with in the Constitution is indigenous in its outlook, and rejects Western practice. PNG's constitutional right to an education does not focus on the building of schools, the learning of English or the attainment of trade or academic qualifications, rather it stresses the limiting of Western educational models and evokes the traditional Papua New Guinean way of life. In considering the role of education in PNG's future development the Constitutional Planning Committee commented in their pre-constitutional report that:

"We are concerned by the way in which in the past development and modern institutions have alienated our people from one another. Our schools have tended to make children strangers to their parents and their villages. Universities have furthered this process of alienation ... to reverse this process of alienation is not an easy matter ... Education should be based on and should promote dialogue and co-cooperation. It should foster integral human development and tolerance among our people, awaken their social conscience, their awareness of the essential dignity of man, and their appreciation of the need to stand up for their rights, both as member of the community as individuals, in the face of pressures from foreign interests and arbitrary government. It should help develop a spirit of solidarity of one with another and an appreciation of our inter-dependence"⁵¹.

Given that the Constitution was drafted by people looking to assert their independence and nationalism it is perhaps not surprising that there is an emphasis on social development rather than the specific components of education and facilitation of the means by which this education may be achieved.

Pre independence the opportunity for local development was further stymied by restrictions placed by Australia on PNG borrowing money for capital developments from other parties such as the United States or even the United Nations. Concerned about foreign influences affecting its plans for the Territory, Australia restricted the Administration of PNG to borrowing money for capital investments from other people in the Territory. Not surprisingly economic development in the Territories was slow. This slowness prompted the Australian Government to invite in 1963 the World Bank to Papua and New Guinea to see what could be done to improve the economy and industry of the Territories. The World Bank made numerous recommendations including that the Administration should reconsider its ban on foreign investment and do everything possible to get more people to invest in Papua and New Guinea. The report stressed the importance of political stability to entice and retain foreign funds.

As if entrenching the colonial attitude, the report also stated that development would depend heavily on European advisors and public servants⁵². From the perspective of those people in the Territories who favoured self-government and were frustrated by what they saw as Australia's delay to proceed to this goal, the World Bank report was unhelpful. The World Bank's report and its emphasis on foreign control and intervention made suggestions, which seemed to delay self-government. Considering that the World Bank and the United Nations can both trace their conception to humanitarian influences arising out of WW2 it is interesting that in the 1960s both organisations had such divergent views on colonised territories.

By 1965 the discussion on the form of administration best suited to PNG had nearly dried up. The pure colonial position was becoming untenable, both in PNG and at the United Nations, consequently Australia finally agreed that PNG could choose either self governance or full independence; no date, however, was set for either option to be implemented. These two options were not acceptable to everyone, there were some people in the Territory who

⁵⁰ ABC Radio Australia 15 August 2005 www.radioaustralia.net.au/news

⁵¹ Brunton & Colquhoun-Kerr (ed) *The Annotated Constitution of PNG*, UPNG 1984 page 8

⁵² Biskup P, Jinks B, Nelson H (Ed) *op.cit* page 161

believed that PNG would be better off becoming a State of Australia. One of the main forums for the debate about the style of Government was the newly established University of Papua and New Guinea in Port Moresby⁵³.

In 1968, Independence and/ or self government seemingly suffered a further setback when the Administration announced a five year plan for New Guinea development that put into place a number of the recommendations and targets from the 1963 World Bank report. By far the most important single economic development that followed the World Bank report was the decision to open the Panguna copper mine on Bougainville⁵⁴. Any perceived setback to Independence was, however, only temporary as within 7 years of the five year plan being implemented PNG was granted independence.

Independence

PNG's transition to Independence is unique in that, unlike many other colonized third world countries, PNG had an orderly and agreeable transition - there was no fighting or violent expulsions of the coloniser (although there were, in the years immediately preceding independence, isolated violent incidents in which Australian and Chinese businesses and people were harassed – the DC in Rabaul was also killed). The model of independence that PNG followed was more like that of the British Dominions of New Zealand, Australia and Canada, where Britain offered independence⁵⁵.

Several influences were at work in the move by Australia to grant independence not the least being that Australia was under increasing pressure from the United Nations. Prompted by the international community, Australia from the mid 1960's onwards began to work with PNG to determine a plan for independence. Australian government advisers, including the newly appointed Australian Minister for External Territories, Andrew Peacock, worked closely with their Papua New Guinean counterparts to bring about the emergence of an independent PNG⁵⁶. The first step was the granting of self-government in 1972.

Hand in hand with preparation for the transfer of power and the transition from self-government to full independence went the development of the Constitution. As the very recent example of creating an acceptable and workable constitution for Iraq illustrates, the development of a supreme law is no simple task. As is also the case in Iraq a significant challenge for the drafters of the Constitution was PNG's cultural and linguistic diversity.

Finally on 16 September 1975 the PNG Governor General declared that:

“We have at this point of time broken with our colonial past and we now stand as an independent nation in our own right”⁵⁷.

With this declaration Sir John Guise heralded PNG's transition from colonial dependence to national independence. In keeping with the theatre of such occasions, following the proclamation of the Declaration of Independence Sir John Guise handed over the Australian Flag to the Australian Governor General Sir John Kerr before PNG's flag was raised on Independence Hill.

Following the raising of the flag Michael Somare took his Oath of office as the country's first Prime Minister. On the same day that Independence was declared the Constitution became operational⁵⁸. The then opposition leader Sir Tei Abal opposed the date set by Michael Somare on the grounds that the Constitution should be passed before a date for Independence could be set.

⁵³ Biskup P, Jinks B, Nelson H (Ed) *op.cit* page 173 UPNG was established in 1966 with its first undergraduate courses in 1967.

⁵⁴ Biskup P, Jinks B, Nelson H (Ed) *op.cit* page 176

⁵⁵ Sinclair K *A Destiny Apart New Zealand's search for National Identity*, Unwin, Wellington 1986

⁵⁶ Kwa EL, *Constitutional Law of Papua New Guinea* Lawbook Co 2001, page 17

⁵⁷ As cited in *Papua New Guinea Post Courier: Special Silver Jubilee Edition* September 15-17 2000 page 3

⁵⁸ Kwa EL *op.cit* page 5

Sir Michael paid little heed to Sir Tei, announcing to the House of Assembly on June 18 that Independence would bring “*Strength, stability and unity*” and went on to say that “*Strength and authority will come when we are truly independent*”⁵⁹.

While the move to Independence was partially fuelled by Bougainville’s embryonic secessionist movement, the fact that Independence was granted to PNG possibly hastened the secessionists calling. Indeed the prospect of Bougainville seceding, or even attempting to do so, was one of the reasons that Australia, under Prime Minister Gough Whitlam, moved the country from self government to independence. From the secessionists perspective the granting by Australia of Independence to PNG raised the opportunity of an ancillary claim for Bougainville independence from PNG. With respect to Bougainville the question that Antony Anghie has raised “How is the post-colonial state to assert its unity when confronted with contending ethnic groups intent on becoming independent states?”⁶⁰ is particularly relevant. PNG’s attempt to answer to resolve the dilemma raised by Anghie was to attempt to develop an inclusive, home grown constitution.

PART 4 THE DEVELOPMENT OF THE CONSTITUTION

In one respect it is illogical that the Constitution was invoked to curtail the implementation of the ECP. The illogicality is in the fact that a constitution exists at all. Written constitutions represent the very essence of western law and governance and yet the production of a written constitution was embraced by many former colonies in Africa and the Pacific as a sign of their self-determination and sovereignty. In drafting written constitutions these newly independent nations were also adopting the jurisprudence that had been the instrument of their suppression. In the example of PNG not only was the concept of a constitution embraced but there is even a direct link between the Constitution and the legislation of its former colonial overlord, as the Papua and New Guinea Act passed by the Australian Parliament in 1949 formed the basis for what became PNG’s independence constitution.

The importance of the Constitution for Papua New Guineans cannot be underestimated. The Constitution not only gives clarity as to legal entitlements and personal liberation, it also entrenches the checks that apply to Executive Government and provides a focus of national identity. As the secessionist movement in Bougainville illustrates, the challenge facing the new Government at Independence was how to unify the country that has over 800 languages and cannot even agree on a “National Dress”⁶¹. In a country that is so diverse, it was the intention of its drafters that the Constitution would become not just a source of law but a source of national identity. While the rival associations of family, clan and region remain, the Constitution gives a point of unified reference, albeit it a conditional one, for, as the secessionist aspirations of Bougainville illustrate, PNG was in fact far from unified at Independence.

Unlike many other colonial territories where the constitutions were drafted within the confines and security of the colonisers own government buildings PNG further attempted to overcome the problem of disunity by creating a “home grown” constitution, written in Waigani not Canberra.

By way of preparation for the drafting, the Constitutional Planning Committee (“CPC”) (charged with PNG’s constitutional development) undertook an extensive consultation process, talking to people in every province and holding public meetings in an attempt to identify what was important to Papua New Guineans. One objective of this consultation process was to ensure that the final document would not be a sterile legal document, but that it would be a living document that belonged to the people and reflected the views of the people, a “charter, a vision of the aspirations of Papua New Guineans”⁶². The “aspirations” that were identified by the CPC as being important to

⁵⁹ Michael Somare Chooses a Date, *Papua New Guinea Post Courier: Special Silver Jubilee Edition* September 15-17 2000 page 7

⁶⁰ Anghie *A Imperialism, Sovereignty and the Post Colonial State* Cambridge University Press 2005 page 205

⁶¹ *Papua New Guinea Post Courier* 19 September 2005

⁶² *Ibid* page 20

Papua New Guinea were incorporated into the Constitution as the 5 National Goals and Directive Principles (the “NGDP”).

Another interpretation of the NGDP is that they represent an attempt to incorporate customary law into the Constitution. While the NGDP are non-judicial, they are an attempt to ensure that the “PNG way” is followed at a Government level. Another enlightened individual who would no doubt have supported the NGDPs and who would have cast a critical eye over the ECP would perhaps have been Scratchley’s successor, John Douglas. As Special Commissioner of Papua, Douglas wrote in a memorandum dated 14 March 1886 that “native customs must be recognized and native rights respected”⁶³. Not only was the ECP flawed by the fact that its enabling legislation, the Enhanced Cooperation between PNG and Australia Act 2004 was flawed (by virtue of the fact that it was inconsistent with the Constitution), but it is also arguable that in developing the ECP no attention was paid to the NGDP.

Had the NGDP been taken into account, then the format and content of the ECP would most likely have been different. For in bringing its claim against ECP one motivating factor for the MPE was that the ECP went against the Constitution and, considering the iconic role of the Constitution to PNG’s democracy, it is not surprising that any attempt to subvert it would be objectionable. For, while the Constitution has been amended, such amendments cannot be made easily or lightly and, pursuant to s19 of the Constitution, such changes can be challenged. It was s19 that the MPE relied upon in bringing its claim.

The writing of the Constitution was a long time coming and predates the establishment of the CPC. In 1968, four years before the establishment of the CPC, a group of PNG politicians, intent on finding the type of constitutional arrangement that best suited PNG, undertook a number of trips to Africa and the Pacific to examine the constitutional documents of other former colonies. Sir Michael Somare, then Chief Minister was part of a group that went to Africa. Sir Michael has written of his African trip as follows⁶⁴:

“I was part of the group that went to Africa. I was especially interested in Tanzania and in the African socialism being developed there, because I believed in some kind of socialism ... We went to Uganda. We went to Ghana. We could not go to Nigeria because a coup d’état was happening there. While travelling our aim was to find the constitutional arrangements most suitable for PNG. We came back with many good ideas”.

The impressive opening words of the Forward in the *Annotated Constitution of Papua and New Guinea*⁶⁵ clearly establish the position of the Constitution on PNG’s legal framework:

“The Constitution of PNG is both a political statement and a legal document. As a legal document it has been subject to review and interpretation by the National and Supreme Courts and to amendment by the National Parliament.”

Considering Sir Michael’s involvement in the development and drafting of the Constitution it is perhaps hardly surprising that, in respect of the constitutional issues raised by the ECP, Sir Michael as Prime Minister has not been more flexible in seeking a solution to its implementation. It is not hard to assume that Sir Michael would not have been impressed by comments reported in the PNG Post Courier where Australian Foreign Minister, Alexander Downer, indicated that PNG may well have to change the Constitution to accommodate the ECP in its original form.

“It’s not just a question of negotiating a new package with the PNG Government. The question is whether there will be some legislation that will be required, which there almost certainly would be,” Mr Downer said. “Even the possibility of some kind of a constitutional change”⁶⁶.

PART 5

⁶³ Oram ND, ‘Land and Race in Port Moresby’ in Haynes CEP, *Land Law and Land Policy in Papua New Guinea: Text, Cases and Materials*, UPNG 1986 page 4

⁶⁴ Regan, A, Jessep, O, Kwa, E, *Twenty years of the Papua New Guinea Constitution*, Lawbook Co Pymont, NSW 2001 page 16

⁶⁵ Brunton B Colquhoun-Kerr, D University of PNG Press 1984

⁶⁶ *Papua New Guinea Post Courier* 17 May 2005

NEOCOLONIALISM IN PNG

With the declaration of Independence and a new Governing document PNG was supposed to have been an independent, sovereign state responsible for its own people, controlling its own resources, making and enforcing its own laws and developing a strong economy. If strength and authority are prerequisites for true independence, as defined by Sir Michael Somare on Independence Day, then by definition true Independence was not, and has never been attained by PNG. PNG is not a strong, stable and unified country. It has not prospered since Independence. Broad-based economic growth has been well below expectations, life expectancy is only 55 years, infant mortality is high and educational attainment is low. In 2001 PNG ranked 122 out of 162 countries on the UNDP human development index⁶⁷.

Anghie supports the proposition that mandated and colonized countries are never really free of the shackles of colonialism. For, while Independence may be rhetorical reality, the reliance on experience, knowledge and economic markets of the coloniser means that the bond is always strong and the post colonial state the submissive partner. The ongoing guidance and aid offered by the colonisers maintained a mandate-like relationship. Certainly that would appear to be the case in PNG.

Anghie's theory gains even more credibility in the example of Bougainville where the UN was required to step back in and assist with sorting out the problems arising out of the war and assisting in seeking a solution. The UN made an important contribution to the peace process through its involvement in negotiating, mediating and facilitating the resolution of the conflict through the United Nations Political Office in Bougainville (UNPOB) and its successor — the United Nations Observer Mission (UNOMB), as well as the UN Country Team. The UN efforts included supervision of the collection and destruction of some 2000 weapons, pushing the parties involved to meet agreed upon pre-election deadlines and ultimately to facilitate the election itself. The swearing in of Bougainville's first autonomous provincial government in June 2005 ended the UNOMB mandate⁶⁸.

Interestingly enough Anghie proposition does not hold true in respect of recent events in the Solomon Islands. The Solomon Islands was in a similar position to PNG. The Regional Assistance Mission to Solomon Islands (RAMSI) was deployed on 24 July 2003 following a request from the Solomon Islands Government of Sir Allan Kemakeza to help the Solomon Islands Government restore law and order, strengthen government institutions, reduce corruption and re-invigorate the economy⁶⁹. Unlike ECP, however, RAMSI (although largely Australian-resourced) is a truly regional response to a regional challenge. By mid 2005 eleven countries had contributed personnel to the mission to date (Australia, New Zealand, Fiji, PNG, Tonga, Samoa, Vanuatu, Kiribati, Nauru, Tuvalu and Cook Islands⁷⁰). It would be illuminating to consider the long term benefits of a regional response to problems of governance (as in the Solomon Islands) compared to a bilateral/ unilateral response in the case of PNG.

Perhaps it is not surprising that both PNG and the Solomons are in a similar position, as they share much of their history, a history that has had significant and bloody repercussions in the last 20 years. Historically, it is also arguable that from the time Europeans "discovered" PNG, the country would never again be truly independent. Having once drunk from the Europeans chalice the pursuit of European goals and the coveting of European goods was more important to Papua New Guineans than their pre European way of life; a classic example of this was the emergence in the nineteenth century of cargo cults. PNG was therefore always going to be an easy target for neo-colonialism.

In my research for this paper I found that one academic – Peter Fitzpatrick was reviewing the state of PNG's Independence from a neo-colonial aspect in 1980 that is only five years after Independence was granted. Fitzpatrick's thesis was based on the economic dependency of the newly independent countries (this is a position that Anghie has further developed). Fitzpatrick says in his book *Law and State in PNG* that:

The thesis of neo-colonialism and some theories of underdevelopment consider that third world countries are now typically independent in political form only and that effective structures of economic dependency

⁶⁷ AusAid, *PNG, Program profile 2001-2002* page: iii

⁶⁸ *Papua New Guinea Post Courier* 24 August 2005

⁶⁹ Moore C, *Happy Isles In Crisis, The historical causes for a failing state in Solomon Islands, 1998-2004*, Asia Pacific Press, Australian National University, Canberra 2004

⁷⁰ http://www.dfat.gov.au/geo/solomon_islands/helpemfren/intro.html October 2005

and external domination persist with the neo-colony being, basically subordinated to the metropolitan economies⁷¹.

Certainly the economy of PNG is linked to Australia, but there is a further aspect to neo-colonialism, namely that of human nature. Neo-colonialism will find a footing in the third world due to citizens of these countries, including PNG, aspiring to and pursuing European lifestyle. Consequently it is arguable that out of this desire for Europeanisation there arose a desire for standardization of life style. Even the fact that former colonies adopted written constitutions as a sign of their independence is an indicator of the adoption of western norms and values. Simultaneous, with the discarding of the mantle of colonial power, the emerging nations sought to install a similar framework of government and an imperialist legal culture.

This international standardization of lifestyle has had wide reaching implications; in particular it is arguable that in the pursuit of uniformity both the West and the non West are currently in the throes of another form of colonialism, a highly evolved cargo cult type colonialism easily described as “commercial colonialism”. Around the world people want the same things, children from Africa to America think that wearing Nike means they will have happiness, while their parents look longingly at a car or television - soon to be a plasma screen. Internationally people are striving to fit an externally determined frame. The marketing of a Western life style and attainment of Western goods is seen by some, the neo-Marxists for example, as emblematic of continuing dominance and oppression by the West over the rest of the world⁷². Perhaps the most sinister factor of commercial colonialism is that, unlike Sovereign States, the international legal obligations of commercial entities are embryonic – quite out of proportion to their global influence and power.

The issue of “commercial colonialism” is important to the discussion of neo-colonialism as it is relevant to the issue of economic development and the standard of living in the third/ developing/ non-Western world. What is also interesting about the discussion of life style is that it was precisely in pursuit of power, money, the “saving of souls” and, at a more plebeian level, a better standard of living that colonialism occurred in the first place. For the colonialist, in order to ensure that they achieve the necessary financial and life style benefits it was necessary upon colonisation to access local resources, alienate land and protect personal and property rights. To this end, upon colonisation, Western-modelled political, legal and economic institutions were quickly established.

The establishment of financial services and the opening of banks is an example of the institutions that the colonists established. In PNG all the major Australian banks were quick to open branches. In 1916 the Commonwealth Bank followed the Australian Army into Rabaul, the former Bank of New South Wales (now Westpac) followed soon after, while the Bank of South Pacific, formerly the National Australia Bank (“NAB”), has been in PNG since 1957. In 1974, as Independence approached, NAB converted its branches into a local subsidiary – the Bank of South Pacific - to comply with the new government’s desire that all banks operating in PNG be locally incorporated⁷³ and because, as from Independence, the bank was not permitted to use the word ‘National’ in its name.

It is not hard to imagine the disappointment that the many conscientious, hardworking and ordinary people in the third world must feel when they consider how, since gaining independence, their dreams and lifestyles have slowly haemorrhaged away. Whether it is because of greed, selfishness, a lack of education or simply the human failing of incompetence and nepotism, it is unfortunate that for many postcolonial countries the ~~populist~~ commonly used descriptive term “failed state” seems to be applicable. Following independence, it is easy to trace many of the financial and political woes of these “failed states” to the nationalised management and operation of the publicly⁷⁴ run, European inspired, government institutions. Post independence, it is in the failure of these institutions to operate without tribal and customary influence and with a Western operandi that has resulted in former colonies not achieving, exceeding or even maintaining the same economic success as their former colonisers. The effect of this mismanagement is that capital intensive infrastructure has deteriorated and financial investment substantially decreased or very nearly ceased. It is as a consequence of the collapsed of the infrastructure and the mismanagement of the institutions that has led to the reliance on western financial aid and development assistance.

⁷¹ Fitzpatrick P, *Law and State in Papua New Guinea*, Academic Press, University of Kent at Canterbury, page 12

⁷² Darian-Smith E, *op.cit* page 292

⁷³ Tschoegl, A, ‘Foreign Banks in the Pacific’ *The Journal of Pacific History* Volume 40, No2 2005

⁷⁴ As compared to private institutions, such as commercial banks e.g. the Bank of South Pacific.

The issues of 'development' and the 'third world' are emotive. Anghie has argued that development is intrinsically linked with the colonial past⁷⁵, as colonialism created a set of economic and political relations which favoured the colonial power and which continued to operate even in the postcolonial era. In the example of PNG, colonial excesses have certainly contributed to PNG's reliance on aid, as did Australia's failure to promote education and employment opportunities for Papua New Guinean's. Government instability has been another major impediment to investment, while measures Australia encouraged in the Constitution are seen as a contributing factor. One example of these destabilising measure was the original provision (subsequently amended) that provided that a no-confidence motion could be passed upon a Prime Minister after only 18 months in power. Historically, Australian economic self interest has also impeded PNG economic development and contributed to the weakness of capitalist penetration. Australia (especially Queensland) being itself a tropical and sub-tropical producer of plantation crops restricted for a long time the importation of competitive crops in PNG⁷⁶.

For some people in PNG, the fear of Australian neo-colonialism actually predates ECP. For these people the fear has been fed by PNG's seemingly complacent historical reliance and acceptance of Australian aid. Prior to the ECP over a third of Australia's bilateral aid budget and a fifth of its total aid program were dedicated to PNG. The reliance on Australian Aid is another marker of pseudo Independence, as, when a country is reliant on Aid, it stands to reason that it is also going to be subjected to the policy demands of the donor-

The other issue for consideration in respect of Australian aid to PNG is that policy decisions from Canberra may not have been made with the specific conditions of PNG in mind consequently the model of aid may not be suitable. On the AusAID website the main objective of the Australian Government's aid program is:

“to advance Australia's national interest by helping developing countries reduce poverty and achieve sustainable development.”⁷⁷

If Australia's ultimate goal is its own national interest then it is hardly surprising that the recent attempt by Australia to implement the ECP met with strong opposition from within PNG, although there remains wide support within the community and parts of the police for institutional support to help reduce crime levels. However, it is the intention of an aid project to dilute the sovereignty and customs of a recipient people commonsense would suggest that project implementation is likely to be difficult.

In many ways PNG was an easy target for neo-colonialism, on account of the fact that the very land over which sovereignty is claimed has hampered PNG's economic development. PNG is richly endowed with export earning natural resources, such as gold, copper and oil, but its terrain is rugged and the cost of developing a comprehensive infrastructure high. Whilst in the places, such as Porgera, OK Tedi and Lihir, the mining companies have invested in infrastructure, the purpose and scope of the development has been largely to improve access to mine sites, rather than as the means to improve what Sen refers to as “people's capabilities”⁷⁸, (recognising that some infrastructure is for wider community benefit, both under the tax credit scheme and the community affairs investments) The impending closure of OK Tedi and Porgera will have not only a detrimental effect on PNG's export earning, but also on the local economy and infrastructure. While Agriculture provides a subsistence livelihood for the bulk of the rural population there is an increasing drift from the villages to the cities where, rather than jobs and education, the people are faced with living off relatives and calling squatter settlements 'home'.

With the changes to the mining sector the challenge to PNG is to find new employment for its people and new sources of capital. Two options it may have are tourism and fisheries. As tourism is, however, dependent on stability, the marketing of PNG as a prime tourist destination is perhaps a long term but certainly viable goal. A more immediate return could be obtained from the development of PNG's commercial fishing industry.

PNG's National Fisheries Authority supports the development of the commercial fishing industry, in particular – long-line tuna fishing. The National Fisheries Authority's *2002 - 2004 Corporate Plan* stated that the "PNG fisheries zone of 2.4 million square kilometres is the richest in the South Pacific". The total market value of PNG's fish catch is estimated at K350 to K400 million per annum.

⁷⁵ Anghie A, *Imperialism, Sovereignty and the Post Colonial State*, Cambridge University Press 2005

⁷⁶ Fitzpatrick P, *Law and State in Papua New Guinea*, Academic Press, University of Kent at Canterbury, page 55

⁷⁷ www.ausaid.gov.au/about April 2005

⁷⁸ Balasubramanyam BN and Sanjaya L (ed) *Current Issues in Development Economics*, New York 1991

While commercial fishing can be highly profitable, it is also a very capital and labour intensive operation. Currently Papua New Guineans do not have the opportunities, skills or expertise to be truly involved with or benefit from the commercial fishing resource, in particular tuna. Foreign flagged vessels take most of PNG's annual tuna catch. Unless PNG has economic growth it will not have stability, it will not have a reputation that will encourage tourism and investment. Until PNG and its people are given the means to develop their own resources and to create fresh and safe investment opportunities economic growth will continue to stagnate and the law and order problems will intensify.

Increasingly it seems, however, that rather than focus on economic growth and developing new employment opportunities that the focus of aid agencies in the Pacific, revolves around Governance. The assumption appears to be that the economic and social problems that these countries are facing are attributable to a paucity of understanding about institutional governance and not to law and order and social problems including those problems that have evolved as a direct result of PNG's colonial legacy. The focus on Governance also ignores the reality that during the 'first round' of colonialism the former colonists had ample opportunity to establish institutional strength.

In relation to the Pacific the emphasis on Governance is used to suggest that Pacific Island states face a bleak future unless they can attract foreign investors by solving frequent problems of alleged corruption, incompetence, laziness and a lack of market incentives. Echoing throughout PNG's history there is an emphasis on proper accountability and governance, which are in turn seen as requirements for financial assistance from metropolitan governments and international agencies⁷⁹.

The proposition from Western aid donors is that, if these countries are reacquainted with Western notions of Governance, then development and prosperity will follow. This is a very linear approach to development. While the linear model for universal development (as promoted by W.W.Rostow) has been discredited⁸⁰, yet donor agencies appear to be continuing to try to make recipient nations comply with a rigid developmental model. A crude, human explanation for this mindset may be that the ex colonial powers simply believe that the structures that they established and left in place were easily adopted and maintained by the newly independent states. Such a Eurocentric view inhibits the role of customary factors in the on-going development of recipient countries. It also fails to take into account that a less structured approach to development has its supporters. Arguably the greatest benefit of Rostow's model for PNG is not so much its practicable application, but the fact that it can be used as a starting block for a discussion on the routes by which economic development does occur. If the ECP is an example of a linear development model proffered by Australia, then its suitability to PNG is questionable. Professor P Mathias for example is quite comfortable with the notion that "There are more paths to industrialization, with different combination of factors than that trodden by eighteenth and nineteenth century Britain."⁸¹

A linear approach to "development" does not have the flexibility to recognize that some changes that may occur in a country's life time are not obvious, they are not tangible. There is no room in the German School of economics and industrialization⁸² for incorporating a peoples' state of mind or a country's self esteem as pre-conditions to Take-Off. Interestingly Rostow states in the Preface to the Third Edition of his treatise *The Stages of Economic Growth* that Africa, with its strong tribal attachments and colonial boundaries was likely to experience Take-Off sooner than China". In light of the Chinese political position in 1960 Rostow can be forgiven for dismissing China as economic back water. The reality in 2005 is of course the complete opposite of Rostow's prediction; Africa has not taken off yet (although growth rates have improved, partly on the back of the China-led commodity boom) and China is now one of the world's largest and fastest growing economies.

In the last 45 years China has indeed "Taken Off", but it would be a very deluded or creative thinker to say that the Chinese development experience is identical to that of England's or PNG's. Interestingly enough, some Chinese businesses are now investing heavily in PNG and China is a significant aid donor.

79 Van Foosin, *A South Pacific Futures: Oceania Toward 2050* The Foundation for Development Cooperation, Brisbane, Australia 2005 page 15

80 Critics of the linear approach as advocated by WW Rostow include Sir Tony Wrigley and Professor P Mathias. Wrigley, EA, *Poverty, Progress, and Population*, United Kingdom, 2004, Mathias, P *The Transformation of England*, London, 1979

81 Mathias, P *The Transformation of England*, London, 1979 page 14

82 The basis for the proposition that there is a script for development, a blueprint for the future is found in the works of the German historical school which were then reformulated and made popular by Rostow.

PART 6

THE SUPREME COURT DECISION THAT MARKED INDEPENDENCE

The MPE filed proceeding pursuant to Section 19 of the Constitution requesting the Supreme Court's opinion on seven questions arising out of the Enhanced Cooperation between PNG and Australia Act 2004 (the "Act") and the ECP.

The Attorney General on behalf of the PNG Government objected to the application and suggested to the Supreme Court that it could exercise its discretion and refuse to answer the questions on the grounds that they were "trivial, vexatious, hypothetical or unlikely to have any immediate relevance to Papua New Guinea"⁸³.

The Supreme Court firmly stated that it did not believe that the "questions raised by this reference are trivial or vexatious." Given the issues that it raised and the fact that the ECP had already commenced by the time the Supreme Court met to consider the application, it is not surprising that the Supreme Court did not agree with the Attorney General's submissions regarding the relevance of the claim.

The Supreme Court also dismissed the Attorney General's claim that PNG was bound under international law to uphold and support the ECP. The Supreme Court opinion was that "We do not consider that the issues raised by the Reference relate directly to the status of the ECP Act (Agreement) in international law. The questions raised relate to the constitutional validity of the ECP Act". It is arguable that the Supreme Court has perhaps inadvertently, extended and applied to a Treaty situation the established legal principle that domestic law will apply to all contracts, including contracts between states, when those contracts are not "contracts between States in their capacity as subjects of International Law"⁸⁴.

Once all the objections by the Attorney General had been considered and dismissed, the Supreme Court turned to consider the seven questions raised by the MPE. From the Supreme Court perspective the job with which they were charged was not so much one requiring the making of law but rather the applying of established legal principles of statutory interpretation. In considering the submissions and forming an opinion, the Supreme Court was required to widen the legislation which had impacted on the ECP and consider not only the Act but also the Police Act.

It was in the Police Act, that the Supreme Court found the key to its Decision. As the powers given to the Police pursuant to the Police Act, do, in many instances, breach the constitutional rights of other people, the Police Act expressly refers to and satisfies a provision of the Constitution (s38) which provides, in specific circumstances for constitutional freedoms to be restricted in specific circumstances. These include "defence, public safety, public order, public welfare". The ECP Act, however contained no such express reference to S38 of the Constitution. The Supreme Court with conviction and in a fearless illustration of the separation of powers and its role as upholder of the Constitution was damning in its criticism of the Executive Government for this oversight "the National Parliament ought to have considered and complied with S38 of the Constitution at the time the ECP Act was passed"⁸⁵.

The Decision is significant as it raises not only foreign political and international law issues but also philosophical and complex PNG domestic political issues. From a legal precedent perspective the Papua New Guinean courts look first to England and then to Australia for their precedents. The development of law based on indigenous concepts and contemporary problems is often stifled because of the force of foreign imitation. This was not always the way it had been intended, as mentioned earlier in this paper the inclusion of the NGDP in the Constitution envisaged the development of an indigenous jurisprudence. In 1973 Sir Michael Somare in anticipation of Independence stressed the importance for PNG in developing a legal system which would not just be an imitation of Australia but a legal system which would "respond to our own needs and values."⁸⁶

⁸³ SCR No2 of 2004 page 3

⁸⁴ This principle was established in the Case Concerning Various Serbian Loans Issued in France (1929) as set out in Anghie A *Imperialism, Sovereignty and the Making of International Law* Page 227

⁸⁵ SCR No2 of 2004 page 18

⁸⁶ Fitzpatrick P, *Law and State in Papua New Guinea* 239

To this end the Constitution does specifically recognize that the higher judiciary has a responsibility creatively to develop a “truly indigenous jurisprudence – one that takes account of custom and the national goals.”⁸⁷ Given development in Globalization and commercial colonialism, it is not surprising that PNG courts have failed to establish a local jurisprudence. Arguably such a jurisprudence while promoting a PNG way of life would have been retrogressive and detrimental steps from an economic perspective. Unless PNG had been prepared to isolate itself in the style of Cuba or Bhutan, it is inevitable that its legal system would adopt the certainties and universalities of western jurisprudence and the precedents of its colonial overlords.

For the purposes of this paper, therefore, the question that naturally arises in respect of the Decision is, ‘has the Supreme Court taken up the jurisprudential gauntlet and commenced to develop an indigenous jurisprudence?’

The short answer to this question, without embarking on a detailed analysis of the Decision is – it’s a bit of both. In invoking the Constitution against Australia the Supreme Court was exercising on behalf of all Papua New Guineans the very tool that had in 1975 been proclaimed to be the manifestation of self determination and the protector of their independence. At the same time the Decision is an example of the promotion and suitability of Western jurisprudence. In upholding the Constitution the Supreme Court was relying on the very essence of legal positivism. Furthermore, the reliance by the MPE on the Constitution and the legal rationale utilised by the Supreme Court illustrate an indigenous confidence that has grown since Independence. In many ways the Decision is a “win / win” decision as it not only protects the PNG way of life but PNG’s neighbours and foreign investors can be confident that PNG’s Supreme Court has mastered, and logically and aptly applied the Western concept of the Rule of Law upon which commercial arrangements and certainty depend.

Traditionally the courts took a literal or legalistic approach to the interpretation of legislation, this strict interpretation was also applied to constitutional provisions. The Privy Council for example, adopted a strict legal approach to the interpretation of the constitutions of Britain’s former colonies. For instance in Kasekewich v Kasekewich⁸⁸ the Privy Council said:

The intention of the framers of this Imperial Statute (the British North America Act) must be ascertained ... by having regard to the words employed without extraneous aids to interpretation where the language is unambiguous.

In looking to England for its precedents PNG is fortunate that the narrow and literal approach did not attract universal judicial approval. In “Edwards v Attorney-General for Canada⁸⁹ for example, Lord Sankey LC said the Privy Council was not to give Canada’s constitution a “narrow and technical construction, but rather to give it a large and liberal interpretation”.

In avoiding rigid interpretations of the Constitution the Supreme Court is not only aided by the NGDP but also by the interpretative provisions contained in the Constitution itself. Schedule 1.5(2) of the Constitution provides “All provisions of, and all words, expressions and propositions in, a Constitutional Law shall be given their fair and liberal meaning”.

In interpreting the Constitution the courts may also have regard to the CPC’s Final Report, of which Chapter 8, paragraph 144 says:

“The courts tend to be formalistic and legalistic. While it is true that their Constitution is law, it is a special kind of law. All too often the courts approach the Constitution as if it were like an ordinary law. They adopt a literal approach and sacrifice the spirit of the letter of the Constitution. By failing to recognize the dynamic character of a constitution, the courts have often introduced unnecessary rigidities⁹⁰.”

⁸⁷ *ibid*

⁸⁸ [1937] 1 DLR 566, 567 cited in Molloy I, ‘The Role of the Courts in Constitutional Change and Reform’ conference paper presented at *Constitutional Renewal in the Pacific Islands* conference, Vanuatu August 26-28 2005

⁸⁹ [1930] AC 124, 136 per Lord Sankey LC cited in Molloy I, ‘The Role of the Courts in Constitutional Change and Reform’ conference paper presented at *Constitutional Renewal in the Pacific Islands* conference, Vanuatu August 26-28 2005

⁹⁰ cited in Molloy I, ‘The Role of the Courts in Constitutional Change and Reform’ conference paper presented at *Constitutional Renewal in the Pacific Islands* conference, Vanuatu August 26-28 2005

The fact that the Decision is the latest of the Supreme Court decisions to have embraced these terms is a clear indicator of the expansive, interpretative approach taken by the Supreme Court. It is also representative of the emerging indigenous jurisprudence that the PNG courts are cultivating.

CONCLUSION

Law was a fundamental instrument of colonial rule. Consequently, to have interpreted and exercised the rule of law against Australia indicates a mastery by PNG of not only its own empowering doctrines but it also indicates that PNG has gained the confidence and judicial maturity whereby it can utilise the apparatus of the Western colonial legacy in defence of its own sovereignty.

With respect to the Decision and its impact on PNG's domestic position and international relations, the sentiments expressed by Scratchley, that "New Guinea must be governed for the natives by the natives" seem eminently applicable. The fact that four of the five Supreme Court Judges who heard the case were indigenous Papua New Guineans gives further weight not only to the timelessness of Scratchley's words but also to the fact that PNG is developing a unique jurisprudence that incorporates indigenous as well as established Western legal practices, procedures and precedents.

Many ordinary Papua New Guineans were justifiably disheartened and disappointed when the AAP departed, not the least the many Haus Meris who had found domestic employment with the influx of expatriates. For grassroots Papua New Guineans, who are exposed daily to PNG's law and order and socio-economic problems, it will not be easy to see any benefits arising out of the collapse of the first attempt at ECP — and yet, there was a silver lining to the Decision.

The 'silver lining' arising out of the Decision is the recognition that PNG has a strong, impartial and respectable judiciary. While this silver lining will elude or be cold comfort to most Papua New Guineans, it is important to remember that just as a firm police force is a requirement for maintaining law and order, so too the existence of an impartial and intelligent judiciary is a requirement for economic development, good governance and a civil society. One significant but perhaps often understated point about the Decision is that it showed the strength and composure of the Supreme Court in the face of considerable public and high level political pressure to ignore the law and bow to the reality of the problems of law and order.

With the guidance of the Australian Public Servants appointed under the Governance part of the ECP to assist in strengthening PNG's judicial system, it is to be hoped that eventually the efficiency and accuracy displayed by the Supreme Court in producing the Decision will be visible in the lower courts and in the quality of legal argument presented for deliberation.

The PNG Government must now determine the best way to prioritise and address the country's challenges. For the future, it is to be further hoped that Australia will take note of the priorities of its Pacific neighbours and that in turn the wise counsel and support which Australia can and does offer will be considered and, where appropriate, heeded by PNG's leaders. While the cancellation of the policing component of the ECP was a blow to Government-level plans for PNG's development, the Decision and the events that led up to it are further proof that PNG is indeed "the Land of the Unexpected".