

Expectations for Foreign Judges in the Implementation of Papua New Guinea’s “Home-Grown” Transformative Constitution

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ABSTRACT

Papua New Guinea's Constitution, made for its independence in 1975, provided the judiciary with broad, liberal powers to rectify the wrongs of colonialism and respond to the needs and unique circumstances of its intensely diverse people. This presents a challenge for judges, particularly foreign judges, who are often unfamiliar with the constitutional history of Papua New Guinea or are reluctant to take an approach to judging that departs from the more conservative judicial roles preferred in their own jurisdictions. This paper argues that foreign judges must adapt to their role as judges of Papua New Guinea. This requires relinquishing the biases and professional sensibilities ingrained from their training and experiences in other jurisdictions. It suggests that greater attention to the judicial ideology of foreign candidates, as well as prioritizing recruits from jurisdictions with similar constitutional frameworks and colonial histories to Papua New Guinea, would aid the country's judiciary in fulfilling the transformative role envisaged for it by the Constitution.

Keywords:

Foreign Judges, Papua New Guinea, judicial method, judicial system, colonialism, transformative constitution, Global South judiciary, decolonisation.

I. INTRODUCTION

Judges in Papua New Guinea are expected to have a transformative role. They are not to be judicial "bystanders," but rather, are to have an active function in shaping society. This vision of the judiciary resulted from an exhaustive and unparalleled constitution-making process between 1969 and 1974 in which the people expressed their desire for a judiciary that would depart from the "narrowly legalistic approach" that had defined the colonial judiciary and adopt a "politically conscious" judicial method "tuned to the wishes of [Papua New Guinean] society" which would apply "judicial ingenuity to do justice."¹

The resulting constitutional framework gives judges expansive powers to intervene in the development of Papua New Guinean society.² This presents a challenge, particularly for foreign judges who are often unfamiliar with this constitutional history and intention or are reluctant to

¹ Constitutional Planning Committee, *Papua New Guinea Constitutional Planning Committee Final Report* (1974), ch. 8, paras. 4–7, 9, 88, <http://www.paclii.org/pg/CPCReport/main.htm>; *State v. Independent Leadership Tribunal ex parte Sasakila* [1976] PNGLR 491 at 506–7 (Kearney J) (Papua N.G.); *Peter v. South Pacific Brewery Ltd* [1976] PNGLR 537 (Prentice DCJ) (Papua N.G.).

² Bal Kama, *Reconceptualising the Role of the Judiciary in Papua New Guinea's 'Home-grown' Constitution*, 160, 246, 283 (March 2019) (unpublished Ph.D. dissertation, Austl. Nat'l Univ.) (on file with the College of Law Library, Austl. Nat'l Univ.).

engage in a method of judging contrary to the more conservative judicial roles preferred in their own jurisdictions. This challenge manifests itself in various judicial functions, but the three that are particularly significant are the mandate to apply a fair and liberal constitutional and statutory interpretation,³ the *sua sponte* power to voluntarily enforce human rights⁴ and the direction to develop an indigenous body of law based on local customs and traditional values known as the “Underlying Law.”⁵

National judges have not always embraced these functions. However, foreign judges are often the most reluctant with some exceptions.⁶ The dominant sourcing jurisdiction of foreign judges is Australia and, to a lesser extent, New Zealand.⁷ As a result judges from these predominantly legalistic judicial cultures bring judicial approaches to Papua New Guinea that risk stifling the transformative intentions of the Constitution and the liberal expectations of the judiciary.⁸

For a developing country with growing international investment and trade, the expertise of foreign judges has been invaluable in resolving complex commercial and multi-jurisdictional legal issues. The benefits of their involvement, however, must be weighed against the intention of the Constitution for all judges to be “leaders” with a special and active role in the development of the country.⁹ As this analysis will demonstrate, a crucial aspect of adapting to their new role as judges of Papua New Guinea, is the need to relinquish some of the biases and professional sensibilities ingrained from their trainings and experiences in their own jurisdictions.

The paper begins with an overview of Papua New Guinea’s court system and the use of foreign judges within it. This is followed by an analysis of judging in the colonial era, which demonstrates how the legalistic approaches of colonial foreign judges were the impetus for the design of a transformative judicial role under Papua New Guinea’s independence Constitution of 1975. The paper subsequently discusses the challenges that foreign judges face in meeting the Constitution’s

³ CONSTITUTION OF THE INDEPENDENT STATE OF PAPUA NEW GUINEA 1975, s. 109(4), sch. 1.5 (Papua N.G.).

⁴ *Id.*, s 57(3).

⁵ *Id.*, schs. 2.3-2.4; Underlying Law Act 2000 (Papua N.G.).

⁶ Kama, *supra* note 2, at 302-06, 311. An analysis drawn from my empirical research and discussed further in the research doctoral thesis.

⁷ ANNA DZIEDZIC, *FOREIGN JUDGES IN THE PACIFIC*, 25-27 (Hart Pub.; 1st ed. 2021).

⁸ Kama, *supra* note 2, at 302-06, 311. On Australian judicial culture, *see* commentary by Michael Kirby, former Justice of the High Court of Australia, in Michael Kirby, *Judicial Activism: authority, principle and policy in the judicial method*, Sydney Morning Herald, November 20, 2003, <http://www.smh.com.au/articles/2003/11/19/1069027176126.html?from=storyrhs>.

⁹ Constitutional Planning Committee, *supra* note 1, ch. 3, at para. 2.

transformative intentions. It concludes with suggestions for improving the recruitment of foreign judges if the country decides to continue the practice of engaging foreign judges.

II. OVERVIEW OF THE JUDICIARY IN PAPUA NEW GUINEA

A. *Court System*

The three main areas foreign judges are formally engaged in Papua New Guinea are as judges of the Supreme and National Courts, members of tribunals, and commissioners in commissions of inquiry.

The Supreme Court is the highest court.¹⁰ It hears appeals from the National Court and constitutional issues. The Supreme Court sits with a bench of three or five judges.¹¹ The National Court is the superior trial court. It has jurisdiction to hear serious criminal and civil cases, appeals from the District Court, and review administrative decisions.¹² Usually, the National Court sits with a single judge. Full-time judges of the Supreme Court are also judges of the National Court.¹³

The main lower courts consist of the District Court and the Village Court.¹⁴ While foreign magistrates did serve on these courts initially during the early post-independence period, sufficient domestic capacity and expertise meant these courts are now fully localized. The District Court is the primary court of first instance and applies formal judicial procedures, while the Village Court is informal in its procedures, deals with minor criminal and civil offenses, and is staffed by lay magistrates who are more proficient in the knowledge and application of local custom and traditional values than the technicalities of law.¹⁵

The Constitution permits other specialist courts and tribunals to be set up as the need arises.¹⁶ A common tribunal in which foreign judges are sometimes recruited to serve is the Leadership Tribunal. The Leadership Tribunal prosecutes prescribed public office holders, such as members of parliament, judges, heads of government departments and diplomats, where

¹⁰ CONSTITUTION OF THE INDEPENDENT STATE OF PAPUA NEW GUINEA 1975, ss. 155(1), 160.

¹¹ CONSTITUTION OF THE INDEPENDENT STATE OF PAPUA NEW GUINEA 1975, s.161.

¹² CONSTITUTION OF THE INDEPENDENT STATE OF PAPUA NEW GUINEA 1975, s.166.

¹³ CONSTITUTION OF THE INDEPENDENT STATE OF PAPUA NEW GUINEA 1975, ss. 62, 66.

¹⁴ District Court Act 1963, ss. 14, 20 (Papua N.G.); Village Courts Act 1989, Part V (Papua N.G.).

¹⁵ Village Courts Act 1989 (PNG), ss. 17, 42, 73.

¹⁶ CONSTITUTION OF THE INDEPENDENT STATE OF PAPUA NEW GUINEA 1975, s. 172. Examples of such specialist courts include the Family Court and the Local Land Court.

they are alleged to have breached the Leadership Code.¹⁷ The Leadership Code is a set of guidelines the office holders are expected to abide by while discharging their public duty.¹⁸ The Ombudsman Commission administers the Leadership Code and investigates alleged breaches, while the Public Prosecutor undertakes the prosecution at the Tribunal.¹⁹ A Tribunal is created ad hoc for each inquiry and usually comprises of three adjudicators.²⁰

B. *Appointment of Judges*

Except for the Chief Justice, all judges, local and foreign, are appointed by the Judicial and Legal Service Commission.²¹ This Commission is constitutionally entrenched and comprises of the Minister for Justice, the Chief Justice, the Deputy Chief Justice, the Chief Ombudsman, and an appointee of the Parliament.²² While the Minister and the parliamentary appointee are Members of Parliament, both the Deputy Chief Justice and the Chief Ombudsman are appointees of the Commission. Only the Chief Justice is appointed by the National Executive Council chaired by the Prime Minister.²³ As a result, there is an involvement of partisan and nonpartisan members in the appointment process of judges to ensure a high degree of independence and transparency.

All local judges have a ten-year tenure and can either be directly appointed to full tenure or after 12 months of serving as an acting judge.²⁴ Foreign judges, defined by statute as “non-citizens,” have a three-year tenure with options for reappointment.²⁵

¹⁷ *Id.*, div. III(2); ORGANIC LAW ON THE DUTIES AND RESPONSIBILITIES OF LEADERSHIP (Papua N.G.). Observations of instances where foreign judges were recruited for the Leadership Tribunal appear to suggest that a key consideration for their recruitment is to mitigate any perception that local judges might be bias in politically sensitive cases that affect them as citizens.

¹⁸ CONSTITUTION OF THE INDEPENDENT STATE OF PAPUA NEW GUINEA 1975, Part III, Div 2; Constitutional Planning Committee, *supra* note 1, ch. 3.

¹⁹ CONSTITUTION OF THE INDEPENDENT STATE OF PAPUA NEW GUINEA 1975, s. 29.

²⁰ CONSTITUTION OF THE INDEPENDENT STATE OF PAPUA NEW GUINEA 1975, s. 28(1)(g); ORGANIC LAW ON THE DUTIES AND RESPONSIBILITIES OF LEADERSHIP, s. 27 (Papua N.G.).

²¹ CONSTITUTION OF THE INDEPENDENT STATE OF PAPUA NEW GUINEA 1975, ss. 170, 175, 176.

²² *Id.*, s. 183.

²³ *Id.*, s. 169.

²⁴ *Id.*, s. 170(3); ORGANIC LAW ON THE TERMS AND CONDITIONS OF EMPLOYMENT OF JUDGES, s. 2 (Papua N.G.).

²⁵ ORGANIC LAW ON THE TERMS AND CONDITIONS OF EMPLOYMENT OF JUDGES (PNG), s. 2; NATIONAL COURT ACT 1975, s. 2 (Papua N.G.).

Foreign judges called to serve in tribunals may be appointed by the Judicial and Legal Service Commission, the Chief Justice, or the executive government, depending on the type of matter.²⁶ Appointments to commissions of inquiry are made exclusively by the executive government.²⁷

C. *Sourcing Foreign Judges*

While the statutory notion of foreign judges in Papua New Guinea is simplified to “non-citizens,” the complexities of citizenship and differences in the depth of local experience and professional backgrounds of foreign judges affect the extent of “foreignness” of individual judges. Legal scholar Anna Dziedzic demonstrates that defining a “foreign judge” is difficult as there is no standard meaning.²⁸ For the purposes of this analysis, foreign judges are defined as judges who either are citizens or were originally citizens of another country and obtained their legal education in a country other than Papua New Guinea.

This meaning goes beyond the statutory definition in Papua New Guinea to include judges who are originally citizens of another country in order to capture naturalized citizens who tend to have gained their substantive legal education and professional experiences in their original country. Adopting a wider definition acknowledges that the legal and professional experience is formative in how the role of the judge is understood, which (as will be shown later in this analysis) differs markedly in Papua New Guinea and most foreign judges’ countries of origin. This definition also captures colonial judges within the definition of a “foreign judge.”

As of 2022, there are seven foreign judges out of the forty-six total judges, including ten acting judges, on the National and Supreme Courts (13 percent).²⁹ Appointment to acting judge is based on experience and considering the experiences of the foreign judges, none of them are appointed to acting capacity.³⁰ Five of the seven foreign judges are from Australia and one each from New Zealand and England. Apart from its

²⁶ CONSTITUTION OF THE INDEPENDENT STATE OF PAPUA NEW GUINEA 1975, s. 181(1)(c); ORGANIC LAW ON THE DUTIES AND RESPONSIBILITIES OF LEADERSHIP, s. 27(7) (Papua N.G.); ORGANIC LAW ON THE GUARANTEE OF THE RIGHTS AND RESPONSIBILITIES OF CONSTITUTIONAL OFFICE-HOLDERS, s. 5(1) (Papua N.G.).

²⁷ COMMISSION OF INQUIRY ACT 1951, s. 2 (Papua N.G.).

²⁸ See Dziedzic, *supra* note 7.

²⁹ See list of judges of the National and Supreme Courts of Papua New Guinea (as of 2022) at <https://www.pngjudiciary.gov.pg/about-the-courts/judges>.

³⁰ See list of judges of the National and Supreme Courts of Papua New Guinea (as of 2022) at <https://www.pngjudiciary.gov.pg/about-the-courts/judges>.

traditional sourcing jurisdictions of Australia and New Zealand, Papua New Guinea rarely recruits judges from other countries.³¹

Appointing a “non-citizen” requires either that the individual be an attorney in Papua New Guinea or in a country with a similar legal system for at least five years, or that the individual be a judge in a court of unlimited jurisdiction in a country similar to Papua New Guinea.³² While this allows for potential recruits from any common law jurisdiction, factors such as personal and professional relations, colonial history, familiarity with socio-cultural settings, and the close business and political relations between Papua New Guinea and Australia and New Zealand mean that judges from these countries often predominate.

For example, five of the foreign judges are resident judges while two are visiting judges from the Federal Court of Australia.³³ The arrangement with the Federal Court began in 2011 with the two visiting judges sitting exclusively on the Supreme Court for civil and commercial appeals, for a period of one week three times a year.³⁴

D. Localization of Judges

Papua New Guinea has the lowest percentage of foreign judges in the Pacific.³⁵ The impetus for the localization of judges began in the pre-independence era when the drafters of the Constitution, the Constitutional Planning Committee, recommended that while the country “will continue to rely on foreign judges for some years to come, ... it will obviously not be consistent with the principle of our national sovereignty after Independence” and urged for “a deliberate policy to have our own people control the courts of our country soon after Independence.”³⁶ The Constitutional Planning Committee reasoned that having “our own judges” would ensure courts are responsive to local customs, values, and circumstances of the people and to developing a common law appropriate to the society.³⁷ As will become evident later in the analysis, this was part of a larger decolonial project of “home-grown” constitution-making which sought to reconfigure colonial institutions and ideologies. It included

³¹ Kama, *supra* note 2, at 302-04.

³² NATIONAL COURT ACT 1975, s. 2 (Papua N.G.).

³³ See list of judges of the National and Supreme Courts of Papua New Guinea (as of 2022) at <https://www.pngjudiciary.gov.pg/about-the-courts/judges>.

³⁴ John Logan, *A Year in the Life of an Australian Member of the PNG Judiciary*, AUSTRAL. NAT. UNIV. STATE, Society and Governance in Melanesia Discussion Paper 2015/16, p. 2.

³⁵ Dziedzic, *supra* note 7, at 40.

³⁶ Constitutional Planning Committee, *supra* note 1, ch. 8, paras. 34, 36.

³⁷ *Id.*, paras. 37–38.

reconfiguring not only judicial personnel but also judicial practices and methodologies.³⁸

The case for the localization of judges was hastened unexpectedly in 1979, four years after independence, when five of the eight foreign judges on the National and Supreme Courts resigned in protest of an alleged interference by Prime Minister Sir Michael Somare in a judicial decision.³⁹ In *Public Prosecutor v. Rooney*, the Minister for Justice was found guilty of contempt of court offenses including scandalizing the judiciary after the Minister, in a series of correspondence with the Chief Justice and in media statements, reacted adversely to a National Court decision to injunct a deportation order issued by the Ministry of Foreign Affairs and Trade.⁴⁰

The Supreme Court sentenced the Minister to eight months imprisonment. However, the Court's decision was short-lived as Prime Minister Somare intervened, using ministerial powers under the Criminal Code in his capacity as the acting Minister for Justice, to release the Minister after only a day in prison.⁴¹ The mass resignation of foreign judges led to the appointment of the first Papua New Guinean judge, Sir Mari Kapi, in December 1979 followed by the appointment of the first Papua New Guinean Chief Justice Sir Buri Kidu in 1980. The political fallout from the *Rooney* case also ensured the decolonial aspirations of the Constitutional Planning Committee were taken seriously with greater government efforts to increase the number of local judges.⁴² By 1992, nine of the fourteen judges (64 percent) were local judges⁴³ with continuing growth to 2022 with thirty-nine of the forty-six judges (85 percent) being local judges.

E. *Impetus for Recruiting Foreign Judges*

Unlike the shortages of local judges necessitating the recruitment of foreign judges in other Pacific countries,⁴⁴ Papua New Guinea has a mature judicial system and greater depth of talent in its legal and judicial sectors such that it arguably no longer needs foreign judges. The Law School at the

³⁸ Kama, *supra* note 2, at 231.

³⁹ David Weisbrot, *Papua New Guinea: Judges and Politicians*, 4 LEGAL SERV. BULL. 240, 242–3 (1979); David Weisbrot, *Papua New Guinea: Judges and Politicians (Part 2)*, 5 LEGAL SERV. BULL. 214, 215 (1980).

⁴⁰ *Public Prosecutor v. Rooney* (No. 1) [1979] PGSC 22 (Papua N.G.); *Public Prosecutor v. Rooney* (No. 2) [1979] PGSC 23 (Papua N.G.).

⁴¹ Criminal Code Act 1974, s. 615 (Papua N.G.).

⁴² Somare's response to the Court's decision created turmoil within the (Somare) Government and led the Opposition to a successful vote of no confidence against Somare a few months later on 11 March 1980.

⁴³ John Nonggorr, *The Maintenance of Judicial Independence and Integrity in Papua New Guinea: Some Recent Developments*, 18 COMMONWEALTH L. BULL. 1181, 1182 (1992).

⁴⁴ Dziedzic, *supra* note 7, at 44.

University of Papua New Guinea, established in 1967, was the first in the Pacific to train lawyers for both Papua New Guinea and other Pacific countries.⁴⁵ As of 2021, Papua New Guinea has 964 certified lawyers with a significant number of highly trained and internationally experienced legal practitioners and scholars.⁴⁶ Papua New Guinea's capacity is also evident with ongoing arrangements to supply judges to other countries in the Pacific, including Nauru and Solomon Islands.⁴⁷

Recruitment of foreign judges therefore does not arise because of a shortage of potential local judges. Instead, as Chief Justice Sir Gibbs Salika indicated, foreign judges are appointed more for their comparative expertise in certain areas of law where local experience may be lacking, such as international trade and commercial law.⁴⁸ Papua New Guinea's economy is heavily reliant on large-scale extractive industries, such as mining, petroleum, liquified natural gas, and logging. These industries have attracted significant international investments in the country.⁴⁹ Disputes from these interactions often give rise to complex commercial, transactional, and human rights issues that require judges to have knowledge and experience of international as well as local legal frameworks.⁵⁰

Further, some local legal practitioners with skills in these areas are reluctant to be appointed due to the conditions of judicial office, including its "secluded life" which, some contend, is unattractive.⁵¹ Thus, relying on foreign judges, which has been the approach since Independence, appears to be a simpler solution than investing in additional avenues of assistance for local judges. Such investing could include trainings or secondments to other jurisdictions for local judges to acquire certain expertise and

⁴⁵ For a history of the University of Papua New Guinea School of Law, see J.B.K. Kaburise, *Access to Legal Education in Papua New Guinea*, 3 QUEENSL. INST. OF TECH. L. J. 163, 165 (1987).

⁴⁶ Public Notice, Papua New Guinea Law Society Practicing Certificate Holders 2021, published 30 April 2021.

⁴⁷ Papua New Guinea Supreme and National Courts of Justice, *Report of the Judges* (Port Moresby, 2019), p. 22.

⁴⁸ Interview with Gibbs Salika, Deputy Chief Justice (now Chief Justice), Papua New Guinea Supreme Court, in Port Moresby (31 March 2016).

⁴⁹ Ebrima Faal, *Growth, Investment and Productivity in Papua New Guinea*, 22 PAC. ECON. BULL. 16, 22 (2007).

⁵⁰ See Angus Grigg, *Norton Rose files key to PNG royal commission into UBS loan*, AUSTRALIAN FINANCIAL REVIEW (Oct. 17, 2019), <https://www.afr.com/companies/financial-services/norton-rose-files-key-to-png-royal-commission-into-ubs-loan-20191017-p531nz>.

⁵¹ Interview with anonymous interviewee (a senior government legal officer who refused a request to be appointed as a judge, in Canberra, Australia (16 June 2016).

addressing issues of hesitancy among qualified local practitioners that could lead towards fully localizing the judiciary.

While there is firm potential to fully localize the judiciary, increased foreign investment and the often-contentious nature of local social and political issues have created a high demand for legal work in the country which has resulted in an increase in foreign lawyers and law firms, especially from Australia.⁵² This has created conditions in which the recruitment of foreign judges from among foreign lawyers in the country is likely to be an inevitable part of Papua New Guinea's judiciary into the foreseeable future.

III. JUDGES IN THE COLONIAL ERA

The state of Papua New Guinea evolved from the unification of two colonial territories—British Papua and German New Guinea. Both British and German colonialism began in 1884 and judicial officers or personnel claiming to wield judicial power were introduced into the respective colonies with the ultimate role of advancing the objectives of colonialism.⁵³

Australia intensified the use of colonial judicial officers after it took over British Papua in 1905 and German New Guinea in 1920.⁵⁴ Its control over the country ended on September 16, 1975, when Papua New Guinea attained its independence.⁵⁵ During its almost seventy years of colonial administration, Australia introduced various court systems that were intended to address the complexities of the intensely heterogeneous society of 836 languages and more than 6,000 ethnic groups that comprised Papua New Guinea.⁵⁶ However, the Australian judicial initiatives were largely inaccessible and inappropriate to the local context. Of particular concern was the judicial method of legalism advanced by the Australian High Court during that period and applied in the colony.⁵⁷

Judges and personnel claiming to exercise judicial power were largely perceived as agents of colonialism rather than independent arbiters

⁵² See a review of the legal market in Papua New Guinea: <https://www.legal500.com/c/papua-new-guinea/legal-market-overview/>.

⁵³ Kama, *supra* note 2, at 54, 68.

⁵⁴ *Id.*; For a background on the colonial history of Papua New Guinea, see Hank Nelson, Stewart Firth & James Griffin, *PAPUA NEW GUINEA: A POLITICAL HISTORY* (1st ed. 1979).

⁵⁵ Papua New Guinea Independence Act 1975 (Cth).

⁵⁶ Ronald Wardhaugh and Janet M. Fuller, *AN INTRODUCTION TO SOCIOLINGUISTICS*, 385 (John Wiley & Sons, 1st ed. 2014); Benjamin Reilly, *Democracy in Divided Societies: Electoral Engineering for Conflict Management*, 65 (CAMBRIDGE UNI. PRESS.; 2001).

⁵⁷ Kama, *supra* note 2, at 74-75; For a review of High Court's legalism during the period of Australian colonialism, see Leslie Zines, *The Australian Constitution 1951-1976*, 7 *FED. L.REV.* 89, 90 (1976).

of justice.⁵⁸ This view was firmly established in the early period of colonization where various “justice” initiatives were tailored to advance the colonial objectives of commercialization, exploitation and control over the lives and properties of native Papua New Guineans instead of serving their interests and protecting their rights.⁵⁹

For instance, the *Native Regulations Ordinance 1908-1939* (Cth) gave the colonial officials power to regulate any matter having a “bearing or affecting the good government and wellbeing of natives”⁶⁰ while the *Native Administrative Regulation 1924* (Cth) enabled the making of “regulations affecting the affairs of the natives with regards to marriage and divorce, the right to real and personal property, the observance of native customs [and the] cultivation of the soil”.⁶¹ Their powers extended to deciding the relevance of native customs, what food natives should plant on their land—a law that also obstructed the natives from venturing into any large agricultural economy in competition to the European plantation owners—and the type of clothes the natives should wear.⁶² The colonial judicial officials and the colonial administrators viewed them generally as instruments of the “civiliz[ing] mission.”⁶³

The situation gradually changed in the 1960s as Papua New Guineans demanded greater autonomy and participation in colonial institutions. The following discussion charts these developments to establish the context that encouraged Papua New Guineans to conceptualize a different role for judges in the post-independence era.

A. German Judges in New Guinea

Albert Hahl, a German judge appointed to the territory of New Guinea after its annexation in 1884, established a judicial system that recruited local clan leaders (*luluais*) and their assistants (*tultuls*) to aid with

⁵⁸ Kama, *supra* note 2, at 19; See Peter Bayne, *Legal Development in Papua New Guinea: The Place of the Common Law* 3 MELANESIAN L. J. 9, 14 (1975); For a discussion on the role of the ‘kiaps’, see Glen Banks and Chris Ballard, ‘The Return of the Kiap: recolonising rural Papua New Guinea’ EMERGING FROM EMPIRE? : DECOLONISATION IN THE PACIFIC: PROCEEDINGS FROM A WORKSHOP AT THE AUSTRALIAN NATIONAL UNIVERSITY, DECEMBER 1996, 161 (Austl. Nat. Univ.; 1st ed. 1997).

⁵⁹ Nelson, Firth and Griffin, *supra* note 54, at 54.

⁶⁰ Native Regulations Ordinance 1908-1939 (Cth), s 5.

⁶¹ Native Administrative Regulation 1924 (Cth), s 5 (1) (6)-(8).

⁶² See *id.* ss 57, 79A and 110.

⁶³ Sinclair Dinnen, LAW AND ORDER IN A WEAK STATE: CRIME AND POLITICS IN PAPUA NEW GUINEA, 20 (UNIV. OF HAW. PRESS.; 2000).

settling disputes.⁶⁴ It mimicked the existing system among the natives in which disputes were adjudicated by local leaders.⁶⁵

The *luluais* and *tutuls* were given formal magisterial powers to resolve minor criminal and civil disputes.⁶⁶ Hahl's intention was to offset his workload as he was not only a judge but was also the administrator of the German New Guinea Company, a commercial enterprise charged by the German government to develop the economic potential of the colony.⁶⁷

However, while Hahl's program allowed natives, who well understood their social and cultural contexts, to adjudicate disputes among the people, the connection of Hahl and his fellow German judges to the commercial objectives of the colonial administration undermined their judicial initiatives and encouraged exploitation and systematic human rights abuses against the natives.⁶⁸ Associating with the Germans also undermined the leadership role and judicial powers of the *luluais* and *tutuls* among their communities.⁶⁹

B. *British and Australian Judicial Initiatives*

In British Papua, the British government sought to establish a native judicial system that was "summary in its operation and free from technicalities of procedure."⁷⁰ However, unlike Hahl's initiative to empower natives as judicial officers in German New Guinea, British administrators considered natives "incapable of impartial judgment" and refused to give them any magisterial functions.⁷¹ Instead, they were relegated to the role of "police constables" and directed to enforce the decisions of the colonial judicial officers within their communities.⁷² The police constable program overlooked the ability of Papuan natives to provide a more considered judicial outcome compared to a European magistrate uninformed by local realities.

⁶⁴ Michael Goddard, *SUBSTANTIAL JUSTICE: AN ANTHROPOLOGY OF VILLAGE COURTS IN PAPUA NEW*, 28 (Berghan Books; 1st ed. 2009).

⁶⁵ Kama, *supra* note 2, at 49.

⁶⁶ Albert Hahl, *GOVERNOR IN NEW GUINEA*, 18 (Austl. Nat. Univ.; 1st ed. 1980).

⁶⁷ Nelson, Firth & Griffin, *supra* note 54, at 34.

⁶⁸ Kama, *supra* note 2, at 49; Goddard, *supra* note 64, at 29; Stewart Firth, *The Transformation of the Labour Trade in German New Guinea, 1899-1914* (Part I), 11 *J. OF PAC. HIST.* 51, 52-3, 56 (1976).

⁶⁹ Goddard, *supra* note 64, at 29.

⁷⁰ R.B. Joyce, *SIR WILLIAM MACGREGOR*, 182 (Oxford Univ. Press; 1st ed. 1976). 182 (1971).

⁷¹ Goddard, *supra* note 64, at 30.

⁷² A. M Healy, *Paternalism and Consultation in Papua, 1880-1960*, 4 *AUSTL. NAT'L UNIV. HIST. J.* 19, 21 (1976).

Australia continued the British approach in the territories of Papua and later New Guinea until the late 1960s when natives were trained as judicial officers. Australia introduced various court systems in the territories of Papua and New Guinea, including the Courts of Native Matters and Native Affairs exclusively for the natives.⁷³ While this was intended to localize the colonial judicial system, the courts were staffed by socio-culturally uninformed colonial magistrates and in many respects reinforced the discrimination and segregation of natives in other aspects of society. It also created confusion as cases between natives and Europeans were prosecuted in other courts unfamiliar to the natives.

Australian historians would later contend that these arrangements made the natives increasingly realize that “the old German priorities were maintained by the Australians: business first, and all else afterwards.”⁷⁴ The most significant judicial initiative that reflected these observations was the “*kiap*” justice program.⁷⁵

“*Kiap*” was a collective name in the local Tok Pisin language for the Australian colonial officials who administered the local communities on behalf of the Australian government.⁷⁶ A *kiap* embodied the powerful colonial institution and had the ultimate tripartite power of making, executing, and judging the exercise of the colonial laws. As legal anthropologist Michael Goddard described it, “the *kiap* was the investigator, arrester, magistrate and gaoler (jailer).”⁷⁷

The *kiaps* had considerable powers with minimal accountability. Sinclair Dinnen described their justice endeavours as “*kiap* justice” and the regulations *kiaps* adjudicated and enforced as “an intrusive body of restrictions”⁷⁸ that systematically disempowered the social, economic, and political autonomy of the natives. The drafters of the Constitution would reflect on its adverse impact in their recommendations for an independence constitution:

⁷³ Kama, *supra* note 2, at 52–3.

⁷⁴ James Griffin, Hank Nelson & Stewart Firth, *PAPUA NEW GUINEA: A POLITICAL HISTORY*, 54 (Heinemann Educ. Austl.; 1st ed. 1979).

⁷⁵ Kama, *supra* note 2, 53–54; Dinnen, *supra* note 63, at 20.

⁷⁶ Tok Pisin is the only nationally spoken language in Papua New Guinea apart from Motu and English, which are not widespread. “*Kiap*” is the Tok Pisin translation of the German word for ‘captain’ which is “*kapitan*”, *see* Tristian Moss, *GUARDING THE PERIPHERY: THE AUSTRALIAN ARMY IN PAPUA NEW GUINEA, 1951–75*, 18 (2017). Colonial legislation referred to these officials with various titles including ‘district officers’, ‘patrol officers’ or ‘commissioned officers’, *see* Native Administrative Ordinance 1921 (Cth), s 2(2); Native Administration Regulation 1924 (Cth), s 80; Native Regulation Ordinance 1908–1930 (Cth), s 3.

⁷⁷ Goddard, *supra* note 64, at 43.

⁷⁸ Dinnen, *supra* note 63, at 20.

Colonial rule has had an important impact upon the character and [lifestyles] of our people. It ignored our traditional forms of social organisation without proper consultation with our people. It deprived us of self-government, and even of self-respect. The proud independence of our local communities was replaced by dependence—upon the all-powerful representative of the colonial government, the *kiap*.⁷⁹

Reactions to the *kiap* justice would shape the formulation of the Constitution, including the reformulation of the role of judges as independent arbiters and leaders interested in constructing the society.

C. *Characteristics of the Colonial Courts*

Apart from the domineering influence of *kiap* justice, other colonial judicial practices also influenced the foreign judges and colonial officers exercising judicial powers.

(i) *Lower Courts*

The first significant issue in the lower courts was an almost systemic denial of fair trial for the natives. Hubert Murray, the Lieutenant-Governor of the colony of Papua in 1908, for instance, conceded that it was “quite impossible to administer even handed justice [because the] public opinion [among the white population] is so strong against” ruling in the favour of natives.⁸⁰ Murray observed that “a native must have a very strong case indeed to get a conviction against a white man.”⁸¹ Justice Winter, a colonial judge in British Papua, lamented in 1902 that “racial feeling [against the natives] is so great and so strong in this country that I cannot regard the [European] defendant morally culpable in taking the life of a native.”⁸²

Second, there was an emphasis on the strict application of the colonial laws and procedures in the lower courts.⁸³ Australian Magistrate A. H. Germain, for instance, directed that “precision in procedure [is] going to be increasingly required in the lower courts if the concepts of law prevailing in Australia is to take root in this country.”⁸⁴ Such an approach enhanced colonial control and imposed a judicial method that was rigid and had little

⁷⁹ Constitutional Planning Committee, *supra* note 1, ch. 10, paras. 1–3.

⁸⁰ Amirah Inglis, *NOT A WHITE WOMAN SAFE: SEXUAL ANXIETY AND POLITICS IN PORT MORESBY 1920 – 1934*, 79 (1974).

⁸¹ *Id.*

⁸² Peter Fitzpatrick, *LAW AND STATE IN PAPUA NEW GUINEA (LAW, STATE, AND SOCIETY SERIES; 4)*, 66 (Acad. Pr; 1980).

⁸³ T.E. Barnett, *MAGISTRATES’ NOTE 10* (1967).

⁸⁴ *Id.*

consideration for local circumstances, justice initiatives, customs, and traditions.

Third, judicial officers in the lower courts were readily receptive to punishment-oriented justice.⁸⁵ A review of the justice system in the 1960s, commissioned by the Australian Government, revealed the widespread misconception among the colonial magistrates that the native “likes going to gaol [prison] or at least does not mind going to gaol [because] in gaol, they are well fed, housed adequately and their health is cared for.”⁸⁶ The author of the report, Professor David Derham, described the perception among the colonial judicial officers as “an erroneous belief” and “a dangerous one.”⁸⁷ It led to a culture of dispensing justice without the guidance of law and, consequently, subjected the natives to a repressive judicial system.

The fourth and more constructive, but rare, development in the later stages of the local court system was the use of local customary laws and practices. Informal judicial avenues led by natives rivalled the colonial structure and some compromises were needed to accommodate this disjunction, a situation that led to the various reforms following the 1960 Derham Report including the enactment of the *Custom Recognition Act* 1963.⁸⁸

(ii) *Superior Courts*

Under the Australian colonial administration, the territories of Papua and New Guinea initially each had their own superior courts—the Central Court of Papua and the Supreme Court of New Guinea—staffed by non-indigenous, mostly Australian, judges. The two courts were amalgamated to form the Supreme Court of the Territory of Papua and New Guinea in 1945.⁸⁹ The High Court of Australia was the apex court for the colony.⁹⁰

An analysis of 913 reported judgments of the Supreme Court of the Territory of Papua and New Guinea and the High Court of Australia from 1945 to 1974 demonstrates that a key characteristic of the superior courts

⁸⁵ See *Tago v. Arura* [1950] PGSC 10; *Malagigi v. Geelan* [1953] PGSC 11 (Papua N.G.).

⁸⁶ David P. Derham, Report on the System for the Administration of Justice in the Territory of Papua and New Guinea (Department of Territories, 1960), p. 20.

⁸⁷ *Id.*

⁸⁸ *Kama*, *supra* note 2, at 71.

⁸⁹ PAPUA NEW GUINEA PROVISIONAL ADMINISTRATION ACT 1945, s. 16 (Papua N.G.); Supreme Court Ordinance 1949, s. 12 (Papua N.G.).

⁹⁰ PAPUA ACT 1905, s. 43 (Papua N.G.); Judiciary Ordinance 1921–1938, s. 7. (Papua N.G.).

was an unwavering commitment to legalism.⁹¹ Chief Justice Owen Dixon, who presided over the High Court during most of this period, set the general direction of the Australian legal method on the day of his swearing-in in 1952: “It may be that the [High] Court is thought to be excessively legalistic. I should be sorry to think that it is anything else. There is no other safe guide to judicial decisions in great conflicts than a strict and complete legalism.”⁹²

A central theme of Dixon’s legalism is that judges should not be “conscious judicial innovator[s].”⁹³ In his study of High Court cases during this period, Professor Leslie Zines observed a consistent commitment to legalism and argued that “[i]n many areas of constitutional law, theories and approaches developed by Dixon CJ were treated as, or eventually became, the orthodox doctrine of the Court.”⁹⁴

The High Court’s commitment to legalism constrained the Territory’s Supreme Court from adopting a liberal and reformist approach. For instance, this constraining effect was evident in its appeal decision on the landmark case of *Queen v. Creighton* (1952) where an all-white jury convicted a European man for the rape of a native woman. Considering some of the adverse social preconceptions against the credibility of natives discussed earlier, trial judge Acting Chief Justice Gore gave the following instructions to the all-male white jurors:

You have, on the one side, a native complainant and native witnesses. You have, on the other, the accused and his witnesses, some white, some native. The woman is a native and her witnesses are natives, but because their skins are black, it does not necessarily follow that they should not be believed. They may lie; natives do lie—so do whites. It seems to me that the same tests of truth should be applied to them as in the case of Europeans.⁹⁵

The instruction was significant in responding to an adverse justice condition and reminded the jury of the equal right of natives to due process. However, the Australian High Court overturned the conviction on the basis

⁹¹ Judgments as available on Pacific Islands Legal Information Institute at www.pacilii.org/pg/cases/PGSC/. The conclusion is based on a reading of the cases and the extent of the reception of the colonial judges to extra-legal considerations including customs, and their fidelity to law and precedent. For further discussion, see Kama, *supra* note 2, at 72.

⁹² Sir Owen Dixon, *JESTING PILATE AND OTHER PAPERS AND ADDRESSES*, 249 (L. Book of Australasia; 1965).

⁹³ Sir Owen Dixon, *Concerning Judicial Method*, 29 AUSTL. L. J. 486, 472 (1956).

⁹⁴ Leslie Zines, *The Australian Constitution 1951–1976*, 7 FED. L. REV. 89, 90 (1976).

⁹⁵ *R v. Creighton* [1952] PGSC 1 (Papua N.G.).

that the instruction was improper and constituted a miscarriage of justice.⁹⁶ The High Court considered that the instruction limited the jury to view the case as only “a contest in the matter of truth” instead of using the evidence to guide the “jury’s attention to the various possibilities” of culpability.⁹⁷ In reaching this decision, the High Court not only overlooked the entirety of the instruction given by the trial judge who instructed the jury that “the burden of proving the guilt is always on the Crown” and that “if there is a reasonable doubt you must give the benefit of it to the accused.”⁹⁸ More importantly, the High Court’s narrow construction overlooked the contextually appropriate judicial undertaking by the trial judge.

The High Court’s restraining influence and legalism was further demonstrated in the case of *Kristeff v. R*. The High Court overturned a conviction for manslaughter that was based on a voluntary investigation conducted by a Supreme Court judge which found evidence contrary to the sworn statement of the accused. The High Court held that the Supreme Court judge “overstepped those limits and substituted for sworn evidence inferences which, rightly or wrongly” influenced the judgment.⁹⁹ The Supreme Court judge voluntarily undertook the investigation to inform his judgment upon discovering discrepancies in the statement of the accused and the inefficiencies of the parties to correct the discrepancies. By applying a strict legal method, the High Court overlooked important policy and social considerations.

These few examples demonstrate the intention of some of the colony’s Supreme Court judges to expand their traditional functions and the constraints imposed on them doing so by the judicial method of the High Court.¹⁰⁰ The influence of the Australian High Court’s commitment to legalism aggravated an already discriminatory, unjust, and insensitive legal and judicial environment under colonialism. As the 1960 Derham Report indicted, “[t]he judicial system has not operated effectively” and that “it is not possible to describe the system for administering justice as satisfying the most elementary requirements of the rule of law.”¹⁰¹

⁹⁶ *Creighton v. The Queen* [1952] PGSC 4 (Dixon CJ, Webb and Taylor JJ) (Austl.).

⁹⁷ *Id.*

⁹⁸ *R v. Creighton* [1952] PGSC 1 (Papua N.G.)

⁹⁹ *Kristeff v. The Queen* [1967] PGHCA 2 (Barwick CJ, Menzies and Owen JJ) (Austl.).

¹⁰⁰ Other cases that demonstrate the High Court’s conservative inclination include *Re Hau Koava* [1959] PGSC 19 (Austl.) and *Jaminyen-Urinjimbi v. The Queen* [1967] PGHCA 4 (Austl.).

¹⁰¹ Derham, *supra* note 86, at 50.

IV. THE ROLE OF FOREIGN JUDGES UNDER THE “HOME-GROWN”
CONSTITUTION

A. A “Home-Grown” Constitution

The consultation and drafting of the Papua New Guinea Constitution over the years from 1969 to 1974 provided the people with the opportunity to address the suitability of the colonial model of the judiciary and its judicial methods. The consultation and drafting were led by the Constitutional Planning Committee (“CPC”). The CPC was established in 1972, approximately three years before Papua New Guinea’s Independence in 1975.¹⁰² However, the CPC drew from the work of three Select Committees that were established between 1962 and 1969 that considered the various aspects of Papua New Guinea’s prospects for political development and self-government—first Select Committee on Political Development (1962), second Select Committee on Constitutional Development (1965) and third Select Committee on Constitutional Development (1969).¹⁰³

Each successive Select Committees were entrusted with responsibilities by the Legislative Counsel and later its replacement, the House of Assembly, that increasingly emboldened them to work towards preparing Papua New Guinea for self-government.¹⁰⁴ According to political historian Clive Moore, one of the reasons for the progression in the work of the successive Select Committees was that “many [of the Papua New Guinean leaders] doubted the sincerity of the Australian government in bringing about further constitutional change and political development.”¹⁰⁵ The CPC was chaired, *ex officio*, by the Chief Minister Michael Somare, but actively led by Deputy Chairman John Momis,¹⁰⁶ a Catholic priest and a member of the colonial House of Assembly whose libertarian theological training would later become influential in the liberal formulations of the Constitution. The CPC reasoned that, “what has influenced us above all in seeking formulations and adapting them, has been the desire to meet Papua New Guinean needs and circumstances.”¹⁰⁷

¹⁰² Ian Downs, *THE AUSTRALIAN TRUSTEESHIP: PAPUA NEW GUINEA 1945-1975*, 491 (Austl. Gov. Pub. Serv.; 1980).

¹⁰³ Don Aitkin and Edward P. Wolfers, *Australian Attitudes Towards Papua New Guinea Since World War II*, 27 *AUSTRALIAN OUTLOOK* 202, 209 (1973).

¹⁰⁴ Edward Wolfers, *A PAPUA NEW GUINEA POLITICAL CHRONICLE 1967-1991*, 13 (C. Hurst & Co 1998).

¹⁰⁵ *Id.* CLIVE MOORE AND MARY KOOYMAN (eds), *A PAPUA NEW GUINEA POLITICAL CHRONICLE 1967-1991* XXVI (1998).

¹⁰⁶ Downs, *supra* note 102, at 492.

¹⁰⁷ Constitutional Planning Committee *supra* note 1, ch. 15, para. 2-3.

It argued that the drafting exercise would not “merely follow some firm precedent, Westminster or otherwise”,¹⁰⁸ or rely on “Marlborough House in London or in Paris”¹⁰⁹ or be seen to “merely rubberstamp prefabricated ideas from Canberra”.¹¹⁰ Instead, the Constitutional Planning Committee was adamant about writing “our own constitution.”¹¹¹

In pursuit of a home-grown Constitution, the Constitutional Planning Committee conducted wide consultations between 1972 and 1975, which involved 2,000 written submissions, 500 discussion groups, each of about twenty people set up throughout the territory, and 110 public meetings attended by an estimated 60,000 people.¹¹² In addition, the drafters were also informed by visits to 13 countries and territories in the Pacific, Africa, and Asia to study the social and political conditions under their post-colonial independence constitutions.¹¹³

Commenting on the breadth of consultation, Australian jurist Justice Barnett and legal academic John Goldring described it as an undertaking to “tap the will and spirit of the people” and as “unparalleled in comparative constitutional law history”.¹¹⁴ Michael Somare, the first native Chief Minister of the colony rationalized that this extraordinary undertaking was to ensure that, “the constitution is suited to the needs and circumstances of Papua New Guinea and is not imposed from outside. In short, it should be a home-grown constitution.”¹¹⁵

The people’s extensive engagement in the constitution-making process afforded them not only an opportunity to correct the wrongs experienced under the colonial system but to construct a new constitutional order with frameworks different to the colonial system and its model of

¹⁰⁸ *Id.*

¹⁰⁹ John Momis, *The Constitutional Planning Committee and the Constitution*, TWENTY YEARS OF PAPUA NEW GUINEA CONSTITUTION 19 (Univ. of Papua New Guinea Pres. 2001).

¹¹⁰ *Id.*

¹¹¹ Constitutional Planning Committee *supra* note 1, ch. 1, para. 12.

¹¹² *Id.*, ch. 1, paras. 3-4; Bernard Narakobi, *Experiences in Constitutional Development in Post-independence Papua New Guinea*, CONSTITUTIONAL CHANGES IN THE 1990S: PROCEEDINGS OF THE 1900 CONSTITUTIONAL CONFERENCE HELD AT DARWIN 37 (Austl. Nat. Univ. Pres. 1994).

¹¹³ Merze Tate, *Australia and Self-Determination for New Guinea*, 17 AUSTRALIAN J. OF POL. AND HIST. 246, 255 (1971); C. J. Lynch, *The Achievement of Independence in Papua New Guinea*, 15 J. OF PAC. HIST. 175, 191 (1980).

¹¹⁴ *Ref By Simbu Provincial Executive* [1987] PNGLR 151 (Papua N.G.); John Goldring, *THE CONSTITUTION OF PAPUA NEW GUINEA: A STUDY IN LEGAL NATIONALISM*, 15 (L. Book Co. Ltd.; 1978).

¹¹⁵ 279 HOUSE OF ASSEMBLY (Third House, Second Meeting of the First Session. 23 June 1972), (statement of Michael Somare).

constitution. One of these frameworks was the judiciary and the role expected of judges, domestic or foreign.

B. *A Liberal Judiciary with Expansive Powers for Judges*

The Constitutional Planning Committee reported from their extensive consultation that the people wanted to differentiate “our judicial system and that of Australia” with the view that the judicial functions should “reflect, to a much greater degree ... our own values and circumstances.”¹¹⁶ They argued against courts being “formalistic and legalistic.”¹¹⁷

Instead, they wanted a judiciary that was “tuned to the wishes of that society” and which would apply “judicial ingenuity to do justice.”¹¹⁸ They argued that judges “do not... exist in a vacuum” and need to “be politically conscious.”¹¹⁹ Judges in Papua New Guinea were thus expected to assert themselves beyond the narrow confines of the black-letter law and be agents of socio-political reform.

The Constitutional Planning Committee consequently ensured that a liberal judicial regime was deeply entrenched in the Constitution by various textual indicators.¹²⁰ Three textual indicators are worth highlighting because they depart from the orthodox approaches of Australian courts and so raise issues that are particularly significant for foreign judges.¹²¹

(i) *Mandate to apply a Fair and Liberal Standard of Judicial Interpretation*

The Constitution expressly mandates that judges apply a broad and liberal standard of constitutional and legislative interpretation. Schedule 1.5(2) states that “[a]ll provisions of, and all words, expressions and propositions in, a Constitutional Law shall be given their fair and liberal meaning.”¹²² “Constitutional Law” includes the Papua New Guinea Constitution and more than twenty Organic Laws,¹²³ and the body of law subject to this standard of constitutional interpretation is very broad. Section 109(4) further extends the liberal interpretative approach to legislation,

¹¹⁶ Constitutional Planning Committee, *supra* note 1, ch. 8, para. 12.

¹¹⁷ *Id.*, para. 144.

¹¹⁸ *Id.*, para. 9.

¹¹⁹ *Id.*, para. 4–7.

¹²⁰ Kama, *supra* note 2, at 316.

¹²¹ See Kama, *supra* note 2, chap. 5. It identified twelve textual indicators in total under the PNG Constitution and discussed how they are indicative of a liberal judiciary that is entrenched within the Constitution.

¹²² Constitution of the Independent State of Papua New Guinea 1975, sch. 1.5(2) (Papua N.G.).

¹²³ *Id.*, sch. 1.2.

stating that “[e]ach law made by the Parliament shall receive such fair, large and liberal construction and interpretation as will best ensure the attainment of the object of the law according to its true intent, meaning and spirit.”

The Papua New Guinea Supreme Court has affirmed on numerous occasions that the Constitution is to be interpreted in ways that are “broad, goal-oriented, purposive and “liberal”,¹²⁴ and not “strict, technical and legalistic.”¹²⁵ Particular emphasis on this approach is often made in politically sensitive constitutional cases in order to allow the Supreme Court to take full account of political and social circumstances.¹²⁶ For instance, the Supreme Court, comprised fully of local judges, in two politically significant cases concerning the election of a Prime Minister and the decentralization of central government power to local governments, held that the Court cannot “turn a blind eye and come to the view that it should not enter the arena of politics,”¹²⁷ and that the liberal standard of interpretation means it “must not shy away” from considering the underlying socio-economic and political issues.¹²⁸ As will be discussed later, some foreign judges have broken away from their conservative legalist training in pursuing this liberal interpretative approach.

(ii) *Mandate to Develop the Underlying Law: “Home-Grown” Jurisprudence*

The second constitutional mandate requires judges to develop an indigenous jurisprudence or body of law known as the “Underlying Law.”¹²⁹ According to the constitutional drafters, the Underlying Law “means the same in essence as the common law (including the rules of equity). It means the ‘unwritten’ law, the rules of which have not only to be applied, but also enunciated and developed, by the courts.”¹³⁰

The Parliament reinforced its importance by enacting the Underlying Law Act 2000 to properly administer legal development “as a

¹²⁴ See *Haiveta v. Wingti* (No. 3) [1994] PNGLR 197 (Papua N.G.).

¹²⁵ *Re Reference to Constitution section 19(1) by East Sepik Provincial Executive* [2011] PGSC 41 at 9 (Papua N.G.).

¹²⁶ *Id.*; See *Haiveta v. Wingti* (No. 3) [1994] PNGLR 197 (Papua N.G.).

¹²⁷ *Re Reference to Constitution section 19(1) by East Sepik Provincial Executive* [2011] PGSC 41, at 85, 398 (Papua N.G.).

¹²⁸ Reference by the Ombudsman Commission of Papua New Guinea [2010] PGSC 10, 30 (Papua N.G.).

¹²⁹ Constitution of Papua New Guinea (n 3) ss. 20, 21, 60, sch. 2.3.4; Underlying Law Act 2000, s. 5 (Papua N.G.).

¹³⁰ Lynch, *supra* note 113, at 38.

coherent system in a manner that is appropriate to the circumstances of the country.”¹³¹ The Act instructs that customary law be elevated over common law in the development of the Underlying Law.¹³² The National Court has affirmed that “custom, if it is enforceable, is a superior law to common law [and] the superiority of custom over common law has since been reinforced by the Underlying Law Act.”¹³³

Supreme Court judge Bernard Sakora explained that the directive to develop the Underlying Law means the Constitution “goes beyond just vesting the traditional law-finding and law-application functions of the superior courts; [vested] are also law-making powers.”¹³⁴ When combined with the directions for liberal interpretative techniques and judicial ingenuity, this mandate ultimately extends the liberal role of judges to include the development of substantive law in which “Papua New Guinean procedures and forms of organization” are to be prioritized.¹³⁵ The development of the Underlying Law is thus, a departure from traditional Anglo-Australian understandings of the judicial function, which emphasized a strict and rigid adherence to the black-letter law.

The Underlying Law can only be formulated in a case where, considering its circumstances, no customary law or common law is adequately applicable or “appropriate to the circumstances of Papua New Guinea.”¹³⁶ However, given that judges have the discretion to decide if a law is appropriate or not, they have wide latitude to exercise their mandate to develop the Underlying Law.

The importance of the courts’ duty to develop the Underlying Law is further reinforced by a reporting and accountability system in the Constitution whereby the National Judiciary and the Constitutional and Law Reform Commission are obliged to report on the “development of the underlying law” to the Parliament.¹³⁷ The reporting requirement is intended to encourage judges to actively invest in developing laws that are reflective

¹³¹ Underlying Law Act 2000 (Papua N.G.), s. 5.

¹³² *Id.*, ss. 5, 21.

¹³³ *Magiten v. Beggie* (No.2) [2005] PNGLR 647 (Papua N.G.).

¹³⁴ See *Southern Highlands Provincial Government v. Somare* [2007] PGSC 2 at [119] (PNG); see also B. B. Sakora, *Judicial Law-Making Under the Papua New Guinea Constitution*, PACIFIC CONSTITUTIONS: PROCEEDINGS OF THE CANBERRA LAW WORKSHOP VI 257-70 (Austl. Nat’l Univ. 1982).

¹³⁵ Constitution of the Independent State of Papua New Guinea, s. 60 (Papua N.G.).

¹³⁶ *Id.*, schs. 2.1.1, 2.3.3; Underlying Law Act 2000 (PNG), ss. 4, 7; *Namah v. Pato* [2014] PGSC 1, [23] (Papua N.G.); *Re Somare* [1981] PGSC 23 (Papua N.G.).

¹³⁷ Constitution of the Independent State of Papua New Guinea, s. 187(1), schs. 2.3.5, 2.6.14 (Papua N.G.).

of local contexts and responsive to custom and traditional values instead of opting for ready-made but inappropriate legal principles from elsewhere.¹³⁸

However, there has been a lack of consistency among judges in developing the Underlying Law.¹³⁹ The Papua New Guinea Law Reform Commission described the purpose of the Underlying Law and commented on the lack of judicial engagement in the following terms a year after the country's Independence in 1976:

It was intended to make a new start on the legal system at Independence. . . . the intention [of the Constitution was] that the judges and the legal profession would get down to the business of developing a legal system that would take far greater account of the customs and the perceptions of the people than was taken before Independence. . . . Unfortunately this has not happened. . . . We consider that if the mode of declaring and developing the underlying law was re-stated in a way that required the profession and the judges to consider customary law and to consider if it meets the needs and aspirations of the people, then a new common law of Papua New Guinea would begin to develop.¹⁴⁰

Papua New Guinean jurist and philosopher Bernard Narokobi observed a tendency among judges to revert to “Eurocentric prejudice” and ready reliance on the “legal system of civili[z]ation”¹⁴¹ instead of investing in developing the Underlying Law.

Such tendencies and inconsistencies have been apparent in many of the cases dealing with questions of the Underlying Law. For instance, in *The State v Koe*, the defendant was charged with manslaughter for reckless driving causing death. In considering the appropriate sentencing, the Australian judge refused to consider the obligations for traditional compensations as a mitigating factor, thus an aspect of the Underlying Law on sentencing, noting that it was not “requisite or desirable for me to embark now on such a philosophical or sociological inquiry” and thus a

¹³⁸ For a discussion on the lack of judicial engagement with the Underlying Law, see Bernard Narokobi, *History and Movement in Law Reform in Papua New Guinea*, LAW AND SOCIAL CHANGE IN PAPUA NEW GUINEA, 13-24 (David Weisbrot, Abdul Paliwala Akilagpa Sawyerr eds., 1982).

¹³⁹ David Gonol, *THE UNDERLYING LAW OF PAPUA NEW GUINEA: AN INQUIRY INTO ADOPTION AND APPLICATION OF CUSTOMARY LAW* (Univ. of Papua New Guinea Press; 2016); Jennifer Corrin, *Getting Down to Business: Developing the Underlying Law in Papua New Guinea*, 46 THE J. OF LEGAL PLURALISM & UNOFFICIAL L. 155 (2014).

¹⁴⁰ Jennifer Corrin, *Declaration and Development of the Underlying Law (Papua New Guinea Constitutional and Law Reform Commission, Working Paper No. 4, 1976)* 9-10.

¹⁴¹ Narokobi, *supra* note 138, at 22.

diversion from “a corner-stone of the common law.”¹⁴² In *Kaputin v The State*, the National Court refused to consider an argument that sentencing in a criminal case should consider as a mitigating factor the traditional sanctions an accused will be subjected to.¹⁴³ In the Supreme Court appeal case of *Acting Public Prosecutor v Aumane, Boku, Wapulae, and Kone*, the same National Court, with a different composition of judge, accepted traditional customs in regard to retribution, compensation payment and sorcery as part of the Underlying Law in a case that dealt with a killing of an alleged sorcerer.¹⁴⁴

The Court consequently sentenced the accused to 5 months imprisonment. However, the Supreme Court overturned the decision, sentenced the accused to 5 years and 5 months, and held that “there is no room for developing the underlying law in this case” and that “the weight of the learned trial judge’s view on the place of customary punishment to be imposed as punishment...is dealing with what the law should be [which] are matters, not for this Court, but for legislative amendment.”¹⁴⁵

The Supreme Court’s decision not only demonstrated the inconsistencies and reluctance of judges but also the restrictive approach often brought to questions on the Underlying Law, which undermined the judiciary’s creativity role in developing custom-based Underlying Law. There is a tendency, instead, for the Supreme Court to adopt English Common Law as part of the Underlying Law than to organically developing the Underlying Law using local customary law and traditions.¹⁴⁶ These issues reinforce Narokobi’s criticisms of ‘Eurocentric prejudices’ noted above. It further presents as an ongoing challenge for judges in Papua New Guinea as evident in the 2019 Annual Judges Report to the Papua New Guinea Parliament in which Chief Justice Salika reported that an area “in need of improvement for improved court performance” is the “[l]ack of cohesion in the development of case law and local jurisprudence.”¹⁴⁷

¹⁴² *The State v. Koe* [1976] PGNC 36 (Papua N.G.).

¹⁴³ *Kaputin v. The State* [1979] PNGLR 559 (Papua N.G.).

¹⁴⁴ *Acting Public Prosecutor v. Aumane, Boku, Wapulae, and Kone* [1980] PGSC 5.

¹⁴⁵ *Id.*

¹⁴⁶ *See Okuk and State v. Fallscheer* [1980] PNGLR 274. The Supreme Court, weighing to either develop an Underlying Law based on local custom or using English Common Law, accepted the latter. The Court stated that “the circumstances as far as this subject is concerned in this country do not warrant, or at least do not amount to the principles being inappropriate or inapplicable [to being] part of the underlying law of Papua New Guinea.”

¹⁴⁷ Papua New Guinea Supreme and National Courts of Justice, *supra* note 47, at 20.

(iii) *Powers to Enforce Human Rights Protection and Police the State*

The third set of textual indicators suggesting a liberal role for judges that is significant for foreign judges are sections 22, 57 and 225 of the Constitution which allow Supreme Court and National Court judges *sua sponte* powers to act on their “own initiative” to enforce human rights and to police the services sector and government agencies in order to better support the operations of constitutional bodies.¹⁴⁸

For instance, in *Re Section 57 of the Constitution of Papua New Guinea*,¹⁴⁹ Justice David Cannings of the National Court acted on his own initiative under section 57 to order the closure of a police lock-up cell in Bougainville on the basis that conditions in the facility were inhumane.¹⁵⁰ In *Re Enforcement of Basic Rights Under the Constitution of the Independent State of Papua New Guinea, Section 57* (2021), Justice Cannings used section 57 to order Members of Parliament to fix deteriorating roads to address a potential risk to human rights.¹⁵¹

Section 225 of the Constitution obliges service providers including state agencies to support constitutional bodies such as the courts, the Public Solicitor’s office and the Parliament.¹⁵² Section 22 gives the courts the power to enforce duties provided under the Constitution either on their own initiative or on the application of a person to whom the duty is owed.¹⁵³ The courts have invoked both provisions to compel service providers and statutory bodies to provide adequate services to the constitutional agencies, for example, to provide adequate infrastructure for the courts and justice officials.¹⁵⁴

¹⁴⁸ Constitution of the Independent State of Papua New Guinea, ss. 57, 225 (Papua N.G.).

¹⁴⁹ *Re Section 57 of the Constitution of Papua New Guinea, Enforcement of Basic and Human Rights* [2006] PGNC 201 (Papua N.G.).

¹⁵⁰ *Id.*; *See also* *Re Enforcement of Basic Rights under the Constitution, Conditions of Detention at Biialla Police Lock-up* (2006) N3022 (Papua N.G.); *Re Lack of Correctional Service (CS) Facilities in Enga Province* [2010] PGNC 251 (Papua N.G.).

¹⁵¹ *Re Enforcement of Basic Rights Under the Constitution of the Independent State of Papua New Guinea, Section 57* [2021] PGNC 8 (Papua N.G.); Bal Kama, *Can PNG Judges Intervene in Social and Development Issues? The 2021 Madang Roads Ruling*, DEVPOLICY BLOG, February 19, 2021, <https://devpolicy.org/can-png-judges-intervene-in-social-and-development-issues-the-2021-madang-roads-ruling-20210219/>.

¹⁵² *Re Constitution Section 225 and Re National Court circuit to Bali and Vitu Island* [2011] PGNC 266 (Papua N.G.).

¹⁵³ SC Reference No 3 of 1999; *Re Calling of the Parliament* [1999] PG Law Rp 285.

¹⁵⁴ *Re Constitution Section 225 and Re National Court circuit to Bali and Vitu Island* [2011] PGNC 266 (Papua N.G.); *Re National Court Circuit, Southern Highlands*

The *sua sponte* “own initiative” powers given to judges by these provisions is extraordinary compared to other Pacific judiciaries including Australia and New Zealand where their constitutions and legal systems do not provide such powers. It demonstrates that judges have an active function in policing Papua New Guinean society and affirms a reformist and interventionist role for the judiciary.

V. RESPONSIVENESS OF FOREIGN JUDGES

Judges are charged with operationalizing the transformative intentions of judicial power under the Constitution. However, foreign judges, especially from the dominant sourcing jurisdictions of Australia and New Zealand, where their professional backgrounds are shaped in legalistic judicial culture and constitutional arrangements, generally tend to shrink from their liberal mandate. This reluctance has been most apparent in relation to the three constitutional directives set out in Part IV: to apply a liberal standard of interpretation, to develop the Underlying Law as a body of substantive judge-made law, and to proactively enforce human rights *sua sponte*.

Reluctance by some foreign judges to apply a liberal standard of interpretation was demonstrated, for instance, in 2011, in a Leadership Tribunal comprising three foreign judges from England, Australia, and New Zealand that tried Prime Minister Sir Michael Somare for breaches of the Leadership Code. The Tribunal found Somare guilty of 13 of the 25 charges of misconduct in office but the majority of the bench (the Australian and New Zealand judges) ruled for a “two weeks suspension” instead of a more severe penalty as permitted by law.¹⁵⁵ The Tribunal’s decision was later described by senior local judges of the Supreme Court as a “slap on the wrist” and “a small injection.”¹⁵⁶ Somare’s decision can be contrasted to the Tribunal’s decision in *Kondra, In re* in which senior local Papua New Guinea judges and magistrates presiding over a case concerning five charges of misconduct in office against a member of Parliament and government minister, decided on the highest penalty of dismissing the accused from public office.¹⁵⁷

Province [1989] PGNC 70 (Papua N.G.).

¹⁵⁵ In Re Michael Somare; Recommendation on penalty [2011] PGLT 1 at 59 (Papua N.G.).

¹⁵⁶ Re East Sepik, *supra* note 125 at para 592; Interview with (then) Deputy Chief Justice Gibbs Salika, *supra* note 48.

¹⁵⁷ *Kondra, In re* [2015] PGLT, 4 (Papua N.G.) <http://www.paclii.org/pg/cases/PGLT/2015/2.html>. While the specific charges are different, in that *Kondra* concerned actual findings of misappropriation of public funds, both cases dealt with the administration and failure to acquit of public funds.

These criticisms indicate differing views about the role of judges in Papua New Guinea between the local and the foreign judges. While the perception of judicial power in Anglo-Australian settings is confined to addressing the legal controversy,¹⁵⁸ the criticism from the local judges aligns with the legitimate constitutional intent for judicial power in Papua New Guinea to be applied in a way that addresses broader societal issues. The local judges thus envisaged a more significant penalty as part of their broader social accountability function, in order to address wider governance and corruption issues in the country.

Insights into foreign judges' hesitation to develop the Underlying Law as an indigenous body of law was provided by Justice John Logan of the Australian Federal Court on secondment to Papua New Guinea.¹⁵⁹ In a paper presented at a 2017 conference that was intended to encourage Papua New Guinean judges to actively develop the Underlying Law, His Honour expressed scepticism of such an endeavour on the basis of the doctrine of separation of powers: “[h]aving regard to the separation of powers for which the PNG Constitution provides, it is difficult to see why the principle ... does not apply with equal force in Papua New Guinea.”¹⁶⁰ His Honour viewed such an endeavour and other liberal roles for judges as contrary to the doctrine of separation of powers and insisted that the Papua New Guinea “judiciary acknowledge and observe the limits of [its] constitutional remit” if it is to avoid the inevitability of tension with the executive.¹⁶¹

However, His Honour's paper demonstrated a lack of understanding of the constitutional context in which the doctrine of separation of powers was intended to apply. It promoted a conservative judicial attitude prevalent in Australia, but which is clearly incompatible with the character of the judiciary and the nature of the separation of powers doctrine under Papua New Guinea's Constitution.¹⁶²

The development of the Underlying Law is particularly challenging for foreign judges who tend to lack a close knowledge of local context, customs, and values. In her study of judicial positivism and foreign judges hesitant to comply with the directive to develop the Underlying Law, Professor Jean Zorn concluded,

¹⁵⁸ Re Judiciary and Navigation Acts (1921) 29 CLR 257 at 265–67 (Austl.); Tom Campbell, *Judicial Activism: Justice or Treason?*, 10 OTAGO L. REV. 307, 311–13 (2003).

¹⁵⁹ John Logan, *Executive Intervention in Judicial Functions and Judicial Encroachment into Executive Functions: Defining the Boundaries* (National Conference on Development of the Underlying Law on Administrative Law, Port Moresby, 27 November 2017), p. 36.

¹⁶⁰ *Id.*

¹⁶¹ *Id.*, at 39.

¹⁶² See Kama, *supra* note 2, at chapter 7.

“If the courts are to accomplish their task of discovering and developing the underlying law of Papua New Guinea, the judges need to adopt a jurisprudential philosophy and method that contradicts positivism, one that gives judges broader scope for the exercise of their discretion and that recognises custom as a source of law.”¹⁶³

The importance of judging within the constitutional context was reinforced by Professor John Nonggor in his assessment that appointments to judicial positions should require not merely a formal legal qualification, but also the capacity to understand Papua New Guinea as a young country with people, cultures and aspirations different from other, especially western, societies.¹⁶⁴ While both the local and foreign judges are culpable for this failing, the challenge is greater for foreign judges from legalistic judicial cultures that do not have a direct constitutional mandate and experience in developing a substantive law in their own jurisdictions.

Foreign judges in Papua New Guinea are thus expected to employ judicial power within its context and purpose as they would in their own jurisdiction. Resorting to their preconceived conceptions and promoting their uncritical “allegiance to the Anglo-Australian common law and its ideology”¹⁶⁵ amounts to abdicating their constitutional responsibilities. In many respects, continued efforts by foreign judges against very clear directives of the Constitution could also be considered as a form of neo-colonialism and thus, an undermining of the country’s constitutional ingenuity and sovereignty.

The trend in Papua New Guinea towards courts composed of multiple judges giving a single judgment “of the Court”, rather than separate opinions from each of the judges on the bench raises the prospect of traditional voices from foreign judges dominating the reasoning.¹⁶⁶ It is not clear which judges have taken the lead in writing the judgment and which have merely concurred in the result. However, senior foreign judges, who are often perceived as “experts”, are likely to be influential in the direction of the reasoning.

¹⁶³ Jean Zorn, *Common Law Jurisprudence and Customary Law*, LEGAL ISSUES IN A DEVELOPING SOCIETY, 104-05 (Univ. of Papua New Guinea 1992).

¹⁶⁴ Nonggor, *supra* note 43.

¹⁶⁵ Zorn, *supra* note 163, at 11.

¹⁶⁶ Kama, *supra* note 2, at 316.

While some jurists have heralded the single court judgement as the “judicial method of the 21st century,”¹⁶⁷ others have contended that it raises the prospect that “a confident ‘specialist’ [will] assume dominance over nervous ‘generalists.’”¹⁶⁸ That contention is arguably apparent in Papua New Guinea in judgments led by experienced and senior conservative foreign judges.

A significant case in point decided in 2017 is *O’Neill v. Eliakim*, in which the Supreme Court dismissed an arrest warrant issued against Prime Minister Peter O’Neill as “defective” and invalid.¹⁶⁹ The singular judgment was issued by Australian Justices Higgins and Foulds and recently appointed local Justice Yagi. The judgment followed several court cases over a three-year period including a controversial Supreme Court reference filed by the Prime Minister in 2014 to dispute the powers of the police to effect an arrest warrant against him. In the 2014 case, Prime Minister O’Neill argued that “an arrest warrant is not a court order and should not be regarded as being the equivalent of a court order.”¹⁷⁰ However, the Supreme Court, composed of four local judges and one foreign judge, unanimously dismissed this argument, holding that the arrest warrant was validly issued because the warrant was not “simply an administrative authority for an arrest”, but rather “something more than an authorization: it is an order, demanding obedience.”¹⁷¹ The Court thus held the warrant to be validly issued. This 2014 judgment remained authoritative until *O’Neill v. Eliakim* in 2017 rejected the arrest warrant issued against the Prime Minister as “defective”.¹⁷²

There were two main grounds to the decision in *O’Neill v. Eliakim*. The first related to the technical aspects of the warrant and the Court found that the information provided on the arrest warrant form was insufficient and “did not follow the form set out in the Arrest Regulations.”¹⁷³ Second, the Court held that it was unreasonable and therefore an abuse of police powers to compel the Prime Minister, through an arrest warrant, to attend a

¹⁶⁷ Susan Kiefel, Chief Justice, High Court of Australia, Keynote Address at the Supreme Court Oration, New South Wales Supreme Court: Judicial Methods in the 21st Century 41 (March 16, 2017) <https://www.hcourt.gov.au/assets/publications/speeches/current-justices/kiefelj/KiefelCJ16Mar2017.pdf>.

¹⁶⁸ J. D. Heydon, *Threats to Judicial Independence: The Enemy Within*, 129 L. Q. REV. 205, 212 (2013).

¹⁶⁹ *O’Neill v. Eliakim* [2017] PGSC 53 at 43, 49 (Papua N.G.).

¹⁷⁰ *Re Powers, Functions, Duties and Responsibilities of the Commissioner of Police* [2014] PGSC 19 at 109-112 (Papua N.G.).

¹⁷¹ *Id.* 127, 129.

¹⁷² *O’Neill v. Eliakim* [2017] PGSC 53 at 43, 49.

¹⁷³ *Id.*

police interview. The judges held that there was no evidence to suggest that the Prime Minister would have failed to attend a police interview absent a warrant.¹⁷⁴ This second ground was considered “the more fundamental defect.”¹⁷⁵

The Court’s decision was based solely on the evidence presented by the lawyers of the Prime Minister and the police, both of whom consented to the dismissal of the warrant.¹⁷⁶ There was no opposing party because the Prime Minister, prior to the trial, disbanded the Investigative Task Force Sweep, a special investigative agency that had been responsible for obtaining the arrest warrant.¹⁷⁷ The Attorney-General further withdrew funding for the independent legal service provided to Task Force Sweep.¹⁷⁸ Justice Makail thus observed, worryingly, in one of the earlier proceedings that “the parties represented at trial all wanted the warrant of arrest set aside.”¹⁷⁹

The serious interferences in police functions by the Prime Minister, who was the subject of the police warrant, gave rise to the need for the Court to take a liberal approach consistent with the judicial character and with precedents in Papua New Guinea in cases of great conflict. A liberal approach would have included taking judicial notice of the adverse actions by the Prime Minister and going beyond the submissions from consenting lawyers, for example, by requesting previous court files and using the Court’s “inherent power to do justice”¹⁸⁰ by possibly granting special leave for members of the Task Force Sweep to appear to give evidence. None of that took place.

The decision of the Court on the technical aspects of the arrest warrant were thus restrictive and legalistic. It was not only contrary to the Supreme Court’s decision in *Re Commissioner of Police* (2014),¹⁸¹ but it was also contrary to *Damaru v. Vaki* (2015), where the Chief Justice Sir

¹⁷⁴ *Id.* at 47-49.

¹⁷⁵ *Id.*

¹⁷⁶ See Bal Kama, *Some Clarification from the Courts in PNG PM’s ‘Fight to the Very Last Breath’*, DEVPOLICYBLOG (Nov. 30, 2022, 11:00 AM), <https://devpolicy.org/judicial-setbacks-for-the-png-anti-corruption-movement-20161214/>.

¹⁷⁷ Bal Kama, *When Police try to Arrest the Prime Minister*, The Interpreter (Dec. 2017), <https://www.lowyinstitute.org/the-interpreter/when-police-try-arrest-prime-minister>.

¹⁷⁸ *Marape v. O’Neill* [2016] PGSC 4 at [27] (Papua N.G.).

¹⁷⁹ *Id.*

¹⁸⁰ Constitution of the Independent State of Papua New Guinea 1975, s. 155(4); *Bebi v. Fox* [2010] PGNC 158 (Papua N.G.).

¹⁸¹ *Re Powers, Functions, Duties and Responsibilities of the Commissioner of Police* [2014] PGSC 19 at 130 (Papua N.G.).

Salamo Injia ruled that the technical aspects of the warrant were intact.¹⁸² Chief Justice Injia also relied on the 2014 Supreme Court decision, which the Court in *O'Neill v. Eliakim* largely overlooked. In their unusually short singular judgment for a case of great national and political significance, Higgins, Foulds and Yagi JJ offered very little reasoning for their departure from these existing precedents.

The Court's findings on the unreasonableness of using an arrest warrant to compel the Prime Minister to attend a police interview were further inconsistent with the Criminal Code which provides that in cases of "official corruption", "a person shall not be arrested without warrant."¹⁸³ They were also inconsistent with case precedents.¹⁸⁴ The National Court has held that an arrest warrant is an exception made for suspects of official corruption, in that "a formal interview is not a pre-condition to effecting an arrest of such a suspect."¹⁸⁵

Another unusual aspect of *O'Neill v. Eliakim* and its judgment was that all the opposing parties to the Prime Minister, including the Task Force Sweep and the prosecutors, were sacked, or disbanded. The three judges failed to inquire into or discuss in their judgment the political undercurrents as to why the pleadings had changed from a contested hearing to a unanimous consent, which, among other consequences, had grave implications for the rule of law.

A further unusual aspect of the singular judgment in *O'Neill v. Eliakim* was that the only overseas cases referred to were from the Australian Capital Territory. This might suggest that Justice Higgins, former Chief Justice of the Supreme Court of the Australian Capital Territory, took the lead in writing the judgment. In any event, such an approach did not assist the development of the law in Papua New Guinea.

While it is difficult to draw firm conclusions from one case, this example shows that there are risks that single judgments "of the Court" may be dominated by senior foreign judges. Where such influence is present, single judgements have the potential to suppress independent judicial thinking and influence the development of law away from its transformative intents under the "home-grown" Constitution.

Research into the trend to single judgements have demonstrated that "some judges join a majority opinion, not because they agree with it, but because to dissent will magnify the effect of the majority opinion by

¹⁸² Damaru v. Vaki [2015] PGNC 308 at 40 (Papua N.G.).

¹⁸³ Criminal Code Act 1974, s. 87(2) (Papua N.G.).

¹⁸⁴ Bal Kama, *Some Clarification from the Courts in PNG PM's "Fight to the Very Last Breath"*, DEVPOLICY BLOG, July 4, 2014, <https://devpolicy.org/some-clarification-from-the-courts-in-png-pms-fight-to-the-very-last-breath-20140704-2/>.

¹⁸⁵ Marape v. Paraka [2014] PGNC 118 at 34 (Papua N.G.).

drawing attention to it”¹⁸⁶, and that most judges do not like to dissent because it “frays collegiality.”¹⁸⁷ The influence of foreign judges in cases in Papua New Guinea and the perception of them as experts with specialist skills and knowledge increase the likelihood of not only falling into this trap, but also of advancing a misunderstanding of the judicial role in Papua New Guinea.

There are some foreign judges that have been exceptions to the challenges identified in this discussion. For instance, Australian colonial judge Justice Kearney held in 1976, a year after Papua New Guinea’s independence, that the liberal interpretative method under the Constitution meant judges should not be “totally divorced from considering socio-political considerations which permeate the Constitution.”¹⁸⁸ Another Australian jurist Justice Barnett was adamant in 1986 that the drafters “gave a clear direction to courts interpreting constitutional laws. That direction is to reverse the previous conservative approach to statutory interpretation ... [and that the judicial mind] must be a mind striving to give effect to the National Goals and Directive Principles.”¹⁸⁹

The National Goals and Directive Principles are a set of political statements in the Preamble that outlines the socio-economic and political aspirations of the country.¹⁹⁰ The Constitution limits their application as non-justiciable on their own.¹⁹¹ By seeking to give effect to them, Justice Barnett was directing the judicial mind to the liberal interpretative approach and away from the conservative judicial method.

Arguably, the most influential of all foreign judges in the country’s history have been Australian jurist Justice David Cannings. He was the lead counsel of the Papua New Guinea Ombudsman Commission prior to his appointment as a judge in 2004. He is currently the President of the Human Rights Division of the Judiciary and a relentless advocate of using the

¹⁸⁶ Heydon, *supra* 168 at 213; See Richard A. Posner, HOW JUDGES THINK 10, 30, 32 (Harv. Univ. Press 2008).

¹⁸⁷ Posner, *supra* note 186, at 32.

¹⁸⁸ *Special Reference by Fly River Provincial Executive Council; Re Organic Law on Integrity of Political Parties and Candidates* [2010] PGSC 3, at 107 (Papua N.G.).

¹⁸⁹ Ref by Simbu Provincial Executive, *supra* note 114.

¹⁹⁰ Sam Sirox Kari, *The Origin and Setting of the National Goals and Directive Principles in the Setting and Writing of the Constitution* (2005) (unpublished Ph.D. dissertation, Queensland University of Technology) (on file with the Library of the Queensland University of Technology).

¹⁹¹ Constitution of the Independent State of Papua New Guinea 1975, ss. 25, 63 (Papua N.G.); For an argument supporting their enforceability, see Vergil Narokobi, *The Implementation of Papua New Guinea’s National Goals and Directive Principles and Basic Social Obligations* (2016) (unpublished Ph.D. dissertation, Victoria University of Wellington) (on file with the Library of the Victoria University of Wellington).

liberal powers of the judiciary in addressing broader social and political issues in the country and in policing the state.

Justice Cannings distinguished his role in Papua New Guinea from judging elsewhere, clarifying that,

Judges in this country do not have the luxury of just being able to sit in court and wait for parties to come to them to resolve their disputes. The duty of a Judge in PNG is to enforce the human rights, as prescribed by the Constitution, and to do so on application or on his or her own initiative, as the circumstances require it.¹⁹²

This echoes another Australian judge, Justice Bredmeyer, who in 1983, read into the “inherent power to do justice” under section 155 of the Constitution, saying that “the Supreme Court and the National Court should not hesitate to use s[ection] 155(4) to make new law on occasions and on other occasions to declare parts of the English common law and equity inapplicable and inappropriate to the circumstances of Papua New Guinea.”¹⁹³

The approaches adopted by these foreign judges might in part be explained by their various experiences with Papua New Guinea’s judicial systems, either as former colonial judges liberated from the grip of the Australian High Court’s commitment to legalism, as in the case of Justice Kearney, or as legal practitioners with substantive in-country experience and hence familiarity with the constitutional intent and the social settings, as in the case of Justices Barnett, Bredmeyer and Cannings. Regardless of their backgrounds and rationales, they firmly demonstrate the potential for foreign judges in Papua New Guinea to depart from the Anglo-Australian judicial method and embrace their mandated liberal and transformative role under the Papua New Guinea Constitution.

VI. CONCLUSION

The drafters of Papua New Guinea’s Constitution made it clear that they were “build[ing] a constitutional framework uniquely suited to Papua New Guinean needs” and not “a mere continuation of the old colonial system.”¹⁹⁴ Accordingly, they contended that these aspirations “meant changes from a number of institutions and procedures we have inherited

¹⁹² Re Section 57, *supra* note 149, at [7].

¹⁹³ Kupil v. The State [1983] PNGLR 350 (Papua N.G.).

¹⁹⁴ Constitutional Planning Committee, *supra* note 1, at ch 1, paras. 10, 13.

from our recent colonial past.”¹⁹⁵ The changes envisaged include changes to the role of judges. Foreign and local judges are thus expected to be responsive to these constitutional intents.

The Constitutional Planning Committee defined judges as “leaders” who should “have bold vision, work hard and [to be] resolutely dedicated to the service of their people.”¹⁹⁶ The vision of judges as “leaders” is consistent with the transformative role of judges to shape politics and society. This is supported by various textual indicators in the Constitution, some of which are highlighted in this analysis. While foreign judges may not have the representative connection to the people and shared national identity as members of the national community,¹⁹⁷ they are joined to the cause through their judicial oath to uphold the Constitution.

For many in Papua New Guinea, the judiciary is “the last beacon of hope”¹⁹⁸ or as Justice Davani somberly puts it, “the last bastion in a sea of uncertainty.”¹⁹⁹ It is a significant responsibility that clearly goes beyond simply adjudicating legal issues to actively using judicial power to stimulate societal reform. There is therefore no option for retreat. This was demonstrated by Chief Justice Kidu who reprimanded his judicial colleagues, including foreign judges, in *Aihi v. The State (No. 1)* for rejecting differing conceptions about the judicial role in Papua New Guinea: “We cannot cut down the powers of this Court if the Constitution has invested it with extra jurisdiction or power, [instead], we must be bold in stating the fact [and in exercising it] ... [w]hatever the nature or extent of this power might be.”²⁰⁰

Foreign judges in the country need to relinquish their conservative backgrounds and inclinations and adopt a new “job description” as Chief Justice Antonio Lamer of the Canadian Supreme Court describes it in the context of departing from the “old approach” of legalism.²⁰¹ To use the words of Chief Justice Lamer, for foreign judges it might be “somewhat of

¹⁹⁵ *Id.*

¹⁹⁶ *Id.*, ch. 3, paras. 1-3.

¹⁹⁷ Dziedzic, *supra* note 7, at 198.

¹⁹⁸ Sam Basil, *Prime Minister in Contempt of Court Again*, MALUM NALU BLOG, February 20, 2011, <https://malumnalu.blogspot.com/2011/03/prime-minister-in-contempt-of-court.html>; Frustrated Citizen, *Watch Papua New Guinea Fall*, PNG BLOG, March 3, 2011, https://www.pngblogs.com/2011/03/watch-papua-new-guinea-fall_3.html; Oseah Philemon, *Independent Judiciary is Key for PNG: Judge*, THE NATIONAL, February 2, 2010, <https://www.thenational.com.pg/independent-judiciary-is-key-for-png-judge/>.

¹⁹⁹ *State v. Mataio* [2004] PGNC 239 (Papua N.G.).

²⁰⁰ *Aihi v. The State (No. 1)* [1981] PGSC 9 (Papua N.G.).

²⁰¹ F. L. Morton, *LAW, POLITICS, AND THE JUDICIAL PROCESS IN CANADA* 128, (Univ. of Calgary Press; 3rd ed. 2002).

a shock to see their job description changed so fundamentally”²⁰² under the Papua New Guinea Constitution. However, that is the intent of the Constitution. Their reluctance can thus have a stultifying and suppressive effect on the transformative intent of the Constitution.

Decisions in the recruitment of judges is a critical first step in averting this outcome. The recruitment process should include an extensive screening and selection process including questioning the judicial ideology of foreign candidates and prioritising recruits from established jurisdictions with similar transformative constitutional frameworks and colonial history to Papua New Guinea, such as common law countries in Africa.²⁰³ Also, foreign lawyers considered for judicial appointment should not only meet the current minimum requirement of experience in Papua New Guinea, but should also demonstrate a deep appreciation of the society and its constitutional history and intents.

While the observations in this analysis focus on foreign judges, it is fair to note that some local judges have also demonstrated reservations about their liberal judicial role. However, the influence of foreign judges, who are often perceived as “experts”, can have a decisive impact in either deepening local reservations or promoting the transformative role of the judiciary. With Australia as the dominant sourcing jurisdiction for foreign judges, the “professional sensibilities, habits of mind, and intellectual reflexes”²⁰⁴ of Australian judges, developed through the conservative legal culture in Australia, remain a risk of contaminating the liberal intents of the “home-grown” Constitution. The growing trend in Papua New Guinea of multiple judges congregating under a single judgment “of the Court” further enhances this risk.

For foreign judges, a constitutionally meaningful judicial service in Papua New Guinea ultimately requires of them to relinquish the biases and professional sensibilities woven from their training and experiences in their own jurisdictions, and to embrace the “home-grown” intents for judicial power.

²⁰² CBC News, *Former Supreme Court Chief Justice Antonio Lamer dies*, <https://www.cbc.ca/news/canada/former-supreme-court-chief-justice-antonio-lamer-dies-1.676733> (Nov. 25, 2007, 4:14 PM); Shawn Ohler, *Lamer Cites Collegiality of Bench as Triumph*, NAT’L POST, <http://www.fact.on.ca/newspaper/np99082c.htm> (Aug. 13, 1999).

²⁰³ A recent example was the appointment of Justice Oagile Bethuel Key Dingake from Botswana in 2018, see Sally Pokiton, *First African Judge sworn to PNG Bench*, LOOP NEWS, <https://www.loopng.com/png-news/first-african-judge-sworn-png-bench-73169> (Feb. 07, 2018).

²⁰⁴ Karl E. Klare, *Legal Culture and Transformative Constitutionalism*, 14 S. AFR. J. OF HUM. RTS. 146, 166 (1998).