EDITORIAL

1981 IN CONTEXT

We review the legal events of 1981 by first canvassing the economic and political occurrences during that year.

1981 was a year of worsening economic recession. The average price of gold on the Lo don market fell from US$614.7 per ounce in 1980 to US$459.9 per ounc in 1981. The average price of copper on the London Metal Exchange fell from 99.2 cents (US) in 1980 to 79 cents (US) per ounce in 1981. This drop in metal prices produced a corresponding decline in the country's biggest export earner, copper concentrate. The net value of concentrate sales fell from K334.5 million in 1980 to K295 million in 1981 (Annual Report 1981 Bougainville Copper Ltd, 32).

PNG GOVERNMENT REVENUE

	1980		1981	
	KINA MILLIONS	%	KINA MILLIONS	%
Australian Aid	174.6	27.72	184.3	27.90
Internal Revenue	342.5	54.37	381.6	57.80
Borrowings	112.9	17.91	94	14.25
TOTAL	630		660	

A comparison of internal revenue, loan raising, and the Australian grants-in-aid, reveals the dependent and fragile state of the Papua New Guinea economy. An extra K10 million, over the 1980 figures, in Australian aid was needed in 1981 to prop up the revenue side of the national accounts, while in 1981 there was a modest increase in internal revenue. The drop in external borrowings during 1981 was short lived, and the Government had to borrow heavily in 1982 (estimated up to K135.7 million) to finance its responsibilities under the Ok Tedi

Agreement.

On the expenditure side, the Government began enforcing a series of budgetary controls resulting in cuts to health services, education, defence, police and jails.

1981 saw the emergence of Hetura Meja as the most likely contractor to win the Vanimo timber resource. The ability of this Filipino organisation to outmaneouvre established Australian, British and Korean timber interests demonstrated something of the trend away from Australian investment and increased penetration of Papua New Guinea by Asian and multinational capital. BHP, Australia's largest company, did however gain a share of the Ok Tedi venture, along with American and West German interests, when the Ok Tedi Agreement was finally signed during 1981.

Further signs of economic vulnerability during 1981 were seen in dependence of the towns upon imported food from Australia and increasingly from New Zealand. A total lack of science-planning resulted in a continuation of the cargo-cult accumulation of high technology. Micro-wave telephone systems, a boom in computer purchases, the acquisition of Canadian De Havilland, Dash 7 by Air Niugini, the introduction of FM Radio to some towns, and the promise of television to others, were amongst the acquisitions in 1981. Contrasting to this was the familiar pattern of school-leavers being unable to find jobs, growing tensions in the Highlands bubbling over into continual tribal fighting, and the cyclic emergence of an urban crime wave in Port Moresby towards the end of the year.

DETERIORATING HUMAN RIGHTS?

Not surprisingly human rights began to waver. Police abused their powers under Section 3 of the Arrest Act, by arresting people for regulatory offences, such as driving without a licence or illegal parking. Police introduced without legislative support a tariff for bail and, by insisting on cash bail and seldom granting bail on "own recognisances", effectively denied bail to many low-income earners. Neither the Public Solicitor nor the Ombudsman Commission appeared concerned enough over these daily harrassments of ordinary people to take the matter before the courts.

Inefficiency and incompetency in the lower courts resulting from an accumulation of inadequate training and poor supervision, compounded

police error. In *Otto* v. *Pewa* (Unreported Judgment N299 (M)) a defendant had been sentenced to two months hard labour for not fixing the new number plates to his motor vehicle within the required seven days. The regulatory punishment for the offence was K20 fine. Mr. Otto spent 18 days in prison before being released on appeal by the National Court.

The Sixth Annual Report of the Ombudsman Commission published in October 1981 contained an inventory of police brutality. The Ombudsman said "it is the view of the Commissioner of Police that if a policeman violated the Constitutional rights of a citizen, the citizen's remedy is to take the policeman to court. There is a reluctance to take disciplinary action". The Ombudsman noted that the Public Solicitor had only limited resources to litigate this type of action which in effect denied many complainants their remedy.

ANTI-DEMOCRATIC TRENDS

But there were in 1981 other anti-democratic trends to be seen on a broader canvas.

The power of the unelected bureaucracy manifested itself in at least two forms.

First, the not always silent struggle between top public servants and Ministers burst into the public domain when the Commissioner for Police, Mr. Bouraga, was charged in December 1981 under the Public Service (Interim Arrangements) Act Section 76 with wilful disobedience to, and disregarding the lawful orders of the Minister of Police, Mr. Warren Dutton. The tribunal which heard this case referred questions of law on the constitutionality of the charges to the Supreme Court, which in March 1982 answered the questions in Mr. Bouraga's favour. In 1982, Mr. Bouraga and many other top bureaucrats were to drop any pretence of an apolitical role by standing for Parliament.

Second, the democratically elected Port Moresby City Council was disbanded, allegedly because of its incompetence. The management of the National Capital passed to two new organisations: The Motu-Koita Assembly of urban traditional villages, and for the rest of the city - an appointed Commission.

Undoubtedly, the most portentous event of 1981 was an Act of Parliament

purporting to amend the Organic Law on National Elections by increasing the nomination fee, required to be paid by candidates for parliamentary seats, from K100 to K1000.

With a stroke of the pen the peasant farmers and largely uneducated small businessmen, that constituted the bulk of National Parliament in 1981, sought to secure their seats by pricing nomination to elective office out of the pockets of most people in the country. A more undemocratic, unprincipled, and unconstitutional act would be hard to imagine. That the government of the day supported the amendment, is an indication of the desperate struggle for power - and the undeveloped sense of constitutionality and respect for the rule of law amongst politicians. It was left to the judiciary, in 1982, to bail the politicians out of the constitutional mess in to which they had fallen, and in that year the Supreme Court declared the Act unconstitutional.

THE SUPREME COURT IN ACTION

During the last few months of 1980 the Supreme Court showed a somewhat ambivalent nature as it tried to pick a middle-of-the-road path between liberalism and conservatism. In October 1980 in the Reference PLAR No. 1 of 1980 the Court was liberal, and used its powers to develop the Underlying Law.

The question of law at issue in that case was whether or not the complete defence of provocation was available to a charge of manslaughter, under the Criminal Code. It was the words, in Section 271 of the Code, defining "the term 'provocation' used with reference to an offence of which an assault is an element", that caused the trouble. Did this section apply only to those provisions in the Code in which the word "assault" actually appeared? Or could the defence apply to any offence defined in the Code in which, in reality, an assault had occurred? Greville Smith J. in a forceful dissenting judgment preferred to follow the majority in *Kaporonowski* (1974-5) 133 CLR 209 in the High Court of Australia, favouring a literal reading of the Code. He preferred to confine the defence to those provisions of the Code in which the word 'assault' was actually present.

He pointed to the prevalence of personal violence in this country and to unintentioned killing by intentional acts of violence. In particular he noted the spleen cases in which women die as a result of wife-bashing.

The majority, Wilson and Andrew J. J., preferred to interpret Section 271 liberally; Andrew J., in particular, taking into account the whole circumstances of the country.

In the last weeks of December 1980, the case *Acting Public Prosecutor v. Uname Aumane*, came before the Supreme Court. This case was one of a number of appeals brought by the Public Prosecutor against the judgements of Acting Judge Narokobi.

In *Aumane's* case, on a charge of wilful murder, Acting Judge Narokobi had imposed an effective sentence of seven months, and made an order for the payment of five pigs compensation. The brief facts of the case were not in dispute. The defendant and his companions had shot an old woman with arrows because they thought she was a sorceress. A bench of five judges including the Chief Justice Sir Buri Kidu and Kapi J. (as he then was), upheld the appeal, imposed an effective sentence of six years, and quashed the order for compensation. In retrospect, it is unlikely that even Narokobi A. J., would deny that his custodial sentence was light. What was contentious, and will remain so, was the rigid, technical and doctrinaire approach of the Supreme Court to the issues thrown up by Narokobi A. J.

The technical analysis of that part of the decision which voided the order to pay compensation was far from satisfactory. The Court ignored any detailed consideration of its role as the fountain of justice under Section 158(1) of the *Constitution* - preferring to follow the narrow positivist path of "justice according to law". Further the Court was doctrinaire in emphasising, without critical examination, the place of "vengeance" and "retribution" as part of the punishment theory of Papua New Guinea. Narokobi A. J. attempted to find a way out of the impasse that the colonial experience had placed the law in. He tried to follow his vision of a Melanesian future - and in so doing relied upon his intuitive powers and his experience. The Supreme Court, on the other hand, relied upon an imperfect technical analysis that had its roots in the past.

AVIA AIHI

This appeal started in 1981 but was concluded the following year. The case originally arose out of the wilful murder of one Morris Modeda. Modeda had been charged with dangerous driving causing death. He had allegedly run over Avia Aihi's husband. Modeda was being tried by the National Court when the Court visited the scene

of incident. The Court was mobbed, Modeda chased and mortally stabbed by Avia Aihi. She was tried for wilful murder and sentenced to life imprisonment on the 17th of March 1979.

Over a year later on the 8th of May 1980, the Public Solicitor filed a Notice of Application for Leave to appeal, well outside the 40-day limitation on appeals.

The sole issue involved in *Avia Aihi No. 1*, decided in 1981, was whether or not the Supreme Court had power to entertain an application for leave to appeal out of time.

The majority in *Avia Aihi* decided that the Supreme Court had an unfettered discretionary jurisdiction, under Section 155(2)(b) of the *Constitution* to hear an application for leave to appeal even though the applicant had no statutory right to apply for leave.

What was contentious about the decision was the manner in which the Court put paid to Section 155(4) of the *Constitution* as a source of power to affect all rights. The Supreme Court cut down Section 155 (4) to an unfettered discretionary power to tailor remedial process to the circumstances of a particular case so as to ensure primary rights are protected.

Not to go unnoticed in this case was the conservative dissenting judgment of Kapi J. (as he then was). Kapi J. in his judgment on the Section 155(4) issue took the opportunity to reply to criticism in *Uname Aumane*. Referring to Section 155(4) of the *Constitution*, Kapi J. said: -

> "Justice" under this provision means justice according to law. This section is to be interpreted in the light of the doctrine of separation of powers under Section 99 of the Constitution".

Kapi J. went on to say in *Avia Aihi* of the Section 155(4) point raised in *Aumane*:-

> "Unfortunately counsel did not raise the provision on appeal and the court did not consider it. In my view it would not have made a difference to the conclusion of the Supreme Court. I was a member of that Court. I held that there was no power in the National Court to approve any other

punishment than is laid down in the Criminal Code".

"It follows from the interpretation I have given to Section 155(4) of the *Constitution* that the order of customary punishment was wrong as the National Court had no power to make it".

THE VANUATU CASE

In 1980, after a formal request from the Government of Vanuatu - and prodding by the Government of Australia, Papua New Guinea sent soldiers to one of the islands of Vanuatu to help put down a rebellion. An Act of Parliament was passed - the Defence Force (Presence Abroad) Act of 1980 - to ensure the constitutionality of the expedition. The then Leader of the Opposition, Michael Somare, petitioned the National Court seeking orders which in effect would have made the Act and the expedition unconstitutional. At the hearing of the petition before Pratt J. a preliminary point of the petitioner's *locus standi* was raised, and referred to the Supreme Court. The Supreme Court decided that the petitioner did have sufficient legal standing to seek a ruling from that Court - and that the matters raised were solely for the determination of the Supreme Court. The decision was split 3:2, Kidu C. J., Kapi J. and Miles J. in the majority, with Kearney D.C.J. and Greville-Smith J. dissenting.

Of interest in the majority decisions of Kidu C. J. and Kapi J. was the way in which they handled the issue of developing or ascertaining the rules of the Underlying Law. This issue was particularly important as one of the arguments presented by the petitioner was based on custom. This point amounted to showing that a customary leader amongst the Coastal and Mountain Arapesh people of East Sepik had a right to be heard in a village forum when the traditions of the group are broken, and that this right existed regardless of whether the leader's personal rights or interests were affected. All three majority judges rejected this approach - either because they thought the affidavit material before them insufficient to prove the custom was a law, or because they thought the material failed to show the custom was prevalent throughout the whole of Papua New Guinea. In essence Kidu C. J. decided that because all constitutional power derives from the people - then if the legislative power is exercised contrary to the Constitution "why should not the people come to this court and complain".

Kapi J. analysed the *Constitution* as it related to the Underlying

Law - concluding there was no custom - no common law applicable and appropriate - and finally using Schedule 2.3(1)(d) to make a new rule of law. In particular Kapi J. drew on the concept of a "person aggrieved" who has "sufficient interest" developed by Lord Denning in *R.* v. *Inland Revenue Commission, ex parte National Federation of Self Employed and Small Business Ltd.* [1980] 2 All ER 378.

Applying the concept of "sufficient interest" to a Member of Parliament, he decided that the petitioner had *locus standi*. But not leaving the matter there, Kapi J. went further to hold that if the Parliament has not complied with the Constitution and members of the Parliament are not willing to bring the matter before the court, then in his view, any citizen could. Kapi J. brushed aside "the flood gates" argument with a memorable phrase: -

> "It is the people's court and let them come by the hundreds if they have the right to come".

Miles J. agreed that as there was no rule of Underlying Law, the Court had a duty to formulate such a rule under Schedule 2.3(1) - and that the recognition of standing was within the Court's discretion. He was prepared to recognise the Leader of the Opposition in this case as having sufficient standing.

The Vanuatu case shows the Supreme Court as a flexible institution prepared to be inventive.

SENTENCING PATTERNS

In the case of *Clement Maki* Unreported Judgment SC204 (1981) the Supreme Court reaffirmed the principle that "youth has always been one of the most effective mitigating factors especially in the case of a first offender and this principle is basic and elementary". The reaffirmation had been necessary as the sentences for youths convicted of break and enter had slowly been rising since the decision of *Paulus Mandatitip* [1978] PNGLR 128. In *Mandatitip's* case, the proposition that "a plea of youth is no longer a satisfactory answer to crime "found its way in to sentencing practice because a statement made by Heron C. J. in *R.* v. *Cuthbert* [1967] 2 NSWLR 329 at 332 was misquoted by the Supreme Court of Papua New Guinea. Nevertheless, even after the *Maki Case*, young first offenders convicted of break and enter invariably receive custodial sentences.

If the Supreme Court sensed, without articulating it, the desperation of urban youth, when it moderated its sentencing policy in 1981, the Court appeared to have no appreciation at all of the nexus between the economic policies of the State, rural under-development and sorcery killings. Sorcery killing (the murder of persons thought to be sorcerers) is a response to what is a perceived evil, found within the traditional and quasi-traditional sectors of society. That sector exists because the economic policies of the State allow it to exist. It is indeed possible to construct an economic and social analysis which shows that the modern economy - of which the State is a part, exists not symbiotically with the traditional sector, but upon its back - as a parasite - and that the modern state system depends upon the underdevelopment and the ignorance in the traditional sector, for its survival and advancement.

Regardless of this argument - within the perceptions of modern psychology and the framework of a modern legal system, to kill a person because that person is believed to be able to kill other people by magic, is irrational, and some allowance can arguably be made for it. In the cases of *Agoara Kebo and Karunai Uraki*, Unreported Judgment SC198 (1981) the Supreme Court considered appeals against sentences of eight years for offences of wilful murder arising from the killing of a known sorcerer, and confirmed the sentences. If this sentence is put beside *Aumane's Case*, in which the Supreme Court imposed an effective sentence of six years - some adjustment would appear to have been necessary.

To summarize. If the Principal Legal Adviser's Reference No. 1 of 1980 (PLAR 1 of 1980), on the application of the defence of provocation to manslaughter, is seen as a liberal adaptation of the received law to customary circumstances, the decision in *Aumane's* case is a reaction against custom. In the *Vanuatu* case, the overall finding that Mr. Somare had *locus standi* was an affirmation of the liberal tendency, but the methodology which rejected the customary arguments, and insisted that in the circumstances custom had to be proved nation-wide, followed colonial trends of confining custom and allowing it only a limited influence in legal development. The softening of sentencing policy towards youthful first offenders again revealed a liberal reformist posture, but the stiffening of sentences for sorcery killings was a rejection of the colonial policy to lightly sentence for such offences. On the other hand it is possible to see the rejection of custom as a determination to modernise legal institutions, but the facts do not seem to support this view. The Supreme Court is prepared to recognise and enforce custom in appropriate cases. There is no evidence of a cleansing of the law of

customary influences. What appears to be happening is that custom is being contained, isolated, so that it does not infect the main body of the Underlying Law.

If this is so, then the trend is consistent with economic, political and social forces at play in the country, by which the traditional sector is conserved in the country's political and social ideology - to be used as a reservoir of labour, raw materials, and an informal social security system to the benefit of the modern economy.

IN THIS EDITION OF THE MLJ

Just as this editorial starts by drawing attention to the dependent nature of the Papua New Guinea economy, and the links between that dependence and the legal superstructure, which is our concern, the first article by Professor Sawyerr examines in detail the nature of dependency within the context of PACTRA - the Papua New Guinea and Australia Trade Agreement.

Professor Sawyerr in his analysis shows how the colonial form, now no longer sustainable, has been transformed, under the cover of a bilateral agreement freely entered into by consenting parties, allowing Australian produce to maintain its access to the PNG market while permitting the importation into Australia of PNG raw materials.

Another aspect of Papua New Guinea's neo-colonial status is touched tangentially in the second article of this issue by Martin Tsamenyi. Tsamenyi deals with the status of refugees in those countries who have not signed any of the Refugee Conventions. Papua New Guinea is one of the countries that has not ratified those treaties. Indeed until 1979, Papua New Guinea appeared to be unconcerned about refugees. Then came a number of border crossings by known OPM activists. There were armed incursions by Indonesian troops in 'hot-pursuit', or in military exercises that overflowed the border. At first Papua New Guinea behaved as if there were no international law on the subject of refugees.

West Irianese were imprisoned in Papua New Guinea jails for illegal entry into the country. Refugees were not infrequently arrested in remote parts of the West Sepik Province, or the Western Province. They were processed through the magistrates courts with little or no regard to their rights. They were deprived of refugee status - they

were threatened with deportation back to Indonesia. During 1980 and 1981 the Government made few pronouncements on refugee policy, although in retrospect it is now clear that some change for the better has occurred.

This edition of the Journal contains two articles on Land Law and Land Policy. The first, by Val Haynes, is an account of the law of succession as it relates to land. Haynes gives an account of the law in this area that reflects the confused, incoherent, and illogical development of a mess of statute law that has accumulated over the years.

The article by Michael Trebilcock and Jack Knetsch attempts to cut a path through the jungle of lapsed statute and inappropriate administrative practice, to try and isolate in the short term, what can be done to improve land administration.

Professor Sawyerr contributes again with a book review of Peter Fitzpatrick's "Law and State in Papua New Guinea". This book, published in 1980, is a marxist analysis of the role that "law" and "the State" have played in development during the colonial and neo-colonial periods.

Finally, there is a case-note on the *Commonwealth Aluminium Corpo - ration* case, which involved tax avoidance and transfer pricing. This case is of interest in Papua New Guinea and other parts of the Pacific for a number of reasons, not the least of which is the partial ownership of the Commonwealth Aluminium Corporation by Conzinc Riotinto of Australia, the major shareholder in Bougainville Copper Ltd.

BRIAN D. BRUNTON