

Making Law in Papua New Guinea

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The Colonial Origins of a Postcolonial Legal System

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This book is dedicated to the memories of Bernard Narokobi and Josepha Namsu Kiris, who served as leaders of the PNG Law Reform Commission at the height of its influence and productivity. Through their writing, their work on the Law Reform Commission and in other areas of government, and by the examples they set in their own lives, they kept alive the generous principles that underlie the PNG Constitution, and the notion that PNG could move successfully into the twenty-first century while remaining true to custom, tradition and the Melanesian Way. They were two of the smartest, most talented, most generous, most gracious, and most visionary people that we have ever had the extraordinary luck to meet and work for—in PNG or anywhere else.

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Preface

This book has been a true labor of love—although, mercifully, few labors last anywhere near as long.

It began informally as a project by its three authors, who were fortunate to have been part of a diverse group of young faculty members teaching law at the University of Papua New Guinea (UPNG) in the years immediately before and after independence was achieved in September 1975.

Those were very special years in Papua New Guinea's intellectual development, and we were lucky enough to be part of them. Australia's stranglehold on PNG's sources of knowledge was loosening. The newly founded University of Papua New Guinea attracted scholars in all academic disciplines from across the world, many with experience in the breakup of colonial structures, and all of them excited to be part of PNG's movement toward independence, and to contribute their ideas and analysis to the process. They were joined by public servants, some Australian, some not, but all the highly educated products of a new focus on recruiting from universities and the professions. In the mix, also, were the members of a new generation of Papua New Guineans, among the first to attain tertiary educations. They, too, had much to contribute to the excited discussions about PNG's future that were taking place in faculty clubs, government offices, and at the Zaharas' famous Sunday afternoon get-togethers.

Closer to home, in the UPNG Law Faculty itself, we were blessed with extraordinary colleagues, some of whom had previously taught in Africa, Asia and the West Indies and had experience of the interaction between colonialism, nationalism and self-determination. They were the perfect people to learn from, share insights and experiences with, and bounce

ideas off. And we had the very good fortune to share our classrooms—and often our living rooms and gardens—with a remarkable crop of students, arguably the golden generation of UPNG, a very high proportion of whom went on to become leading judges, academics, legal practitioners, politicians and government ministers, business leaders and ambassadors.

Bruce Ottley also served as a Magistrate for the National Capital District Court in Port Moresby in 1976–1977 (and experienced the rare pleasure of a litigant referring to him as “Your Majesty”). In deciding civil and criminal cases, Bruce applied laws adopted or enacted during the colonial period and retained after independence.

While at UPNG, Jean Zorn created the Law Faculty’s first Customary Law course, something she could not have done without the generous help and advice of her students. Jean also created a Land Law course which, while teaching students all the arcane rules of real property law that British law students have been forced to learn for generations, also devoted a significant portion of the semester to a study of customary land law rules and processes. Jean’s third major contribution to the Law Faculty curriculum was a seminar in Law and Development, during which the students took on the task of helping a village near Port Moresby to incorporate their business of making and selling traditional handcrafts. She was lured away from UPNG by Bernard Narokobi, who made her chief researcher for the Papua New Guinea Law Reform Commission, which had just been established to help transform PNG’s westernized legal system into something more closely resembling customary law. Jean’s reports for the Law Reform Commission included ground breaking work bringing customary law rules and practices into contracts law, as well as the law of wills and succession. Her partner Steve Zorn, senior adviser to Pangu Pati leader Michael Somare, who was the Chief Minister and then the first Prime Minister, was a co-author of the Eight-Point Plan and one of the lead developers of the excess profits tax and other measures aimed to curb the greed of foreign mining and other corporations. Jean and Steve’s relationship with Papua New Guinea continued, even after they returned to teaching positions in the United States; both of them spent several northern hemisphere summers working for the Law Reform Commission when it was chaired by Josepha Namsu Kiris.

David Weisbrot was assigned to teach the compulsory course on Customary Law straight off the airplane, and had to make every effort to

swim rather than sink, by turning it into an interactive program requiring students to consider and record their own experiences of custom, law and dispute resolution in their home areas. David then also served as a consultant to the Law Reform Commission, which in those early years was engaged in reviewing and recommending changes to a number of laws introduced during the colonial period in order to better meet the needs and conditions of an independent country, as well as restoring local customs, concepts (such as the extended family, and group ownership) and modes of dispute resolution as the basis for a new, just and more relevant legal system. Much to his own surprise, David was elected Dean of the UPNG Law Faculty in 1978, at age 26. Two decades later, as President of the Australia Law Reform Commission (1999–2009) he was directly involved—at the request of former student and colleague, and then PNG Attorney-General, Alan Marat—in the training of PNG Law Reform Commission staff in both Port Moresby and Sydney.

As we each left PNG in the late 1970s for law schools and other careers in the United States and Australia, we were confident that the structural legal reforms created by the Constitution and operationalized by the Law Reform Commission would soon be achieved. By the mid-1980s, however, it was already becoming apparent that the transformation project had been abandoned, and we thought it would be worthwhile to chronicle this as it was happening. In the event, however, our contemporary report has become a work of history.

Initially, we hoped to have this book completed by the early 1990s—and, once that deadline was passed, we aimed for the 25th anniversary of PNG independence in 2000. At least we nearly made it in time for the 45th! We hope that all of that additional time spent on reflection, reading, talking, comparing and arguing has made it an indisputably better book than it would have been 20 years ago.

This book relies heavily on original contemporaneous sources: newspaper accounts, journal articles, and government reports, as well as extracts from speeches and books written by those who participated in the events being discussed. Beginning with 1972, we have also been able to draw on our own experiences, observations, and contacts with those involved in governmental, educational, and legal affairs.

Each of the three authors was primarily responsible for the initial drafts of a few chapters, but we then workshopped them relentlessly, so that in

the best tradition of a genuine collaboration it is now hard to remember who supplied which insight (although our individual writing styles do try hard to shine through!). The final manuscript then, is the product of a healthy mixture of compromise, consensus and resignation.

It is our fondest hope that this book is viewed in PNG—and elsewhere—as a contribution to knowledge and an accurate record of a crucial time in PNG’s history. Although we are very critical of some actions and decisions (or the absence of actions and decisions), our intention is not to point fingers or apportion blame, but to detail the history, offer explanations for these phenomena, and perhaps suggest the way forward for a just and effective legal system that serves the interests of those governed. We hope this book will be of interest and value not only to judges, political leaders, scholars, lawyers, historians, policy-makers and others in Papua New Guinea and the Pacific Islands, but also internationally to those with an interest in colonialism, neo-colonialism, self-determination, the recognition and integration of customary law, law and society, law reform, legal development, legal pluralism and comparative law.

Special credit should be given to Bruce Ottley for keeping this book on life support at times, when the exigencies of life, love, work, family and lockdowns might so easily have derailed it. And to David Weisbrot for always knowing when humor was the medicine we needed. Special credit also to Jean Zorn for taking charge of the pre-publication editing work to ensure accuracy, consistency and purpose. As with all books, it is precisely at the moment that the authors think it is “finished” that much of the hard work really begins.

Thanks to our editors at Carolina Academic Press for their unwavering support and remarkable patience, and for believing in the intellectual merit and commercial viability of this rather unique project.

Last, but certainly not least, we would like to acknowledge the immense love, support, patience and editing skills of our families, so thank you very much, Younghee Ottley, Faith Wieland, Steve Zorn, Charlotte Bendayan, Joshua Weisbrot, Ella Weisbrot, Sora Hwang, Chase Zorn, his parents and aunt.

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