CASES AND COMMENTS

THE SEPARATION OF POWERS

The division of government into three branches and the independence of each are basic to Western concepts of constitutionalism. As Papua New Guinea achieves its own constitution, it is interesting to consider the applicability of these constitutional theories to this country. We discuss first whether there was any separation of powers and functions in a traditional village government, and then the extent to which colonial authorities observed constitutional requirements.

I. Government in Busama

I am from Busama village in the Morobe District.[1] The concept of separation of powers is not distinctly discernable in Busama as it is in Western societies, because there is in Busama a more basic desire for communalism and co-operation. The three functions of government - legislation, executive powers and adjudication - are carried out, but the same people are involved in the day-to-day operation of all three tasks, and whether the leaders or all the people of the village are acting in a legislative or judicial capacity can be seen only when the situation occurs.

There are two main groups governing the village -- the big men the *goloac atu*, a village assembly made up of the mass of the population, including the big men. The *goloac atu* includes villagers of both sexes and of every age. The big men of the village tend to be elderly men with some wealth, influence and socio-economic status. Both the big men and the *goloac atu* perform executive, legislative and judicial functions.

Legislatively, either the big men or the *goloac atu* can initiate the passage of new rules, and the two groups act as checks on each other's decisions. For example, if the big

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1 A considerable amount of material on law, the administration of justice and government in my village can be found in I. Hogbin, *Transformation Scene* (1971).

men decide that no woman from Busama who has married an outsider may settle permanently in the village, the decision must go to the *goloac atu* for approval before it has the effect of law. If it is not approved by the *goloac atu*, it is ineffective. Similarly, if a new rule is initiated by the *goloac atu*, it will be subject to the approval of the big men.

Judicial duties are also shared, some cases arising first before the *goloac atu*. In their judicial capacity, the big men do most of the preliminary hearings and investigations. They decide many cases without initial reference to the *goloac actu*, except to report their decision to that body. But, if the big men believe that they require the opinion of the *goloac atu* on a case, they will do one of two things. Fither they will decide on the matter after they have received the opinions of the *goloac atu* at a village meeting, or they will give their decision during the meeting with the *goloac atu*. In the latter event, the decision is not exclusively that of the big men but a decision of the whole village. Cases of stealing or assault and disputes between families or individuals are normally heard and decided in the *goloac* meeting. Such cases may have gone first to the big men, or they may arise initially at a village meeting.

Land disputes and adultery cases normally go first to the big men before being taken to a village meeting. The big men may decide any case without consultation with the *goloac atu*, but the *goloac atu* can demand that a case be settled at its meeting, or the *goloac atu* can depart from the decision of the big men if it thinks that the case has been wrongly decided.

If a case arises at a village meeting, the big men may determine that it should be heard by them alone. They will do this if they believe the interests of the parties would be protected if the case were heard by the big men, or if they feel that a more private hearing would minimiss chances of fighting and preserve peace and order in the village.

In their executive capacities, both the big men and the *goloac atu* can separately decide questions or make public policies affecting the daily lives of the villagers, but their policies are always subject to the scrutiny of the other group. The big men may appoint one or more people to see that decisions reached by them are properly executed. The big men decide which pieces of land to clear for gardening and when to start clearing the land. They discuss matters involving the lives of individuals and of the village as a whole. They arrange marriages and feasts.

The *goloac atu* can make a decision in an executive capacity without referring first to the big men. That decision is authoritative, unless the big men think it infringes some rule of humanity, society or the community. In that case, the big men may withdraw the decision from the *goloac atu* and reconsider it at their own meeting.

Busama's system of government severely limits opportunities for arbitrariness. A decision by one body is always reviewable and reversable by the other. Thus, in legislation, the passing of a rule passed by the big men is subject to the approval of the *goloac atu* before it becomes a valid law. Judicially, the big men are responsible to the *goloac atu* for every decision they make, and in turn, when the *goloac atu* assumes the judicial role, its decisions are reviewable by the big men. Mutual accountability also operates in the executive area. If the *goloac atu* lays down general policies governing the daily living of the villagers, these policies are subject to the approval of the big men before they can affect the village. Or, if the big men dismiss a leader from his post, they are obliged to give their reasons for doing so to the *goloac atu*, and the dismissal is not valid unless it has received the endorsement of the *goloac atu*.

There are no rigid rules or laws entrenched in a written document specifying the areas of authority and responsibility of the big men and the *goloac atu*. Instead, unwritten notions of community welfare and co-operation guide the governors of Busama village.

II. The Wantok System and the Independence of the Judiciary

The concept of constitutionalism is derived from the law and practice of Western countries, particularly the United Kingdom. "The desirability of an independent and impartial judiciary has been a valuable element of our political wisdom and should be understood as the expression of a general attitude rather than as an inexorable table of organization."[2]

The independence of the judiciary as an integral part of the theory was given a palpable content by Montesquieu in his *L'Esprit des Lois*, though Aristotle and Locke had stated its essentials. Montesquieu's great point was that if the total power of government is divided among autonomons organs,

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2 L. Jaffe, *Judicial Control of Administrative Action*, 28-29.

one will act as a check upon the other and in the check liberty can survive:

> The political liberty of the subject is a tranquility of mind arising from the opinion each person has of his own safety. In order to have this liberty, it is requisite that government be so constituted as one man need not be afraid of another.... there is no liberty, if the judiciary power be not separated from the legislature and executive. Were it joined with the legislature the life and liberty of the subject would be exposed to arbitrary control, for the judge would then be the legislator. Were it joined with the executive power, the judge might behave with volence and oppression.
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> There would be an end of everything, were the same man or the same body, whether of the nobles or of the people, to exercise those three powers, that of enacting laws, that of executing the public resolutions and of trying the causes of individuals.[3]

The concept of constitutionalism connotes, in essence, limitation on the powers confided in each of the organs of government. It is the anitithesis of the arbitrary rule of totalitarian, military, despotic, oligaricd aristocratic types of government. They manifest clearly all unfettered power in one man or group of people. In many constitutions (notably that of the United States) an attempt has been made to enshrine the separation of powers doctrine as a principle of the consituation, so that any statute which confers power of one type on a body constituted to exercise an other type of power is invalid as a violation of the constitution.

An independent judiciary is necessary to avoid the creation of a government where the same man or the same body of people exercise all the powers, that of enacting laws, that of executing the public resolutions and that of judging the crimes or differences of individuals. With the principle of checks we are a step further because the danger is not in blended power but in unchecked power. This residual power to check should remain in the judiciary, but if it loses that independence and impartiality which is essential to the successful working of the true democratic government the judiciary

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3 Montesquieu, *The Spirit of the Laws,* 151-152.

will be just another arbitrary arm of government.

I shall now look at the *wantok* system in the light of the principles of judicial independence and impartiality. Traditionally, the *wantok* system encompassed only the people of a particular clan or laneage within the tribe, or was a reference to fellow tribesmen at a wider level. The coming of European colonisation has, however, given this concept a wider term of reference by creating a conciousness of a regional or district level. Thus in my home village of Bowat my sense of belonging to the *wantok* system will be limited to my immediate kinsmen, upon moving to the town of Lorengau my *wantoks* would include all my fellow villagers, but in Port Moresby my *wantoks* would be everyone from Manus.

The *wantok* system has both good and bad aspects. It is necessary to examine these in order to understand whether the *wantok* system is an inpediment to the development of an independent and impartial national judiciary. The *wantok* system is vital and necessary for the survival of an individual and his group. It serves him in times of hunger or when he is short of the necessaries essential for life. It consolidates the social and economic ties between individuals and groups within the community. The feelings of oneness, group-conciousness and solidarity, coupled with the co-operative nature of the group form the basis of the *wantok* system.

The relationships established within the system are interdependent. Accordingly, dependency is an intergral part of the *wantok* system. There is nothing to lose from participating and much to gain. It is a good form of investment yielding good prospects. It needs co-operation and assistance, which may be expressed in labour or materical gifts. A person who is apathetic and indifferent to the needs and affairs of his fellows is looked down upon. Good standing and character are built and measured by one's contributions to the welfare of one's *wantoks*. People move up the social ladder this way.

The *wantok* system has some bad effects also. This parochial loyalty has a tendency to lead to favouritism, nepotism, and discrimination. Therefore the *wantok* system will impede the development of an indigenous national judiciary that is independent and importial.

The *wantok* system is not dying out in the towns. If a person divorced himself altoghter from his own society, he would not have *wantoks* to carry about. However I do not foresee a rapid withering away of the *wantok* system.

As an educated Papua New Guinea, the degree of my

independence is limited while my dependence on my *wantoks* is much stronger and tighter. In town I still have obligations to fulfill towards my *wantoks*.

Numerous cases have arisen in the Papua New Guinea courts which demonstrate that councillors and magistrates are influenced in their decisions by the demands of *wantoks*. While I was at home in 1971 I witnessed a case in which a young man was accused of having an affair with a girl from the next village who later became pregnant. A court was held and three people (a councillor representing four villages but from the young man's village, a committee member from the young man's village, and another committee man from the girl's village) sat to hear the case. Everyone knew that the evidence clearly showed that the young man was responsible. However, the majority (the councillor and the committee man from the young man's village) decided that he was not responsible, on the grounds that there was another man involved. The councillor later told us that he had fought very hard to release the young man of the responsibility even though he knew he was responsible.

In 1973, while attached to the Public Solicitor's Office, I defended two cases in the local courts which were not handled impartially by the magistrates. In one, my client was a young man 25 years old from the Gulf District. His friend from another part of Papua who had a P.M.V. ran into financial difficulties and asked for $80 from my client. He lent the money in the belief that it would be repaid to him later. Six months later, my client went to his friend (who by then had made substantial profits from his P.M.V. business) and asked for his $80. The friend, however, refused to pay and so my client went to court. The court was not conducted in Hiri Motu, but in a dialect known to the defendant and the magistrate, who were from the same area. Every now and then, the magistrate would explain the matter to my client in English. The magistrate decided that the defendant believed the $80 had been a gift. Therefore, he would not order the defendant to repay it.

In the second case, a young Marshall Lagoon man married a girl from Ihu in the Gulf District. They lived in Port Moresby and had one son. A few months later the woman took her son home on what was supposed to be a short visit to parents. The man later learned that she had married another man and would not come back to him. He went to Local Court to sue for the bride price and to get a court order for custody of the child. The magistrate, who was from Kerema, decided that the great distance to the woman's village made it futile to press the matter. These two cases are on appeal.

While I appreciate the quality and ability of those men who administer justice in our courts, I must agree with Kubulan Los who said that while the magistrates, "knowledge of land may suffice for the purpose for which they have been trained, their natural tendency towards partiality has not been altered."[4] He too experienced a similar case. A taxi driver was sent to jail for two months for committing adultery with another man's wife. He appealed on the grounds that the sentence was excessive and the trial had been unfair in that he was not given a chance to speak. The proceedings were conducted in the language of the complainant and the magistrate, which the accused did not understand. He discovered the results of the trial only later when he was told in Pidgin that he had committed adultery and was going up to Bomana for two months.

Those cases demonstrate the all too common prejudice of judicial officers in favour of people from their clans, lineages or districts. This may become very serious especially in the lower courts. It is already serious enough that something has to be done to check these practices. I would recommend the following:

(a) Judicial officers should be trained to appreciate the value of dispensing justice with impartiality.
(b) A tribunal should be set up to supervise the local and district courts.
(c) The Supreme Court or the Law Reform Commission should lay down principles applicable to customary law for the lower courts to follow.
(d) The system of appeal from local courts should be improved to be more efficient.

These are some of the ways and means that can immunize the prejudicial effects of the *wantok* system. Supervisory measures of this sort will be necessary to counter favouritism among magistrates and judges so long as the *wantok* system remains an important and valued norm in Papua New Guinea society.

-- Thomas Awasa

-- Moi Kanat

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4 (1972) 1 *Mel. Law J.* 73-74.